Journal of Private International Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rpil20

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To cite this article: Ben Köhler (2023) Blaming the middleman? Refusal of relief for mediator misconduct under the Singapore Convention, Journal of Private International Law, 19:1, 42-66, DOI: 10.1080/17441048.2023.2189779

To link to this article: https://doi.org/10.1080/17441048.2023.2189779

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Published online: 26 Apr 2023.

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Journal of Private International Law, 2023
Vol. 19, No. 1, 42–66, https://doi.org/10.1080/17441048.2023.2189779

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Blaming the middleman? Refusal of relief for mediator misconduct under the Singapore Convention

Ben Köhler*

The discussion surrounding the Singapore Convention on Mediation 2018 has gathered steam. In particular, the refusal of enforcement based on mediator misconduct as prescribed in Article 5(1)(e) and (f) has been the focus of debate and is widely perceived to be the Convention's Achilles heel. These two provisions, already highly controversial in the drafting process, have been criticised as ill-suited to a voluntary process and likely to provoke ancillary dispute. This article defends these grounds for refusal, arguing that they play an indispensable role in guaranteeing the legitimacy of mediated settlements enforced under the Convention. It addresses some of the interpretative challenges within Article 5(1)(e) and (f) before discussing the tension between the provisions on mediator misconduct and the confidentiality of the mediation. The article then offers some guidance on how parties may limit the effects of the provisions, concluding with a brief outlook for the future.

Keywords: Singapore Convention; international mediation; settlements; enforcement; mediator misconduct; confidentiality; impartiality; independence; mediation ethics; party autonomy

A. Introduction

Mediation is increasingly used to resolve international commercial disputes.[1] Given the transformation of international arbitration into a sometimes more formal and costly form of dispute resolution, businesses may turn to mediation in search of efficiency and less adversarial processes.[2] However, mediation still

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[1]SI Strong, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" (2014) 45 *Washington University Journal of Law & Policy* 10, 11.

[2]Klaus J Hopt and Felix Steffek, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues" in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2012), 1, 9; SI Strong, "Use and Perception of International Commercial Mediation and Conciliation:

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falls short of international arbitration in one respect: enforceability. A key feature of international commercial arbitration is the system of international enforcement of arbitral awards. Awards are enforceable in most jurisdictions under the UN Convention on the Recognition and Enforcement of Arbitral Awards[3] (hereinafter 1958 New York Convention). Users of international commercial arbitration cite this enforcement mechanism as the most important feature of international arbitration.[4]

In stark contrast to the well-developed system for arbitral awards, the international enforcement of mediated settlements has thus far depended on the domestic law of the jurisdiction where enforcement is sought.[5] The enforcement mechanisms vary greatly, including enforcement of the settlement under the general rules of contract law, several forms of expedited enforcement, and general enforcement of a mediated settlement without the need for further proceedings.[6] Although rates of voluntary compliance with mediated settlements are high,[7] the lack of efficient and predictable enforcement mechanisms has been described as a key disadvantage of mediation at the international level.[8] Most surveys have found that enhanced enforcement would lead a majority of potential users to engage in international commercial mediation more

A preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", University of Missouri School of Law Legal Studies Research Paper No. 2014-28, 22, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302> accessed 21 February 2023, noting that the desire to save on costs and time are the two highest-ranked reasons in favour of mediation.

[3]UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 330 UNTS 38.

[4]Queen Mary University 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 7, <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF> accessed 21 February 2023.

[5]Hopt and Steffek, *supra* n 2, 46; Corinne Montinieri, "The United Nations Commissions on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation" (2019) 20 *Cardozo Journal of Conflict Resolution* 1023, 1032; Yun Zhao, "The Singapore mediation convention: A version of the New York convention for mediation?" (2021) 17 *Journal of Private International Law* 538.

[6]UNCITRAL Working Group II (Dispute Settlement), 62nd Session, 2–6 February 2015, A/CN.9/WG. II/WP.187, <https://undocs.org/en/A/CN.9/WG.II/WP.187> accessed 21 February 2023, paras 20 ff; Hopt and Steffek, *supra* n 2, 45, with further examples; see also Clemens Treichl, "The Singapore Convention: Towards a Universal Standard for the Recognition and Enforcement of International Settlement Agreements?" (2020) 11 *Journal of International Dispute Settlement* 409, 414; on the enforcement of mediated agreements in Germany, see Cathrin Wentzel, *Internationale Mediation* (Logos, 2016), 49–110; see also Nadja Alexander, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform" in Hopt and Steffek, *supra* n 2, 131, 179–180.

[7]Hopt and Steffek, *supra* n 2, 45; Treichl, *supra* n 6, 412; Zhao, *supra* n 5, 549.

[8]Strong, *supra* n 1, 28.

frequently.[9] In order to remedy this problem, the United Nations Convention on International Settlement Agreements Resulting from Mediation (hereinafter "the Singapore Convention" or "the Convention") was developed under the auspices of UNCITRAL.[10] The purpose of the Singapore Convention is to provide an effective framework for the enforcement of international settlements resulting from mediation.[11] Pursuant to Article 3 of the Convention, a State Party is required, firstly, to enforce the settlement agreement, and, secondly, to allow a party to invoke the settlement agreement in order to prove that the matter has been resolved.

However, the enforcement of mediated settlements under the Convention depends, of course, on the fulfilment of certain requirements and is subject to certain exceptions. Like the 1958 New York Convention, the Singapore Convention provides a list of grounds for refusal of enforcement. Article 5 of the Convention lists the different grounds for refusal that concern deficiencies in the settlement agreement,[12] the conduct of the mediator,[13] and public policy considerations in the enforcing jurisdiction.[14] The grounds for refusal regarding the settlement agreement and the public policy of the enforcing jurisdiction hardly seem surprising. They aim at ensuring that the request for relief is supported by a valid agreement, does not go beyond the parties' agreement, and is consistent with the enforcing jurisdiction's public policy. Similar safeguards against enforcement can be found in the 1958 New York Convention.[15] The grounds for refusal based on the mediator's misconduct in Article 5(1)(e) and (f) of the Convention seem less evident. Prima facie, there seems to be no reason why a valid settlement agreement concluded after a mediation should not be enforced because of the conduct of someone who was a third party in relation to the

[9]SI Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 *Washington and Lee Law Review* 1973, 2051; Treichl, *supra* n 6, 413, with further references.

[10]UN Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018, entered into force 12 September 2020) (Singapore Convention); see Nadja Alexander, Shouyu Chong and Vakhtang Giorgadze, *The Singapore Convention on Mediation, A Commentary* (Wolters Kluwer, 2nd edn, 2022); for a comprehensive account of the Convention and the drafting history of specific provisions, Timothy Schnabel, "The Singapore Convention On Mediation: A Framework For The Cross-Border Recognition And Enforcement Of Mediated Settlements" (2019) 19 *Pepperdine Dispute Resolution Law Journal* 1, 60.

[11]Singapore Convention, Preamble (4); on the parallels between 1958 New York Convention and the Singapore Convention, see Zhao, *supra* n 5, 538.

[12]Singapore Convention, Art 5(1)(a), (b), (c) and (d).

[13]Singapore Convention, Art 5(1)(e) and (f).

[14]Singapore Convention, Art 5(2).

[15]1958 New York Convention, Art V; on the model function of the New York Convention for Art 5 of the Singapore Convention: Héctor Flores Sentiés, "Grounds to Refuse the Enforcement of Settlement Agreements under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention" (2019) 20 *Cardozo Journal of Conflict Resolution* 1235, 1238.

agreement.[16] Unsurprisingly, the grounds for refusal based on mediator misconduct were particularly controversial in the drafting process and are still strongly criticised today.[17]

This article seeks to contribute to the understanding of these grounds for refusal in the overall system of the Convention. In Part B, it will argue that the rules on refusal of relief based on mediator misconduct are not only compatible with the overall framework of international commercial mediation but are indeed an indispensable mechanism to ensure the legitimacy of mediated outcomes that are enforced under the Convention. In light of this function of the provisions, the article will attempt to clarify some of the uncertainties in the interpretation of Article 5(1)(e) and (f) in Part C, before addressing in Part D the tension between respect for the confidentiality of the mediation and the right to oppose enforcement based on mediator misconduct. In Part E, the article will then explore how parties may try to limit the effect of the provisions in their agreements; a brief conclusion will follow.

