(2022) 34 SAcLJ 1
(Published on e-First 27 December 2021)

LEADING THE WAY FOR THE RECOGNITION AND ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENT AGREEMENTS

The Singapore Convention on Mediation Act 2020

On 4 February 2020, the Singapore Parliament passed the Singapore Convention on Mediation Bill (Bill 5 of 2020). The enactment of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) ("SCMA") implements Singapore's obligations under the Singapore Convention on Mediation. The Singapore Convention on Mediation has since entered into force on 12 September 2020. This article examines the provisions of the SCMA and shows how the Act gives effect to the Singapore Convention. It then sets out the new regulatory landscape for the recognition and enforcement of international mediated settlement agreements in Singapore, which comprises the common law, court-referred mediation practice, the Mediation Act 2017 (Act 1 of 2017) and the SCMA, and offers some comparative comments.

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1 The authors are grateful to Vakho Giorgadze for his comments on an earlier draft. The authors would also like to acknowledge Ong Kye Jing for his meticulous research and editorial assistance. The second author dedicates this article to the memory of his beloved grandmother, Yuen Yoke Chan, who passed away on 4 May 2021 at dawn; she is profoundly missed.

I. Introduction and background to the Singapore Convention

1 On 4 February 2020, the Singapore Parliament passed the Singapore Convention on Mediation Bill.[2] The enactment of the Singapore Convention on Mediation Act 2020[3] ("SCMA") completes the implementation of Singapore's obligations under the Singapore Convention on Mediation[4] ("Singapore Convention" or "the Convention").

2 The Singapore Convention is a multilateral treaty with the underlying objective to promote the resolution of international commercial disputes through mediation.[5] The Singapore Convention aims to be, for mediation, what the New York Convention has been, for arbitration – a catalyst for the growth of institutional arbitration for cross-border disputes.

3 Inspired by the success of the New York Convention (and drawing, in part, on its provisions), the Singapore Convention offers a legal framework that facilitates the circulation of international mediated settlement agreements ("iMSAs") across national borders. It achieves this by establishing a system for the recognition and enforcement of commercial iMSAs. The Convention provides for the elevation of iMSAs to the status of a new type of legal instrument recognised in international law. Neither a contract nor a consent arbitral award, iMSAs that fall within the scope of, and that satisfy the conditions within, the Singapore Convention enjoy a unique status.

4 In most cases, where parties have concluded an iMSA, they ordinarily comply with their obligations under that agreement.[6] Where

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2 The Singapore Convention on Mediation Bill (Bill 5 of 2020) implements Singapore's domestic obligations under the Singapore Convention on Mediation. It was tabled for its first reading in Parliament on 6 January 2020. It was passed by Parliament after the third reading on 4 February 2020. The Act has come into force on 12 September 2020.

3 Act 4 of 2020.

4 The United Nations Convention on International Settlement Agreements Resulting from Mediation (GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018)) (hereinafter "Singapore Convention").

5 See Eunice Chua, "The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution" (2019) 9 *Asian Journal of International Law* 195 at 196. *Cf* Chang-fa Lo, "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7 *Contemporary Asia Arbitration Journal* 119.

6 Nadja Alexander *et al*, *The SIDRA Conversations on International Dispute Resolution* (forthcoming, 2021). These are based on a series of interviews with user respondents to the 2019 SIDRA International Dispute Resolution Survey. The Survey Report is available at <https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020> (accessed 1 June 2021). See further Chang-fa Lo & Janice

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parties do not comply, however, the Convention offers them access to an expedited recognition and enforcement regime. The drafters of the Convention anticipated that disputing parties would rarely resort to the Convention's expedited enforcement mechanism. Rather, it was hoped that its presence would offer lawyers and parties the confidence to engage in cross-border mediation, knowing that in the unlikely event of non-compliance, their iMSA may be directly enforceable. This approach is in line with the findings of the SIDRA International Dispute Resolution Survey,[7] which discerned the reasons behind *how* and *why* mediation is being used by disputants not just as a standalone procedure for cross-border commercial disputes, but equally as a central component of mixed mode dispute resolution procedures involving mediation and arbitration. The reasons motivating parties engaged in commercial disputes to choose hybrid dispute resolution procedures (rather than standalone mediation) include the desire to rely on expedited enforcement mechanisms[8] (for instance, under the New York Convention or legislation promoting the enforcement of arbitral awards) – this is an important element which the Singapore Convention promises to deliver.

5 Singapore signed the international treaty named after it on 7 August 2019, alongside 45 other State Parties.[9] At the time of writing,

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Lee, "A New Approach for the Settlement of Regional Disputes to Maintain Dynamic Stability – A Selective Elaboration of the Draft Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization" (2018) 13(1) *Asian Journal of WTO & International Health Law Policy and* 27 at 40–41: "[T]he chances of the parties reneging on their obligations and not performing according to the agreed terms and conditions [of the mediated settlement agreement] is limited." Nolan-Haley shares similar sentiments, in Jacqueline M Nolan-Haley, "Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent" (2013) 5 *Yearbook on Arbitration and Mediation* 152 at 158–159. See also Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 450, para 5 and Klaus J Hopt & Felix Steffek, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford University Press, 2013) ch 1, at pp 105–106.

7 Singapore International Dispute Resolution Academy, *SIDRA International Dispute Resolution Survey: Final Report 2020.*

8 Singapore International Dispute Resolution Academy, *SIDRA International Dispute Resolution Survey: Final Report 2020* at p 46, paras 9.27–9.29.

9 Nadja Alexander & Shouyu Chong, "UN Treaty on Mediation signed in Singapore" (2019) 23(2-3) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 71. Alongside Singapore, the names of the State Parties which signed the Singapore Convention on 7 August 2019 are: Afghanistan, Belarus, Benin, Brunei Darussalam, Chile, China, Colombia, Congo, Democratic Republic of the Congo, Eswatini, Fiji, Georgia, Grenada, Haiti, Honduras, India, Islamic Republic of Iran, Israel, Jamaica, Jordan, Kazakhstan, Lao People's Democratic Republic, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, the Philippines,

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nine more States have signed on to the Singapore Convention, bringing the total to 55 State Signatories.[10] After enacting the SCMA in Parliament, Singapore was among the first two countries to deposit their instruments of ratification of the Singapore Convention at the United Nations Headquarters on 25 February 2020, the other being Fiji.[11] Qatar became the third signatory State Party to deposit its instruments of ratification on 12 March 2020; as such, in accordance with Art 14 of the Convention, the Singapore Convention has since entered into force on 12 September 2020,[12] six months after the third ratification.[13]

6 Against this contextual background, the article is structured into two parts. Part 1[14] examines the provisions of the SCMA and shows how the Act gives effect to the Singapore Convention. Part 2[15] examines the regulatory landscape for iMSAs in Singapore in terms of four co-existing regimes: the common law, court-referred mediation practice, the Mediation Act 2017[16] ("MA") and the SCMA.

II. Part 1: The Singapore Convention on Mediation Act 2020

A. From Convention to Act

7 With its 16 Articles, the drafters of the Singapore Convention intended to create a minimalist and efficient framework for the recognition and enforcement of iMSAs internationally. The provisions

Qatar, Republic of Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Sri Lanka, Timor-Leste, Turkey, Uganda, Ukraine, United States of America, Uruguay and the Bolivarian Republic of Venezuela.

10 "Status: United Nations Convention on International Settlement Agreements Resulting from Mediation" *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> (accessed 21 September 2021). The nine additional States are Armenia, Australia, Brazil, Chad, Ecuador, Gabon, Ghana, Guinea-Bissau and Rwanda.

11 "Singapore, Fiji First 2 Countries to Deposit Instruments of Ratification for Singapore Convention on Mediation" *ChannelNewsAsia* (26 February 2020).

12 Nadja Alexander & Shouyu Chong, "12 September 2020: The Singapore Convention on Mediation Comes Into Force" *Kluwer Mediation Blog* (12 September 2020).

13 United Nations Information Service, "The United Nations Convention on International Settlement Agreements Resulting from Mediation Will Enter into Force Following Ratification by Singapore, Fiji and Qatar" (13 March 2020) <http://unis.unvienna.org/unis/en/pressrels/2020/unisl293.html> (accessed 1 June 2020).

14 See paras 7–71 below.

15 See paras 72–97 below.

16 Act 1 of 2017.

of the Singapore Convention have been dealt with in previous writing.[17] To set the context for our examination of the SCMA, the comparative table below sets out the most important provisions of the SCMA and the equivalent provisions in the Convention itself. It is noteworthy that Singapore has not declared any reservations, which would have been possible under Art 8 of the Convention.

Singapore Convention on Mediation Act	Singapore Convention on Mediation
s 2(1) "mediation"	Art 2(3)
s 2(2)	Art 2(2)
s 3(1) "international"	Arts 1(1) and 2(1)
s 3(2)	Arts 1(2)–1(3) and 8
s 4(1)	Arts 3(1)–3(2)
s 4(2)	Art 7
s 5	Art 3
s 6	Art 4
s 7	Art 5
s 9	Art 6
s 13	Art 4(1) "competent authority"

Figure 1: Comparative table of key provisions of the Singapore Convention on Mediation Act 2020 and Singapore Convention

B. How the Singapore Convention on Mediation Act 2020 works, in a nutshell

8 In Singapore, the SCMA gives legislative effect to the provisions of the Singapore Convention. As indicated previously, once parties have concluded an iMSA, research indicates that they normally comply with their respective obligations.[18] However, where this is not the case, the SCMA provides parties to iMSAs that fall within its scope[19] with the possibility to proceed to the High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) or the Court of Appeal (namely, the Appellate Division of the High Court and the Court of Appeal, *per* s 2(5) of the SCMA) of Singapore to seek relief.[20] In accordance with the

17 See Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer, 2019).

18 See n 7 above.

19 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3.

20 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 4. It bears emphasis that "enforcement relief" would generally embrace what one would understand

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SCMA, the party that seeks relief will have to file an application before the relevant Singapore court, and submit as evidence (a) the iMSA which reflects the parties' signatures[21] *and* (b) some tangible proof that the iMSA was a result of mediation, such as an attestation by the mediator or mediation institution that the settlement resulted from mediation.[22]

9 When seeking relief, parties relying on the SCMA for expedited enforcement may apply their iMSA as a "sword" or a "shield".[23] Provided the iMSA is not refused enforcement based on a defence set out in s 7,[24] it will be enforced *per* ss 4(1)(*a*) and 5 of the SCMA: the iMSA in this instance would be applied like a "sword", to compel a counter-party to perform some obligations which have not been complied with therein.[25] Alternatively, issues resolved and reflected in the iMSA may be invoked, in accordance with s 4(1)(*a*) or 4(1)(*b*) of the SCMA, as a complete defence (or shield) to High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) or Court of Appeal (namely, the Appellate Division of the High Court and the Court of Appeal, *per* s 2(5) of the SCMA) proceedings, if parties at litigation contest issues which have already been resolved and reflected in that iMSA.[26] At this

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in private international law as reliefs flowing from a recognition and enforcement of a cross-border dispute resolution outcome: *cf* Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 464–466, paras 32–36.

21 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 6(1)(*a*).

22 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 6(1)(*b*); s 6(1)(*b*)(iv) further provides that other forms of suitable evidence may be submitted in the absence of the mediator's signature on the international mediated settlement agreement or an attestation by the mediator or mediation institution that the settlement agreement resulted from mediation. In the authors' view, these could include an agreement to mediate: see Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 467–468, para 40.

23 The metaphors were helpfully applied by Schnabel in Timothy 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 35 *ff*.

24 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7.

25 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) ss 4(1)(*a*) and 5.

26 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 4(1)(*b*). See also s 13 of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020). The Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) has been amended to clarify that the Singapore High Court wields the necessary jurisdiction to enforce international mediated settlement agreements, and the Singapore High Court and Court of Appeal (which have, since January 2021, been reorganised to comprise the General Division of the High Court, the Appellate Division of the High Court, and the Court of Appeal) possess jurisdiction to recognise iMSAs for the purposes of invocation as a defence, in accordance with the provisions of the Singapore Convention.

juncture, it also bears note that there is *no requirement* for an iMSA to undergo a review process at the location where it was concluded (the State of origin).[27] Whereas the New York Convention imposes an obligation on Contracting States to recognise and enforce an arbitration agreement, that satisfies the requirements prescribed in Art II of the New York Convention, by referring the parties to arbitration, there is no corresponding requirement in relation to mediation agreements in the Singapore Convention. It follows that no question of the preliminary jurisdiction of a mediation arises[28] and there is no "seat" of mediation in the sense that there is a "seat" of arbitration in the State of origin, the courts of which State have powers of supervision and review.[29] Therefore, as a matter of logic and principle, the State of origin plays no role in judicial review of the iMSA and this may only occur in the State(s) of enforcement.

