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The Role of Mediation Institutions: Ensuring Enforceability under Article 5 of the Singapore Convention on Mediation

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THE ROLE OF MEDIATION INSTITUTIONS: ENSURING ENFORCEABILITY UNDER ARTICLE 5 OF THE SINGAPORE CONVENTION ON MEDIATION

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Abstract

Since the advent of the Singapore Convention on Mediation, scholars have raised concerns regarding uncertainties in applying and interpreting the law in relation to several of the Article 5 grounds for refusal of enforcement of settlement agreements. These concerns could be ameliorated by principles of party autonomy, for example, by parties agreeing on the law applicable to the settlement agreement or choosing a set of mediator standards. However, is not uncommon to see mediators, parties, and their legal representatives being unaware or unfamiliar with such concerns, let alone the possible solutions, owing to the novelty of the Convention as a new mechanism.

As party representatives or mediators may not always possess the expertise required to ensure enforceability under Article 5 of the Singapore Convention, mediation institutions are in a good position to provide assistance on such matters, even in relation to mediation confidentiality, thereby facilitating a smooth and secure mediation process.

This article proposes expanding the role of mediation institutions by having them address the legal uncertainties under the Convention. By communicating with the parties during the pre-mediation conference or at other times, mediation institutions can help parties voluntarily manage these uncertainties without deviating from their conventional administrative role. To establish a safety zone for mediation institutions to address such points, this article examines the scope of judicial deference that may be granted to institutional decisions, drawing on precedent in arbitration.

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I INTRODUCTION

Mediation institutions have provided their services to disputants who are trying to mediate their disputes, even prior to the advent of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (‘*Singapore Convention*’ or ‘*Convention*’). The institutionalisation of mediation as an Alternative Dispute Resolution (‘ADR’) process is inclined to bring uniformity to its practice.[1] Such uniformity has certainly been desired for decades. A similar movement occurred in relation to the ADR process of arbitration, as evidenced by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (‘*New York Convention*’).

The *Singapore Convention on Mediation* has followed similar steps to the *New York Convention* in becoming a successful international convention. Introduced in 2020, as of May 2025, the Convention has achieved 57 signatories and 18 ratifications.[2] Still, there are lingering doubts or concerns about how the Convention will actually work and what obstacles lie ahead. This is also due to the fact that ratifying states have yet to establish solid databases or publicly available information about the challenges encountered or enforcement processes enacted under the Convention. However, if the predicted uncertainties or ambiguities can be eradicated in advance, signatory States will be more willing to proceed with ratification confidently.

Scholars have raised concerns about the interpretation of Article 5 of the Convention, which provides for the refusal of enforcement of an international mediated settlement agreement (‘iMSA’) under certain circumstances. Such concerns will probably be raised in the domestic courts of enforcing fora, which will prolong procedures and increase costs. As a preventive measure, Professor Ben Köhler suggests focusing on party autonomy to mitigate uncertainty,[3] because it aligns with the core legal principles of many enforcing fora. To better implement party autonomy in mediation to achieve the production of enforceable iMSAs under the Convention, the support of mediation institutions may be required. The fact that parties and mediators are the most crucial players in international mediation does not necessarily undermine the importance of the role of administering institutions, as we have seen with the evolving arbitral institutions and their roles in international arbitration. A mediation institution’s goal of delivering an enforceable iMSA under the auspices of the Convention will benefit all participants in mediation by streamlining the process with confidence.

This article proposes expanding the role of mediation institutions to include ensuring the enforceability of iMSAs under the Convention. Section II reviews scholars' concerns regarding uncertainty under Article 5 of the Convention. Section III discusses the deference granted to decisions of arbitral

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1 Bhimanagouda Sanganagouda Patil, ‘Common Mistakes in Mediation’ (2017) 5 *International Journal of Consumer Law and Practice* 81, 81.

2 See (Web Page) <https://www.singaporeconvention.org/jurisdictions>.

3 Ben Köhler, ‘Blaming the Middleman? Refusal of Relief for Mediator Misconduct Under the Singapore Convention’ (2023) 19(1) *Journal of Private International Law* 42, 62-3.

institutions and the scope of matters that can be decided by mediation institutions. Section IV provides suggestions and guidance for mediation institutions to enhance certainty in the enforceability of iMSAs and to preserve the confidentiality of mediation under the Convention.

II UNCERTAINTY AND ITS RESOLUTION UNDER ARTICLE 5 OF THE *SINGAPORE CONVENTION ON MEDIATION*

Scholars have raised a number of issues that may arise when interpreting and applying Article 5 of the Convention.[4] Contract-related grounds for refusal of iMSA enforcement are provided in Articles 5(1)(a) – (d), and mediator conduct-related grounds for refusal are provided under Article 5(1)(e) and (f). Commentators are concerned about these Article 5(1) grounds due to uncertainties in their application and interpretation, including in relation to the phrases 'null and void, inoperative or incapable of being performed,'[5] the 'iMSA being not clear or comprehensible,'[6] and uncertainty as to which standard is applicable in relation to a 'serious breach by the mediator of standards.'[7] These grounds may lead to protracted subsequent enforcement proceedings, which the drafting stage of the Convention intended to avoid.[8] A few safeguards must be implemented to improve the uniformity of court practices in applying and interpreting Article 5(1) according to the *lex fori*. This section will review the uncertainties under the Convention and explore some suggested methods to help ensure the enforceability of iMSAs.