B. The conceptual challenge of the provisions on mediator misconduct in the framework of the Singapore Convention

Regulating mediator misconduct has been notoriously difficult and controversial, even at the national or state level.[18] More so than arbitrators who adjudicate disputes by applying legal rules,[19] mediators may come from very different professional backgrounds and employ very different mediation styles.[20] The plurality

[16]For an articulation of similar concerns, see UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901 <https://undocs.org/en/A/CN.9/901> accessed 21 February 2023, para 76.

[17]Alan Anderson, Ben Beaumont, and Herman Verbist, "The United Nations Convention on International Settlement Agreements Resulting from Mediation: Its Genesis, Negotiation and Future" (2020) *The Comparative Law Yearbook of International Business* 35, 54; generally on the risk of abuse of these provisions, Hal Abrahamson, "New Singapore Convention on Cross-Border Mediated Settlements: Key Choices" in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press, 2019), 360, 371; for an account of the drafting process, see Natalie Y Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 *Singapore Academy of Law Journal* 487, 511–514; Dai Yokomizo and Peter Mankowski, "Article 5: Grounds for Refusing to Grant Relief", in Guillermo Palao Moreno (ed), *The Singapore Convention on Mediation: a commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation* (Edward Elgar 2022), paras 5.48–5.50.

[18]Art Hinshaw, "Regulating Mediators" (2016) 21 *Harvard Negotiation Law Review* 165.

[19]This distinction seems to have been very important in the drafting process: Michel Kallipetis, "Singapore Convention Defences Based on Mediator's Misconduct: Articles 5.1(e) & (f)" (2019) 20 *Cardozo Journal of Conflict Resolution* 1197.

[20]Anderson, Beaumont, and Verbist, *supra* n 17, 51.

of approaches to mediation is exacerbated on the international level by different dispute resolution cultures and traditions.[21] Consequently, it seems a lot to ask from an international convention that it establish well-balanced substantive rules on mediator misconduct and draw the line between unusual – yet permissible – behaviour and impermissible behaviour. Perhaps not surprisingly, it was consequently argued in the drafting process that the Convention should refrain from attempting to regulate mediator misconduct altogether and to rely exclusively on defences pertaining to the invalidity of the settlement agreement or to public policy.[22] Others insisted that defences based on mediator misconduct were indispensable in the framework of the Convention. These discussions led to the compromise that is now Article 5(1)(e) and (f) of the Convention.[23] The debate has continued after the adoption of the Convention, as the provisions on mediator misconduct have attracted severe criticism,[24] with some commentators even suggesting that State Parties should omit the grounds for refusal of relief in their implementation of the Convention.[25]

Fortunately, these critical voices have not prevailed. In fact, the grounds for refusal based on mediator misconduct are indispensable to the overall system of the Convention: they uphold the balance between the legitimate interest in swift and efficient dispute resolution, on the one hand, and guarantees of basic procedural fairness, on the other.[26] The enforcement of mediated settlements is not a self-evident truth but a political choice that requires a reasoned

[21]Alexander, Chong and Giorgadze, *supra* n 10, paras 5.45–5.55; Zachary R Calo, "Mediation Ethics after the Singapore Convention", (2021) 14 *American Journal of Mediation* 73, 79; Hopt and Steffek, *supra* n 2, 79–83, with a comparative overview of different models of regulation.

[22]UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901 <https://undocs.org/en/A/CN.9/901> 16 June 2022, para 76; for a detailed explanation of the discussion, see Morris-Sharma, *supra* n 17, 511–514; Kallipetis, *supra* n 19, 1197.

[23]Morris-Sharma, *ibid*.

[24]See, for instance, Anderson, Beaumont, and Verbist, *supra* n 17, 54; Koji Takahashi, "Enforcement of Mediated Settlement Agreements under the Singapore Convention and the UNCITRAL Model Law: An Argument for the Opt-In Model" (2020) *The Comparative Law Yearbook of International Business* 63, 73; also rather critically, Kallipetis, *supra* 19, 1199; for a moderate critique, see also David Tan, "Prolegomena to the UN Convention on International Mediated Settlement Agreements Resulting from Mediation" (2022) 27 *Uniform Law Review* 37, 61; contra Yumeng Tan, "An Analysis of Mediators' Misconducts Relating to Articles 5(1)(E) and 5(1)(F) of the Singapore Convention on Mediation" (2022) *Bristol Law Review* 115.

[25]Takahashi, *supra* n 24, 73.

[26]Yokomizo and Mankowski, *supra* n 17, para 5.45; for a discussion of this role in the *travaux préparatoires*, see UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901 <https://undocs.org/en/A/CN.9/901> accessed 21 February 2023, para 42.

justification. This justification can lie only in the increased legitimacy of mediated settlements as compared to unmediated settlements due to the intervention of a neutral third party in the resolution of the dispute.[27] By providing a safeguard against enforcement of settlements that do not result from such a neutral intervention, either because there was an undisclosed conflict of interest or the mediator did not respect the basic standards of procedures, the grounds for refusal strengthen the overall legitimacy of the mediated outcomes that are enforced under the Convention. The grounds for refusal of relief in Article 5 (1)(e) and (f) of the Convention thus have to be viewed through the prism of the expectation of legitimacy added through mediation *in abstracto*, which justifies expedited enforcement of international settlements under the Convention. Article 5(1)(e) and (f) of the Convention implements this rationale *in concreto* by denying enforcement for mediation awards that do not satisfy this expectation, thereby contributing to the overall legitimacy of the Convention.[28] The controlling principle for the understanding and interpretation of Article 5(1)(e) and (f) of the Convention should therefore be whether the mediator misconduct is such that it removes the added legitimacy of mediation as a dispute resolution process *in casu*. This understanding is in line with the complementary objectives of the Convention to foster trust in international commercial mediation and to facilitate enforcement of mediated outcomes.[29] It also offers a yardstick for many interpretative questions within the provisions that have been visibly written in the language of compromise and leave significant uncertainty regarding their application.[30] To resolve these interpretative conundrums, the provisions need to be analysed through the lens of their purpose of ensuring the added legitimacy of the mediation process *in concreto*. With this purpose in mind, this article will try to address some of these interpretative challenges.

C. Interpretative challenges in the provisions on mediator misconduct

The compromise found in Article 5 (1) (e) and (f) of the Convention creates many interpretative challenges that may lead to uncertainty for the parties in the application of the provisions by national courts. With the purpose of ensuring and upholding the legitimacy of mediated outcomes in mind, this article will try to address some of these challenges in Article 5 (1)(e) (subpart 1) and (f) (subpart 2).

[27]But see Flores Sentiés, *supra* n 15, 1235, arguing that limiting enforcement to mediated settlements is regrettable.

[28]For an interpretation focusing on the legitimate expectations of the parties, see Tan, *supra* n 24, 132.

[29]Singapore Convention, Preamble (3), (4).

[30]On the process of the negotiation of the provisions, see Kallipetis, *supra* 19, 1197.

1. ***Serious breaches of standards***

Pursuant to Article 5(1)(e) of the Convention, "[t]he competent authority (…) may refuse to grant relief at the request of the party against whom relief is sought only if that party furnishes to the competent authority proof that: (…) (*e*) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which […] that party would not have entered into the settlement agreement." Article 5 (1) (e) of the Convention can thus be broken down into three elements: the breach of applicable standards by the mediator (subpart a.), the seriousness of the breach (subpart b.), and a causal link between the breach and the settlement agreement (subpart c.).