10 Further, the SCMA amends two existing pieces of legislation. First, the MA[30] is amended to accommodate and acknowledge the new status of iMSAs,[31] which are recognised and enforceable under the Singapore Convention.[32] The purpose of the amendments to the MA is to

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27 Singapore Parl Debates; Vol 94; [4 February 2020].

28 In arbitration this is referred to as the principle of competence-competence: the principle of competence-competence empowers arbitrators to rule on their own jurisdiction. Some jurisdictions accept the negative effect of competence-competence, according to which courts give a priority to arbitrators to rule on their own jurisdiction, while the courts keep the power to conduct "a full review of the existence, validity and scope of the arbitration agreement at the end of the arbitral process". See *The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958* (Emmanuel Gaillard & George A Bermann eds) (Brill Nijhoff, 2017) at p 48.

29 See also the discussion of the term "international" at paras 19–24 below. Shouyu Chong & Nadja Alexander, "Singapore Convention Series: Why is There No 'Seat' of Mediation?" *Kluwer Mediation Blog* (1 February 2019); Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at paras 1.14–1.16; Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 456, para 15.

30 Mediation Act 2017 (Act 1 of 2017).

31 In other words, an international mediated settlement agreement ("iMSA") that falls within the scope of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) is not precluded from also falling within the scope of the Mediation Act 2017 (Act 1 of 2017), if that iMSA also qualifies under the Mediation Act. Note, however, that the iMSA cannot be recorded under the Mediation Act if it has already been recorded under the Singapore Convention on Mediation Act. See also Part 2 below on the new regulatory landscape for iMSAs.

32 While the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) makes references to "international settlement agreements", for the sake of clarity, such agreements are referred to here as "international *mediated* settlement agreements" to highlight the principle that the settlement agreement must result from a mediation.

maximise parties' procedural choice by preserving a party's rights under the MA as well as the SCMA, if the iMSA falls within the scope of both pieces of legislation.[33] Secondly, the Supreme Court of Judicature Act[34] has been amended to clarify that the Singapore High Court and Court of Appeal wield the necessary jurisdiction to recognise, and the Singapore High Court to enforce, iMSAs in accordance with the provisions of the Singapore Convention.[35] Finally it is noteworthy that the Supreme Court of Judicature (Amendment) Act 2019[36] has since come into force in 2021. As such, s 2(4) of the SCMA serves to precisely define references to the High Court in the Act as the General Division of the High Court; whilst s 2(5) defines references to the Court of Appeal in the Act as the Appellate Division of the High Court and the Court of Appeal.

11 The provisions of the SCMA are considered in greater detail below.

(1) Scope and basic terms

12 In terms of the scope of the SCMA, international settlement agreements resulting from mediation are relevant. In this article, these are referred to as international mediated settlement agreements or iMSAs.

(a) Settlement agreements resulting from mediation

13 It bears emphasis that the iMSA brought for enforcement under the SCMA must resolve a commercial dispute and must be in writing.[37] This factor distinguishes an ordinary contractual agreement from an iMSA;[38] only the latter may be offered direct relief under the SCMA. Although based in contract, the legal effect of an iMSA differs from that of an ordinary transactional contract.[39] For example, according to the common law of Singapore, settlement agreements (mediated or negotiated) concluded to resolve a commercial dispute may engender *res*

33 See Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 12.
34 Cap 322, 2007 Rev Ed.
35 See Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 13.
36 Act 40 of 2019.
37 See s 2(1) of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020).
38 Singapore Parl Debates; Vol 94; [4 February 2020].
39 Consider *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131; see analysis in Nadja Alexander & Shouyu Chong, "Mediation and Appropriate Dispute Resolution" (2019) 20 SAL Ann Rev 614 at paras 22.7–22.12.

judicata,[40] and render dispute proceedings in court or an arbitral tribunal (in relation to the discrete issues resolved under it) spent and exhausted.[41]

14 Therefore, consistent with the Convention, parties must establish that their settlement agreement to resolve a commercial dispute is in writing and was procured as a result of mediation when applying to the relevant Singapore courts for relief.[42]

15 Section 2(1) of the SCMA provides:[43]

> 'mediation' means a process (whether referred to by the expression 'mediation' or 'conciliation' or any term of similar import) —
>
> > (*a*) by which the parties to the mediation attempt to reach an amicable settlement of their dispute with the assistance of one or more third parties (called in this Act the mediator); and
> >
> > (*b*) in which the mediator lacks the authority to impose a solution upon the parties to the dispute …

16 Modelled on the definition of mediation in the Singapore Convention, the definition in the SCMA is a functional one,[44] which puts emphasis on the *nature* and *substance* of the dispute resolution mechanism, rather than the form and label of it.[45] Importantly, it is

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40 In contrast, note that the *res judicata* effect of settlement agreements is marginalised in non-common law legal traditions: see Khory McCormick & Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation" (2019) 31 SAcLJ 520 at 534, para 38.

41 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95].

42 Singapore Parl Debates; Vol 94; [4 February 2020].

43 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 2(1). Also note that "mediation" is defined broadly under Art 2(3) of the Singapore Convention to be:

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

44 See Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 457–458, para 17. *Cf* Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 37 at 41 and Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at paras 2.18–2.20.

45 Nadja Alexander & Shouyu Chong, "The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes" in *The Asian Turn in Foreign Investment* (Chester Brown & Mahdev Mohan eds) (Cambridge University Press, 2021).

not inconsistent with the meaning of mediation under s 3 of the MA.[46] However, while the language of the MA seems to encourage (but not require) a facilitative approach to mediation,[47] the language of the SCMA is broader and more "neutral" in this regard. The SCMA definition embraces a variety of facilitative and advisory practice models, regardless of whether it is called "mediation", "conciliation" or goes by another name, but excludes determinative mechanisms such as arbitration and adjudication.[48] It reflects the diversity in cross-border mediation practices around the world.[49] As Senior Minister of State ("SMS") Edwin Tong SC had recognised in his speech at the Second Reading of the Bill:[50]

> It is not uncommon for parties to discuss and come to a resolution through various channels. So, in other words, where there is a dispute, one does not just sit down and say, 'Okay, listen, this is a mediation. Let's start'. Often, there is a series of informal discussions, maybe exchange in writing sometimes or over meetings. This can happen for a period of time before arriving at an agreement through the mediation.

17 Consequently, parties need not pedantically use the word "mediation" to describe their iMSA, in order for it to be recognised or enforceable under the SCMA. By way of illustration, in *Ram Niranjan v*

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46 See Dorcas Quek Anderson, "Comment: A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAcLJ 275 at 277, para 7.

47 The definition of mediation in s 3(1) of the Mediation Act 2017 (Act 1 of 2017) provides:

> In this Act, 'mediation' means a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:
>
> (*a*) identify the issues in dispute;
>
> (*b*) explore and generate options;
>
> (*c*) communicate with one another;
>
> (*d*) voluntarily reach an agreement.

48 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 457–458, para 17. It is noteworthy that the Mediation Act of 2017 (Act 1 of 2017) also embraces a variety of facilitative and advisory practice models, despite the more facilitative-oriented language.

49 Consider Nadja Alexander, "Ten Trends in International Mediation" (2019) 31 SAcLJ 405 at 430–432, paras 50–54. In his speech, SMS Tong SC noted a comment by Member of Parliament, Professor Dr Fatimah Lateef, who acknowledged that the domestic framework, context and cultures of each country may drive the conduct of mediation differently, leading to a valid (and related) concern that the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) should be applied to ensure consistency of standards for mediators before whom such iMSAs are concluded, in Singapore Parl Debates; Vol 94; [4 February 2020].

50 Singapore Parl Debates; Vol 94; [4 February 2020].

Navin Jatia,[51] a mediated settlement agreement, which resolved various disputes in relation to a family business and was encapsulated in a document labelled a "Memorandum of Understanding", was enforced in substance as a settlement agreement resulting from mediation in spite of the label attached to it.

18 Finally, a comment on the extent to which online mediation could fall within the SCMA's mediation definition is necessary. The SCMA expressly recognises that iMSAs may be concluded and recorded digitally, thereby acknowledging the practice of online mediation. The broad functional definition of "mediation" certainly supports online mediation with a human mediator. But what of the situation where artificial intelligence algorithms assume the mediator's role? Could "the mediator" referred to in s 2(1) of the SCMA be defined broadly enough to embrace an AI system? Or will the law begin to accept the possibility of personality in artificial intelligence systems?[52] The functional definition of "mediation" and "the mediator" is bound to embrace the pushing of boundaries in the evolution and advancement of dispute resolution mechanisms, as technological norms transform with time.[53] These are some interesting considerations which may arise in the years to come when the application of the SCMA becomes more commonplace.

(b) International nature of international mediated settlement agreements and absence of a "seat" of mediation

19 The SCMA only applies to mediated settlement agreements with an international character.[54] Here the language of the Singapore Convention (and the SCMA) differs from the New York Convention on Arbitration (and the International Arbitration Act),[55] which refers

51 [2020] 3 SLR 982. The parties appealed and the defendant was successful in overturning some of the High Court's findings, but the Court of Appeal nevertheless upheld the High Court's finding that the mediated settlement agreement, encapsulated in a document titled a "Memorandum of Understanding", was enforceable: *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [74]–[76].

52 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 458–459, para 19. Consider Paulius Čerka, Jurgita Grigienė & Gintarė Sirbikytė, "Is It Possible to Grant Legal Personality to Artificial Intelligence Software Systems?" (2017) 33 CL&SR 685.

53 Consider how litigation proceedings in the High Court of Singapore may now, in some limited and controlled circumstances (owing to the COVID-19 pandemic movement restrictions), be conducted online: Aaron Yoong, "Zooming into a New Age of Court Proceedings – Perspectives from the Court, Counsel and Witnesses" [2020] SAL Prac 19.

54 *Cf* Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at para 1.09.

55 Cap 143A, 2002 Rev Ed.

to "foreign" (and not "international") arbitral awards. As indicated previously, this difference is linked to the absence of the concept of a "seat" of mediation.[56] In international arbitration, the seat indicates the single jurisdiction (the State of origin) that has the power to set aside an arbitral award. Further, the seat of arbitration, as the originating State of arbitration, may impose domestic law requirements which may affect the enforcement of arbitral awards pursuant to the New York Convention.[57]

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56 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 Art I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959) (hereinafter "New York Convention")). In addition, 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 Art V(1)(*e*) of the Convention to engage in a principal review of awards made by the tribunal (see Nadia Darwazeh, "Article V(1)(*e*)" in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (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 before an award is taken abroad for enforcement, see Alexander J Bělohlávek, "Seat of Arbitration and Supporting and Supervising Function of Courts" (2015) 5 *Czech (& Central European) Yearbook of Arbitration* 21. 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 an award aside if any breach has occurred: for instance, the court may examine whether the parties have been sufficiently apprised 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 no need to discern the seat of mediation as it is not a determinative process as is arbitration – the nature of 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 State to refuse to enforce an international mediated settlement agreement 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 Arts 5(1)(*e*) and 5(1)(*f*) of the Singapore Convention).

57 Timothy 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 22. Take for instance *AJU v AJT* [2011] 4 SLR 739, where the Court of Appeal found that an arbitral award may be set aside if it finds that a Singapore seated arbitral tribunal makes an error of law in respect to what the public policy of Singapore is (at [67]). If the tribunal had held that a disputed contractual agreement was illegal under the law of Country X, but *incorrectly* ruled that it could nonetheless be enforced in Singapore because it was not contrary to Singapore's public policy, the Court of Appeal found that this would be a finding which it may properly set aside. Once set aside at the seat of arbitration pursuant to domestic law, the arbitral award cannot be enforced under the New York Convention in another jurisdiction.

20 None of this applies in the case of international mediation. As indicated previously, the power to refuse to enforce an iMSA lies with the State of enforcement. The internationality of a "foreign" arbitral award enforced under the New York Convention is clear:[58] "foreign" means the seat is in a different jurisdiction to that in which enforcement is sought. In contrast, the internationality of a mediated settlement agreement must be defined, because it is a non-starter to describe that agreement as "foreign". For this reason, it is only meaningful to refer to them as being of "international" character, in contrast to those of "domestic" character, which fall outside of the Art 1(1) definition. Further, unlike in the case of arbitral awards, the issue of reciprocal enforcement of iMSAs under the Singapore Convention does not arise. Without a "seat" of mediation, it is impossible to define any form of reciprocity from the perspective of the enforcing competent court.

