The Coming Revolution in International Mediation – The Singapore Convention and Its Impact

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"An ounce of Mediation is worth a pound of Arbitration and ton of Litigation".

--- Joseph Gymbaum

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS

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United Nations Convention on International Settlement Agreements Resulting from Mediation

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Contents

Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

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[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

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[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[5] Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

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

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(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.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(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.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: *(a)* if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or *(b)* as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

V.19-00316

Annex II

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Section 1 — General provisions

Article 1. Scope of application of the Law and definitions

1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

2. For the purposes of this Law, "mediator" means a sole mediator or two or more mediators, as the case may be.

3. For the purposes of this Law, "mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Section 2 — International commercial mediation

Article 3. Scope of application of the section and definitions

1. This section applies to international[3] commercial mediation.

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1 The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

2 In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

3 States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

2. A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

3. For the purposes of paragraph 2:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

5. The parties are free to agree to exclude the applicability of this section.

6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 4. Variation by agreement

Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

Article 5. Commencement of mediation proceedings[4]

1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

2. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

Article 6. Number and appointment of mediators

1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

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[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 7. Conduct of mediation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

Article 8. Communication between mediator and parties

The mediator may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

Article 10. Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 11. Admissibility of evidence in other proceedings

1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not

in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 12. Termination of mediation proceedings

The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Article 13. Mediator acting as arbitrator

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 14. Resort to arbitral or judicial proceedings

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred

arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Article 15. Binding and enforceable nature of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

Section 3 — International settlement agreements[5]

Article 16. Scope of application of the section and definitions

1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").[6]

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:[7]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the

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[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.

[6] A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[7] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

Article 17. General principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

Article 18. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 19. Grounds for refusing to grant relief

1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(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.

2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Article 20. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

United Nations A/RES/73/198

General Assembly

Distr.: General
11 January 2019

Seventy-third session
Agenda item 80

Resolution adopted by the General Assembly on 20 December 2018

[*on the report of the Sixth Committee (A/73/496)*]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

Annex

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.
[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.
[5] Ibid., annex I.

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1
Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2
Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic

communication if the information contained therein is accessible so as to be useable for subsequent reference.

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

Article 3
General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4
Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5
Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(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.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6
Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7
Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8
Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(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.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9
Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10
Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11
Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12
Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13
Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14
Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15
Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16
Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited

to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

SINGAPORE CONVENTION ON MEDIATION

List of Signatory Countries

- Afghanistan
- Belarus
- Benin
- Brunei Darussalam
- Chile
- China
- Colombia
- Congo
- Democratic Republic of the Congo
- Eswatini
- Fiji
- Georgia
- Grenada
- Haiti
- Honduras
- India
- Iran (Islamic Republic of)
- Israel
- Jamaica
- Jordan
- Kazakhstan
- Lao People's Democratic Republic
- Malaysia
- Maldives
- Mauritius
- Montenegro
- Nigeria
- North Macedonia
- Palau
- Paraguay
- Philippines
- Qatar
- Republic of Korea
- Samoa
- Saudi Arabia
- Serbia
- Sierra Leone
- Singapore
- Sri Lanka
- Timor-Leste
- Turkey
- Uganda
- Ukraine
- United States of America
- Uruguay
- Venezuela (Bolivarian Republic of

Total Count: 46 countries
Updated: August 22, 2019

The Singapore Convention: A First Look

By Deborah Masucci and M. Salman Ravala

On 25th June, 2018, at its 51st session, the United Nations Commission on International Trade Law (UNCITRAL), the U.N.'s core legal body in the field of international trade law, approved by consensus of its member States a "Convention on International Settlement Agreements Resulting from Mediation." It will be commonly referred to as the "Singapore Convention" upon adoption by the United Nations General Assembly and ratification by at least three member States. The official signing ceremony for the Singapore Convention is expected to be in late 2019.[1]

