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The Singapore Convention on Mediation

Lecture recorded on 2 October 2025, at UNHQ, New York

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1. A very good day. My name is Natalie Morris Sharma and I'm a Singapore Government Legal Counsel. I'm honoured to contribute this lecture on the Singapore Convention on Mediation to the United Nations Audiovisual Library. This lecture is informed by my involvement as the Chairperson of the negotiations that developed this treaty, as well as the amendments that led to the 2018 UNCITRAL Model Law on Mediation.

2. The Singapore Convention on Mediation was developed in response to the barrier posed by the lack of a unified cross-border mechanism, giving legal effect to international mediated settlement agreements.

3. The Convention, which is to mediate its settlement agreements – what the New York Convention is to arbitral awards – has also been called the missing third piece in the International Dispute Resolution Enforcement Framework, joining the Hague Conventions and the New York Convention. It was inspired by the New York Convention and is a pithy treaty. A lot has been distilled into and can be distilled from the 16 articles, and I hope to be able to unpack some of that during today's lecture.

4. I will begin my lecture with a brief introduction to the history and context of the Singapore Convention on Mediation, as well as a brief introduction to mediation, its benefits and how we can define it. I will then expand upon some of the key provisions of the Singapore Convention on Mediation: general principles (1), scope of application (2), form requirements (3) and grounds for refusal (4), as well as – number five – reservations (5). After that, I will

wrap with concluding remarks, and I hope that through this lecture you will have a better understanding of the Singapore Convention on Mediation.

5. This is important as consistent interpretation and application of the Singapore Convention, particularly by legislatures and competent authorities, is critical so that the effort at unification is not undermined by divergent approaches to the implementation of the Convention.

6. So here we go: brief history and context. The long-form name of the Singapore Convention on Mediation is the Convention on International Settlement Agreements Resulting from Mediation. The Singapore Convention on Mediation entered into force on 12 September 2020 and it was developed through a multilateral process by consensus at UNCITRAL. The United States put the proposal of the Convention on the table in 2014, and the text of the Convention was finalized and adopted in 2018. The Convention opened for signature in Singapore on 7 August 2019 with 46 countries from all the regions of the world signing the Convention and more have signed since.

7. So, let's turn now to the benefits of mediation. Mediation has many known benefits. It promotes the best solution for the individual case and is a time-effective and cost-effective form of dispute resolution. Mediation is non-adversarial. It's intended to be more informal, less "juridified". It places focus on the interests of the parties, unlike other forms of dispute resolution which prioritize the legal rights and positions of the disputing parties. And mediation permits the exploration of solutions beyond the four corners of the dispute. It empowers the parties to take into account wider operational and other considerations when discussing their settlement, and solutions are not confined to legal or monetary solutions.

8. A win-win outcome and less adversarial process overall also bodes well for preserving or repairing the relationship of the disputing parties. With party control over the process, it means that the dispute settlement process can adjust flexibly to the needs of the disputing parties and the resolution of their dispute, including regarding elements such as the involvement of third-party stakeholders.

9. Notwithstanding all these known benefits of mediation, there were surveys that showed that the lack of a uniform international framework for the enforcement of international mediated settlement agreements had been “a major obstacle to the development of global mediation practice”.

10. Without the Singapore Convention on Mediation, disputing parties that reach a mediated settlement agreement generally seek to utilize contract actions, court orders, or even consent awards in the New York Convention for cross-border enforcement. But there are complexities and inherent uncertainties in these approaches.

11. One of the purposes behind the Singapore Convention on Mediation was to “address the enforceability of settlement agreements directly, rather than [rely] on the legal fiction of deeming them to the arbitral awards”. There is now greater certainty with the Singapore Convention on Mediation, which will thereby encourage the uptake of mediation as a form of dispute resolution.

12. Most notably, it was already recognized from the start that the existence of a convention would in and of itself encourage the use of mediation. Very few settlement agreements require enforcement or would likely require resort to the Singapore Convention on Mediation.

13. Mediation is such that having invested in a decision to settle, having decided on the terms of the resolution, parties to a settlement agreement are more likely to implement the legally binding agreement that they had arrived at by themselves to reflect their settlement than they would be in the case of an externally imposed outcome.

14. The Singapore Convention on Mediation may very well be little used in post-settlement litigation. However, the fact remains that the value of the Singapore Convention on Mediation is in encouraging the use of mediation by offering disputing parties greater certainty in the outcome of their mediated settlement agreements.