A *Contract-related Grounds for Refusal Grounds: Article 5(1)(b)(i) and (ii), (c)(ii) and (d)*

Under the Convention, the court may refuse to enforce an iMSA if it is 'null and void, inoperative or incapable of being performed',[9] 'not binding, or [is] not final according to its terms',[10] the obligations in the iMSA 'are not clear or comprehensible',[11] or 'granting relief would be contrary to the terms of the

4 Alan M Anderson, Ben Beaumont and Herman Verbist, 'The United Nations Convention on International Settlement Agreements Resulting from Mediation: Its Genesis, Negotiation and Future' (2020) *International Mediation: The Comparative Law Yearbook of International Business* 35, 50.

5 *United Nations Convention on International Settlement Agreements Resulting from Mediation,* opened for signature 8 May 2019 (entered into force 12 September 2020) Article 5(1)(b)(i) (the 'Convention').

6 Ibid Article 5(1)(c)(ii).

7 Ibid Article 5(1)(e).

8 *Settlement of Commercial Disputes – International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation*, UN Doc A/CN.9/WG.II/WP.202 (14 July 2017) [43] ('Settlement of Commercial Disputes').

9 Article 5(1)(b)(i) of the Convention.

10 Ibid Article 5(1)(b)(ii).

11 Ibid Article 5(1)(c)(ii). See also Nadja Alexander, Shouyu Chong and Vakhtang Giorgadze, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer, 2nd ed, 2022) [5.41].

iMSA'.[12] In certain circumstances, one party can resist enforcement by alleging that the iMSA is not expected to be directly enforceable due to the grounds above, particularly in the absence of a competent lawyer understanding the difference between enforcing an iMSA under the Convention framework and enforcing an iMSA as a contract.[13] Despite assistance from lawyers, direct enforceability would possibly be challenging due to the nature of obligations prescribed in an iMSA involving non-pecuniary obligations,[14] or future cooperative action.[15] Especially in relation to an iMSA that stipulates future cooperative action as an obligation—such as an agreement to agree, a commitment to make best efforts, or an agreement to perform reasonably to the other party's satisfaction—such provisions may be considered unenforceable due to the absence of a clear, mutual expectation or assumption between the parties, which is a prerequisite for the contract to be enforced.

Clearly identifying the governing law for the substantive obligations within the iMSA is undoubtedly a key consideration for the parties. At best, it helps mitigate the risk to enforcement under these provisions, as different legal systems may have varying nuances in determining legal validity (Articles 5(1)(b)(i) and (ii)) and interpreting ambiguous terms (Article 5(1)(c)(ii)).[16] Proper designation of choice of law will be paramount, as generally available choice of law rules, such as the close connection rule, may differ in their operation between different jurisdictions.[17] As for the interpretation of potentially 'not clear and comprehensible' terms under an iMSA, if the enforcing court is willing to avoid an overly generous interpretation limiting the applicable scope of the Convention,[18] it may apply the validation principle to give effect to the subject terms.[19] Lastly, a proper indication of governing law would assist the legal analysis of force majeure clauses in an iMSA, in situations where seeking enforcement of an iMSA contrary to such a clause could potentially be contrary to the terms of an iMSA (Article 5(1)(d)).[20]

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[12] Article 5(1)(d) of the Convention.

[13] *Settlement of Commercial Disputes* (n 8) [65-6].

[14] Specific performance requires non-pecuniary obligations to be directly enforceable, however, they may not be in accordance with the parties' original expectations.

[15] *Settlement of Commercial Disputes* (n 8) [66].

[16] *Report of Working Group II (Dispute Settlement) on the Work of its Sixty-Eighth Session*, UN Doc A/CN.9/934 (19 February 2018); Alexander, Chong and Giorgadze (n 11) [5.49].

[17] Koji Takahashi, 'Enforcement of Mediated Settlement Agreements under the Singapore Convention and the UNCITRAL Model Law: An Agreement for the Opt-In Model' (2020) (Special Issue) *International Mediation: The Comparative Law Yearbook of International Business* 63, 68-9.

[18] See Interventions of Canada and the Forum for International Conciliation and Arbitration ('FICA') in *UNCITRAL Audio Recordings*, Working Group II (Dispute Settlement), 67th Session, (4 October 2017) 9:30-12:30.

[19] Alexander, Chong and Giorgadze (n 11) [5.50].

[20] Ibid [5.56].

B *Mediator Misconduct-Related Refusal Ground: Article 5(1)(e)*

According to Article 5(1)(e) of the Convention, a competent enforcing authority may refuse to enforce an iMSA if there was 'a serious breach by the mediator of standards applicable to the mediator.' This provision has raised some concerns from commentators and scholars due to uncertainty regarding the determination of such applicable standards and their interpretation, which may result in ancillary satellite disputes, thus prolonging the dispute and increasing related costs.[21] Therefore, it is appropriate to focus on measures that can be taken before commencing the mediation, to prevent uncertainties from incurring such ancillary disputes.

The proliferation of numerous mediation standards in different jurisdictions may pose a potential obstacle to the Convention's objective of serving as a mechanism for resolving international commercial disputes.[22] Individual States and ADR institutions may choose to adhere to their distinct mediation protocols and standards, which may impact the enforceability of iMSAs.[23] In-depth research about mediation standards on a global scale could offer valuable insights into the multifaceted interpretations of mediation concepts across various legal jurisdictions,[24] contributing to the development of harmonised mediation standards among nations and ADR institutions.[25]

Applicable standards under Article 5(1)(e) may refer to the diverse sets of mediator ethical guidelines issued by various organisations, such as mediation or arbitral institutions,[26] and laws of States.[27] However, they may not include non-binding recommendations or best practices,[28] and many jurisdictions do not have a solid code of conduct for mediators, which would result in making the review of Article 5(1)(e) feasible only when the mediator possesses a certain professional status.[29] Some commentators have criticised the nature

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21 Takahashi (n 17) [73-4].