The Background: A Timely Proposal

In May 2014, UNCITRAL, through its Working Group II (WGII), received a proposal from the United States[2] government to develop a multilateral convention on the enforceability of international commercial settlement agreements.[3] The foundation of the proposal was to encourage the acceptance and credibility of mediation as a tool for resolving international cross-border disputes. A second goal of the proposal was to find a more efficient and robust enforcement mechanism when a party breached a mediated settlement agreement without resorting to costly and time-consuming processes such as initiating a new lawsuit to obtain a judgment or court decree on a settlement agreement or utilizing consent awards in arbitration. The need for the proposal was premised on the existing conviction of the global community, adopted by United Nations, that the use of mediation and conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by [member] States."[4] The United Nations previously adopted UNCITRAL Conciliation Rules (1980) and UNCITRAL Model Law on International Commercial Conciliation (2002), as well as the widely ratified Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention" (1958). Adoption of the Singapore Convention therefore moved relatively swiftly and also included the adoption of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from International Commercial Mediation (the "UNCITRAL Model Law on ICM-ISA"). Adoption of the Model Law will ensure a more widespread global acceptance by member States in their local jurisdictions and smoother domestic implementation across the world.

The Deliberations: Mediation in Action

Since 2014, deliberations on the international instruments took place over eight UNCITRAL Working Group II sessions, by 85 member States and 35 non-governmental organizations, including the International Mediation Institute (IMI). Delegations vigorously participated in debate over the proposed Singapore Convention and related Model Law. The diversity of voices that contributed to the deliberations and eventual adoption is to be celebrated and welcomed by the global business community.

Progress on the instruments had many parallels to a multi-party co-mediation. WG II elected a Chairperson from the member states. The Chairperson (the lead mediator) effectively developed the agenda for the proceedings, secured consensus from the participating members, framed and reframed for action agreements and disagreements, and brought in experts and others to supplement the knowledge of delegates. As meetings progressed, member States substituted delegates to include internal mediation experts in their delegations. Each session convened with a joint caucus. Consultation meetings or private caucuses were used during the sessions to work out language with one or two delegates filling the role of co-mediators. The UNCITRAL Secretariat provided technical assistance to the group ensuring consistency of provisions and language with other instruments adopted by UNCITRAL. Educational programs were held between and during WGII sessions. They provided opportunities for delegates to learn more about practices globally and why there is a need for a Convention despite lack of evidence that mediated agreements are not being honored.

The Key Provisions: Integrating the ADR Landscape

The Preamble section of the Singapore Convention acknowledges that "mediation is increasingly used in international and domestic commercial practice as an alternative to litigation"[5] and further acknowledges the "significant benefits"[6] of mediation. There are only 16 Articles in the Convention.

Article 1 outlines the scope, applying the Convention to cross-border commercial disputes resolved through mediation where "at least two parties to the [written] settlement agreement have their places of business in different States"[7] or in which parties "have their places of business different from either the State in which a substantial part of the obligations under the settlement agreement is performed or the State in which the subject matter of the settlement agreement is most closely connected."[8] Article 1 specifically excludes settlement agreements

related to consumer, family, inheritance, and employment matters, as well as those enforceable as a judgment or as an arbitral award.[9]

Article 2 defines key terms used in the Convention such as "place of business," "in writing," including in electronic form, and even "mediation." Article 3 summarizes the general principles and obligates member States that ratify the Convention and also permits a party subject of the Convention to invoke a defense and to subsequently prove that a particular dispute being raised was already previously resolved by a settlement agreement.

Article 4 provides a specific but broad checklist of what a party must supply for enforcement of the international settlement agreements that result from mediation. Article 4 includes submission of a "settlement agreement signed by the parties"[10] and "evidence that the settlement agreement resulted from mediation."[11] Evidence includes items "such as" a "mediator's signature on the settlement agreement,"[12] or "a document signed by the mediator,"[13] or "an attestation by the institution" administering the mediation. In the absence of such proof, Article 4 allows a party to submit "other evidence" acceptable or required by a competent authority of the member State where relief is sought. Article 4 also addresses key issues related to electronic communication, translation of settlement agreements, and calls for the competent authority of the member States enforcing the settlement agreements to "act expeditiously."[14]

Article 5 was vigorously debated and certain overlaps within the Article are intentional to accommodate the concerns of a member State's domestic legal systems. Article 5 includes the grounds when a competent authority may refuse to grant enforcement. These circumstances include incapacity of a party, or where the settlement agreement a) is null and void, inoperative or incapable of being performed; b) not binding or not final; c) was subsequently modified; d) was performed; e) is not clear or comprehensible; or where granting relief would be contrary to terms of the settlement agreement or contrary to public policy, and subject matter is not capable of settlement by mediation under the law of that party. A competent authority may also refuse to grant relief where there is a serious breach by the mediation of standards applicable to the mediator or the failure by the mediator to disclose to the parties' circumstances as to the mediator's impartiality or independence.