15. I have briefly introduced the history in the context of the Singapore Convention on Mediation and before we get to some of the key provisions of the Singapore Convention, let us first understand what does mediation mean for the purposes of the Singapore Convention on Mediation? Well, mediation is defined in the Singapore Convention on Mediation as "a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach a settlement of their dispute with the assistance of a third person or persons (the mediator) lacking the authority to impose a solution upon the parties to the dispute".

16. There are two points to note. First, mediation uses an impartial third party to assist in the resolution of disputes. And second, unlike arbitration where the third-party adjudicator imposes a decision on the disputing parties, in mediation there is no "external imposition" of a settlement outcome. Rather, the settlement is reached by the disputing parties themselves with the assistance of a third-party mediator.

17. The definition of mediation in the Singapore Convention on Mediation encompasses any process that meets the elements as set out in the definition. This could include conciliation, mutual evaluation and other such processes regardless of the nomenclature. The definition of mediation is intended to encompass a wide variety of approaches to mediation in practice around the world, including the different mediation techniques such as facilitative or evaluative mediation. There is no requirement for mediation to be structured or to be conducted under the auspices of an institution or by a mediator with specific qualifications. There is also no limitation on the types of remedies, whether monetary or non-monetary, and a settlement agreement might resolve matters that are not contemplated when the mediation started or matters not discussed during the mediation.

18. So, with a better understanding now of how mediation is defined, we can turn to some of the key provisions of the Singapore Convention on Mediation.

19. First up: general principles. There are two general principles in the Singapore Convention on Mediation. First, Parties to the Singapore Convention would continue to apply their own rules of procedure. Like the New York Convention, the Singapore Convention on Mediation establishes a framework for cross-border enforcement of dispute settlement outcomes while leaving Parties to apply the relevant rules of procedure. In respect of the Singapore Convention on Mediation, this is expressly set out in Article 3, paragraph 1.

20. Second, the term "recognition and enforcement" does not appear in the Singapore Convention on Mediation but is articulated in the functional terms of enforcement or invocation. In other words, a settlement agreement would not only be capable of being enforced, but it could also be invoked as a defense if a dispute arises concerning a matter that a party to the settlement agreement claims was already resolved by the settlement agreement. And with the Singapore Convention on Mediation, there is no longer a need to transform an international mediated settlement agreement into another enforceable instrument, such as a court judgment or an arbitral award before it can be relied upon before a court. In fact, if an international mediated settlement agreement is thus transformed into court judgment or an arbitral award, then the Singapore Convention on Mediation would not apply.

21. This brings me to my second point: scope of application. The Singapore Convention on Mediation quite simply applies to (1) international, (2) commercial, (3) settlement agreements (4) resulting from mediation.

22. The internationality of a mediated settlement agreement is based on the relative geographies of the disputing parties. And this is unlike the New York Convention, which refers to "foreign" arbitral awards. There is no reference in the Singapore Convention to foreign mediated settlement agreements. To define an award as foreign, it must be foreign in respect to something or somewhere, and this is where the notion of a seat of arbitration is useful.

23. However, settlement agreements typically do not have a legal seat in the same way that arbitral awards have. And amongst other implications, this means that there is no requirement for the mediation or the settlement to comply with the domestic legal requirements of any particular State of origin. And no one State has the ability to set aside a settlement agreement in a manner that would be binding on other jurisdictions.

24. So, that is "internationality"; and now resolving a "commercial" dispute. The term "commercial" is not defined in the Singapore Convention on Mediation, and it is to be broadly understood. Commercial settlement agreements include agreements involving government entities for one and, at the same time, the Singapore Convention on Mediation does not apply to settlement agreements concluded to resolve a consumer dispute or relating to family inheritance or employment law.

25. Notably, the broad understanding of commercial international mediated settlement agreements means that the Singapore Convention on Mediation, by default, applies to settlement agreements in the investor-State dispute settlement context. In fact, the Singapore Convention on Mediation has already been taken into consideration by various investment mediation rules. The most recent set of ICSID Mediation Rules, as well as ICSID Conciliation Rules, for example, rely on the Singapore Convention on Mediation to provide an enforcement mechanism for settlement agreements reached through these rules.

26. After "international" and "commercial", is the element of "settlement agreements". In terms of "settlement agreements", the Singapore Convention on Mediation does not apply to settlement agreements that have been approved or recorded as a judgment or arbitral award, and are possible of being enforced as such. This is to avoid overlaps or gaps with the Hague Conventions and the New York Convention.

27. Importantly, recognition is only in respect of the mediated settlement agreement and not the agreement referring the dispute to mediation. This departs from the approach in the New York Convention in respect of arbitration agreements – that is, where the New York Convention applies to agreements referring to a dispute to arbitration.