(a) *Applicable standards*

The first element concerns the standards applicable to the mediator or the mediation. The Convention itself does not set a uniform and autonomous standard. It is noteworthy, however, that the drafters initially envisaged a substantive standard of fair treatment of the parties that was subsequently modified to refer only to the applicable standards.[31] The solution in Article 5(1)(e) of the Convention thus appears to be a compromise between countries favouring a uniform and autonomous standard and countries opposing any grounds for refusal based on the mediator's conduct.[32] The term "standards" was deliberately chosen by the drafters to encompass both applicable laws as well as codes of conduct for mediators developed by professional organizations.[33] It includes not only laws but also codes of conduct or professional ethics regulations.[34] Non-binding recommendations or best practices are not "applicable" in the sense of the Convention and will not be taken into account.[35] In many jurisdictions, however, there is no code of conduct for all mediators.[36] Professional standards may therefore

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[31] UNCITRAL Working Group II (Dispute Settlement), 66th Session, 6–10 February 2017, A/CN.9/WG.II/WP.200, <https://undocs.org/en/A/CN.9/WG.II/WP.200> accessed 21 February 2023, paras. 37, 41.

[32] UNCITRAL Working Group II (Dispute Settlement), 67th Session, 2–6 October 2017, A/CN.9/WG.II/WP.202, <https://undocs.org/en/A/CN.9/WG.II/WP.202> accessed 21 February 2023, para. 46; for more detail on the negotiations, see Schnabel, *supra* n 10, 50 ff.

[33] UNCITRAL Working Group II (Dispute Settlement), 67th Session, 2–6 October 2017, A/CN.9/WG.II/WP.202, <https://undocs.org/en/A/CN.9/WG.II/WP.202> accessed 21 February 2023, para. 47; for a criticism, see Tan, *supra* n 24, 61.

[34] Alexander, Chong and Giorgadze, *supra* n 10, paras 5.72–5.74.

[35] Schnabel, *supra* n 10, 51.

[36] For a discussion of mediation regulation and different options, Stephen B Goldberg, Frank EA Sander, Nancy H Rogers and Sarah Rudolph Cole, *Dispute Resolution - Negotiation, Mediation, and Other Processes* (Aspen Publishing, 5th edn, 2007), 158 ff; for a comparative overview of different approaches to mediator regulation, see Alexander, Chong and Giorgadze, *supra* n 10, paras 5.65–5.74; Klaus J Hopt and Felix Steffek,

apply to certain professionals but not to others, making the review in Article 5 (1)(e) of the Convention dependent on the professional status of the mediator.[37]

A peculiar element of the provision is that it does not indicate which standards are deemed to be applicable to the mediation or the mediator.[38] The situation is relatively uncomplicated if the parties have chosen a law for the mediation agreement or made use of a mediation institution that provides for a choice of law or directly imposes a code of conduct for mediators,[39] or if the mediation agreement itself contains procedural standards or an express reference to a code of conduct. However, even in these cases, the question remains to what extent mandatory mediation regulations in other jurisdictions can be applicable as overriding mandatory provisions.[40] The situation is more complicated if the parties have not chosen a law for the mediation. In the absence of such a choice of law clause, the provision relies on the conflict-of-laws rules of the jurisdiction where enforcement is sought to determine the applicable standards.[41] This approach is markedly different from the 1958 New York Convention in its Article V(1)(a), (d) and (e), which specifically designates the law of the seat of arbitration as the applicable law.[42] The Singapore Convention does not provide a similar conflict rule and, hence, did not create a similar "seat of the mediation".[43] Rather, the determination of the applicable law and standards will depend on whether the enforcing jurisdiction provides specific choice of law rules for the law governing the mediation and the mediator. In the absence of specific rules tailored to the mediation agreement and the mediator contract, the question here is typically whether the choice of law rules on contractual obligations extend to these aforementioned agreements.[44] In the absence of such rules, there may be many diverging answers to the question of which law is applicable to the mediation: the

"Mediation – Rechtsvergleich, Regelungsmodelle, Grundsatzprobleme" in Klaus J Hopt and Felix Steffek (eds), *Mediation* (Mohr Siebeck, 2008), 59–71.

[37]Alexander, Chong and Giorgadze, *supra* n 10, para. 5.75.

[38]Takahashi, *supra* n 24, 74.

[39]Kallipetis, *supra* 19, 1200; Schnabel, *supra* n 10, 52; Alexander, Chong and Giorgadze, *supra* n 10, para 5.120.

[40]Helge Großerichter, "Mediationsverfahren mit Auslandsberührung" in Horst Eidenmüller and Gerhard Wagner (eds), *Mediationsrecht* (ottoschmidt, 2015), 423, 448–449.

[41]In this direction, also Treichl, *supra* n 6, 423.

[42]Christian Borris and Rudolf Hennecke, "Improper Tribunal Composition or Flawed Proceedings, Article V (1) (d)" in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Commentary* (CH Beck Hart Nomos 2012), 329, 343; generally, on the notion and the drafting history of the seat of arbitration in the 1958 New York Convention, Gary B Born, *International Commercial Arbitration*, *volume II* (Wolters Kluwer, 2nd edn, 2021) 1657 ff.

[43]Shouyu Chong and Nadja Alexander, "Singapore convention series: Why is there no 'seat' of mediation?" (2019) *Kluwer Arbitration Blog*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330366≥ accessed 21 February 2023; Takahashi, *supra* n 24, 75; Treichl, *supra* n 6, 420.

[44]For the Rome I Regulation, see Großerichter, *supra* n 40, 443–444.

country where the mediation took place,[45] the *lex causae* governing the dispute and the settlement agreement, or the country with the closest connection with the subject matter of the settlement agreement (which is also mentioned in Article 1(1)(b)(ii) of the Singapore Convention).[46] The failure to provide for a uniform conflict rule designating the law applicable to the mediation and/or the mediator could thus cause significant uncertainty for the parties in the enforcement phase if the mediator's conduct may be assessed under different standards in different jurisdictions.

(b) *Seriousness of the breach*

Pursuant to Article 5(1)(e) of the Convention, the mediator's conduct needs to amount to a serious breach. The seriousness of the breach is designed to be an objective criterion in order to raise significantly the threshold for challenges to the mediator's conduct.[47] The purposes of this requirement are to protect the settlement agreement from opportunistic challenges because of minor breaches by the mediator and to prevent ancillary disputes.[48]

In contrast to the applicable standards, the seriousness of the breach constitutes a uniform and autonomous concept. Accordingly, the line between a common breach and a serious breach is to be drawn by interpreting the Convention and, in principle, without recourse to the law applicable to the mediation. However, the seriousness of the breach committed by the mediator will depend on the breached standard and its role and purpose in the relevant regulatory instrument. The competent authority should therefore interpret the seriousness of the breach in light of the relevant rule and its purpose. The purpose of the requirement of a serious breach should lead interpreters to err on the side of enforcement.[49] Serious breaches should thus be limited to the most egregious forms of mediator misconduct.[50] Given the sanction of refusal of relief, the misconduct should be such that

[45] For this approach, see Schnabel, *supra* n 10, 51.
[46] For this approach as a fall-back rule, see, Alexander, Chong and Giorgadze, *supra* n 10, para 5.122.
[47] Alexander, Chong and Giorgadze, *supra* n 10, para 5.112; Schnabel, *supra* n 10, 51.
[48] UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901, <https://undocs.org/en/A/CN.9/901> 16 June 2022, para 50; Alexander, Chong and Giorgadze, *supra* n 10, para 5.112.
[49] As regards the 1958 New York Convention, see Nigel Blackaby, Constantine Partasides and Alan, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7th edn, 2022), paras 11.59 f; Frank-Bernd Weigand and Antje Baumann, *Practitioner's Handbook on International Commercial Arbitration* (Oxford University Press, 3rd edn, 2019) para 21.15.
[50] Shouyu Chong and Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective" (2019) 31 *Singapore Academy of Law Journal* 448, 473; for a

it deprives the mediation of any legitimacy as an alternative form of dispute resolution *in casu*.[51] This is in line with the logic of the Convention whereby mediated settlements are privileged over other forms of negotiated outcomes due to the intervention and assistance of a (neutral) third party as the guarantor of basic procedural fairness. If the mediator's conduct does not live up to the basic standard of procedural fairness, the justification for enforcement under the Convention ceases to exist.