21 Section 3(1) of the SCMA directly imports the definition of "international" from Art 1(1) of the Singapore Convention. An iMSA is considered international, where:[59]

> (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.

22 There are two scenarios worthy of further explanation, when Art 1(1) is read with[60] Art 2(1) of the Singapore Convention. First, where the parties to an iMSA are natural persons, according to Art 2(1)(*b*), reference will be made to their habitual residence, when determining if their dispute is an international one.[61]

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58 Take, for example, Art I of the New York Convention, which provides: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State [that is, the "seat"] *other than the State where the recognition and enforcement of such awards are sought* …" [emphasis added].

59 Singapore Convention, Art 1(1).

60 As provided by s 3(1) of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020).

61 Singapore Convention, Art 2(1)(*b*).

23 Secondly, where parties are legal persons,[62] there is a possibility that they are recognised as an institution of more than one place of business when the dispute settled at mediation arose.[63] Article 2(1)(*a*) of the Singapore Convention provides, for the purposes of determining the international character of the iMSA brought to court for recognition or enforcement, that the relevant place of business be benchmarked at the place which bears the closest relationship to the dispute resolved by the "settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement".[64] This means that the court should also pay attention to the circumstances known to, or reasonably contemplated by, the parties at the instance of concluding their iMSA, when determining the relevant place of business: this covers scenarios where parties are in the midst of migrating their businesses from one jurisdiction to another, or where parties are in the process of merging or becoming acquired by another business from outside the jurisdiction.[65]

24 Finally, it bears noting that the location of the mediation is irrelevant to the determination of the international character of the iMSA.[66]

(c) Commercial nature of the dispute resolved

25 The SCMA applies to iMSAs which resolve commercial disputes: this is expressly articulated in the interpretation provision of the Act,[67] where the definition of settlement agreements is set out.[68]

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62 For instance, recognised corporate bodies and companies (or corporations) which are validly constituted and have contracting capacity.

63 Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at paras 2.03–2.04.

64 Singapore Convention, Art 2(1)(*a*).

65 See Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at paras 2.03–2.04.

66 Timothy Schnabel, "Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties" (2020) 30 *American Review of International Arbitration* 265.

67 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 2(1). As a matter of technicality, note that s 3(1) of the Singapore Convention on Mediation Act 2020 provides precisely that "this Act applies to a settlement agreement which, at the time of its conclusion, is international within the meaning of article 1, paragraph 1(*a*) and 1(*b*), read with article 2, paragraph 1, of the Convention."; that is, s 3(1) only imports the meaning of the term "international" from the Singapore Convention, without any reference to the "commercial" nature of the dispute resolved through settlement agreement, alluded to in Art 1(1) of the Singapore Convention.

68 It is defined as such: "'settlement agreement' means an agreement resulting from mediation and concluded in writing by the parties to the mediation to resolve a commercial dispute".

Making reference to the import of Arts 1(2) and 1(3) of the Singapore Convention, s 3(2)(*a*) of the SCMA provides that it applies to the exclusion of consumer,[69] family, probate or labour disputes.[70] It should be noted that at the Second Reading of the Bill, Parliament was resolute that it would apply to iMSAs resolving commercial disputes. It was queried in Parliament if the SCMA ought to be limited to providing relief for iMSAs related to commercial disputes, and the reasons for doing so.[71] SMS Tong SC confirmed the SCMA's focus on commercial disputes and provided the following succinct rationale:[72]

> The Convention, which the Bill seeks to implement, itself excludes disputes in relation to 'family, inheritance or employment law'. The rationale of that is because it is consistent with UNCITRAL's mandate to focus on commercial disputes and commercial matters.
>
> In fact, in its deliberations on the draft Convention text, commercial disputes were the main focus of the Working Group. The Working Group decided that settlement agreements dealing with family and labour law matters, and other areas where party autonomy might be limited due to overriding mandatory rules or public policy, should be excluded from the scope of the Convention.
>
> Further, in matters such as family and employment law, domestic laws and public policy considerations often differ from one country to another. This could become an issue if a foreign court is faced with an application for the enforcement or invocation of agreements that might otherwise be contrary to its own laws and public policy of that particular jurisdiction.

26 Whilst the term "commercial" is not defined in the SCMA, SMS Tong SC emphasised that it must be interpreted widely, taking into account that disputes may be multifaceted and cannot simply be pigeon-holed into singular discrete categories.[73] By way of example, an iMSA touching on intellectual property rights could fall within the scope of the SCMA, if it can be said to resolve a commercial dispute;[74] similarly an iMSA resulting from an investor-state mediation may also be characterised as commercial, depending on the nature of the actual dispute.

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69 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3(2)(*a*), read with Art 1(2)(*a*) of the Singapore Convention.

70 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3(2)(*a*), read with Art 1(2)(*b*) of the Singapore Convention.

71 Singapore Parl Debates; Vol 94; [4 February 2020].

72 Singapore Parl Debates; Vol 94; [4 February 2020]. Also see Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 37 at 40–41.

73 Singapore Parl Debates; Vol 94; [4 February 2020].

74 Singapore Parl Debates; Vol 94; [4 February 2020].

27 For guidance and comparison, we may first look domestically to the Rules of Court[75] which provide a scaffolded definition for "commercial" disputes over which the Singapore International Commercial Court ("SICC") may seise jurisdiction. Order 110 r 1(2)(*b*) provides:[76]

> [A dispute] is commercial in nature if —
>
> (i) the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions:
>
> (A) any trade transaction for the supply or exchange of goods or services;
>
> (B) a distribution agreement;
>
> (C) commercial representation or agency;
>
> (D) factoring or leasing;
>
> (E) construction works;
>
> (F) consulting, engineering or licensing;
>
> (G) investment, financing, banking or insurance;
>
> (H) an exploitation agreement or a concession;
>
> (I) a joint venture or any other form of industrial or business cooperation;
>
> (J) a merger of companies or an acquisition of one or more companies;
>
> (K) the carriage of goods or passengers by air, sea, rail or road;
>
> (ii) the claim relates to an in personam intellectual property dispute; or
>
> (iii) the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature; …

28 The scaffolded definition provided by the Rules of Court is broadly similar to that provided in footnote 1 of the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation[77] ("2018 Model Law"), which was drafted alongside the Singapore Convention:[78]

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75 Cap 322, R 5, 2014 Rev Ed.

76 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 1(2)(*b*).

77 GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "2018 Model Law").

78 2018 Model Law, fn 1.

> 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.

29 The 2018 Model Law definition may not be directly relevant to the SCMA, as Singapore has not adopted the 2018 Model Law. Nevertheless, it potentially adds international gravitas to the Rules of Court definition.

30 Further, international guidance may be found in the common law of Canada and India, in precedents rendered in the context of international commercial arbitration. In the Alberta Supreme Court, Walsh J in *R v Wah Kee*[79] – when the court was tasked to decide if a laundry operated by the defendant was a commercial business – opined:[80]

> I read the word 'commercial' in the sense of relating to commerce partly on the *ejusdem generis* principle and partly because that is its ordinary and generally understood meaning. … The word 'commercial' conveys to the mind the idea of dealing or trading in some article of commerce … In a sense, of course, every business which has profit for its object … is a commercial business …

31 In its determination of whether an asset was applied for commercial purposes in a tax assessment dispute, the New Brunswick Supreme Court (Appeal Division) in *New Brunswick (Minister of Municipal Affairs) v Ashley Colter*[81] ("*Ashley Colter*") considered various dictionary definitions of the words "commercial" and "commerce".[82] Hughes JA concluded that the court may apply the ordinary and generally understood meaning of the term "commercial", which includes the buying, selling and exchange of commodities for profit.[83] In another international commercial arbitration-related dispute, the Alberta Court of Queen's Bench in *Borowski v Heinrich Fiedler Perforiertechnik GmbH*[84] applied the *Ashley Colter* definition of "commercial", even though that precedent was decided in relation to a tax statute.[85]

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79 [1920] 3 WWR 656.
80 *R v Wah Kee* [1920] 3 WWR 656 at 656.
81 (1970) 10 DLR (3d) 502 (NBCA).
82 *New Brunswick (Minister of Municipal Affairs) v Ashley Colter (1961) Ltd* (1970) 10 DLR (3d) 502 (NBCA) at [6]–[8].
83 *New Brunswick (Minister of Municipal Affairs) v Ashley Colter (1961) Ltd* (1970) 10 DLR (3d) 502 (NBCA) at [9].
84 [1994] 10 WWR 623.
85 *Borowski v Heinrich Fiedler Perforiertechnik GmbH* [1994] 10 WWR 623 at [27]–[28].

32 The High Court of Bombay in *European Grain & Shipping Ltd v Bombay Extractions Pte Ltd*[86] considered the definition of "commercial" with reference to *Black's Law Dictionary*, where it is defined as something which "relates to or is connected with trade and traffic or commerce in general".[87] Chandurkar J eventually opined that "commercial" is a generic term for most, if not all, aspects of buying and selling. The Bombay court in *Mukesh H Mehta v Harendra H Metha*[88] suggested that one could also approach the question through negative proof: "[A] commercial relationship is in contradistinction with matrimonial or family or social or political relationship. It would not embrace that type of dispute."[89] In contrast, the High Court of Calcutta in *Boeing Company v RM Investment & Trading Co Pvt Ltd*[90] provided a much broader definition of "commercial"; Bhattacharjee CJ opined:[91]

> [T]he rendering of consultancy services or other business cooperation in exchange of pecuniary consideration is undoubtedly a commercial transaction and the parties to such transaction cannot but stand in commercial relationship. According to the ordinary meaning of the term 'commercial' any activity or transaction which turns out to be a source of any gain, profit, benefit or advantage to the parties is 'commercial'.

33 It may be observed from the reported cases in Canada and India that courts are generally inclined to interpret the definition of "commercial" widely so as to cover as many business relationships as possible. Such relationships are generally activities where parties substantially seek to derive a gain, profit, benefit or tangible advantage, to the exclusion of consumer, family, probate, labour, criminal or political disputes.

34 Finally, it should also be noted that state investment transactions may also fall within the commercial scope of the SCMA.[92] When the UNCITRAL Working Group II drafted the Singapore Convention, it was initially proposed that its scope would be limited to "commercial agreements between businesses only".[93] However, this proposal was not

86 (1982) 84 BOMLR 246.

87 *European Grain & Shipping Ltd v Bombay Extractions Pte Ltd* (1982) 84 BOMLR 246 at [22].

88 (1995) 5 Comp LJ 517 (Bom).

89 *Mukesh H Mehta v Harendra H Metha* (1995) 5 Comp LJ 517 (Bom) at [14].

90 (1994) 1 Comp LJ 416 (Cal).

91 *Boeing Company v RM Investment & Trading Co Pvt Ltd* (1994) 1 Comp LJ 416 (Cal) at [12].

92 Nadja Alexander & Shouyu Chong, "The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes" in *The Asian Turn in Foreign Investment* (Chester Brown & Mahdev Mohan eds) (Cambridge University Press, 2021).

93 *Cf* United Nations Commission on International Trade Law Working Group II, *Settlement of commercial disputes: Enforceability of settlement agreements resulting*

(cont'd on the next page)

accepted by the delegates, and the restricted definition was deliberately deleted from the final draft of the Convention. Consequently, iMSAs to which States are parties may be enforced under the SCMA, subject to any provisions made to the contrary.[94]

(d) Exclusions from scope of the Singapore Convention on Mediation Act 2020

35 As indicated above, the requirement that the iMSA be commercial in nature effectively excludes iMSAs of consumer,[95] family, probate and labour disputes,[96] from the scope the SCMA. In addition, s 3(2)(*a*) of the SCMA – directly importing Art 1(3) of the Singapore Convention – excludes iMSAs which:[97]

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

36 These exclusions were drafted into the Singapore Convention to avoid overlaps in the recognition and enforcement regimes for foreign judgments, foreign arbitral awards, and iMSAs,[98] such as the New York Convention[99] and the Hague Choice of Court Agreements Convention.[100] For instance, Art 12 of the Hague Choice of Court Agreements Convention already provides specifically for the enforcement of settlement agreements which comply with its scope. The rationale behind this exclusion was explained by Natalie Morris-Sharma:[101]

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from international commercial conciliation/mediation – Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.188, 23 December 2014) at p 3.