28. In the case of arbitration agreements, there is the issue of the exclusive nature of such an agreement, creating the need for their recognition. The negotiators of the Singapore Convention on Mediation considered that this did not necessarily arise with respect to agreements to mediate.

29. And finally: “resulting from mediation”. And this aspect is key. Mediated settlement agreements can be justified as meriting direct enforcement because they are distinguishable from mere contracts. This is owing to the involvement of a third-party mediator as a catalyst, and because there is an exercise of party autonomy in arriving at the mediated settlement agreement, which is different from the mutual assent that can be witnessed for a mere contract. In other words, mere negotiations do not suffice. And parties to a settlement agreement cannot agree to the application of the Singapore Convention on Mediation if there was no mediation from which their settlement agreement resulted.

30. With that, we wrap on the scope of application and can now turn to the form requirements. The form requirements that need to be met in order for the Singapore Convention on Mediation to apply are simple and straightforward. The Singapore Convention on Mediation may apply so long as the settlement agreement is in writing, signed by the parties, and so long as there is evidence that the settlement agreement resulted from mediation. The Singapore Convention on Mediation provides an illustrative list of the types of evidence.

31. Moving on now to the third point: grounds for refusal. Article 5, paragraph 1, of the Singapore Convention on Mediation exhaustively sets out the grounds for refusal that may be raised by the parties to the settlement agreement. Article 5, paragraph 2, refers to the grounds that may be raised by the competent authority on its own initiative, namely on the grounds of public policy or where the subject matter is not capable of a mediated settlement.

32. The grounds for refusal in Article 5, paragraph 1, are tailored to the practice of mediation. Some of the grounds in the Singapore Convention were inspired by those in the

New York Convention. That being said, there are a number of grounds for refusal in the New York Convention that are not found in the Singapore Convention on Mediation and vice versa.

33. The grounds for refusal in Article 5, paragraph 1, are (1) where there was incapacity of a party to the settlement agreement; (2) where the settlement agreement was null and void, not binding or final or subsequently modified – so a ground for refusal that would address instances of fraud, for instance, or misrepresentation; (3), where the obligations were performed are not clear or comprehensible; (4), where relief would be contrary to the terms of the settlement agreement and, in terms of the fifth and sixth grounds, where there was a serious breach by the mediator of standards applicable to him or her or to the mediation, or where the mediator failed to disclose to the disputing parties circumstances that raised justifiable doubts as to his or her impartiality or independence. On the fifth and sixth limbs, the serious breach of applicable standards or the failure to disclose must have had a material undue influence on a disputing party.

34. The inclusion of these grounds for refusal on mediator misconduct demonstrates recognition of the mediation procedure as the source of procedural legitimacy. The grounds for refusal on mediator misconduct are intended to apply only in exceptional circumstances.

35. A few general remarks on the grounds for refusal in general are in order, in respect of two questions. First, *how exhaustive*, and two, *whether waivable*.

36. How exhaustive? First of all, the Singapore Convention on Mediation's primary promise is to give legitimacy to mediation. As an amicable process that is founded upon party autonomy through the conclusion and outcome of the mediation, the expectation is that the Singapore Convention on Mediation will not itself create avenues for significant litigation. The purpose of the grounds for refusal is to foreclose defenses based on unique domestic law requirements. This means that domestic law requirements such as on the licensing of mediators, the use of institutional mediation, or the notarization of mediated settlement agreements cannot be referred to in and of themselves as form requirements or

grounds for refusal of the enforcement of the mediated settlement agreement since they would be additional to what is reflected in the Singapore Convention on Mediation.

37. Now, that is not to say that other domestic laws or international law obligations of a party to the Singapore Convention on Mediation are irrelevant or must be subordinated for the purposes of enforcing a mediated settlement agreement pursuant to the Convention. Examples of these include confidentiality and sovereign immunity.

38. On *confidentiality*, the Singapore Convention on Mediation is silent on the issue. This was a deliberate decision on the part of the negotiators. The tension between the confidential nature of mediation and need for information to be disclosed for purposes of enforcement was recognized. However, the overwhelming view was that there was no need for the Singapore Convention on Mediation to include a provision on confidentiality since this was a matter addressed by domestic legislation in enforcing jurisdictions.

39. Where required though, certainty can still be enhanced through other means and this includes proactive steps on the part of the disputing parties, such as explicit confidentiality clauses in mediation agreements, in mediated settlement agreements, and through choice of law and forum selection clauses.