The determination of whether the mediator committed such a serious breach of procedure will depend on the specific circumstances of the case.[52] However, some categories of egregious misconduct will be particularly likely to constitute a serious breach of procedure. Relief should, for instance, normally be refused if the mediator reveals to a party confidential information she obtained in a private caucus with the other party in the course of the mediation in violation of legal or contractual confidentiality obligations.[53] Such a violation of "internal confidentiality"[54] not only constitutes a serious breach of trust by the mediator but will in most cases also affect a party's bargaining position in the mediation. Besides violations of internal confidentiality, a serious breach of procedure should be understood to encompass also external breaches of confidentiality, e.g. if the mediator discloses confidential information to third parties.[55] Serious breaches will, however, not be limited to violations of confidentiality obligations.[56] Although mediators should have considerable leeway on how to conduct the mediation, the threshold for a serious breach of procedure in terms of Article 5(1)(e) will, for instance, be satisfied if a mediator unduly inflicts significant emotional distress on one of the parties[57] or misrepresents material facts of the case in order to

different view, see Chien-Yu Lung, "Violation of Mediators' Duties as a Ground of Non-Enforcement under the Singapore Convention" (2020) 13 *Contemporary Asia arbitration journal* 435, 464: "[T]he proper standard […] should be whether the alleged misconduct […] deters active participation and communication of the parties."

[51]For a different approach, see Tan, *supra* n 24, 137, who argues that a breach is serious if it leads to a failure of self-determination by the parties. It may, however, be very difficult to establish the international standards of self-determination in the context of international mediation.

[52]Lung, *supra* n 50, 464; for the critique on this point, see Anderson, Beaumont, and Verbist, *supra* n 17, 55.

[53]Anderson, Beaumont, and Verbist, *supra* n 17, 55; for this type of mediator conduct, see Michael Moffitt, "Ten Ways to Get Sued: A Guide for Mediators" (2003) 8 *Harvard Negotiation Law Review* 81, 111.

[54]On this distinction, see Moffitt, *supra* n 53, 108.

[55]Moffitt, *supra* n 53, 108.

[56]See Anderson, Beaumont, and Verbist, *supra* n 17, 55, who note that the application of the provision could be limited to breaches of "fairness and confidentiality".

[57]See, with further examples, Moffitt, *supra* n 53, 120–122; for such a set of circumstances (although the Court ultimately upheld the settlement), see *Olam v Congress Mortgage* Co 68 F Supp 2d 1110 (ND Cal 1999), 1139–1151.

induce the parties to settle.[58] Mediators who engage in such fraudulent or threatening behaviour compromise the overall legitimacy of the mediation process on which the enforcement of the mediated settlement relies.

(c) *Causal link*

The last requirement of the ground for refusal in Article 5(1)(e) of the Convention is that, but for the breach, the party against whom relief is sought would not have concluded the settlement agreement. The requirement's purpose is to ensure that the party does not opportunistically invoke a breach that did not affect the settlement to avoid its obligations under the settlement agreement.[59] The party opposing relief thus must prove that it would not have concluded the settlement agreement. A presumption to that effect would be contrary to the express wording of Article 5(1) of the Convention.[60] Given these clarifications in the drafting process, it is widely assumed that the requirement of a causal link between the breach and the conclusion of the settlement significantly raises the evidentiary burden of the party resisting enforcement.[61]

However, a literal reading of the provision ("*the* settlement agreement") implies that it not only encompasses the situation in which a party would not have agreed to any settlement at all but also one in which that party could have settled on different terms. Thus the party would not need to establish that it would have walked away from the mediation without concluding a settlement but merely that the conduct had an impact on its decision to conclude *the* specific settlement agreement.[62] The wording of the provision is confirmed by the purpose of Article 5(1)(e) within the system of the Convention: if the reason for enforcement under the Convention is the added procedural legitimacy of the mediation as compared to unmediated settlements, this reason ceases to exist when the specific terms of the settlement were the product of serious breaches of the applicable standards.

The distinction between different levels of impact on the settlement decision may make no difference if it is clear that the mediator's behaviour in no way affected the mediated outcome, for instance, if the conduct occurred after the settlement terms were agreed upon. Thus, disclosure of confidential information

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[58]See Moffitt, *supra* n 53, 122, with further examples on egregious forms of mediator misconduct.
[59]Schnabel, *supra* n 10, 51.
[60]Schnabel, *supra* n 10, 51.
[61]Kallipetis, *supra* 19, 1201; Schnabel, *supra* n 10, 52: "extraordinary circumstances"; but see also Tan, supra n 24, 61, pointing to the evidentiary difficulties this may provoke.
[62]In this direction, Takahashi, *supra* n 24, 76; Calo, *supra* n 21, 84; but see, Schnabel, *supra* n 10, 51, who seems to argue that the party would not have settled at all: "decision to settle"; see also Kallipetis, *supra* 19, 1197: "the behaviour of the mediator caused him to consent to a settlement against his will."

to third parties after the conclusion of the settlement could not, for example, have had an impact on the terms of the settlement. Conversely, if a serious breach occurs during the mediation, such as the violation of internal confidentiality after a caucus session, it will be reasonable to assume that the conduct affected the bargaining position of the party at least in some way. In that scenario, the party opposing relief would need to establish how this violation affected its position in the mediation and led to a less favourable outcome in the settlement.[63]

2. *Breaches of duty to disclose conflicts of interests*

Pursuant to Article 5(1)(f) of the Convention, "[t]he competent authority […] may refuse to grant relief at the request of the party against whom relief is sought only if that party furnishes to the competent authority proof that: […] *(f)* There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement". The ground for refusal in Article 5(1)(f) of the Convention consists of three main elements: (a) a failure to disclose by the mediator, (b), circumstances raising justifiable doubts as to her impartiality and independence, and (c) an impact of the non-disclosure on the settlement agreement.

(a) *Failure to disclose circumstances raising justifiable doubts as to impartiality and independence*

The duty to disclose is contained in many mediation laws and regulations.[64] However, unlike Article 5(1)(e) of the Convention, Article 5(1)(f) imposes an independent and autonomous duty to disclose on the mediator, regardless of whether such a duty exists in the domestic mediation laws or codes of conduct.[65] The settlement agreement may thus be unenforceable even though the mediator has complied with all her obligations under national law and the applicable professional codes of conduct. The provision does not specify the time of disclosure. However, it would normally be expected that a disclosure should occur before the mediation starts or, if facts that require disclosure arise or become known later, without undue delay.[66] In any case, if disclosure occurs before the settlement agreement is concluded, it will be difficult to establish that the failure to disclose influenced the settlement agreement.

[63]Takahashi, *supra* n 24, 76.
[64]Uniform Mediation Act (2002), s 9 (a) (1); ICC Mediation Rules (2014), Art 5 (3); German Mediation law, s 3 (2); Art 3 (3) IBA Rules for Investor-State-Mediation (2012).
[65]Alexander, Chong and Giorgadze, *supra* n 10, para 5.78; Schnabel, *supra* n 10, 53.
[66]UNCITRAL Model Law (2002), Art 5 (5); Art 3 (4) IBA Rules for Investor-State-Mediation (2012).

The standard in Article 5(1)(f) of the Convention relates to circumstances that raise justifiable doubts as to the mediator's impartiality and independence. Independence and impartiality are requirements that are extensively used in international arbitration laws and rules[67] as well as in most mediation laws or rules.[68] The threshold in Article 5(1)(f) of the Convention perfectly matches the text of Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration (2006) and ensures coherence between UNCITRAL's different instruments. The purpose of the criterion of justifiable doubts is to provide an objective standard for a defence based on non-disclosure at the enforcement level.[69] Impartiality is usually described as a subjective element consisting of the absence of bias in the neutral's mind.[70] Independence is described as an objective element relating to the absence of certain material relationships between the arbitrator and a party, notably significant financial relationships of dependence.[71] In the drafting history, it was questioned, however, whether it is appropriate to use the same criteria both for arbitrators, who render binding decisions, and for mediators, who merely facilitate an agreement by the parties.[72] In principle, it seems clear that most parties have a strong interest in knowing about potential conflicts of interests of the mediator, given that the mediator may significantly influence the negotiations, particularly through shuttle diplomacy and private caucuses. The introduction of an obligation to disclose is also not unheard of: many mediation laws or rules provide for at least some standard of impartiality and/or independence and a duty to disclose that attaches to the mediator.[73] The prevention of conflicts of interests is also widely recognised in the discussion of mediation ethics.[74] Establishing an international obligation to disclose may

[67]See, e.g., UNCITRAL Model Law on International Commercial Arbitration (2006), Art 12(2); French Code of Civil Procedure, Art 1456(2); ICC Arbitration Rules 2017, Art 11 (1); see, with further references and examples, Peter Ashford, *Handbook on International Commercial Arbitration* (JurisNet, 2nd edn, 2014), 93 ff; Born, *supra* n 42, 1890 ff.