94 See s 7(2)(*d*) of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020).

95 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3(2)(*a*), read with Art 1(2)(*a*) of the Singapore Convention.

96 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3(2)(*a*), read with Art 1(2)(*b*) of the Singapore Convention.

97 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 3(2)(*a*), read with Art 1(3) of the Singapore Convention.

98 Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 SAcLJ 487 at 505, para 45.

99 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959).

100 Convention on Choice of Court Agreements (30 June 2005) (entered into force 1 October 2015).

101 Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 SAcLJ 487 at 505, para 45.

> Specifically, the purpose was to avoid overlaps between the Singapore Convention and the Hague Convention on Choice of Court Agreements, the Judgments Project of the Hague Conference on Private International Law ('the Judgments Project') [which later materialised into the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters] and the New York Convention. This was, in many ways, *the main preoccupation* of delegations for this issue. It was, in many ways, a function of the fact that a number of the most interested delegations in the UNCITRAL process were also active in the Judgments Project discussions. They were therefore able to keenly appreciate the various permutations and combinations of how the outcomes of the UNCITRAL discussions and the anticipated output of the Judgments Project could interact. [emphasis added]

37 In the Singapore context, this may be illustrated as follows. Parties to a commercial dispute before the SICC may be directed to mediation or any other form of alternative dispute resolution (ADR) during case management proceedings.[102] If the parties are able to conclude a mediated settlement agreement, the SICC may record a consent order on the terms of the settlement agreement if the judge deems it appropriate to do so.[103] If such a consent order is recorded as part of proceedings at the SICC, it may be enforced as a court judgment accordingly. Therefore, it would be excluded under s 3(2)(*a*) of the SCMA, read with Art 1(3)(*a*) of the Singapore Convention. A further consideration may be made of the MA, which permits parties to apply to have their iMSA recorded as a court order.[104] The application to record an iMSA as a court order must be made within eight weeks and with all parties' consent.[105] In this case, if parties are to apply to enforce their iMSA under the MA, that iMSA falls outside the scope of the SCMA.

38 In the illustrations above, iMSAs which are recorded as court orders may likely be enforceable as foreign court judgments under reciprocal arrangements in another jurisdiction,[106] or through the Hague

102 See r 77(11) of the Singapore International Commercial Court Practice Directions (effective from 20 July 2020).

103 See r 77(12) of the Singapore International Commercial Court Practice Directions (effective from 20 July 2020).

104 But note that before parties may apply to have an iMSA enforced under the Mediation Act 2017 (Act 1 of 2017), a number of conditions must be fulfilled (see s 12 of the Mediation Act 2017). These conditions will be discussed at paras 86–92 below.

105 Mediation Act 2017 (Act 1 of 2017) s 12(2). But parties may apply to court for an extension of time, granted at the court's discretion.

106 For instance, the Administration of Justice Act 1920 (c 81) (UK) provides for the reciprocal enforcement of money judgments from the superior courts of Singapore (that is, the General Division of the High Court, the Appellate Division of the High Court, and the Court of Appeal).

Choice of Court Agreements Convention.[107] In future, the Hague Foreign Judgments Convention[108] may become relevant, but at the time of writing Singapore is not a State Party to that Convention.

39 These enforcement paths for iMSAs will be compared with that under the SCMA later in this article.[109]

(2) Recognition and enforcement mechanism

40 As indicated previously, the Singapore Convention allows parties seeking relief to administer an iMSA as a "sword" or "shield". The expedited recognition and enforcement mechanism of the SCMA is set out in ss 4 and 5.

(a) Enforcement (the "sword") under the Singapore Convention on Mediation Act 2020

41 Section 4(1)(*a*)(i) simply provides that parties to an iMSA may apply to the High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) to record it as an order of court for the purposes of enforcing it.[110] In this manner, an iMSA may be applied like a metaphorical "sword" to compel the performance of another party to it.[111] As a matter of procedural clarification, s 4(1)(*a*)(i) must be read with s 5 of the SCMA, which provides that after an iMSA has been recorded as an order of court in accordance with s 4(1)(*a*)(i), that iMSA may be enforced in the same manner as a court judgment of the High Court.[112] There is no time limit imposed on parties to iMSAs to apply for enforcement. Parties need only satisfy the two formal requirements set out in s 6, namely, to produce the written iMSA signed by the parties and provide evidence that the settlement resulted from a mediation. These

107 Convention on Choice of Court Agreements (30 June 2005) (entered into force 1 October 2015); assuming that the recording of the international mediated settlement agreement as a court order was founded on a relevant choice of court agreement under the Convention.

108 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2 July 2019).

109 See paras 94–97 below.

110 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 4(1)(*a*)(i).

111 This metaphor was first applied by Schnabel in Timothy 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 35 *ff*.

112 This provision is essential as a matter of *locus standi*, as ordinarily courts must search for a useful or practical purpose before exercising their discretion to grant such declaratory relief (see *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [77]).

requirements are discussed below.[113] As a noteworthy procedural point, the Sixth Schedule to the Supreme Court of Judicature Act, which sets out the cases under which an appeal against a judgment from the General Division of the High Court is to be filed with the Court of Appeal, was recently amended[114] to provide that any appeal of a decision rendered by the General Division of the High Court in relation to court orders made under the SCMA should be filed directly with the Court of Appeal.[115]

(b) Recognition (the "shield") under the Singapore Convention on Mediation Act 2020

42 Sections 4(1)(*a*)(ii) and 4(1)(*b*) provide that an iMSA may be invoked in court proceedings, like a metaphorical "shield",[116] as a complete defence to the issues litigated.[117] In other words, courts may be compelled to recognise – in the private international law sense[118] – the discrete issues already resolved by the parties through their settlement agreement at mediation, which have been recorded in their written iMSA. In doing so, courts may dismiss or strike out the relevant issues covered by the iMSA. Accordingly, if parties endeavour to have the iMSA recognised or directly invoked in High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) or Court of Appeal (namely, the Appellate Division of the High Court and the Court of Appeal, *per* s 2(5) of the SCMA) proceedings in Singapore, they need only satisfy the formal requirements set out in s 6 in order to successfully rely on their iMSA for such invocation. Alternatively, they may first apply to the General Division of the High Court to have the iMSA recorded as a court order for the purposes of invocation in *any* court proceedings in Singapore (under s 4(1)(*a*)(ii)). On a plain reading of ss 4(1)(*a*)(ii) and 4(1)(*b*) of the SCMA, the High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) or the Court of Appeal (namely, the Appellate Division of the High Court and the Court of Appeal, *per* s 2(5) of the SCMA) appear to be the only relevant competent authorities for the purposes of invocation of iMSAs. However, s 4(2) clarifies that the SCMA does not limit or restrict any right or remedy of parties to

113 See paras 46–49 below.

114 Supreme Court of Judicature Act (Amendment of Sixth Schedule) Order 2020.

115 *Per* s 29C(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), read with its amended para 1(l) of the Sixth Schedule.

116 This metaphor was first applied by Schnabel in Timothy 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 35 *ff*.

117 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) ss 4(1)(*a*)(ii) and 4(1)(*b*).

118 See *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [65] *ff*.

iMSAs that exist or may arise beyond the SCMA itself. Looking into the future, it is conceivable that other legislation, for example, Singapore's International Arbitration Act[119] might be amended to better interface with the Singapore Convention to provide for invocation of iMSAs in non-judicial proceedings, such as international arbitration.

(c) International mediated settlement agreements recorded as court orders: Difference between ss 3(2) and 4(1) of the Singapore Convention on Mediation Act 2020

43 Readers will recall that s 3(2)(*a*) of the SCMA excludes iMSAs that "have been approved by a court or have been concluded in the course of court proceedings … and are enforceable as a judgment in the State of that court". In many cases, such iMSAs will be recorded as court orders. It is imperative therefore to distinguish between iMSAs recorded as court orders under s 3(2)(*a*) of the SCMA (read with Art 1(3)(*a*) of the Singapore Convention) and those recorded as court orders under ss 4(1)(*a*)(i) to 4(1)(*a*)(ii) and 4(1)(*b*), as the former are excluded from the scope of the SCMA, whilst the latter lie at its heart.

44 Section 3(2)(*a*) of the SCMA (read with Art 1(3)(*a*) of the Singapore Convention) does not exclude an iMSA which has been "approved" or recognised by a court in granting relief under the Convention. At the Second Reading of the Bill, this point was clarified by SMS Tong SC that iMSAs, which have been recorded as a court order under the SCMA for the purposes of recognition or enforcement in Singapore, would not thereafter be excluded under Art 1(3) in another jurisdiction that is a Party to the Singapore Convention, if parties applied to the courts there for the same recognition or enforcement relief.[120] In other words, if parties seek to enforce or invoke an iMSA under the SCMA, a successful application *would not extinguish* the legal effect of that iMSA in another jurisdiction which is a Party to the Singapore Convention, solely on the basis of Art 1(3). Consequently (and logically), an iMSA which has been successfully enforced or invoked in another jurisdiction through the expedited mechanism of the Singapore Convention would *not* be excluded from the scope of the SCMA, purely on the basis of s 3(2)(*a*) of the SCMA read with Art 1(3) of the Singapore Convention.

45 The Singapore Convention expressly states in Art 3 that iMSAs are to be enforced in accordance with the rules of procedure of the State of enforcement. In Singapore, the mechanism set out in s 4(1)(*a*) of the SCMA serves as the domestic procedure by which a party may enforce

119 Cap 143A, 2002 Rev Ed.
120 Singapore Parl Debates; Vol 94; [4 February 2020].

an iMSA in Singapore under the Convention. It was intended to mirror the MA mechanism with which practitioners are familiar, but with notable adjustments to suit the context within which it was designed. For example, s 4(1)(*a*) of the SCMA states that a party to an iMSA may apply to the High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) to record the agreement as an order of court, *for the specific purposes of enforcing or invoking the agreement in Singapore*. No equivalent wording is found in the MA.[121] Therefore the recording of an iMSA as a court order is not intended to be a mechanism for the free use of parties who have entered into a settlement agreement and who seek to "convert" their iMSA to a court order, but for parties seeking the specific purpose of enforcing or invoking their iMSAs in Singapore under the Convention. In the same vein, as clarified above, it is not intended to extinguish the underlying iMSA for the purposes of enforcement in other courts.

(d) Minimal formal requirements

46 As indicated previously, s 6 of the SCMA provides for two general requirements which must be satisfied in order for the recognition or enforcement of iMSAs to be made possible. Parties must:

(a) produce the *written*[122] iMSA signed by the parties;[123] and

(b) provide evidence that it was concluded as a result of mediation.[124]

47 Unlike the MA, the SCMA does not impose any further formalities such as the need to use the services of accredited mediation service providers (*eg*, the Singapore International Mediation Centre) or mediators with specific qualifications (*eg*, accredited by the Singapore International Mediation Institute).[125] Section 2(2) generously provides that the written requirement for iMSAs may be fulfilled so long as the iMSA is recorded in any form, including electronic communications, provided it is accessible such that it may be used for subsequent reference. This provision embraces the modern application of technology and electronic communications in online dispute resolution ("ODR")

121 Further differences between the Mediation Act 2017 (Act 1 of 2017) and the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) are examined at paras 94–97 below.

122 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 2(1), definition of "settlement agreement".

123 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 6(1)(*a*).

124 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 6(1)(*b*).

125 *Cf* Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at para 4.01 *ff*.

forums, which represent a new frontier for the mediation of cross-border commercial disputes. This means that iMSAs which were concluded over ODR platforms may be enforceable, so long as the two general requirements stated above are fulfilled; the lack of a physical copy of the iMSA would not be a hindrance to its enforcement, in terms of the "in writing" requirement.

48 Next, as set out by s 6(1)(*b*) of the SCMA, parties need to prove that their iMSA was concluded as a result of mediation. They may provide evidence such as:

(a) the mediator's signature on the iMSA;

(b) a document signed by the mediator attesting that he or she conducted the mediation;

(c) a document by a mediation service provider or institution attesting that the mediation was administered; or

(d) some other form of evidence which the court may find acceptable as proof that mediation has taken place, in the absence of the first three examples.