40. Now, the Singapore Convention on Mediation also does not delve into the issue of sovereign immunity and this too was deliberate. The negotiators had noted that issues relating to sovereign immunity did not need to be regulated under the Singapore Convention on Mediation. Instead, it would be for the enforcing authority to decide on such questions on the basis of the applicable public international law norms, specifically the applicable rules on foreign State immunity.

41. So, that was *how exhaustive*. Next, *whether waivable*. Another often asked question is, can the grounds for refusal in the Singapore Convention on Mediation be waived? There is no provision for that in the treaty. In the context of discussions in the literature on the grounds for refusal on mediator misconduct in particular, it has been suggested that a State that needs to pass legislation to implement the Singapore Convention

on Mediation may do so while omitting Article 5(1), paragraph (e), and that this would not be in violation of the Singapore Convention on Mediation.

42. To those who consider Article 5(1)(e) to be problematic, this may seem at first blush like an attractive option. However, the suggested approach of simply not implementing Article 5(1)(e) overlooks the fact that the competent authority is provided with the room to decide whether or not to refuse enforcement on such a ground after being furnished with the requisite proof. Taking away Article 5(1)(e) altogether at the stage of crafting the implementing legislation would impact the right of the party defending against the claim for relief to furnish proof regarding the ground for refusal.

43. Such an approach, which would in effect be a modification of the Singapore Convention on Mediation as it applies to the implementing State, would also raise questions as to its compatibility with the spirit of Article 8, paragraph 2. Article 8, paragraph 2, specifically provides that no reservations are permitted to the Singapore Convention on Mediation, except those expressly authorized in Article 8, paragraph 1.

44. Further, as a matter of principle, it would be difficult to distinguish between permitting parties to the Singapore Convention on Mediation to choose whether or not to implement Article 5(1)(e), and not permitting them to choose whether or not to implement other of the grounds of for refusal or for that matter other parts of the treaty. This risks a slide down a slippery slope that would likely undermine the unification effort of the Singapore Convention on Mediation.

45. So, if the desire is to specify the standards applicable to a mediator or mediation referred to in Article 5(1)(e) for example, this could instead be done at the level of contracts. Disputing parties could choose to include a choice of law clause in both the mediation agreement and the settlement agreement. Disputing parties could also limit the enforcement to specific jurisdictions to the exclusion of other jurisdictions.

46. To an extent, at the level of the disputing parties, there is no want of available options, in contrast to the limitations on the part of parties to the Singapore Convention on Mediation.

47. With that, I wrap on the grounds for refusal and move to the final key provision in the Singapore Convention on Mediation that I will be covering in this lecture – and that is on reservations.

48. A reservation is a unilateral statement made by a Party to a treaty when signing, ratifying or acceding to a treaty that purports to exclude or modify the legal effect of certain provisions of the treaty as applied to that Party. Reservations provide space for Parties to not abide by the obligations and provisions that they may not be able or willing to implement fully. At the same time, reservations can result in a treaty regime being less unified than intended because of the modifications introduced between relevant parties in the event of a reservation being launched.

49. The Singapore Convention on Mediation expressly permits two reservations. The reservations may be made by a Party to the Singapore Convention at any time and not just at the time of signature, ratification, or accession. They may also be withdrawn at any time, and any reservation or withdrawal will only take effect six months after they are made and apply only to settlement agreements concluded after the date when the reservation or withdrawal enters into force for the party concerned.

50. First, a Party may declare that it shall not apply the Convention to settlement agreements to which it or its agencies or agents is a party to the extent specified in the declaration. That's the first reservation. And this was included because a blanket exclusion of settlement agreements concluded by government entities was seen as undesirable since government entities do engage in commercial activities.

51. Without such a reservation being entered by a Party to the Convention, the Singapore Convention on Mediation would by default apply to settlement agreements involving government entities. Conversely, in the event a reservation pursuant to Article

8(1)(a) of the Singapore Convention on Mediation is made by a Party to the Convention, then the Singapore Convention on Mediation would not apply to the extent stated in the reservation.

52. The second reservation that is articulated in the Convention is that a Party may declare that it shall apply the Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention. And this was included as a compromise to bridge between delegations that saw express consent as a natural follow-through of the consensual nature of mediation and delegations that viewed express consent as undermining the Singapore Convention on Mediation's objective of promoting mediation and the ease of enforceability.