Article 6 addresses issues of parallel applications or claims and draws inspiration from the New York Convention. It grants, to the competent authority of the member State where relief is being sought, wide discretion to adjourn its decision under the Convention where an application or claim relating to a settlement agreement was made in a court, an arbitral tribunal, or other competent authority.

Article 7 also draws inspiration from the New York Convention and allows member States flexibility to enact national legislation in their countries to expand the scope of settlement agreements excluded by Article 1, Paragraphs 2 and 3 of the Singapore Convention.

Article 8 allows for a tailored adoption of the Convention by each member State, allowing for two reservations when ratifying the Convention. The first reservation is one which relates to the member State or its own governmental agency. The second allows for a declaration that the Convention applies only where the parties to the settlement agreement resulting from mediation have agreed to the application of the Convention.

Article 9 clarifies that the settlement agreements encompassed by the Convention include those concluded *after* entry into force of the Convention, related reservations, or withdrawals by the member State. Article 16 similarly clarifies that the settlement agreements encompassed by the Convention include those concluded *before* denunciation of the Convention.

The Future: Mediation Benefits Our World

In 2016 and 2017, the IMI convened the Global Pound Conference series which surveyed an array of participants from around the world, including those in the business community.[15] Participants surveyed represented many fields such as law, construction, energy, architecture, international business, healthcare, food and beverage, tourism, trade, education, and finance.[16] One survey question asked respondents to rank why they believed parties do not try to solve their commercial cross-border dispute through mediation. Lack of a universal mechanism to enforce a mediated settlement was cited as the second highest ranked reason. On a similar question about the likely use of a mediation clause in contracts if there existed a uniform global mechanism to enforce mediation settlements, the survey result found over 80 percent of the respondents answering in the affirmative. One respondent event added a comment that "lack of uniform enforcement mechanism is a problem."

The enforcement regime promulgated by the Singapore Convention and related Model Law address the concerns raised by those surveyed by the IMI. Incorporating input from around the world, it promises to foster international trade, improve access to justice, and increase confidence, predictability and certainty amongst the business community. It also assists member States and their respective judiciaries to become more efficient in resolving disputes, especially those of commercial nature where parties seek stability and certainty.

Adoption of the Singapore Convention and Model Law on the global stage signals the most credible acknowledgment of mediation as a meaningful tool to resolve cross-border commercial disputes. The timing of the adoption is also significant and perhaps eye-opening,

a subliminal reminder to the world community that the Singapore Convention, akin to the New York Convention, has the power to significantly and positively shape a harmonious regime of international trade around the world.

Endnotes

1. The final text of the Singapore Convention and Model Law is forthcoming on UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, *see* UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. The U.S. is one of 60 member States that consider proposals for recommendation and adoption by UNCITRAL.
3. UNCITRAL, 51st Sess. UN Doc A/CN.9/942 (25 June, 2018).
4. General Assembly resolution 57/18, *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* A/RES/57/18 (19 November 2002), available from undocs.org/A/RES/57/18.
5. UN Doc A/CN.9/942, *supra* note 1, at Preamble.
6. *Id.*
7. UN Doc A/CN.9/942, *supra* note 1, at Art. 1.
8. *Id.*
9. UN Doc A/CN.9/942, *supra* note 1, at Art. 2, 3.
10. UN Doc A/CN.9/942, *supra* note 1, at Art. 4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Global Pound Conference Series 2016-2017, Shaping the Future of Dispute Resolution and Improving Access to Justice, Cumulated Data Results, *available a*t https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf (last visited, June 25, 2018).
16. Weiss, David S. and Griffith, Michael R., Report on International Mediation and Enforcement Mechanisms, *available at* https://www.imimediation.org/download/.../imi-njcuidr-wgii-report2017v4-0-pdf.pdf (last visited, June 25, 2018), at p.7.

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MINTZ

New Convention Aims to Make Mediated Settlements an Attractive Means of Resolution of International Disputes . . . But Will It?