49 It bears emphasis that the s 6(1)(*b*) requirements are *disjunctive*;[126] parties to an iMSA only need to submit one element of proof to show that mediation had occurred and resulted in the iMSA in question. The final "catch-all" provision of s 6(1)(*b*)(iv) provides the court with the discretion to accept other means of proof, such as a written mediation agreement by the parties.[127]

(e) Grounds for refusal to enforce international mediated settlement agreements

50 Section 7 of the SCMA sets out exhaustively the possible exceptions to the recognition or enforcement of iMSAs which would have otherwise fulfilled the minimal formal requirements of s 6. The court may[128] refuse to recognise or enforce an iMSA if one or more of

126 Singapore Parl Debates; Vol 94; [4 February 2020].

127 United Nations Commission on International Trade Law, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third Session (Vienna, 7–11 September 2015)* (A/CN.9/861, 17 September 2015) at para 68.

128 Mediation agreements are also referred to as agreements to mediate. It is in theory within the prerogative of the court to exercise discretion and, nevertheless, enforce the international mediated settlement agreement even if one or more of the grounds in s 7 of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020) were proved. As to theories behind how such discretion may be exercised, see Jonathan Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce

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these grounds are proven. Parties relying on the defences under s 7(1) of the SCMA must furnish proof that one or more of these grounds for refusal exist. In contrast, the court may by its own volition find that the grounds for refusal under s 7(2) of the SCMA exist.

51 For this article, the defences will be categorised into four parts:

(a) contract-related grounds for refusal;

(b) mediator (mis-)conduct-related grounds for refusal;

(c) public policy ground for refusal; and

(d) subject matter-related ground for refusal.

(1) Contract-related grounds for refusal

52 Under s 7(2) of the SCMA, seven grounds for refusal founded on contract law are set out. The court may refuse an application to invoke or enforce an iMSA if:

(a) a party to it was under some incapacity when it was concluded;[129]

(b) it is null and void, inoperative or incapable of being performed according to the applicable law;[130]

(c) it is not binding, or is not final, according to its terms;[131]

(d) it has been subsequently modified;[132]

(e) the obligations in it have been performed;[133]

Arbitral Awards under the New York Convention 1958" (2016) 36(2) *Oxford Journal of Legal Studies* 304. Hill has observed, albeit in the arbitration context, that such a discretion is likely applied within circumscribed circumstances (at 333): "As a general rule, if a defence to enforcement … is established, enforcement will be (and should be) refused. [However, to] this general principle, there is a limited number of exceptions … which are based on intelligible legal principles, rather than the court's perception of what would be fair in all the circumstances." This is an interesting issue which should be left for further research in another article, in the international mediation context.

129 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*a*).

130 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*b*)(i).

131 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*b*)(ii).

132 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*b*)(iii).

133 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*c*)(i).

(f) the obligations in it are not stated clearly or comprehensibly;[134] or

(g) granting relief would be contrary to its terms.[135]

53 First, it should be noted that the incapacity defence would apply to parties that are natural or legal persons, understood in the appropriate context and with reference to the proper law governing the iMSA.[136] This defence may be a relevant consideration when parties to the iMSA are minors,[137] natural persons with intellectual deficits,[138] natural persons who are under the influence of drugs (including medicine)[139] or alcohol,[140] or legal persons that are not validly represented.[141]

54 The second defence has three aspects to it: "null and void", "inoperative", and "incapable of being performed". *Null and void*: An iMSA which is null and void would contain defects from the moment in time when they are concluded. Defects arising subsequently from the conclusion of the iMSA should not render it null and void.[142] With reference to the proper law of the iMSA, the following defences may be relevant: misrepresentation, fraud, duress, undue influence and unconscionability.[143] It is likely that iMSAs which are concluded in breach of competition laws may be refused enforcement, for being void as well.[144] Conversely, provisions in an iMSA which may fall foul of the rule against penalty clauses[145] under the common law may not be refused enforcement, as such clauses are taken to be *not enforceable*[146]

134 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*c*)(ii).

135 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*d*).

136 See Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 470–471, para 46.

137 See s 35(1) of the Civil Law Act (Cap 43, 1999 Rev Ed); also see Loo Wee Ling, "Full Contractual Capacity: Use of Age for Conferment of Capacity" [2010] Sing JLS 328.

138 *Cf* s 4(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

139 *Chan Gek Yong v Violet Netto* [2019] 3 SLR 1218 at [39] *ff*.

140 *Resorts World at Sentosa Pte Ltd v Lee Fook Kheun* [2018] 5 SLR 1039; *Molton v Camroux* (1849) 4 Exch 17 at 19; 154 ER 1107 at 1108.

141 See *Alphire Group Pte Ltd v Law Chau Loon* [2020] SGCA 50.

142 See Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at para 5.14.

143 Consider *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982.

144 See s 34(3) of the Competition Act (Cap 50B, 2006 Rev Ed).

145 See *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386.

146 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 136; Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 6th Ed, 2018) at p 656; Shouyu Chong, "Another Piece of the Puzzle: Are Penalty Clauses Unenforceable or Void?" *Society of Construction Law Paper No. D234* (September 2021). The rule against penalty clauses in English law also applies to

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under contract law,[147] rather than null and void. *Inoperative*: An iMSA which is inoperative may become ineffective because of circumstances transpiring at or after its conclusion: this may be a result of badly drafted clauses which inherently contradict each other or cancel each other out, or due to subsequent agreements (express or implied) to waive all rights to pursue remedies under it.[148] *Incapable of being performed according to the applicable law*: An iMSA which is incapable of being performed is (or becomes) impossible to enforce, possibly as a result of supervening events transpiring after its conclusion.[149] It may also be incapable of being performed because of poor drafting and structuring of the clauses, causing its performance to simply be impossible.[150]

55 In relation to the third defence, an iMSA which is not binding or final according to its terms will be evaluated in accordance with its proper law. There may be express or implied terms in the iMSA which

commercial contracts: see *Cavendish Square Holding BV v Talal El Makdessi* [2015] 3 WLR 1377.

147 See, for instance, *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386: the parties in this case concluded a settlement agreement in relation to the plaintiff's departure from the defendant's employment. The effect of the settlement agreement was to provide for a severance package of share entitlements to the plaintiff. The terms of the settlement agreement contained a provision which purportedly allowed the defendant to disentitle the plaintiff from those shares in the event of non-compliance with the latter's non-competition and confidentiality obligations. The Court of Appeal found that the purported disentitlement clause, being a secondary obligations clause which would come into effect on the plaintiff's breach of his primary obligations under the settlement agreement to comply with his non-competition and confidentiality obligations, was not enforceable as it was a penalty clause under the common law.

148 See Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at para 5.15. Also see, for instance, *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [353], where Tan Siong Thye J found that a provision for liquidated damages in a construction contract was inoperative on the basis that (i) the parties had not contracted for any extension of time provisions and (ii) the employer in the contract commits an act of prevention, leading to (iii) the contractor no longer being bound by the original contractual completion date because the time for the completion of the construction project would be set at large.

149 Consider *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857; *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233; *Sheng Siong Supermarket v Carilla Pte Ltd* [2011] 4 SLR 1094; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 and *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265.

150 See Polish Supreme Court (Sqd Najwyzszy) Civil Chamber Division, Case No V CSK 231/14 of 5 February 2015 (reported in English in Alexander Sergeev & Tatiana Tereshchenko, "The Interaction of Arbitration and State Courts: A Growing Confrontation or a Peaceful Coexistence?" (2015) *Czech (& Central European) Yearbook of Arbitration* 195 at 214–215).

indicate if it is to have binding effect.[151] It is also noteworthy that if Singapore law were the proper law, it will be apparent from the discussion below[152] that iMSAs which are made in the context of social and domestic arrangements (these may also address commercial subject matters, if parties are mediating for instance over a transactional dispute in a family-run business) attract a presumption that parties *do not intend* to create legal relations;[153] whilst in contrast, settlement agreements made in the context of business and commercial arrangements attract a presumption that parties *do intend* to create legal relations.[154] These presumptions would also affect the court's view of whether the iMSA concluded was intended to be binding on the parties.[155]

56 According to the fourth defence, if the terms of an iMSA have been validly modified in accordance with its proper law, the original iMSA may not be enforced. Only the modified iMSA shall be enforceable.

57 The fifth defence states that if the terms of an iMSA have already been performed in accordance with its proper law, it must logically follow that courts have to refuse its enforcement, given that it has already been discharged by performance. Parties will be entitled to no further rights.[156]

58 If the terms of an iMSA are not drafted clearly or comprehensibly, the sixth defence provides that the courts may refuse to enforce it.[157] It must be emphasised that meticulous and comprehensive drafting of iMSAs is essential for them to be recognised and enforced. Key obligations must be spelt out *clearly*, such as the exact price to be paid in a predetermined currency and on predetermined dates. Where parties agree in an iMSA that important terms, such as the price of objects, would be determined

151 *Choo Ah Sam v Kieu Ka Tong* [2020] SGHC 62. In this case, the parties had negotiated for a settlement of their dispute over some shares through an exchange of WhatsApp messages. While there was a meeting of the minds between the disputing parties, as they later proceeded to draft out the terms negotiated over WhatsApp into a document, Ang Cheng Hock J found that there was an implied understanding between the parties that the settlement agreement would only be binding *after* it had been executed by the parties, namely, after the parties had *signed* the written settlement agreement (at [133]). Consequently, the High Court found that the settlement agreement was not binding, according to its implied terms, because there was no such signature reflected on the settlement agreement.

152 See para 78 below.

153 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [72], citing *Balfour v Balfour* [1919] 2 KB 571.

154 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [72], citing *Rose and Frank Co v J R Crompton and Brothers, Ltd* [1925] AC 445.

155 Consider *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39.

156 *Tan Tien Choy v Kiaw Aik Hang Co Ltd* [1965–1967] SLR(R) 16 at [16].

157 See *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [56]–[57].

separately by an expert[158] or neutral evaluator,[159] such provisions must be set out methodically, and dispute resolution provisions (*eg*, arbitration or choice of court agreements) should ideally be made in anticipation of possible disputes over the terms of the subsequent determination.[160] The parties should provide discrete scaffolding for the performance of non-monetary obligations.[161]

59 The seventh defence provides that if its performance would be contrary to its terms, an iMSA may be refused enforcement. There are several instances where this defence is applicable. It would be applied when conditions precedent[162] or conditions subsequent contained in the iMSA have not been satisfied.[163] It may be applied to give effect to a valid dispute resolution clause.[164] It could also be applied to give effect to *force majeure* clauses.[165] Furthermore, it accommodates the possibility of parties opting out of the application of the Singapore Convention by private agreement, with respect to their iMSA.[166]

158 See *Teo Lay Gek v Hoang Trong Binh* [2019] SGHC 84.

159 See *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36.

160 Shouyu Chong & Nadja Alexander, "Singapore Case Law Series: Dispute Resolution Clauses in MSAs" *Kluwer Mediation Blog* (16 May 2020). See *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763.

161 For instance, if a party to a mediation has agreed to apologise to another, the terms of the international mediated settlement agreement may be provided as such:

> Mia Pte Ltd shall publish the following words, "We unconditionally and sincerely express our deepest apologies to Janet AB and their associates for any embarrassment resulting from the words our employees have caused to be published on the *FunTube*, which is a popular video sharing site, and on their behalf offer to rescind those embarrassing statements made", on the front pages of the relevant local newspapers, *The Fun Times* and *The Cheerful Nightly*, and on their social media platforms (such as *FunBook* and *Fun-gram*), by 31 August 2020 (unless an extension of time has been agreed), as a form of apology to Janet AB, in return for Janet AB's application to discontinue Suit No XYZ/2019 and Suit No ABC/2019 in the High Court of Singapore.

162 *Tan Chin Hoon v Tan Choo Suan* [2015] SGHC 306 at [24].

163 See United Nations Commission on International Trade Law, *Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018)* (A/CN.9/934, 19 February 2018) at para 57.

164 See Vakhtang Giorgadze, "Dispute Resolution Clauses and the Enforcement of International Mediated Settlement Agreements under the Singapore Convention on Mediation" (2021) TDM 3.

165 *Merchant Industries (S) Pte Ltd v X-Media Communications Pte Ltd* [2001] SGHC 338 at [141]–[142].

166 Timothy 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 56 *ff*.

(II) Mediator (mis-)conduct-related grounds for refusal

60 The Convention provides two grounds for refusal related to mediator (mis-)conduct: where there has been either (a) a serious breach of mediator or mediation standards or (b) a failure by the mediator to disclose to parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.[167] In both cases, a party must establish that, without the alleged serious breach of standards or failure to disclose circumstances laying doubt on impartiality or independence, it would not have entered into the iMSA. This sets a high bar for any party seeking to rely on either of these grounds.[168]

61 Mediator standards may be found in legislation, court practice directions, a range of instruments referred to variously as ethical codes, codes of conduct or practice standards, private mediation agreements, the general law including case law, or a combination of the above.[169] The Singapore International Mediation Institute's Code of Professional Conduct for Mediators is illustrative of the type of standards envisaged by the mediator misconduct grounds of refusal.[170] Of course, mediators may be accredited by more than one institution and sit on more than one mediation panel, all with different codes of ethics and practice standards that may be potentially applicable. In the case of uncertainty, it will be the task of the relevant Singapore court to determine the applicable standards.