[68]See, e.g., Uniform Mediation Act (2002), s 9 (a) (1): "known facts (…) likely to affect the impartiality of the mediator"; ICC Mediation Rules (2014), Art 5 (3); German Mediation law, s 3 (2).

[69]Schnabel, *supra* n 10, 53; Alexander, Chong and Giorgadze, *supra* n 10, para 5.115.

[70]Blackaby, Partasides, Redfern and Hunter, *supra* n 49, para 4.77; Jean-François Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (Thomson Sweet & Maxwell, 2nd edn, 2007), 348.

[71]Blackaby, Partasides, Redfern and Hunter, *supra* n 49, para 4.77; Poudret and Besson, *supra* n 70, 348.

[72]Schnabel, *supra* n 10, 53; on further differences between international arbitration and mediation, see also Zhao, *supra* n 5, 555.

[73]See, e.g., Uniform Mediation Act (2002), Section 9 (a) (1); DIS Mediation Rules (2010), Section 3 (2); ICC Mediation Rules (2014), Art 5 (3); IBA Rules on Investor-State-Mediation (2012), Art 3 (1).

[74]David A Hoffman, "Ten Principles of Mediation Ethics" in Russ Bleemer, *Mediation: Approaches and Insights* (JurisNet 2003), 55: "Mediators should err on the side of

reinforce this trend and increase trust in and the legitimacy of mediation as a dispute resolution mechanism.

The more important question, however, is how the standard will be interpreted and understood in practice. Concerns have been expressed that the provision may be become a "quagmire".[75] In resolving these issues, it will surely be tempting to rely on the extensive work[76] and case law[77] on independence and impartiality in international arbitration. However, rather than blindly transposing standards for arbitrators, the insertion of an international duty to disclose in Article 5(1)(f) of the Convention should lead to the formulation of international standards of impartiality and independence specifically tailored to mediation as a flexible and voluntary process. The development of such categories could be facilitated by international organizations such as the International Mediation Institute (IMI) or the International Bar Association (IBA), which could prepare and publish guidelines similar to those which are widely used in international arbitration.[78] This would, of course, require an international effort to define such conflicts specific to mediation practice rather than simply transposing the guidelines that were developed for international arbitration.[79]

(b) *Material impact or undue influence and causal link*

The provision further requires that the failure to disclose had a material impact or undue influence on the party resisting enforcement, who otherwise would not have concluded the settlement agreement. The drafting thus combines the requirements of material impact or undue influence with a causal link between the failure to disclose and the settlement agreement. This seems to imply that the causal link

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disclosure"; for a nuanced position, see also, Neil Andrews, "Mediation: International Experience and Global Trends" (2017) 4 *Journal of International and Comparative Law* 217, 222.

[75]A Maia, P Mason and D Masucci, "The passage of a Convention on the enforcement of mediation settlements for cross-border commercial disputes" (1 October 2018) IBA Mediation Committee Publications, as cited by Takahashi, *supra* n 24, 74, who also points to the risk of ancillary disputes.

[76]See, IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association 2014); see for recent monographs on the topic, Stavroula Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration*, (Nomos, 2022); Ilka H Beimel, *Independence and Impartiality in international commercial arbitration* (Eleven International, 2021).

[77]See Born, *supra* n 42, 1760, with further references and cases.

[78]IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association 2014).

[79]On the development of global ethical standards, see Lola Akin Ojelabi, "The Challenges of Developing Global Ethical Standards for Mediation Practice" in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023), text to fns 30 f; see also Tan, *supra* n 24, 141, who argues that the circumstances on the Non-Waivable Red List of the IBA Guidelines can be transposed to international mediation.

in itself is not sufficient and that the failure to disclose must have had a material impact or exerted undue influence. This drafting is unfortunate as it leaves entirely open how the failure itself should have influenced the mediation.

The unfortunate drafting may lead to different interpretations of the provision. One understanding of the requirement is to simply ask whether the party would have acted significantly different in the mediation if the disclosure had been made. Such a reading seems to be in line with the wording of the provision requiring that the failure to disclose had a material impact or exerted undue influence. Nevertheless, some authors argue for an even more restrictive understanding that requires a party to prove that the absence of impartiality or independence manifested itself in the conduct of the mediation.[80] If this reading were correct, a party would not only have to prove the failure to disclose but would also need to show that the mediator somehow improperly influenced the mediation in favour of the other party.[81] Such a requirement relating to the conduct of the mediation, however, does not fit squarely with the nature of a duty to disclose. The purpose of the disclosure is to make transparent the relationship of the mediator to the parties, and it should thus not depend on whether the mediator actually conducts the mediation in a partial or biased fashion. The duty to disclose exists independently of actual dependence and bias and, in any case, of a partial or otherwise inappropriate conducting of the proceedings. Misconduct other than failures to disclose should therefore exclusively be dealt with under Article 5(1)(e) of the Convention.[82]

Even under such a narrow construction of material impact or undue influence, it is necessary to define these ambiguous terms. It has been suggested that one should resort to existing common law jurisprudence in order to interpret the concepts also in the context of the Convention.[83] However, such resort to existing case law in common law jurisdictions risks compromising international uniformity, particularly since undue influence does not appear to be a uniform concept within and across common law jurisdictions.[84] It therefore seems preferable not

[80]Alexander, Chong and Giorgadze, *supra* n 10, paras 5.116–5.119; Chong and Steffek, *supra* n 50, 474.

[81]In this direction, Alexander, Chong and Giorgadze, *supra* n 10, para 5.118, with reference to *Olam v Congress Mortgage* Co 68 F Supp 2d 1110 (ND Cal 1999); see also Chong and Steffek, *supra* n 50, 474, with reference to *BOM v BOK* [2019] 1 SLR 349.

[82]This distinction was already expressly highlighted in the *travaux préparatoires*, see UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901 <https://undocs.org/en/A/CN.9/901> accessed 21 February 2023, para 73.

[83]Alexander, Chong and Giorgadze, *supra* n 10, paras 5.116–5.118, with several examples.

[84]For a general discussion, see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd edn, 2019) para 7-003: "[T]he concept of undue influence is notoriously difficult to define". On the distinction between equitable undue influence and probate undue influence in England, Law Commission, Making a Will,

to overburden Article 5 (1)(f) of the Convention with elusive domestic concepts. Another approach is to conduct a conflict-of-laws analysis and to leave the definition of undue influence and material impact to the governing law.[85] This would, however, essentially turn a standard established by the Convention into one of domestic law and lead to further uncertainty at the stage of enforcement. It seems therefore preferable to interpret the concepts of Article 5(1)(f) of the Convention in an autonomous and internationally uniform manner. Finally, it has been suggested to consider these terms essentially devoid of any independent meaning. In the context of failures to disclose, some authors argue that material impact and undue influence "need not be understood independently from the […] causal link".[86] As a consequence, whenever this causal link was established, "the impact was material or [the] influence […] undue".[87] Although this reading renders parts of the provision meaningless, it has the benefit of relative legal certainty and simplicity. If the terms carry any meaning at all, they may be understood as a reminder of the high threshold for refusal of relief.[88]

In addition to undue influence or material impact, Article 5(1)(f) requires a party to prove that it "would not have entered into the settlement agreement". The purpose of the requirement is to raise the threshold for parties trying to avoid enforcement.[89] While it will be difficult to prove what a party would have done if the mediator had disclosed the circumstances justifying doubts as to her impartiality and independence, the requirement is satisfied if a reasonable party would have been affected in their settlement decisions by the circumstances.[90] In practice, it seems very difficult to conceive of a situation in which a reasonable party would not be influenced in their settlement behaviour by the non-disclosure of circumstances that raise justifiable doubts as to the mediator's impartiality and independence. Although the express wording of Article 5(1) of the Convention does not allow for a presumption to that effect,[91] the requirement

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Consultation Paper 231 (2017) paras 7.36 ff; on undue influence in US succession law, Ronald J Scalise Jr., "Undue Influence and the Law of Wills: A Comparative Analysis" (2008) 19 *Duke Journal of Comparative & International Law* 41.