22 David Tan, 'Prolegomena to the UN Convention on International Mediated Settlement Agreements Resulting from Mediation' (2022) 27(1) *Uniform Law Review* 37, 61.

23 Dorcas Quek Anderson, 'A Matter of Interpretation? Understanding and Applying Mediation Standards for the Cross-Border Enforcement of Mediated Settlement Agreements' (2020) 38(1-2) *Conflict Resolution Quarterly* 27, 43.

24 Tan (n 22) [61].

25 Ibid.

26 See, e.g., 'Code of Professional Conduct', *International Mediation Institute* (Web Page) <https://www.imimediation.org/practitioners/code-professional-conduct/>; Council of Europe, European Commission for the Efficiency of Justice, *European Code of Conduct for Mediators*, CEPEJ(2018)24, 31st Plenary Meeting, 3-4 December 2018; Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators Around the Globe: An Australian Perspective' (2014) 45 *Washington University Journal of Law & Policy* 145; *Settlement of Commercial Disputes* (n 8) [47]; Anderson, Beaumont and Verbist (n 4) 54.

27 Alexander, Chong and Giorgadze (n 11) [5.72]–[5.74].

28 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* 51.

29 Alexander, Chong and Giorgadze (n 11) [5.75].

of the concept of 'standard' under the provision, arguing that a broadly defined 'standard' creates ambiguity and untethered interpretation.[30]

Although public policy under the *lex fori* may provide a certain degree of clarity on the mandatorily applicable standards for mediators,[31] the situation becomes much more straightforward when the parties have either chosen a governing law for the iMSA or selected a mediation institution that provides a choice of law for the mediator's code of conduct, or directly imposes such an ethical standard with explicit reference.[32] In addition, parties may intentionally design an enforcement protocol to align with a specific jurisdiction, thus preventing the intervention of other jurisdictions' public policy regarding mediator standards.[33] In the absence of a chosen law or applicable standard for the mediator, the conflict of law rules of a jurisdiction may complicate the situation due to the existence of different conflict of law rules in other jurisdictions. For example, the question arises whether to choose the law governing the dispute or iMSA, or the law chosen according to the closest connection rule.[34] Assessing the seriousness of the breach would still be premised on determining the applicable standards for the mediator and the case-specific circumstances.[35] Thus, the proper designation of the applicable law, or the institution providing a respected code of conduct regarding mediator standards, would be imperative to reduce the complexities in determining which standard is applicable.

C *Confidentiality Concerns Attached to Contract-Related Grounds*

Confidentiality is a fundamental aspect of mediation, ensuring privacy so that all parties can openly discuss their true motivations for resolving the dispute. Confidentiality also safeguards the communications or information disclosed during mediation by preventing their admissibility in any court of law or tribunal without the prior consent of the parties involved.[36] However, when a dispute encompasses matters under Article 5 of the Convention, the resisting party might tactically want to reveal specific interactions involving a mediator or communications that transpired between the parties during the mediation process.

Upon the resisting party's request for disclosure of communications during mediation, the court may have due regard to the limits to mediation confidentiality under the *lex fori,*[37] or the test of confidentiality established by case law in the absence of such relevant provisions under the *lex fori*, such as

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[30] Anderson, Beaumont and Verbist (n 4) [55].
[31] Ibid.
[32] Alexander, Chong and Giorgadze (n 11) [5.120]; Köhler (n 3) [62]; Schnabel (n 28) [52].
[33] Köhler (n 3) [62].
[34] Ibid [50].
[35] Ibid [51]; Anderson, Beaumont and Verbist (n 4) [55].
[36] Shashank Garg and Tejas Baria, 'Institutional Mediation' in *Conciliation and Mediation in India* (Wolters Kluwer, 2022) 143.
[37] Takahashi (n 17) [71]; Köhler (n 3) [60]; *Indian Evidence Act 1872* (India) ss 126–129.

the Wigmore test.[38] In the United States, where the *Uniform Mediation Act* is in effect, mediators have the option not to testify in proceedings involving the enforcement of a mediated settlement agreement ('MSA').[39] The Model Law acknowledges an exception to mediation confidentiality in cases where 'disclosure is required under the law or for implementation or enforcement of a settlement agreement.'[40] The EU Mediation Directive contains similar exceptions,[41] based on the notion that the importance of uncovering the truth outweighs the commitment to maintaining mediation confidentiality, especially in cases where fraud or duress is alleged to invalidate an MSA.[42] The scope of mediation privileges and confidentiality varies widely across different jurisdictions,[43] creating significant uncertainty for the participants in mediation.[44] The law and regulations also differ considerably regarding who holds the privilege, especially in terms of whether mediators have a separate privilege or if the parties involved can waive it.[45]

Institutional rules provide extensive confidentiality clauses that stipulate almost absolute confidentiality, subject to the limits of the *lex fori*.[46] For instance, both the Mediation Rules of the International Chamber of Commerce ('ICC') and Singapore International Mediation Centre ('SIMC') Rules provide that 'unless required by applicable law or unless all parties and the mediator agree otherwise in writing, the mediator shall not give testimony in any judicial, arbitral, or similar proceedings concerning any aspect of the mediation proceedings.'[47] When parties choose institutional mediation, they agree to adhere to these confidentiality clauses.[48] Institutions like the ICC have clauses to guarantee strict confidentiality even after the termination of mediation.[49]

Despite the importance of the parties' prior agreement on confidentiality obligations during mediation, which may exclude a party's right to submit evidence regarding the mediation process in a court proceeding,[50] the courts

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38 Garg and Baria (n 36) [143] citing *R v Gruenke* [1991] 3 SCR 263.