62 As noted above, these defences were crafted in such a way as to set a high bar for anyone seeking to rely on them. The reason for this is to deter frivolous claims. At the same time, given that this is a new statutory ground for refusal, there is some concern that disgruntled parties seeking to set aside an iMSA which they no longer want will try to rely on one of the mediator misconduct defences. Here the Singapore courts' experience with, and support of, mediation serves to put such concerns to rest.

63 As an illustration, the case of *Chan Gek Yong v Violet Netto*[171] demonstrates the Singapore courts' approach to such claims. In this case, the court considered allegations that co-mediators pressured one party

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167 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(2)(*f*).

168 For a detailed analysis of these provisions, see Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019).

169 On the regulation of mediator standards, see Nadja Alexander & Felix Steffek, *Making Mediation Law*, (International Finance Corporation, 2016). See also the Australian case of *Tapoohi v Lewenberg* [2003] VSC 410 at [46], where the court applied general law principles to the question of professional standards of mediators.

170 Non-legislative standards are often incorporated into the mediation agreement which parties, lawyers and the mediators sign before commencing the mediation.

171 [2019] 3 SLR 1218.

into signing the mediated settlement agreement ("MSA"). As reported in the judgment, Mdm Chan alleged that the co-mediators "persuaded and urged her to accept the amount offered by the defendants as it was almost the end of the one-day mediation session. The mediators further said that if the mediation failed, [they] would have to go back to Court for trial". The reported judgment further states that Mdm Chan maintained that she "understood this to mean that she would have to incur further costs to continue the [pending suits]. She also stated that there was no time for her to consider the Settlement Agreement before signing it".[172]

64 After considering all the arguments and evidence, Tan Siong Thye J opined that there was "no reason for anyone to feel pressured by [the mediators' actions]".[173] As the mediators were merely conveying words of advice founded upon facts and the logical consequences of Mdm Chan's ultimate decision to agree or disagree with the negotiated terms, it demanded a tremendous stretch of imagination to interpret those words as undue pressure.

65 Secondly, Tan J ruled that no undue pressure had been applied on Mdm Chan by the mediators, though she alleged that she was pressed to endorse the MSA "as it was already late in the day [and hence] she had no time to consider the [terms of the] Settlement Agreement".[174] It appears to be the court's view that circumstantial time pressures should not invalidate MSAs. His Honour opined that Mdm Chan could simply have requested for more time if she needed it to consider the terms of the MSA before she endorsed it with her signature. There was also no actual pressure by the mediators, as she admitted that they had not forced her to endorse the MSA against her volition.

66 This case demonstrates that evidence of shift in a party's position (here, Mdm Chan) after the signing of the MSA is, of itself, not evidence of undue influence, intimidation or the like. Further, it indicates that Singapore courts understand and support the mediation process and recognise the role of mediators in reality testing and ensuring that mediating parties are aware of the implications and/or costs of pursuing alternatives to settlement such as going to trial.

172 *Chan Gek Yong v Violet Netto* [2019] 3 SLR 1218 at [52].
173 *Chan Gek Yong v Violet Netto* [2019] 3 SLR 1218 at [57].
174 *Chan Gek Yong v Violet Netto* [2019] 3 SLR 1218 at [58].

(iii) Public policy ground for refusal

67 Section 7(3)(*a*) of the SCMA provides that the court may refuse to enforce iMSAs that are contrary to the public policy of Singapore.[175] Whilst the public policy of Singapore is specifically referred to in legislation, it should be emphasised that the prevailing practice in private international law contemplates the scrutiny of *both* domestic and international perspectives of public policy.[176] This means that in relation to the enforcement of iMSAs under the SCMA, Singapore public policy should be applied "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".[177] Consequently, the courts should only exercise discretion to refuse the enforcement of iMSAs by reason of public policy under highly exceptional circumstances.[178] The Court of Appeal had laid out such a guideline (albeit in the context of international commercial arbitration):[179]

> In our view, [the public policy defence] should only operate in instances where the upholding of [a dispute resolution outcome] would 'shock the conscience' … or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974) at 974.

68 It is useful to consider the case of *BAZ v BBA*,[180] where a dispute resolution outcome was not enforced based on the public policy exception. The High Court exercised its discretion on public policy grounds to refuse to enforce part of an international arbitral award rendered by a tribunal seated in Singapore, because it bound young children to be jointly and

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175 Singapore Convention on Mediation 2020 (Act 4 of 2020) s 7(3)(*a*).

176 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 474–475, para 55; *cf* Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3652.

177 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3655; although taken out of context (*ie*, Born's words refer to the New York Convention), the phrasing of the words applies with equal logical force to the Singapore Convention as well. See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]; *AJU v AJT* [2011] 4 SLR 739 and *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860 at [63].

178 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]; *BAZ v BBA* [2020] 5 SLR 266 at [154]–[187].

179 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59].

180 [2020] 5 SLR 266; the parties appealed in *BBA v BAZ* [2020] 2 SLR 453, but the appeal was dismissed.

severally liable to pay an award of damages amounting to $720m. Belinda Ang Saw Ean J opined:[181]

> The survey of the law of contract with regard to the legal position of minors in Singapore shows that there is protection given to minors. Importantly, minors only have a limited capacity to enter into binding contracts. I find that the principle of protecting the interests of minors in commercial transactions is part of the public policy of Singapore.
>
> The effect of the Award on the Minors is to enforce the SPSSA, which is not a contract falling under any of the exceptions to the general position that contracts do not bind minors. This violates the protection given to minors in contractual relationships under Singapore law. The Award finds them jointly and severally liable for the fraudulent misrepresentation that induced the counterparty to enter the SPSSA. This liability is imposed on the Minors for the fraudulent misrepresentation of their guardian or principal on matters which the Minors had no knowledge of. This has the effect of violating the protection given to a minor under s 35(7) of the Civil Law Act. As stated above, the provision protects a minor even where the minor made a misrepresentation personally. All in all, such an award against the Minors that saddles them with legal liability for an amount exceeding S$720 million shocks the conscience, and it violates Singapore's most basic notion of justice to find the Minors liable under a contract that was entered into when they were only between three to eight years old at the material time. At the time of the arbitration, they were only between eight and twelve years old.

69 In the context of enforcing iMSAs under the SCMA, it is likely that similar considerations would be taken into account if the courts are required to consider if an iMSA should be refused enforcement by reason of public policy.

(iv) Subject matter not capable of settlement by mediation: Ground for refusal

70 Section 7(3)(*b*) of the SCMA provides that the court may refuse to enforce iMSAs which address subject matters which are not capable of resolution by mediation according to Singapore law.[182] Similar to the public policy defence, it is submitted that the subject matter defence is another exceptional defence.[183] Whilst the Singapore court may consider that under its own domestic rules some subject matter issues are not

181 *BAZ v BBA* [2020] 5 SLR 266 at [179]–[180].

182 Singapore Convention on Mediation Act 2020 (Act 4 of 2020) s 7(3)(*b*).

183 Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation – A Commentary* (Wolters Kluwer, 2019) at para 5.110; Timothy 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 55.

susceptible to mediation and be eager to enforce them, there is a good argument that it should first consider – given the international nature of the iMSA – the degree of nexus of the subject matter to Singapore, before categorically imposing domestic conditions and expectations onto that iMSA.[184]

71 In any event, it is also submitted that this defence would likely be rarely raised, because mediation is a flexible mechanism for dispute resolution, providing parties with a multitude of creative ways to frame and characterise their disputes for resolution. Take, for instance, a dispute over patent validity and associated rights that could be resolved at mediation, where parties agree to compromise on a licensing arrangement, but the mediated outcome could be characterised as a simple obligation to make fixed payments on designated dates, without any mention of the patented object in dispute.

III. Part 2: New regulatory landscape for international mediated settlement agreements

72 Part 2 examines the new regulatory landscape for the recognition and enforcement of iMSAs under four co-existing regimes: the common law, court-referred mediation practice, the MA and the SCMA, from a comparative perspective. This article concludes by setting out how the expedited recognition and enforcement regime under the SCMA can improve[185] and enhance the existing regulatory landscape in relation to iMSAs.

A. Common law

73 In Singapore, an iMSA may be recognised (or invoked) and enforced under the common law, so long as parties relying on it prove that they intended to conclude a binding agreement.[186] However, parties'

184 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 483–484, para 75.

185 Such was the optimism expressed by Chua, shared by the authors, in Eunice Chua, "Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation" (2019) 31 SAcLJ 572 at 597, para 44.

186 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131; *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982. The parties in [2020] 3 SLR 982 appealed and the defendant was successful in overturning some of the High Court's findings, but the Court of Appeal nevertheless upheld the High Court's finding that the mediated settlement agreement in dispute was binding and enforceable: *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [74]–[76]. Also consider *Choo Ah Sam v Kieu Ka Tong* [2020] SGHC 62 at [131]–[134].

success in doing so is limited by the availability of a wide number of contractual defences in common law and equity, thereby creating some uncertainty as to whether, on a case by case basis, iMSAs ultimately will be enforced.[187] The discussion below proceeds with the assumption that Singapore law governs the iMSA.

(1) Recognising (or invoking) international mediated settlement agreements

74 The Court of Appeal in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*[188] has set out definitively the Singapore position on the recognition of settlement agreements in court and at arbitration.[189] In this case, the parties had concluded a signed settlement agreement, which was recorded in a memorandum of understanding ("MOU"). Having recorded the compromises which the parties would make in favour of each other, the settlement agreement purported to put an end to arbitration proceedings at the Singapore International Arbitration Centre. In the days following the conclusion of the settlement agreement, one of the parties decided not to withdraw the arbitration proceedings, and decided to unilaterally continue with it, successfully obtaining an arbitral award in its favour. Dissatisfied with the outcome, the non-participating party applied to the Singapore courts to set aside the arbitral award. They argued that the MOU (*ie*, settlement agreement) should be recognised and invoked accordingly in arbitral proceedings, to prove that the issues up for arbitration (and rendered in the resulting award) had already been conclusively resolved, such that the tribunal lacked any jurisdiction to render the award. In this case, the bindingness and validity of the MOU was not disputed. Whilst unsuccessful in the High Court, they filed a successful appeal in the Court of Appeal.

75 Giving weight to the MOU, the Court of Appeal ruled that as a matter of principle, a settlement agreement may be invoked to supersede a cause of action flowing from a dispute,[190] which would normally be available to parties when a breach of a contract occurs.[191] If that settlement agreement is validly concluded and binding on the parties, it

187 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 452–453, paras 6–7.

188 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131.

189 Also see *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1992] 3 SLR(R) 841 at [13]–[20].

190 See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [152].

191 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95].

will put a conclusive end to judicial and arbitral proceedings, in regards to the discrete subject matters which they resolve. As soon as a settlement agreement is concluded (*eg*, when parties endorse it with their signatures as an indication of acceptance of its terms), it will bind the disputing parties, and proceedings in court or at arbitration will become spent and exhausted.[192] Effectively, the settlement agreement operates to preclude parties from taking any further steps with respect to the resolved matter in court or at arbitration, *unless* there are provisions in that agreement enabling the parties to revive the settled dispute.[193]

76 Whilst it is unclear on the facts of the case, as reported, if the successfully invoked MOU was a mediated settlement agreement or a negotiated settlement agreement, the principles set out by the Court of Appeal apply equally to the recognition of both kinds of settlement agreements, including iMSAs.

(2) Enforcement of international mediated settlement agreements

77 In the matter of enforcing mediated settlement agreements, the High Court's judgment in *Ram Niranjan v Navin Jatia*,[194] which – on the specific point of enforcement – was recently affirmed by the Court of Appeal,[195] is instructive. In this case, the parties were engaged in an acrimonious and complicated domestic dispute which spilled over into the management of the family business. The parties were in dispute for over a decade. During the course of their heated quarrels, the parties concluded two settlement agreements between themselves: a mediated settlement agreement recorded as a MOU dated 9 December 2006, and a negotiated settlement agreement recorded as a settlement deed concluded on 6 August 2015 ("Settlement Deed"). The opposing parties were in dispute over the validity of both settlement agreements. We will only focus on the MOU as its enforcement by the High Court presents several interesting and noteworthy observations, applicable to how iMSAs may be enforced by the Singapore courts.