[85]Chong and Steffek, *supra* n 50, 482; Tan, *supra* n 24, 141.

[86]Yokomizo and Mankowski, *supra* n 17, para 5.67.

[87]Yokomizo and Mankowski, *supra* n 17, para 5.67.

[88]This is in line with the reply to concerns as to the ambiguity of the terms in the drafting process, see UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 6–10 February 2017), General Assembly, 50th session, 3–21 July 2017, A/CN.9/901 <https://undocs.org/en/A/CN.9/901> accessed 21 February 2023, para. 75. Regarding the potential legal uncertainty, some of the drafters seem to have been surprisingly optimistic. See ibid: "It was stated that while those terms might be novel, the enforcing authorities would not have much difficulty in interpreting them".

[89]Schnabel, *supra* n 10, 53.

[90]Schnabel, *supra* n 10, 54.

[91]Schnabel, *supra* n 10, 54.

will rarely not be satisfied if there are indeed circumstances raising justifiable doubts in terms of Article 5(1)(f) of the Convention.

The qualifications of Article 5(1)(f) *in fine* aim at preventing opportunistic challenges by parties that regret their agreement. However, this laudable purpose does not seem to justify the extent of the qualifications. While it is true that opportunistic challenges may arise, it is difficult to see why settlements that are facilitated by mediators who fail to disclose circumstances in the sense of Article 5(1)(f) of the Convention should enjoy such a high degree of enforceability. The purpose of the duty to disclose is not only to avoid biased outcomes or behaviour but also to protect the integrity of the mediation process as a whole. This integrity will suffer if a settlement is enforced despite a violation of the duty to disclose circumstances that fall under Article 5(1)(f) of the Convention because a party cannot establish precisely how the failure affected its settlement behaviour. More generally, the provision seems to underestimate the influence a mediator can subtly exert on the negotiations even where the parties receive legal advice, particularly through private caucus sessions and shuttle diplomacy. It appears that the drafters of the Convention missed an opportunity to provide a more meaningful sanction for non-disclosure. The potential enforcement of settlement agreements mediated by a mediator who was potentially affiliated with a party, or who was biased, might in the long term do a disservice to international mediation and its integrity. In interpreting the provision, courts should apply it in a way that enforcement is barred for mediations that did not meet the expectation of added legitimacy due to the intervention of a neutral third party. As discussed, they should therefore not place too much emphasis on the terms "undue influence" or "material impact" and refuse enforcement if mediators failed to disclose relevant circumstances in terms of Article 5(1)(f) of the Convention.

D. The challenge of confidentiality in proceedings under the Singapore Convention

Confidentiality is acknowledged as a key element of mediation.[92] It has even been described as the "*sine qua non* of the process"[93] and is a key reason why parties engage in mediation. The protection of confidentiality thus becomes one of the crucial questions for every mediation instrument. This is particularly pressing for rules on mediator misconduct as the party opposing relief will have to provide evidence as to the mediation process, including actions and statements of the parties and the mediator.[94] Given the importance of confidentiality and

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[92] Alexander, Chong and Giorgadze, *supra* n 10, para 5.06; Hopt and Steffek, *supra* n 2, 49; Gerhard Wagner, "Kapitel 7 Vertraulichkeit der Mediation" in Eidenmüller and Wagner (eds), *supra* n 40, 247.

[93] David A Hoffman and Vicki L Shemin, "The Uniform Mediation Act: Upgrading Confidentiality in Mediation" (2005) 33 *Massachusetts Lawyers Weekly* 2510.

[94] Alexander, Chong and Giorgadze, *supra* n 10, para 5.02; Takahashi, *supra* n 24, 78.

the obvious tension with the grounds for refusal, it is surprising that the Convention is completely silent on the issues of confidentiality and evidentiary privilege. The text that follows will consider the silence of the Convention (sub-part 1), the shifted focus on the law otherwise applicable to the confidentiality obligation (sub-part 2), and the admissibility of evidence and evidentiary privileges (sub-part 3).

1. *The silence of the Convention*

The words "confidentiality" and "privilege" are not mentioned in the Convention. This is surprising since Article 5(1) of the Convention expressly provides for defences focusing on the validity of the settlement agreement and the conduct of the mediator, defences that will, in many cases, require proof of acts or omissions within the mediation, particularly testimony of the persons present in the mediation, including the mediator.[95] Article 5(1) of the Convention could thus be read as overriding rules on privileges and confidentiality entirely – since such protections could curtail a party's right to provide proof of the elements of a defence under Article 5(1) of the Convention – or as requiring State Parties to revise their evidence rules accordingly.[96] As a result, Article 5(1) of the Convention would take precedence over domestic rules on confidentiality and privilege. This understanding would, however, be erroneous in light of the drafting history of the Convention. Many times during the drafting process, the drafters referenced the tension between the defences in Article 5(1) of the Convention and the confidentiality of the mediation.[97] The decision was taken, however, not to regulate confidentiality and privilege in the Convention and to leave it instead to the applicable domestic laws to address the tension between defences against enforcement and the protection of confidentiality.[98] Consequently, as a general matter, the Convention simply does not govern the questions of confidentiality and privilege.[99] To resolve the tension between the defences in

[95]Kallipetis, *supra* n 19, 1204; Anderson, Beaumont, and Verbist, *supra* n 17, 51.
[96]In this direction, Kallipetis, *supra* n 19, 1207; accord Yokomizo and Mankowski, *supra* n 17, para 5.63; see also Zhao, *supra* n 5, 557, asking whether confidentiality rules are compatible with the Convention.
[97]UNCITRAL Working Group II (Dispute Settlement), 65th Session, 12–23 September 2016, A/CN.9/WG.II/WP.198, <https://undocs.org/en/A/CN.9/WG.II/WP.198> accessed 21 February 2023, para 46; UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 12–23 September 2016), General Assembly, 50th session, 3–21 July 2017, A/CN.9/896 <https://undocs.org/en/A/CN.9/896> accessed 21 February 2023, para 120.
[98]UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (New York, 12–23 September 2016), General Assembly, 50th session, 3–21 July 2017, A/CN.9/896 <https://undocs.org/en/A/CN.9/896> accessed 21 February 2023, para 121; Zhao, *supra* n 5, 545.
[99]Schnabel, *supra* n 10, 18; Zhao, *supra* n 5, 545.

Article 5(1) of the Convention and the protection of confidentiality, the focus shifts to the otherwise applicable law. While Article 5(1) of the Convention requires a party to furnish proof to the competent authority, it does not contain any evidentiary rules or limits on the admissibility of evidence. Therefore, the question is whether the Convention contains any guidance regarding choice of law principles that may point to the law applicable to confidentiality and privilege.