39 *Uniform Mediation Act* 2001 (United States) drafted by the National Conference of Commissioners on Uniform State Laws, s 6(c).

40 *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* opened for signature 7 August 2019 (entered into force 12 September 2020) Article 10.

41 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136/3, Article 7(1)(b).

42 Takahashi (n 17) [71].

43 See Manon Schonewille and Fred Schonewille, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing, 2014).

44 David A Hoffman, *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals* (Massachusetts Continuing Legal Education, 2013) 6–17.

45 Alexander, Chong and Giorgadze (n 11) [5.12].

46 Garg and Baria (n 36) [146–7].

47 *ICC Mediation Rules 2014* rule 10.4; *SIMC Mediation Rules 2024* rule 9.3.

48 Garg and Baria (n 36) [144].

49 *ICC Mediation Rules 2014* rules 7.1–7.6, appendix-III.

50 Köhler (n 3) [64].

are not mandated to find that such an agreement is binding,[51] unless there are relevant provisions under the *lex fori* giving effect to it. Any sanction arising from a breach of such a confidentiality agreement also stems from the *lex fori*, which may range from the inadmissibility of the evidence to an award of damages for the violation of the confidentiality agreement.[52] As the *lex fori* will be mandatorily applied and the parties' agreement on confidentiality obligations would work as a supplement (if not contrary to the *lex fori*), the parties may have different options to reduce uncertainties compared to previously discussed methods to resolve the issue of application and interpretation by choice of law.[53]

III JUDICIAL DEFERENCE TO THE DECISIONS OF INSTITUTIONS

To establish a clear line for mediation institutions to proactively address uncertainties arising in the enforcement of iMSAs under the Convention, [54] it is worth identifying the kind of procedural assistance or decisions made by the institutions that would not be reviewed, or that would be granted deference, by an enforcing court. A number of jurisprudential precedents pertaining to judicial deference to, and the reviewability of, decisions rendered by arbitral institutions offer a limited but insightful resource for understanding what might happen in this context. These insights are particularly important for arbitral institutions that have dual functionality—providing both arbitration and mediation services—necessitating differentiation in the treatment of arbitration and mediation to ensure the enforceability of the outcome.

A *Arbitral Institutions: Deference to the Decisions of Arbitral Institutions*

Despite some differences in the services offered, all arbitral institutions share some similarities, such as making arbitration rules, providing information and training on the arbitration process and the applicable rules, designating arbitrators and performing administrative tasks to streamline the arbitration process.[55] As the arbitral institutions' rules provide the power to determine certain aspects of arbitration proceedings, including the designation of appropriate arbitrators in the absence of the parties' consensus, the national courts sometimes receive requests from dissatisfied parties to review those decisions made by arbitral institutions.

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51 Alexander, Chong and Giorgadze (n 11) [5.21].
52 Köhler (n 3) [64].
53 See section II.A, II.B.
54 See section II.
55 Eric Schwartz, 'The Role of the Arbitral Institution in the New Millennium' (1999) 65(4) *Arbitration: The International Journal of Arbitration, Mediation, and Dispute Management* 321.

1 *Deference to a Non-Jurisdictional Act from a Non-Jurisdictional Organ*

Decisions from the French courts indicate that it is necessary to protect the decisions of arbitral institutions from interference arising out of judicial review.[56] This is consistent with the conventional idea that the role of institutions is merely administrative, therefore neither jurisdictional nor adjudicative.[57] This is also because if most decisions by institutions are subject to the review of a court, there is a possibility that a dissatisfied party may employ 'guerrilla tactics' to significantly extend the timeframe for arbitration.[58] Furthermore, if such comprehensive reviewability is imposed on decisions by arbitral institutions, it could lead professionals to perceive those institutions as supervisory organs, which may result in increased costs.[59]

In *Raffineries v ICC*[60] and *Opinter v Dacomex*,[61] the French courts identified institutional decisions as unreviewable in relation to the appointment of arbitrators by institutions under certain circumstances in accordance with the adopted arbitral rules, attributing this non-reviewability to the administrative and non-jurisdictional nature of institutional decisions. The French court in the former case elaborated on the nature of the institution by holding that its decision would be differentiated from the exercise of the power to adjudicate the substantive matter of the dispute, which does not require the same level of due process compared to a tribunal's decision.[62] The court in the *Opinter* case also supported such a view by concluding that the non-jurisdictional nature of the act results from the non-jurisdictional function of the institution. This is also why a reasoned decision from the arbitral institution is not required.[63] Similarly, the extension of a deadline under the auspices of a discretion prescribed under the adopted institutional arbitration rules was found to be non-jurisdictional, as the court put more emphasis on the origin of the non-jurisdictional act emanating from an arbitral institution as an administrative functioning organ, rather than on the character of the decision itself.[64]

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56 Rémy Gerbay and Alexander Afnán, 'Judicial Deference to Decisions of Arbitral Institutions' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Deference in International Commercial Arbitration* (Wolters Kluwer, 2023) 195.

57 Rémy Gerbay, *The Functions of Arbitral Institutions* (Wolters Kluwer, 2016) 117–84.

58 Jan Paulsson, 'Vicarious Hypochondria and Institutional Arbitration' (1990) 6(3) *Arbitration International* 226, 248.

59 Ibid.

60 *Raffineries de Pétrole d'Homs et de Banias v Chambre de Commerce Internationale* (1985) Revue de l'Arbitrage (1985) 141.