September 03, 2019| Blog | By **Gilbert A. Samberg**

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The United States joined 45 other countries on August 7, 2019 as the initial signatories of the UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). Other notable vanguard signatories included China, India, South Korea, and of course Singapore. The aim of this Convention is to make mediated international settlement agreements as easily enforceable as international arbitration awards now are under the New York Convention. But is it likely to succeed? We think it could . . . to a degree.

The Singapore Convention applies to mediated settlement agreements, reached outside of judicial or arbitral proceedings, that are "concluded by the parties in writing," "resolve a commercial dispute," and are "international" in nature. The operative provision is that "[e]ach party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention." Singapore Convention Art. 3(1). The Convention seeks to eliminate the need for a court to address all but a few enumerated defenses relating to the mediation process and the subject of the settlement. In principle, a breached qualifying settlement agreement should be enforced according to its terms more or less summarily by the national courts of a Convention country, rather than being considered merely the basis for a plenary proceeding for breach of contract.

However, the ultimate breadth of use of the Singapore Convention seems less than clear. One possible impediment to the success of the Convention is a consequence of the differences in (a) the arbitration and mediation processes, (b) the motivations for employing one or the other, and (c) their respective "products".

Arbitration is an adjudication in a private proceeding, and entry into that process generally signals the termination of a commercial relationship. The arbitrator has authority, by agreement, to resolve certain claims and defenses and to prescribe a remedy, much as a judge would. In most instances that remedy is likely to be money damages; less frequently, it might include an injunction against the continuation of specific conduct that is deemed wrongful. A continuing relationship of the parties is rarely in contemplation in an arbitral award.

Judicial involvement in the review of an arbitral award is limited to assessing (a) whether the adjudication process was corrupted by bias or interest or fraud; (b) whether the arbitrator exceeded his/her contractedly-authorized powers; and possibly (c) whether the arbitrator knowingly ignored well established determinative law. If the arbitration has "run amok" in any of these ways, then the losing party is presumed to have been prejudiced, and a court may vacate such an award. If, on the other hand, the court determines to confirm and/or enforce the award, the award remedy will very likely be consistent in kind with what a court would ordinarily order, and the local laws governing enforcement of the resulting judgment will be attuned to enforcing just such remedies.

Compare mediation -- a facilitated settlement negotiation with no adjudicator. The mediator has virtually no noteworthy "powers," as his/her job is merely to assist the parties in reaching a settlement. Any evaluation of the law and the facts is up to the parties, and they devise the "remedy" for their dispute(s). A mediation may produce an agreed remedy that looks a lot like an arbitral award -- perhaps involving a payment of money (although possibly with a structured payment schedule), perhaps including an agreement to cease specified conduct, and perhaps ending the commercial relationship. Enforcement of an agreed "plain vanilla" remedy of this sort could be expedited by reason of the Singapore Convention. A court's order of compliance with such settlement terms would produce a familiar-looking judgment, to be enforced by familiar means.

However, an agreed resolution of a commercial dispute could easily be significantly different -- for example, preserving a complex commercial relationship and/or requiring specified commercial

conduct or “cooperation” for an extended period. In case of a breach, are national courts and applicable laws geared to enforcing specific performance of such terms, e.g., requiring a court to act as a monitor and umpire for an extended period? Courts in the U.S., for example, rarely order and are rarely required to enforce a judgment of specific performance in a commercial dispute, and they are even less often (if ever) required to enforce a judgment of specific performance in a commercial relationship over an extended period.

If a court, following its own rules of procedure, will not order such specific performance of settlement terms, what happens then? Could the court in effect amend the settlement terms by ordering the parties to engage an independent monitor and umpire (i.e., a private adjudicator)? Could it conduct a proceeding to determine an enforceable standard remedy for breach of contract -- e.g., money damages -- that is different from the terms of the settlement agreement? The Convention expressly provides that resort to its mechanism shall not be the exclusive means of enforcement of such an agreement. Id. Art. 7.

So it is fair to ask how much the Singapore Convention will expedite the ultimate resolution of a dispute in the event of a breach of a mediated settlement agreement. The answer may be that, except in the case of a plain vanilla settlement principally involving an exchange of money for a release, we don’t know.

In any case, here are the Convention’s principal details.