2. *The law applicable to confidentiality obligations*

The first question concerns the law applicable to the confidentiality obligations concerning the mediation. These obligations will typically be contained in the mediation agreement and the mediator contract or form part of institutional mediation rules that are incorporated into these agreements.[100] They will be governed by the substantive law that is applicable to the mediation agreement and/or the mediator contract.[101] Even absent such contractual confidentiality obligations, mediation laws may include statutory confidentiality obligations falling upon the mediator and/or the parties.[102]

3. *The law applicable to the admissibility of evidence and mediation privilege*

The second question is which law determines whether evidence that is submitted in violation of confidentiality obligations is, in principle, admissible in the enforcement proceedings and whether the mediator can eschew testimony by invoking a mediation privilege. There is no clear rule in the Convention that is specifically tailored to the question of admissibility of evidence or evidentiary privilege. There is also no indication that the Convention seeks to address the law governing the protection of confidentiality in the enforcement proceedings or, more specifically, to the extent of the privilege enjoyed by the mediator. The only viable option seems to be for the issues of protection of confidentiality and the existence and extent of a mediator's privilege to be governed by the *lex fori*. This is in line with Article 3(1) of the Convention, pursuant to which enforcement is to occur in accordance with a State's rules of procedure. The "rules of procedure" in the sense

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[100] See, e.g., DIS Mediation Rules (2010), s 10; ICC Mediation Rules (2014), Art 9; AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule M-10; on different ways to protect confidentiality by party agreement, see Alexander, Chong and Giorgadze, *supra* n 10, paras 5.19–5.21.

[101] Ulrich Magnus, "Rome I Regulation" in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (degruyter, 2021) Art 1, para 76; Felix Steffek, "Internationales Recht", in Reinhard Greger, Hannes Unberath and Felix Steffek (eds), *Recht der alternativen Konfliktlösung* (CH Beck, 2nd edn, 2016) paras 7, 21.

[102] See, e.g., German Mediation Act, s 4.

of this provision include the matters of admissibility of evidence and evidentiary privileges. Regarding, for example, the proof of mediator misconduct under Article 5(1)(e) of the Convention, the question of whether the mediator can be compelled to testify as to her conduct during the mediation or disclose notes from the mediation will thus depend on the law of the jurisdiction in which relief is sought.

Although in line with the generally recognised principle that the law of the forum governs procedural matters, the application of the forum's rules on admissibility of evidence and privilege at the enforcement level may lead to immense uncertainty for the parties.[103] Enforcement may be possible due to strict rules of privilege in one jurisdiction, yet it may be blocked in another jurisdiction if there is no privilege for mediation communications and the defence based on Article 5 (1)(e) of the Convention proves successful. The existence and the extent of mediation privileges and the protection of confidentiality varies considerably from one jurisdiction to another.[104] While some jurisdictions provide for very strict privileges that are subject to only very few exceptions,[105] others recognise no such privilege[106] or allow for many exceptions.[107] Regulation also varies significantly regarding who is a holder of the privilege, specifically whether a mediator holds an independent privilege or whether it can be waived by the parties.[108]

There may, of course, be other ways to protect confidentiality of the mediation in practice: mediators may choose not to testify, particularly if they are not domiciled in the jurisdiction where relief is sought, or courts may ensure external confidentiality by excluding the public from the enforcement proceedings. Even more importantly, parties may also try to address the issue in the mediation or

[103]David A Hoffman, *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals* (Massachusetts Continuing Legal Education, 2013) 6–17.
[104]See, for instance, Manon Schonewille and Fred Schonewille (eds), *The Variegated Landscape of Mediation, A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing 2014).
[105]See, e.g., in Massachusetts, G.L. c. 233, §23C; but see also *Bobick v. U.S. Fid. & Guar. Co.*, 489 Mass. 652, 658, n.11 (2003), providing an exception for mediator misbehaviour; but see *Mozer v Augustine* Cal.App. 2 Dist (2019) WL 4439664 (unpublished), rejecting an exception to the privilege in cases of non-disclosure, discussed by Alexander, Chong and Giorgadze, *supra* n 10, para 5.18; for Germany, see Mediation Act, s 4.
[106]For the case of Denmark, Lin Adrian, "Denmark", in Schoneville and Schoneville (eds), *supra* n 104, 119, 124.
[107]See, for instance, Uniform Mediation Act (2002), s 6.
[108]For the mediator as holder of the privilege, e.g., Uniform Mediation Act (2002), s 4 (b)(2); see also ss 383(1),(6), 385(2) of the German Code of Civil Procedure, pursuant to which the parties can jointly waive the mediator's privilege; on German law, see Jörg Risse, "Das Mediationsgesetz – Eine Kommentierung" (2014) *German Arbitration Journal* 244; Wagner, *supra* n 92, 260; for an overview, see Alexander, Chong and Giorgadze, *supra* n 10, para 5.12.

settlement agreement.[109] Some of the questions regarding the parties' ability to exclude litigation over Article 5(1)(e) and (f) or protect the confidentiality of the mediation throughout the process will be discussed in the following section.

E. Mediator misconduct and party autonomy

Mediation is a voluntary and autonomous process. Parties may therefore try to modify or waive the grounds for refusal of Article 5(1)(e) and (f) of the Convention (sub-part 1) or try to ensure confidentiality of the mediation at the enforcement stage (sub-part 2).

1. *Modification or waiver of refusal for mediator misconduct*

As described above, a closer look at Article 5(1)(e) of the Convention reveals many uncertainties for the parties to the settlement agreement at the stage of enforcement. Parties may therefore wish to limit the scope of Article 5(1)(e) *ex ante*. As demonstrated by the possible reservation in Article 8(1)(b) of the Convention,[110] the application of the Convention does not depend on an agreement by the parties to that effect.[111] While parties can agree that the settlement agreement should not be enforced under the Convention pursuant to Article 5(1)(d), the Convention does not provide a provision that allows parties to derogate from specific provisions comparable to Article 6 of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[112] There is, however, still considerable room for parties to remove some of the uncertainty at the enforcement stage. Firstly, parties can choose to include a choice of law clause in both the mediation agreement and the settlement agreement. The choice of law clause eliminates most uncertainties linked to the applicable law and standards mentioned above. Additionally, parties can limit enforcement to specific jurisdictions, to the exclusion of other jurisdictions. Such a restriction will be respected pursuant to Article 5(1)(d) of the Convention.[113] Secondly, parties may wish to

[109] Alexander, Chong and Giorgadze, *supra* n 10, paras 5.19–5.21.
[110] See, Art 8(1)(b): "A Party to the Convention may declare that: […] (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention."
[111] For a discussion on the different choices of the drafters at an early stage, see UNCITRAL Working Group II (Dispute Settlement), 68th Session, 5–9 February 2018, A/CN.9/WG.II/WP.205 <https://undocs.org/en/A/CN.9/WG.II/WP.205> accessed 21 February 2023, paras 29 ff.
[112] UN Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG). While the parties may thus exclude enforcement under the Singapore Convention *in toto* or can further restrict enforcement within its enforcement regime under Art 5(1)(d), there is nothing to suggest that parties can modify the grounds for refusal in Art 5 of the Convention.
[113] Alexander and Chong, *supra* n 10, paras 5.37–5.38.

define certain terms, specifically the term "serious breach". They may, for example, restrict the notion of serious breach to specific forms of conduct. While the parties cannot change the meaning of "serious breach" in Article 5 (1)(e) of the Convention, the competent authority will have to take the parties' stipulations and expectations into account in determining whether a breach was serious *in casu*. Similarly, parties may include a clause in the settlement that they were not affected by any conduct of the mediator in their decision to settle. While not changing the requirements of Article 5(1)(e), this may raise the evidentiary burden for the party against whom relief is sought. Thirdly, and most problematically, parties may try to waive the right to rely on Article 5 (1)(e) and (f) of the Convention in the mediation agreement or in the settlement agreement. The permissibility of such an approach in issue is disputed in respect of Article V of the 1958 New York Convention.[114] A general waiver of Article 5 (1)(e) in the mediation agreement prior to occurrence of the breach seems far-reaching, since the parties are not yet aware of breach and its impact.[115] For the same reasons, a waiver in the settlement agreement should not affect a party's right to rely on Article 5(1)(e) and (f) of the Convention where the party was not aware of the breach at that moment of the conclusion of the settlement agreement, for example, where internal confidentiality was breached in a private caucus session with the other party. The parties may, however, stipulate in the settlement agreement that their settlement behaviour was not affected in any way by the conduct of the mediator or by her potential failure to disclose relevant circumstances. This may at least raise the evidentiary burden for the party opposing relief under Article 5(1)(e) and (f) of the Convention. The problem is more nuanced if the party is already aware of the breach at the time of conclusion of the settlement agreement. In those cases, it seems that a party can at least in theory assess its rights and the seriousness of the breach. A waiver in the settlement agreement should therefore, in principle, be possible. However, reliance on Article 5(1)(e) and (f) of the Convention may in any case be barred due to the lack of a causal link between the breach and the decision to settle.