61 *Société Opinter France v SARL Dacomex*, Cour d'Appel de Paris, 15 January 1985.

62 *Raffineries de Pétrole d'Homs et de Banias v Chambre de Commerce Internationale* (1985) Revue de l'Arbitrage (1985) 141.

63 *Société Opinter France v SARL Dacomex* (1985) Revue de l'Arbitrage (1986) 87.

64 *Société Appareils Dragon* (1982) Revue de l'Arbitrage (1982) 91; *Société Appareils Dragon* (8 June 1983) Revue de l'Arbitrage (1987) 309; *Société Techni-Import Professionnel v Société Electro Scientific Industries* (17 May 1983) Revue de l'Arbitrage (1987) 309.

2 *Deference to the Use of Institutional Arbitration Rules under Party Autonomy*

The courts tend to respect party autonomy when parties have agreed to grant certain decision-making powers to an arbitral institution and are generally reluctant to overturn an institution's ultimate decision made in accordance with its own rules. In *Belize Bank v Government of Belize* ('*Belize Bank*'), the US court determined that the arbitration agreement between the parties unambiguously empowered the London Court of International Arbitration ('LCIA') to decide on forming the arbitral panel on the basis that 'the decision was well within LCIA's "complete discretion" under Article 11.1 of the LCIA Rules.'[65] In *P v Q*,[66] when considering the applicant's request for disclosure of the arbitrator's communications concerning an alleged improper delegation of work, the UK court drew attention to the party autonomy under the *Arbitration Act 1996*, which stipulated that the parties seeking removal of an arbitrator shall exhaust their remedies in advance through the arbitral process, prior to seeking recourse through the domestic judiciary.[67] It held that in cases where the parties have granted the institution the authority to order the disclosure being requested, the court should generally be hesitant to grant such an order if the institution's discretionary power decides not to do so.[68]

3 *Deference to the Arbitral Institution's Interpretation of Its Own Rules*

Courts in the United States and the United Kingdom have shown a tendency to grant deference to an institutions' interpretation of their own rules,[69] which seems appealing because, as authors of the rules, arbitral institutions are best acquainted with the meaning of those rules.[70] In *Anatolie Stati v Kazakhstan*, the US court examined Kazakhstan's objection under Article V(1)(b) of the New York Convention to the enforcement of an arbitration award issued under the Rules of the Stockholm Chamber of Commerce ('SCC'), asserting that the SCC did not adhere to its own rules regarding the appointment of arbitrators and the non-compliance with the mandatory cooling-off period stipulated by the Energy Charter Treaty ('ECT').[71] The court cited precedent to stress the basis of its decision by adding that in the case where a 'party's challenge involves an application of the arbitral institution's own rules, courts typically have deferred to the arbitral tribunal's

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65 *Belize Bank Ltd v Government of Belize*, 191 F Supp 3d 26, 37 (D DC, 2016) ('*Belize Bank*'). Under Article 11.1 of the LCIA Rules 1998, 'if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have complete discretion to decide whether or not to follow the original nominating process'.

66 [2017] EWHC 148 (Comm) ('*P v Q*').

67 *Arbitration Act 1996* (UK) s 24(2).

68 *P v Q* (n 66) [55].

69 *AT & T v Saudi Cable* [2000] 1 Lloyd's Rep 22 ('*AT & T v Saudi Cable*').

70 Gerbay and Afnán (n 56) [201].

71 *Anatolie Stati v Republic of Kazakhstan* 302 F Supp 3d 187 (D DC, 2018).

interpretation of them.'[72] Similarly, in *AT&T v Saudi Cable*, the English Court of Appeal concluded that 'the court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court.'[73]

B *Mediation Institutions: Unexplored Decisions for Judicial Deference*

1 *Two Broad Types of Mediation Institutions*

Mediation institutions can be categorised into two distinct forms: specialised mediation institutions without arbitration services and arbitral institutions offering mediation services. Specialised mediation institutions, which have been developed over several decades with a national and regional focus,[74] can provide parties with a mediation process that is highly attuned to local culture or dispute practice, at relatively lower costs compared to arbitral institutions providing mediation services.[75] However, owing to its reliance on a more localised and limited selection of mediators, specialised mediation institutions may have the drawback of being less effective in handling complex international disputes.[76] On the other hand, arbitral institutions providing mediation services, such as the ICC and the LCIA, have only added mediation capabilities in the past decade.[77] Such arbitral institutions can offer a one-stop combination of mediation and arbitration without referring to another institution to administer the dispute resolution process. However, they may not be as experienced in coordinating mediation or in selecting mediators, particularly in situations where the parties cannot agree on a mediator.[78] Administrators at arbitral institutions continue to uphold the characteristics of arbitration due to their limited experience in handling mediation; as a result, mediation may likely evolve into a more formalistic proceeding with higher costs.[79]

2 *Current Role of Institutions in Mediation and Their Decisions*

An institution providing mediation services often plays a supportive role at various stages of the mediation process under its mediation rules, which aim to facilitate a comprehensive, final, and binding settlement between the

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72 *Belize Bank* (n 65) 37, citing *York Research Corp v Landgarten* 927 F 2d 119, 123 (2d Cir, 1991).
73 *AT & T v Saudi Cable* (n 66) [49].
74 Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) [1-203].
75 Ibid [1-204].
76 Ibid [1-205], [4-045].
77 Ibid [1-207].
78 Unlike specialized mediation institutions that maintain a fixed roster of mediators, the International Centre for Dispute Resolution (ICDR) and the International Chamber of Commerce (ICC) do not provide a list of panels for mediators. Instead, they leverage their global network to select an appropriate mediator tailored to each dispute's specific requirements.
79 McIlwrath and Savage (n 74) [1-209], [4-046]-[4-048].