Scope of Convention’s Applicability

A mediated settlement agreement that is to be recognized and enforced under the Singapore Convention must have the following characteristics: (i) it resolved a commercial dispute; (ii) it resulted from mediation; (iii) it is written; (iv) it is signed by the parties; (v) it is “international”; (vi) it does not concern certain excluded types of disputes, such as consumer or employment disputes, or family or inheritance disputes; and (vii) none of the other few grounds, enumerated in the Convention, to decline enforcement exist. Id. Art. 1. For example, other excluded settlement agreements are those that have been approved by a court, concluded in the course of proceedings before a court, or are otherwise enforceable as a court judgment or as an arbitral award. Id. Art. 1(3).

Defined Terms

For these purposes, “mediation” is defined broadly. See id. Art. 2(3).

A settlement agreement is “in writing” if it is recorded in any form, including electronically (with minimal qualifiers). See id. Art. 2(2). An electronic signature is permitted if specified conditions are satisfied. See id. Art. 4(2).

The “place of business” (or “habitual residence”) of each of the parties to a settlement agreement, and the place in which the agreement is to be performed, are the principal determinants of whether the settlement is “international”. See id. Arts. 1(1), 2(1)(a), 2(2).

Mediated Settlement Agreement as Basis for Claim or Defense in Accordance with Local Procedures

A qualifying mediated settlement agreement may be invoked under the Convention either for enforcement or as the basis for a defense. Id. Art. 3. When presented with a request for relief, the “competent authority” within a Convention country “shall act expeditiously,” id. Art. 4(5), albeit “in accordance with its rules of procedure,” id. Art. 3(1). So too, a party invoking a qualifying settlement agreement as a defense, contending that a dispute has already been resolved by settlement, may do so only in accordance with the Convention country’s rules of procedure.

Convention Defenses to Enforcement of Mediated Settlement Agreement

The party resisting enforcement of course has the burden of proof of grounds for a court’s refusing to grant relief under the Convention. Id. Art. 5(1).

Like the New York Convention concerning arbitral awards, the Singapore Convention identifies limited grounds to decline summary enforcement of a mediated settlement agreement. See id. Art. 5. They concern the settlement agreement’s (i) validity and enforceability under applicable law, (ii) finality, (iii) nature of terms, and (iv) prior performance. They also include severe misconduct of the mediator, provided it can be shown by the breaching/objecting party that it would not have entered into the settlement agreement absent that misconduct.

Finally, a court in a Convention country may decline to grant relief under the Convention (a) if granting such relief would be contrary to the public policy of that Convention country or (b) if the subject of the dispute is not settleable by mediation under the law of that Convention country. Id. Art. 5(2).

Commencing Proceeding Under Convention

When invoking the Convention, a party is required to supply to “the competent authority” of the Convention country: (a) the signed settlement agreement and (b) evidence that that agreement

resulted from mediation. Id. Art. 4(1). Examples of such evidence are described in the Convention. See id. Art. 4(1)(b).

Ratification and Reservation vis-à-vis the Convention

Finally, in order to bring the Convention into effect, a signatory state must ratify it, and such ratification may be qualified by one or two permitted "reservations". See id. Art. 8. One such reservation, which would affect the breadth of application of the Convention substantially, would require an agreement of the parties to a mediated settlement agreement that the Convention applies in order for it to have effect. Id. Art. 8(1)(b).

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The Singapore Convention
Promoting the Enforcement and Recognition of International Mediated Settlement Agreements

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Current enforcement mechanisms for mediated settlement agreements vary widely across jurisdictions providing little certainty in international disputes. In recent years, there have been numerous calls by scholars, practitioners and users for the development of a mechanism for the uniform enforcement and recognition of international mediated settlement agreements. Following three years of effort, the UNCITRAL Working Group II successfully completed the drafting of a multilateral convention for enforcement and recognition titled 'The Convention on International Settlement Agreements Resulting from Mediation' which will be commonly known as the 'Singapore Convention'. The new convention was approved by consensus of UNCITRAL's Member States on 25 June 2018, at its fifty-first session. Parallel amendments have been made to the 2002 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation to add provisions that mirror those of the Singapore Convention. These new instruments promise to provide parties with a clear, uniform framework for the enforcement and recognition of international mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Introduction

In 2002, the United Nations recognized that the use of mediation[1] 'results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States'.[2] The use of mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, the development of the IBA's rules for mediation of investor-state disputes, and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of mediation, it is generally viewed to be under-utilized. Many reasons have been offered to explain this. A commonly cited impediment is that settlement agreements reached in international disputes through mediation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting mediation of international commercial disputes, the United States proposed that the United Nations Commission on International Trade Law (UNCITRAL) Working Group II develop a multilateral convention for enforcement[3]. The US recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through mediation which conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization, just as under the

1 While the process was described in 2002 and in the early discussions of the new convention as 'conciliation', the more common and more useful term now is 'mediation' and, as discussed below, is the terminology that has now been adopted in the new convention and the amended model law.