78 In determining whether to enforce a mediated settlement agreement, the court must rule on whether it has a valid and binding

192 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95].

193 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [95]; *The Dilmun Fulmar* [2004] 1 SLR(R) 140 at [7]. Also see *Korea Foreign Insurance Co v Omne Re Sa* [1999] 1 Lloyd's Rep IR 509.

194 [2020] 3 SLR 982.

195 See *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [74]–[76].

contractual effect on the parties.[196] One relevant consideration was if the dispute resolved by the settlement agreement flowed from a family business. On the face of the MOU, it was unclear whether the dispute (as resolved through an *ad hoc* mediation reflected in the MOU) involved a social and domestic, or business and commercial, arrangement. As such, the court had to make a preliminary inquiry of which one of the two arrangements was more likely. This line of inquiry is necessary as under Singapore law, settlement agreements made in the context of social and domestic arrangements attract a presumption that parties *do not intend* to create legal relations;[197] whilst in contrast, settlement agreements made in the context of business and commercial arrangements attract a presumption that parties *do intend* to create legal relations.[198] Considering the particular facts, context and circumstances,[199] Chua Lee Ming J found that the MOU was more likely to be a commercial arrangement as many of its terms related to the settling of disputes related to the family business.[200] Besides, upon evaluating the circumstances leading to the mediation and conclusion of the MOU in 2006, the court opined that the mediated settlement agreement represented the result of an earnest attempt by the parties to work out a complex and acrimonious father-son quarrel over business and domestic affairs which unfortunately muddled into one another. For instance, the court opined that a hand-written clause (written by the son) which provided his father and mother, both of whom he was in dispute with, with a right to live at a residential property in the MOU engendered a strong inference that all parties were committed to reaching a compromise and amicably resolving their disputes through the signing of that MOU in 2006. Once signed, the natural inference flowing from that observation would be that the parties had intended the MOU to be legally binding on all parties.[201] Accordingly, Chua J ruled that the mediated settlement agreement (*ie*, the MOU) was valid and binding, and granted the necessary declaratory orders to enforce its provisions.

79 Once the validity of an iMSA is established, it is important to consider possible contractual defences. The availability of a wide number of contractual defences in common law and equity, which could defeat the enforceability of such settlement agreements, may bring some uncertainty to its enforcement under the common law.

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196 Dorcas Quek Anderson, "Comment: A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAcLJ 275 at 286, para 29.

197 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [72], citing *Balfour v Balfour* [1919] 2 KB 571.

198 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [72], citing *Rose and Frank Co v J R Crompton and Brothers, Ltd* [1925] AC 445.

199 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [84].

200 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [87].

201 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [86].

(3) Defences preventing recognition and enforcement

80 In Singapore, where settlement agreements are brought to court for invocation or enforcement, parties hoping to escape their obligations because they may have had a change of heart possess a broad arsenal of defences which they may argue. This leads to the ironic situation where parties end up litigating over disputes and issues which should have already been resolved at mediation. Coben and Thompson coined the term "disputing irony" to describe these cases.[202]

81 The case of *Ram Niranjan v Navin Jatia*,[203] which was discussed earlier, is illustrative. It may be recalled that the parties had concluded two settlement agreements: an MOU and a Settlement Deed. When challenging the validity of the settlement deed, the plaintiffs pleaded the following laundry list of defences:

(a) uncertainty of terms;

(b) misrepresentation;

(c) duress;

(d) undue influence;

(e) unconscionability;

(f) *non est factum*; and

(g) material non-disclosure of facts.

82 The High Court rejected all but one of the defences; Chua J ruled that the Settlement Deed could be set aside for a material non-disclosure of fact.[204] The court opined that the Settlement Deed could be characterised as a family arrangement[205] (not to be confused with a settlement agreement resolving disputes over family law-related matters, such as division of matrimonial assets in divorce proceedings),[206] which engendered a duty of disclosure of material facts when contracts

202 James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation About Mediation" (2006) 11 *Harvard Negotiation Law Review* 43.

203 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982.

204 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [79].

205 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [77]. The law governing contracts concluded in furtherance of a family arrangement may be found in *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 at [204].

206 In *Kuek Siang Wei v Kuek Siew Chew* [2015] 5 SLR 357, the Court of Appeal broadly opined that a family arrangement refers to an agreement between members of the same family which is intended to be generally and reasonably for the benefit of the family (at [45]).

within such an arrangement were concluded.[207] The parties could thus avail themselves to an exceptional defence of material non-disclosure of fact, on the basis of the finding that the defendant was unforthcoming with the disclosure of certain sales proceeds to the plaintiff, the facts of which led up to the conclusion of the Settlement Deed.[208] On appeal, the Court of Appeal overturned Chua J's ruling to set aside the Settlement Deed, as the circumstances the parties were in were not sufficiently exceptional to justify the application of the defence.[209] Woo Bih Li J ruled that the totality of evidence showing the parties' acrimonious relationship demolished any possibility that the parties were in a relationship of trust and confidence.[210] In so finding, the Court of Appeal opined that "where the underlying rationale for the duty of disclosure in family arrangements is not engaged, the duty may not apply. … [I]t would seem, *prima facie*, that the duty is not engaged where there is no relationship of trust and confidence between the counterparties to the contract".[211]

83 While the defence of material non-disclosure was unsuccessfully applied in this case, it is noteworthy that this defence remains available under exceptional circumstances in the law of contracts in Singapore. It may be applied in future to set aside iMSAs which may address commercial subject matters but also involve family arrangements if such an iMSA were brought to be enforced outside one of the statutory regimes available in the Singapore courts.

84 Another recently decided case, *Ricardo Leiman v Noble Resources Ltd*,[212] may also be briefly considered. In this case, part of a severance payments and benefits clause under a settlement agreement concluded between the appellant and respondents over the matter of the former's resignation was deemed unenforceable because the Court of Appeal ruled that it was a penalty clause.[213] It is imperative to note that if an iMSA is not carefully framed and drafted, under the common law of Singapore there is a possibility that some payment clauses may be rendered unenforceable by the courts for being a penalty clause.

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207 Generally, non-disclosure of a material fact does not provide the counterparty with the right to avoid obligations under a contract, but an exception is made in family arrangements: *Bell v Lever Brothers Ltd* [1932] AC 161 at 227.

208 *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982 at [79].

209 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [52]–[61].

210 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [58].

211 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [57].

212 [2020] 2 SLR 386.

213 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [107].

B. Court-referred mediation

85 Parties to cross-border and domestic disputes, which are in litigation, may be referred to mediation by the courts including the Supreme Court[214] and the Singapore International Commercial Court.[215] Although court-referred mediation is not mandatory (and dependent on the parties' mutual willingness), the Singapore courts are supportive of mediation and encourage parties to mediate in appropriate cases. Mediation for cross-border disputes is typically conducted by mediators external to the courts and often the mediators are SIMC[216] panel members.[217] Where a court matter is settled at mediation, then, as a matter of court practice, parties may apply to the court for the iMSA to be recorded as a consent order of the court.[218] Frequently parties will include a provision in their iMSA according to which they agree to apply to the court for such order. Normally, once the case is settled and a consent order is recorded, parties would agree to apply to discontinue the litigation.[219] After the iMSA is recorded as a consent order, and the court and parties have given effect to the application for a discontinuance, no defences to set aside the iMSA may lie, unless expressly provided for by the consent order. This is because courts cannot make any substantive amendments to that consent order *after* the case has been discontinued,[220] unless express provisions have been made for them within that consent order.[221]

214 See r 35C(4) of the Supreme Court Practice Directions (effective from 4 November 2020). For the State Courts, see Practice Direction 35(9).

215 See r 77(11) of the Singapore International Commercial Court Practice Directions (effective from 20 July 2020).

216 The SIMC refers to the Singapore International Mediation Centre. The SIMC Panel's members may be found at <https://simc.com.sg/mediators/> (accessed on 15 December 2020).

217 Andrew Phang, Judge of Appeal, "Mediation and the Courts – The Singapore Experience", keynote speech at the 4th Asian Mediation Association Conference (20 October 2016) at 20, para 39.

218 Also see r 77(12) of the Singapore International Commercial Court Practice Directions (effective from 20 July 2020).

219 See *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763.

220 It is said that the courts would be *functus officio* once the case has been discontinued. See *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [11].

221 See *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763.

C. *The Mediation Act 2017*

86 In order to enforce an iMSA as a court order under the MA, parties need to ensure that a number of conditions are fulfilled.[222]

87 First, s 6 of the MA establishes that its enforcement mechanisms would be applicable if the iMSA were a result of any mediation conducted under a mediation agreement where either (a) the mediation is wholly or partly conducted in Singapore;[223] or (b) the agreement provides that the MA, or the law of Singapore, applies to the mediation.[224] Where an iMSA arises from mediation proceedings conducted entirely outside of Singapore, parties need to show that they have agreed (*ie*, in their mediation agreement) to subject that mediation to the terms and procedure set out by the MA, or they need to agree that Singapore law governs the proceedings.

88 Secondly, s 12(1) of the MA provides that the expedited enforcement mechanism (via court order)[225] is only available in relation to mediated outcomes of disputes *not* the subject of proceedings in court.[226] In other words, where parties have filed proceedings before settling their dispute through mediation, they cannot seek to have their iMSA recorded as a court order under s 12 of the MA.

89 Thirdly, s 12(3)(*a*) of the MA provides that its expedited enforcement mechanism[227] is only available to iMSAs which result from a mediation that is administered by a designated mediation service provider or conducted by a certified mediator.[228] At the time of writing, there are four designated mediation service providers – the Singapore International Mediation Centre, the Singapore Mediation Centre, the Tripartite Alliance for Dispute Resolution, and the World Intellectual Property Organization's Arbitration and Mediation Center – and one approved mediation certification scheme – the Singapore International Mediation Institute Credentialing Scheme.

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222 See s 12 of the Mediation Act 2017 (Act 1 of 2017). A mediated settlement agreement need not be international in character to fall within the scope of the Mediation Act 2017; however, this article focuses on international mediated settlement agreements and this part of the article on iMSAs under the Mediation Act 2017.

223 Mediation Act 2017 (Act 1 of 2017) s 6(1)(*a*).

224 Mediation Act 2017 (Act 1 of 2017) s 6(1)(*b*).

225 *Ie*, s 12 of the Mediation Act 2017 (Act 1 of 2017).

226 Mediation Act 2017 (Act 1 of 2017) s 12(1).

227 *Ie*, s 12 of the Mediation Act 2017 (Act 1 of 2017).

228 Mediation Act 2017 (Act 1 of 2017) s 12(3)(*a*).

90 Next, the following conditions must be fulfilled before an iMSA may be enforced under the MA:

(a) all parties to the iMSA must consent to recording the iMSA as an order of court;[229]

(b) the iMSA must be evidenced and recorded in writing and signed by all parties;[230] and

(c) the application for recording the iMSA as an order of court must be made within eight weeks after the conclusion of the iMSA, subject to extensions of time which may be granted at the court's discretion.[231]

91 Finally, s 12(4) of the MA sets out the defences under which a court may refuse to record an iMSA as an order of court. In full, it provides:[232]

> (4) The court may refuse to record a mediated settlement agreement as an order of court if —
>
> (*a*) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;
>
> (*b*) the subject matter of the agreement is not capable of settlement;
>
> (*c*) any term of the agreement is not capable of enforcement as an order of court;
>
> (*d*) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or
>
> (*e*) the recording of the agreement as an order of court is contrary to public policy.

92 It is noteworthy that s 12(4)(*a*) is essentially an open-ended provision allowing any conceivable ground for invalidating a contract to be considered as a defence against recording an iMSA as a court order under the MA. If the governing law of the iMSA is Singapore law (which is highly conceivable, considering that a connection to Singapore law is a necessary element, under s 6 of the MA, for the application of the MA to occur), this would mean that a wide number of contractual defences

229 Mediation Act 2017 (Act 1 of 2017) s 12(1).
230 Mediation Act 2017 (Act 1 of 2017) s 12(3)(*b*).
231 Mediation Act 2017 (Act 1 of 2017) s 12(2).
232 Mediation Act 2017 (Act 1 of 2017) s 12(4).

in common law and equity may be available to the parties. Accordingly, s 12(4)(*a*) may bring some uncertainty into the enforcement of iMSAs under the MA, similar to enforcement under the common law.