disputants.[80] Even though the quality or customisation of the mediation services offered by institutions may vary depending on their know-how and experiences, most mediation institutions provide similar assistance. For example, assisting parties with entering into an Agreement to Mediate; arranging a suitable venue and date for a mediation; organising the exchange of any pertinent information and documents; providing administrative and logistical support; and providing case-management services.[81] If the matter is not expressly provided for in the mediation rules, institutional rules like the ICC mediation rules provide that the institution and the mediator shall act according to the spirit of the applicable rules.[82] While carrying out such assistance, the mediation institution may often undertake decisions consistent with its own mediation rules, which may possibly (but rarely) be the subject of a resisting party's request for a review by an enforcing court.

Under the SIMC Mediation Rules (2024), the SIMC is authorised to provide support in the processes of appointing a mediator, determining the venue for mediation and languages, setting relevant timelines, and arranging for a pre-mediation conference. In the absence of agreement on a mediator, the SIMC may appoint a mediator 10 days from the date of initiation of the mediation,[83] based on the prospective mediator's attributes.[84] The SIMC may also appoint an alternative mediator where any party expresses valid objections to the appointment of the mediator within 10 days of receipt of notification of objections,[85] or replace the mediator during mediation if any conflict arises, or in exceptional circumstances raised by the mediator or any parties.[86] In the absence of agreement on the venue and language, the institution will determine these matters, in consultation with the mediator,[87] if the parties do not provide such agreement within the specified timelines set by the institution.[88] The SIMC may also suggest arrangements for a pre-mediation conference where appropriate to streamline the conduct of the mediation through various formats.[89]

Under the ICC Mediation Rules (2014), the ICC is empowered to appoint a mediator in the absence of agreement[90] based on appropriate attributes of the mediator,[91] or the institution can replace the mediator when objections are made by any party with reasons.[92] The ICC also has the power to

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80 Garg and Baria (n 36) [140].
81 *SIMC Mediation Rules 2024* rule 6.1 ('*SIMC Rules*').
82 *ICC Mediation Rules 2014* rule 10.6 ('*ICC Rules*').
83 *SIMC Rules* (n 81) rule 4.2.
84 Ibid rule 4.3.
85 Ibid rule 4.7.
86 Ibid rule 4.8.
87 Ibid rule 6.1, 6.2.
88 Ibid rule 6.1, 6.2, 6.3.
89 Ibid rule 6.5.
90 *ICC Rules* (n 82) rule 5.2.
91 Ibid rule 5.4.
92 Ibid rule 5.5.

determine the location[93] and language[94] of the mediation when the parties' consensus is absent. The LCIA Mediation Rules (2020) also provide a mechanism for the LCIA to appoint a mediator in the absence of the parties' agreement,[95] and to replace the mediator under certain circumstances.[96] However, unlike the ICC and SIMC rules, the LCIA rules do not grant the institution discretion to determine the venue and language of the mediator; rather those rules confer that discretion to the appointed mediator.[97] Even though both the ICC and the LCIA Rules do not expressly provide for the role of a mediation institution in relation to arranging a pre-mediation conference, given the case management services they have been offering in arbitration, it is likely that they may arrange such a conference for the sake of streamlining mediation, which will prevent misunderstandings between the parties about the mediation process.

Mediation is a consensual and voluntary process that relies on the parties' willingness to settle the dispute amicably. Unlike arbitration, since the mediator has no adjudicative power on the substantive issues of the dispute, there can be no jurisdictional issue arising from the appointment of a mediator by a mediation institution even in the absence of the parties' agreement. However, a mediation institution may retain the authority to determine certain key aspects of the mediation in accordance with specific wordings of the parties' chosen rules, such as SIMC's power to determine language and venue of the mediation through consultation with the parties and mediator. As observed from the arbitration cases, enforcing courts are prone to defer to decisions made by arbitration institutions due to their expertise in interpreting their own rules and because the parties have chosen them.[98] Similarly, one may speculate that courts may defer to mediation institutions to assist with the determination of such issues in a mediation context.

IV DESIGNING THE ROLE OF THE MEDIATION INSTITUTION

The mediation institution can play a crucial role in enhancing the protection of mediation confidentiality, as well as in helping to ensure the enforceability of an iMSA under the Convention, thus assisting in mitigating the uncertainties previously discussed,[99] but it can only do so if its actions in those respects are not subject to judicial review by an enforcing court.[100] The mediation institutions should also furnish suitable support at appropriate times during the mediation, as discussed below.

93 Ibid rule 4.1.
94 Ibid rule 4.2.
95 *LCIA Mediation Rules 2020* rule 1.6, 2.7.
96 Ibid rule 4.2.
97 Ibid rule 6.2, 6.6.
98 See section III.A.3.
99 See section II.
100 See section III.

A *When and How Should Mediation Institutions Take Action to Assure Enforceability*

Active case management utilising pre-mediation conferences is often considered a significant optimiser for the mediation process.[101] Premised on the parties' voluntary participation in mediation, parties are required to deliver their views and perspectives to the other party by exchanging statements and relevant documents. This information also provides the context and details of the case to assist the mediator in understanding the entire dispute, and it allows the parties to comprehend the priorities of the other party and thus inform their negotiations.[102] Additionally, mediation institutions may also make the parties and the mediator aware of possible uncertainties if they are not equipped with a comprehensive set of tools for ensuring the enforceability of an iMSA under the Convention. This could include informing the parties of the importance of designating a proper applicable law and preserving confidentiality during a pre-mediation conference.