2. *Preservation of confidentiality throughout enforcement*

Absent a legal duty of confidentiality,[116] parties can agree on the confidentiality of the mediation in their mediation agreement. This is expressly recognised in most

[114]Christian Borris and Rudolf Hennecke, "Article V General" in Wolff (ed), *supra* n 42, 239, 261 ff.
[115]For this position on Art V of the 1958 New York Convention, see Borris and Hennecke, *supra* n 114, 263; on the inadmissibility of advance waivers in international commercial arbitration, see Angoura, *supra* n 76, 204–206; Beimel, *supra* n 76, 267–270.
[116]See, e.g., in Massachusetts, G.L. c. 233, §23C; for a legal duty imposed on the mediator and her staff in Germany, see Mediation Act, s 4.

mediation laws,[117] and many institutional mediation rules provide for confidentiality obligations for the parties and the mediator.[118] While some institutional rules contain more lenient confidentiality obligations that may not exclude evidence on the mediator's conduct,[119] others impose strict confidentiality duties that exclude any submission of evidence in terms of Article 5(1)(e) of the Convention.[120] The most important question under the Convention is whether contractual confidentiality clauses can have an impact on a party's right to submit evidence to the competent authority.[121] While confidentiality obligations can exclude a party's right to submit evidence pertaining to the mediation in a court proceeding,[122] the court is not bound by the parties' confidentiality agreement[123] unless the procedural law of the forum so provides. Additionally, the sanctions for the breach of the confidentiality agreement will depend on the law of forum.[124] Sanctions can range from the inadmissibility of the submissions or the evidence to mere damages for the breach of the confidentiality agreement.[125] Courts will therefore have to establish the relationship between the grounds for refusal under Article 5(1) of the Convention and contractual confidentiality obligations and their impact on the admissibility of evidence. Since the Convention does not govern confidentiality obligations, the consequences of confidentiality clauses and potential exceptions will depend on the law applicable to the issue of confidentiality, which in most cases will be the law chosen in the mediation agreement; by contrast, the procedural consequences of such clauses will normally be governed by the law of the forum pursuant to Article 3 (1) of the Convention.

As the forum will determine the applicable rules of privilege and confidentiality, parties may have other options to influence the applicable law. While a choice of law clause will probably not be effective regarding rules on evidentiary privilege, parties can include forum selection clauses in the settlement agreement

[117] See, for instance, Uniform Mediation Act (2002), s 8.

[118] See, e.g., AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule M-10 (3); DIS Mediation Rules (2010), s 10; ICC Mediation Rules (2014), Art 9 (2); IMI Model Mediation Rules (2016), Art 7.

[119] See, e.g., AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule M-10 (3).

[120] See, e.g., ICC Mediation Rules (2014), Art 9 (2); IMI Model Mediation Rules (2016), Art 7.

[121] In this direction, Anderson, Beaumont, and Verbist, *supra* n 17, 55.

[122] See, for certain types of facts, AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule M-10 (3).

[123] See, Alexander, Chong and Giorgadze, *supra* n 10, para 5.21; Anne M Burr, "Confidentiality in Mediation Communications: A Privilege Worth Protecting" (2002) 57 *Dispute Resolution Journal* 64; Goldberg, Sander, Rogers and Cole, *supra* n 36, 442.

[124] On the discussion in German law, Wagner, *supra* n 92, 275 f.

[125] The issue is disputed in German law, see, e.g., Wagner, *supra* n 92, paras 71 ff., with arguments for the inadmissibility of evidence.

and, for instance, exclude enforcement of the settlement in specific jurisdictions under Article 5(1)(d) of the Convention.

F. Concluding remarks

Article 5 (1)(e) and (f) of the Convention successfully establishes a baseline for mediator conduct in international commercial mediation. By denying enforcement in specific cases, this generally strengthens the legitimacy of enforcing mediated settlements. Disapproval voiced against the existence of grounds for refusal seems to be misplaced in so far as the critique relies on the freedom of the parties to leave the mediation at any time,[126] or on the lack of an adjudicative function of the mediator.[127] The latter point fails to recognise that the justification for having expedited enforcement without the intervention of an adjudicator is not based solely on the autonomous decision of the parties but also on the recognition of the mediation procedure as the source of procedural legitimacy. The former point not only undersells the influence that a skilled mediator can exert in the negotiation of a settlement but also fails to explain why enforcement should be privileged despite blatant violations of basic norms of procedural fairness. This is most obvious regarding the disclosure obligation in Article 5(1)(f) of the Convention that serves to preserve the legitimacy of mediated outcomes. Particularly in light of the backlash in some quarters against international arbitration,[128] it is important to defuse any appearance of bias that could threaten the legitimacy of international mediation. The duty to disclose also does not revolutionise international mediation as it merely codifies a standard practice that is supported by a broad international consensus.[129] Contrary to some critiques,[130] Article 5 (1)(f) of the Convention does not impose on the parties a requirement to choose an impartial and independent mediator. Parties are still free knowingly to select a mediator with a conflict-of-interest who is, for her part, merely required to disclose all relevant circumstances under Article 5(1)(f) of the Convention.

The provisions on mediator misconduct may, however, very well be the result of a hard-fought compromise that is on the whole consistent with the purpose of the Convention and suited to preserving the legitimacy of mediated outcomes enforced under the Convention. The rules provide a baseline that is, on the one side, unlikely to provoke a myriad of opportunistic challenges and, on the other, apt to protect international mediation's reputation as a mechanism for

[126]Anderson, Beaumont, and Verbist, *supra* n 17, 54.
[127]Takahashi, *supra* n 24, 72 f.
[128]See, e.g., Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010).
[129]Hopt and Steffek, *supra* n 2, 76; for institutional rules, see AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule M-5 (2); DIS Mediation Rules (2010), s 3(2); ICC Mediation Rules (2014), Art 5(3); LCIA Mediation Rules (2020), Art 4(1).
[130]On this criticism in the drafting of the Convention, Schnabel, *supra* n 10, 53.

alternative dispute resolution. It can be hoped that the existence of the provisions on mediator misconduct will allow courts to develop an internationally coherent body of case law over time without the need to resort to public policy so as to prevent enforcement in cases of egregious mediator misconduct.

The deficiencies in the provisions lie in their details and omissions. Firstly, the omission of a choice of law rule regarding the applicable standards under Article 5(1)(e) of the Convention is regrettable. The Convention could have borrowed the concept of a "seat" from the 1958 New York Convention and made clear which standards apply. The reliance on domestic choice of law rules seems to introduce an unnecessary degree of uncertainty for parties who will not necessarily know at the outset in which jurisdiction relief will be sought. Secondly, the introduction of elusive concepts like undue influence or material impact in Article 5(1)(f) of the Convention may create some of the very ancillary disputes that the drafters intended to prevent. Lastly, and most importantly, the Convention should have addressed the tension between the provision on mediator misconduct and confidentiality. It is evident that the Convention cannot deal with every procedural aspect and must leave most of the procedural questions to the law of the State Parties. However, the lack of guidance in the Convention on the issue of confidentiality opens the door to disputes over: (1) which evidence is admissible under the rules of the forum; and (2) to what extent contractual confidentiality obligations will be enforced in enforcement proceedings. Meaningful uniformity at the enforcement level would include a balancing of the interest in confidentiality of the process, on the one hand, and the need to provide evidence to prove the grounds for refusal on the other. To leave these controversial issues to domestic laws may increase the overall acceptability of the Convention to potential contracting States. Yet in practice it may undo some of the benefits of unification and lead to legal uncertainty for the parties in contentious enforcement proceedings.

Acknowledgements

The author is grateful to Elizabeth Dakash, Michael Friedman and David Hoffman for their comments on earlier drafts of this article. He also thanks the anonymous reviewers and the editors for their helpful comments.

Disclosure statement

No potential conflict of interest was reported by the author(s).