53. The default position under the Singapore Convention on Mediation is that parties to an international settlement agreement need not confirm their consent to enforce their obligations in the settlement agreement in order for the Singapore Convention on Mediation to apply. So, as long as the terms in the Singapore Convention on Mediation are met, the Convention would apply to the settlement agreement where it is sought to be relied upon or invoked before the competent authority of a party to the Singapore Convention on Mediation.

54. However, where a Party to the Singapore Convention on Mediation has made a declaration under Article 8(1)(b) of the Singapore Convention, this default position has changed. This means that the parties to a settlement agreement would need to opt in in order for the Singapore Convention on Mediation to be relied upon or invoked before the competent authority of that Party.

55. The provision of this declaration in the Singapore Convention on Mediation was one of the five issues in a package deal that was part of a larger bargain that was struck in the negotiations and that tied four other issues with it.

56. For some delegations, requiring the disputing parties to express the consent to the enforcement regime was a natural follow-through of the consensual nature of mediation, of party autonomy, of being fully aware of what the disputing parties were agreeing to. And

introducing a requirement of expressed consent would also serve the function of raising the awareness of the disputing parties of the question of enforceability. For these delegations, potentially surprising disputing parties with a novel feature of mandatory enforceability risked undermining the amicable nature of the mediation process.

57. For other delegations, requiring expressed consent would result in the Singapore Convention on Mediation being less used. It would undermine the Singapore Convention on Mediation's objective of promoting international commercial mediation, as well as the ease of enforceability of mediated settlement agreements in commercial matters. Practically speaking, disputing parties would unlikely be interested in having further discussions regarding enforcement after they've reached their settlement. By that stage of the mediation process, disputing parties are more likely to form the expectation that the other party would comply with the settlement agreement that they jointly reached. Requiring opt-in for applicability of the enforcement regime would run counter to these expectations.

58. So, between having an opt-in or opt-out mechanism, on the one hand, and the Singapore Convention on Mediation not explicitly providing for either option for disputing parties, on the other hand, delegations were divided. And ultimately, it was decided to have a declaration providing signatory States to the Singapore Convention with the option of requiring disputing parties to agree to apply the expedited enforcement regime. And this was a compromise. It was an outcome that was seen as facilitative of maximal participation in the Singapore Convention while preserving its object and purpose. It is a declaration that some have said if made, will probably be withdrawn over time, with the growth and familiarity with international mediation and understanding that it would be in line with the expectations of the disputing parties that the mediated settlement agreement that they reach would be enforceable.

59. Nevertheless, in practical terms, parties to a settlement agreement should probably consider whether an agreement is likely to be relied upon or invoked. And in any event, err on the side of opting into the application of the Singapore Convention on Mediation, irrespective of the every intention of the parties to the settlement agreement, that

the obligations therein will be performed. This will cater to the possibility that enforcement action may be required in a Party to the Singapore Convention that has made a declaration under Article 8(1) Paragraph (b).

60. And this brings me to my concluding remarks. I wish to highlight three points in conclusion. First, more signatories to and ratifications of the Singapore Convention will make it more effective and more useful. Relevant to this, notably, UNCITRAL had, for the first time at the time, developed both a Convention and a Model Law in parallel with each other. This was to accommodate the different levels of experience that different jurisdictions have with mediation. Having been concurrently prepared, the Model Law offers potential Parties to the Singapore Convention on Mediation a ready Model to adopt or to adapt from, should they require domestic implementing legislation and therefore smooth the path towards joining the Convention and implementing it.

61. Second, in respect of negotiating intent. When developing the Singapore Convention on Mediation, it was generally felt that the treaty needed to be simple, preserve the flexibilities of mediation process, and ensure respect for the public policy of the State in which enforcement would be sought. And I hope that, through this lecture, you have come to better appreciate how the Singapore Convention on Mediation has indeed stayed true to this initial negotiating intent. The treaty respects that mediation is a flexible art, radically heterogeneous and culture specific. The treaty also does not lend itself to the unnecessary juridification of the mediation process, especially through its careful and objective drafting.

62. Third, ultimately, it should be clear what we are working towards with the Singapore Convention on Mediation – and this would be supporting the desired growth of mediation. The Singapore Convention on Mediation will make mediation a more viable option for the resolution of international commercial disputes. It will do this by broadening the suite of options available to users of dispute resolution. Mediation will not replace the role of other forms of dispute settlement. It will provide disputing parties with an additional option in the suite of available options, recognizing that mediation is not for all disputes and

does not claim to be. The further growth of mediation as a form of dispute settlement will not only be a benefit in and of itself. Importantly, it will also reap benefits for access to justice.

63. And with that, I thank you for listening to today's lecture.