During the pre-mediation conference or even before, institutions may adopt several measures to optimise the process of informing parties and mediators of enforceability risks under the Convention, including: first, allowing a mediation officer with expertise in the Convention to join the pre-mediation conference to suggest ways to reduce enforceability risks in the context of the specific dispute; second, issuing guidelines or notes on best practices for mediation users, which may include suggesting that the parties agree on choice of law issues where uncertainties may arise; and third, creating specific provisions mandating that the parties agree on the choice of law regarding the uncertainties discussed above.

The first option, of allowing a mediation officer with expertise in the Convention to join the pre-mediation conference to suggest ways to reduce enforceability risks in the context of the specific dispute, would alleviate the burden on the parties and mediators while catering to the specifics of the dispute without exceeding the administrative role of the institution. This would also expand the pool of mediators available to the parties, allowing them to consider a larger cohort of highly experienced industry professionals. However, the cost of retaining such mediation experts, who are often also qualified lawyers, can be burdensome for mediation institutions, potentially leading to increased administration costs. Additionally, it is crucial that the mediation expert’s role is strictly limited to providing preliminary guidance to the parties and the mediator, without recommending specific jurisdictional laws or mediator standards. This is necessary to ensure the efficacy of the administrative nature of the institution and to avoid actions that could be subject to judicial review. Here, mediation institutions may consider making the involvement of mediation experts an opt-in mechanism within their rules to address the concerns of disputants in cost-sensitive, low-stakes disputes.

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[101] Garg and Baria (n 36) [140].
[102] Ibid.

The second option, of issuing guidelines or notes on best practices for mediation users including suggesting that the parties agree on choice of law issues where uncertainties may arise, would inform mediation participants of the importance of agreeing on these matters during or before the pre-mediation conference. This would help ensure the enforceability of an iMSA without financially burdening either party or the institution. Guidance notes detailing best practices or recommendations to mitigate the effects of uncertainties in enforcing an iMSA (e.g., model clauses for choice of law) allow parties to flexibly and voluntarily adopt these practices or suggestions according to their specific needs and the particularities of the dispute. Mediation institutions may choose to codify their rules by referencing these best practices or guidance notes; however, it is worth noting that a party may attempt to argue against enforcement of an iMSA by citing non-compliance with such guidance notes.[103] Given that flexibility and voluntariness are core values of mediation, it would be prudent for mediation institutions to leave such detailed and useful guidance notes as non-binding, allowing the parties to use them according to their circumstances and needs.

The third option, of creating specific provisions mandating that the parties agree on the choice of law to eliminate uncertainties under Article 5 of the Convention, may be construed as being part of the mediator's standard applicable under the Convention. However, this approach may eventually reduce the flexibility of mediation to some extent and make the parties feel burdened by the need to hire someone with relevant mediation expertise to analyse the effect of selecting certain laws or standards for mediators. There may also be discrepancies between the expectations of disputants and even between the counsel hired by parties, complicating and prolonging negotiations, eventually resulting in wasted costs and time for the parties.

Apart from these approaches during or prior to the pre-mediation conference, another possible mechanism is the scrutiny of an iMSA by an institution prior to the parties' and mediators' signatures.[104] Similar to the scrutiny of an ICC arbitration award under its rules,[105] if such scrutiny is adopted in mediation, ICC mediation experts would explore enforceability risk factors in an iMSA and provide suggestions to the mediator or parties on addressing those risks. However, choice of law issues cannot be properly dealt with in such a post-iMSA measure. If the iMSA is issued without the choice of law rules mentioned in Section II, this indicates that the parties have already conducted mediation under the cloud of some uncertainties regarding the applicable standards or confidentiality rules, without the benefit of clarification during or prior to the pre-mediation conference. Obviously, it would be untimely and problematic if these uncertainties materialised into

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[103] For instance, the resisting party may argue that the mediator has not cautiously followed the best practices referred to in the mediation rules chosen by the parties. However, this may not pass the high threshold of a 'serious breach by the mediator of standards applicable to the mediator or the mediation' under Article 5(1)(e) of the Convention.

[104] Garg and Baria (n 36) [145].

[105] *ICC Arbitration Rules 2021* Article 34.

points of disagreement between the disputants after the creation of the iMSA. ICC-style scrutiny after the issuance of an unsigned iMSA would therefore be less appealing for the parties.

B *Important Matters to be Discussed with Parties and Mediators to Ensure Enforceability of an iMSA under the Singapore Convention*

1 *Proper Designation and Perception of the Applicable Law: Article 5(1)*

As mediation institutions may generally arrange pre-mediation conferences as authorised by the institutional rules, or according to their best practices, such pre-mediation conferences are unlikely to run afoul of the public policy of the *lex fori*. Within this safe zone, the mediation institution may hold discussions with the parties and the mediators to attempt to reduce the enforceability risk of an iMSA under Article 5 of the Convention (these risks being mainly contract-related and mediator misconduct-related grounds of refusal).