D. The Singapore Convention on Mediation Act 2020

93 The SCMA facilitates potentially greater access to direct enforceability for iMSAs, compared to the mechanisms available under the common law, court-referred mechanisms and the MA. Whereas the common law regards an iMSA as a contract, albeit one which could potentially extinguish judicial or arbitral proceedings,[233] the SCMA facilitates the convergence of the functions of an iMSA with an arbitral award and court judgment, galvanising its enforceability uniformly on a transnational level and across other State Parties to the Singapore Convention.[234] While iMSAs recorded as consent orders form an integral part of Singapore court-referred mediation practice, parties must necessarily be in litigation before a Singapore court before this option becomes available. In relation to the MA, iMSAs must satisfy six requirements, which are set at a significantly high bar, before expedited enforcement under the MA is possible: (a) Singapore law applies; (b) the mediation is conducted pursuant to a mediation agreement; (c) the mediation is conducted by approved mediators; (d) the iMSA is in writing and signed by parties; (e) all parties consent to the iMSA being recorded as a court order; and (f) the application for recording an iMSA as an order of court is made within an eight-week time frame. By comparison, the SCMA sets out two requirements for iMSAs to be invoked or enforced accordingly: (a) the iMSA is in writing and signed by parties; and (b) evidence that the iMSA resulted from mediation. Finally, s 7 of the SCMA sets out exhaustively the possible exceptions to the invocation and enforcement of iMSAs, providing greater certainty to the applicable law than the more open-ended common law and s 12(4)(*a*) of the MA. In both cases, existing case law may be indicative of the approach that the court will take.[235]

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233 *Cf Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131.

234 Shouyu Chong & Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 SAcLJ 448 at 453–454, para 8.

235 See, for example, Nadja Alexander & Shouyu Chong, "Mediation and Appropriate Dispute Resolution" (2019) 20 SAL Ann Rev 614. See also the case of *Chan Gek Yong v Violet Netto* [2019] 3 SLR 1218, considered previously in this article.

E. Comparison of the enforcement regimes in Singapore

94 The following table summarises the main features of the four different enforcement regimes in Singapore's new regulatory landscape for iMSAs.

Factor	Common Law	Court-Referred	MA	SCMA
Scope	Domestic and international MSAs* may be subject to the common law of Singapore. *Also referred to as (i)MSAs.	Domestic and international MSAs, resulting from the referral of matters in litigation before Singapore courts to mediation.	Domestic and international MSAs conducted wholly or partially in Singapore and pursuant to a written mediation agreement.[236] If mediation is not conducted in Singapore, then the mediation agreement must specify that the MA or Singapore law applies.	International and commercial iMSAs provided they are not capable of enforcement as a court order or consent arbitral award.[237]
Expedited enforcement possible?	No.	Yes.	Yes.	Yes.
The terms of the iMSA may be recorded as a court order (even if a party is not applying for the order to seek relief in relation to the iMSA)	It depends. Yes, for litigation matters and with consent of all parties. No, for matters not in litigation. But for the purposes of enforcement, the court may declare the validity of an (i)MSA.	Yes, with consent of *all* parties. An (i)MSA will be enforceable as a judgment.	Yes, with consent of *all* parties. An application can be made to record an (i) MSA as an order of the court. It must be made within 8 weeks of the (i)MSA being concluded.	No. But for the purposes of enforcement, a party to an iMSA may apply to the High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA) to record the iMSA as an order of court.

236 Mediation agreements are also referred to as agreements to mediate.
237 Singapore Convention, Art 1(3).

Factor	Common Law	Court-Referred	MA	SCMA
Limitation period to bring action for *enforcement* of iMSA	6 years from breach of (i) MSA. General limitation period on actions founded on a contract. Section 6(1)(*a*) of the Limitation Act.	12 years from the date of rendering court consent order (containing the terms of the (i)MSA). Section 6(3) of the Limitation Act.	12 years from the date of rendering court consent order pursuant to s 12 of the MA. Section 6(3) of the Limitation Act. Alternatively, 6 years from breach of (i) MSA (common law contract) if no court consent order rendered pursuant to s 12 of the MA.	6 years from breach of the iMSA. Section 6(3) of the Limitation Act.
Certified mediator/ designated mediation service provider	No.	No.	Yes. Mediator must be "certified" under the MA and/ or institutional mediation service provider must be "designated".	No.
iMSA required to be in writing	No, subject to specific exceptions.[238]	Yes, as a matter of practice.	Yes.	Yes.

238 For instance, dealings with real estate must comply with the formality requirements set out by s 6 of the Civil Law Act (Cap 43, 1999 Rev Ed) (for deeper analysis, see Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2018) at pp 271–274). Also, dispositions of equitable interests following alternative dispute resolution procedures need to comply with the formality requirements set out by s 7(2) of the Civil Law Act.

Factor	Common Law	Court-Referred	MA	SCMA
Requirement to show evidence of mediation leading to iMSA	The law applicable to negotiated settlement agreements is generally applicable to mediated settlement agreements. However, there may be circumstances where evidence concerning the mediation becomes relevant, *eg*, for defences that involve the mediator's behaviour.	Court consent orders can be based on negotiated or mediated settlement agreements. However, there may be circumstances where it is necessary to prove that the settlement results from mediation, *eg*, if it may impact the nature of the court's review or costs awards.	Yes. Evidence that the mediation was administered by a designated mediation service provider or conducted by a certified mediator.	Yes. The SCMA provides for a non-exhaustive list of evidence. A party may submit the mediator's signature on the iMSA; an attestation by the mediator or mediation institution; or any other evidence.
Requirement that iMSA be signed by the parties	No, as there is no signature requirement; but subject to specific subject-matter requirements.[239]	Yes, as a matter of practice.	Yes.	Yes.
Requirement that iMSA be signed by the mediator	No.	No.	No.	No.[240]

239 For instance, dealings with real estate must comply with the formality requirements (including that of signature) set out by s 6 of the Civil Law Act (Cap 43, 1999 Rev Ed) (for deeper analysis, see Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2018) at pp 271–274). Also, dispositions of equitable interests following alternative dispute resolution procedures need to comply with the formality requirements (including that of signature) set out by s 7(2) of the Civil Law Act (for deeper analysis, see Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2018) at pp 354–359).

240 For the sake of completeness, under s 6(1)(*b*)(i) of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020), it is worth clarifying that whilst the mediator's signature on the international mediated settlement agreements may be used as evidence to show that mediation has occurred, it is *not a necessary condition*, as parties may provide evidence of mediation in other ways.

Factor	Common Law	Court-Referred	MA	SCMA
Availability of defences	Yes. Any contractual grounds.	No.[241]	Yes. The list of defences prescribed in s 12(4) of the MA. Any contractual grounds.	Yes. The exhaustive list of defences prescribed in s 7 of the SCMA.
Competent court[242]	The State Courts and High Court.	The State Courts and High Court.	The High Court.	The High Court (namely, the General Division of the High Court, *per* s 2(4) of the SCMA).[243]

Figure 2: Comparative table of factors relevant to international mediated settlement agreements recognition and enforcement

95 In Singapore, legal practitioners are most familiar with the court-referred mediation practice of obtaining a consent order that reflects the contents of an iMSA.[244] However, the growing use of mediation for cross-border disputes demands an updated understanding of the different options available for the recognition and enforcement of iMSAs available in Singapore's fast-evolving regulatory landscape for iMSAs. Significantly the SCMA applies to iMSAs regardless of whether or not litigation proceedings have commenced, whereas the MA provides for the recording of an iMSA as an order of court only where litigation proceedings have not yet commenced. Therefore, both Acts encourage disputants to save time and costs associated with commencing litigation, whilst pursuing early options for settlement that promise direct and

241 After the international mediated settlement agreements is recorded as a consent order, and the court and parties have given effect to the usual and consequential application for a discontinuance, no defences to set aside the iMSA may lie, unless expressly provided for by the consent order. This is because courts cannot make any substantive amendments to that consent order after the case has been discontinued, unless express provisions have been made for it within that consent order. See *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763.

242 Note that for the invocation of international mediated settlement agreements, appeal courts may also be competent courts.

243 For direct invocation of an iMSA under s 4(1)(*b*) of the Singapore Convention on Mediation Act 2020 (Act 4 of 2020), where there are ongoing proceedings in the Appellate Division of the High Court or in the Court of Appeal, the Appellate Division of the High Court or the Court of Appeal respectively will be the competent court that can allow the party to invoke the agreement as well.

244 Nadja Alexander *et al*, *The SIDRA Conversations on International Dispute Resolution* (forthcoming, 2021).

perceptible enforcement relief should it be required (however, once litigation has been commenced, only the SCMA remains potentially applicable). There are further differences between the MA and the SCMA that will influence choices and strategies in relation to the recognition and enforcement of iMSAs. For example, the MA only applies where the mediation is at least partly conducted in Singapore or where Singapore law otherwise applies pursuant to the mediation agreement; further, mediation service providers and mediators must meet certain standards; finally, the parties have eight weeks within which to apply for a consent order reflecting the terms of the iMSA. These requirements do not apply to the SCMA. Moreover, under the SCMA, it is envisaged that only one party needs to apply to the court to record the iMSA as an order of the court – this is because the party applying will be seeking relief in relation to a dispute with the other party about the iMSA. In any case, in the event that parties succeed in obtaining enforcement of their iMSA as a court order under the MA, they will be precluded from doing so under the SCMA.

96 Where iMSAs potentially fall under more than one regime, considerations which may influence the parties' preference for one statutory enforcement regime over the other may include: costs, an assessment of the risk of non-compliance by the other party, and relevant time frames in relation to (a) the recording of the iMSA as a court order and (b) enforcement proceedings.[245] By way of example, where one party to an international commercial dispute is in Singapore, there is a threshold decision to be made about whether or not to commence litigation proceedings. If proceedings are commenced before a Singapore court, then the court-referred mediation practices will be available. However, if not all parties agree to a consent order to record the terms of settlement, the SCMA may still be applicable.[246] Where litigation proceedings have not been commenced, parties can potentially proceed under the common law, the MA or the SCMA regimes. Where litigation proceedings have been commenced in court, the enforcement mechanism under the MA is not available.[247] Where, for instance, the written and signed iMSA cannot be produced or it cannot be established clearly that the settlement resulted from mediation or that it is international in nature, then resort may be had to the common law. Parties wishing to proceed under the MA will need to fulfil its requirements as set out above, and this requires making some choices prior to entering mediation such as selecting

245 Nadja Alexander & Shouyu Chong, "Singapore Convention Series: Bill to Ratify before Singapore Parliament" *Kluwer Mediation Blog* (4 February 2020).

246 The Mediation Act 2017 (Act 1 of 2017) is unlikely to apply if not all parties agree to record the international mediated settlement agreement as an order of the court.

247 Mediation Act 2017 (Act 1 of 2017) s 12(1).

an approved mediator or proceeding to a designated service provider. Certainly, for iMSAs, the SCMA offers the most accessible mechanism for direct recognition and enforcement with its minimalist framework.

97 A final comment: this article has focused on recognition and enforcement in Singapore. There will certainly be situations where parties to an iMSA seek to enforce it in Singapore and also in a foreign jurisdiction. Here further considerations come into play, such as which jurisdictions are parties to reciprocal arrangements with Singapore for the recognition and enforcement of foreign judgments (for iMSAs recorded as consent orders) and which jurisdictions have ratified the Singapore Convention (for iMSAs that would fall within the scope of the SCMA). These considerations are worthy of further research; however, they fall beyond the scope of this article.

IV. Conclusion

98 The passing of the SCMA is an important contribution to Singapore's leadership role in relation to the Convention and to international commercial mediation more generally.[248] It is in line with Singapore's endeavour to become a hub for international commercial dispute resolution.[249] Part 1 of the article has offered a comparative view of the SCMA's and the Convention's provisions and undertaken a detailed examination of the provisions of the SCMA. Subsequently in Part 2, the analysis from Part 1 was situated within Singapore's legal landscape for iMSAs in terms of four co-existing regimes: the common law, court-referred mediation practice, the MA and the SCMA. This new regulatory regime for iMSAs in Singapore is both comprehensive and multilayered. As the international dispute resolution spotlight is increasingly focused on mediation, legal practitioners are well advised to familiarise themselves with the legal framework for cross-border mediation, in particular the new SCMA.

248 Singapore Parl Debates; Vol 94; [4 February 2020].
249 Singapore Parl Debates; Vol 94; [10 January 2017].