Despite the expected difficulty of varying interpretations among national courts when dealing with private international law matters, most jurisdictions still defer to the parties' choice of applicable law, which can be conveyed in various ways. Proper designation of the governing law for legal obligations under an iMSA would reduce the risk of refusal of enforcement on contractual grounds, because a properly drafted choice of law clause can determine the iMSA's legal validity, [106] resolve ambiguity when interpreting the iMSA terms,[107] and facilitate appropriate legal analysis which will in turn prevent relief from being contrary to the terms of the iMSA.[108]

While noting that the *lex fori* may possibly impose certain interpretations of the applicable law under the auspices of public policy, if the mediation institution can advise the parties and mediators about the benefits of properly indicating the governing law (including the benefit of avoiding an enforcement challenge under the contractual grounds for refusal pursuant to Article 5 of the Convention), the parties can thus be encouraged to agree on an applicable law for their iMSA. Even if such matters are not resolved at the first case conference, it is likely that the parties' lawyers will be mindful of such suggestions or comments from the institution, so subsequent negotiations may have a higher chance of success at reaching agreement on such preliminary matters.

As with the contractual grounds for refusal, applicable standards to determine mediator misconduct may also be affected by the public policy of the *lex fori* where the party would like to enforce the iMSA. Given that the parties have chosen the mediation institution to administer mediation under its rules, it is assumed that the parties have agreed to the mediator standards

[106] Article 5(1)(b)(i) and (ii) of the Convention.
[107] Ibid Article 5(1)(c)(ii).
[108] Ibid Article 5(1)(d).

prescribed under the adopted mediation rules. The mediation institution can clarify the scope of the applicable standards for a mediator by informing mediation participants of any relevant public policy under the *lex fori*, as well as the standards set forth in the institutional rules or code of conduct for accredited mediators. A mediation institution may also suggest a possible way to limit the scope of such applicable mediator standards: the mediation institution may, during the pre-mediation conference, advise the parties to limit enforcement of an iMSA to certain jurisdictions, in order to avoid uncertainties arising from varying conflicts of law rules across various jurisdictions, which could potentially result in the application of an unanticipated set of mediator standards. However, such suggestions should not be made right before the signing of the iMSA, because this may potentially cause prejudice to one party, which may in turn be grounds for a party to resist enforcement under the *lex fori*.

Such measures taken by mediation institutions during the pre-mediation conferences can alleviate the uncertainties associated with lawyers or mediators being less familiar with ensuring enforceability under Article 5 of the Convention. Mediation institutions that also provide arbitration services should be more cautious regarding what to share during pre-mediation conferences, as this information should not blend the features of arbitration with the mediation process, especially in mixed-mode dispute resolution such as arb-med-arb. By adequately setting the governing laws of the iMSA obligations and identifying the desired set of mediator standards, mediators and the parties would be reassured as to the appropriate scope of their strategies and techniques in facilitating an amicable settlement of the dispute.

2 *Resolving Concerns in Relation to Confidentiality*

Parties are generally concerned about whether communications shared in mediation are subject to absolute confidentiality, for the sake of more open mediation. However, the choice of law clause for confidentiality does not necessarily protect mediation communications. Since the public policy of the enforcing forum is not restricted by such agreement between the parties, the actual applicable law on confidentiality would be subject to the procedural justice principles under the *lex fori*, even if it is contrary to the parties' agreement on confidentiality under the iMSA.

Due to the ineffectiveness of the choice of law clause when deciding the rules for evidentiary privilege, [109] Professor Ben Köhler suggests that the parties strictly protect their confidentiality by selecting an exclusive forum for enforcement of the iMSA or by excluding specific forums from the enforcement function. This approach aligns with Article 5(1)(d) of the *Convention* and effectively limits the intervention of any unpredictable application of *lex fori*.[110] Another safeguard for preserving confidentiality may

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[109] See section II.C.

[110] Köhler (n 3) [64-5].

include measures that can be taken when drafting mediation documents:[111] documents can be labelled specifically as a 'mediation document' or with some other clear indication that the document is 'subject to mediation privilege and confidentiality.'[112] Mediation documents, such as a summary of the dispute, are less likely to be subsequently produced in court due to the bias in favour of the party who created it.[113] However, if a document is protected by mediation privilege, yet was not created specifically for the mediation, the opposing party may request its production based on relevance to the disputed issue, in contrast to the documents produced purely for mediation.[114]

Thus, during the pre-mediation conference, the mediation institutions should address the option of selecting an exclusive forum for the parties and make participants aware of the importance of labelling mediation documents to prevent mediation communications from being admissible in an enforcing forum. This approach would allow the parties to explore various options for protecting confidentiality and help them understand the scope of safe and privileged communications. For instance, parties could make offers to the mediator during a caucus meeting instead of directly offering them to the other party, which may enable both parties and the mediator to engage in substantive discussions for settlement with greater confidence.

V CONCLUSION

As organisers of pre-mediation conferences and issuers of proper guidance for mediation users, mediation institutions are often in the best position to highlight enforceability risks to mediators, parties and parties' lawyers. By making appropriate suggestions for the mediation participants, mediation institutions can help put the parties at ease about potential uncertainties surrounding Article 5 of the Convention, thus allowing the parties to focus on the substantive settlement of the dispute. This role of mediation institutions may require the institutions to be equipped with experts who know the mechanisms of the Convention and the refusal grounds therein, which may also incentivise more mediation users to choose well-prepared mediation institutions.

The proper designation of governing law for the contractual factors of iMSAs, the applicable standards for mediators, and a clearer notion of mediation confidentiality are required for users of the Convention to perceive legal certainty in enforcing an iMSA. Mediation institutions have several options to consider in expanding their role to include educating parties about these issues. Mediation participants will benefit from such education and can subsequently concentrate on the substantive matters in settling their disputes. Mediation institutions can play a significant role in helping mediation parties

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111 McIlwrath and Savage (n 74) [4-080].
112 Ibid.
113 Ibid.
114 Ibid.

achieve efficiency and promptness with greater legal certainty in their desired outcomes, including the important outcome of parties being able to enforce their bargain under the Convention.