2 *U.N. Comm'n on Int'l Trade Law, Model Law on International Commercial Conciliation*, at V, U.N. Sales No. E.05.V.4 (2002).

3 United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL's business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.

New York Convention, they have their own procedures governing arbitration.[4] The US requested that this initiative be given high priority and explained:

> Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.[5]

Thus, the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

After extensive discussions over a period of three years, on 25 June 2018, at its fifty-first session, UNCITRAL approved by consensus of its Member States a 'Convention on International Settlement Agreements Resulting from Mediation'. It will be commonly referred to as the 'Singapore Convention' upon adoption by the United Nations General Assembly and ratification by Member States starting as early as August 2019.[6]

I - Prior efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements had previously emerged.

There was a strong effort by those working on the *UNCITRAL Model Law on International Commercial Conciliation* ('2002 Model Law on Conciliation') to develop a uniform enforcement mechanism.[7] However, notwithstanding the effort made, that goal was not achieved. Article 14 provides:

> If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement].

The comments to Article 14 recognized that 'many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award'.[8] The Commission supported 'the general policy that easy and fast enforcement of settlement agreements should be promoted'.[9] Notwithstanding that, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision left the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The *EU Mediation Directive*[10] recognizes the importance of enforcement and expressly stipulates at paragraph 19:

> Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties.

However, while the EU Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be 'made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member state'.

4 'Proposal by the Government of the United States of America: future work for Working Group II', A/CN.9/822 (Jun. 2, 2014).

5 'Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation — Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings', 7, A/CN.9/WG.II/WP.188 (Dec. 23, 2014).

6 The final text of the Singapore Convention and the companion Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation is forthcoming on the UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, the draft convention and draft amended Model Law have been made available by the Secretariat. *See* 'International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation', available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html; 'International Commercial Mediation: Draft Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation', A/CN.9/943 (Mar. 2, 2018). *See also* a commentary on the Singapore Convention by T. Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (August 27, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527.

7 Supra note 2.

8 *2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use*, at 55, U.N. Sales No. E.05.V.4 (2002).

9 Id.

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.

The same result was reached by the drafters of the *US Uniform Mediation Act* ('UMA').[11] A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement, but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

II - Calls for action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNICTRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. Scholars,[12] practitioners and users have called for the development of an enforcement mechanism.

The *European Parliament's study* assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study 'suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector'.[13]

A survey conducted by the *International Bar Association's Mediation Committee* in 2007 emphasized the importance of enforcement.

The results of the survey were summarized by the Committee:

> (T)he enforceability of a settlement agreement is generally of the utmost importance...
>
> [...]
>
> [I]n international mediation ... reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.[14]

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the US and confirm that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and it would be a significant factor in encouraging and increasing the use of mediation.

In order to assist the Working Group II delegates in their consideration of the US proposal, a survey was conducted in the fall of 2014 by *S.I. Strong* to ascertain the need for and level of interest in such a mechanism.[15] The survey responses were compelling:

- An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the New York Convention would encourage mediation and conciliation, with 18% saying maybe.
- Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country.
- 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place.

11 The US Uniform Mediation Act was adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the 2002 Model Law on Conciliation into the UMA and provides that unless there is an agreement otherwise, the 2002 Model Law on Conciliation applies to any mediation that is 'international commercial mediation'.

12 See, e.g., Lawrence Boulle, 'International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework', 7(1) *Contemp. Asia Arb. J.* 34 (2014); Chang-Fa Lo, 'Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements', 7(1) *Contemp. Asia Arb J.* 119 (2014); Bobette Wolski, 'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research', 7(1) *Contemp. Asia Arb. J.* 87 (2014).

13 Directorate-General for Internal Affairs, '"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014), http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI_ET(2014)493042.

14 IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, IBA (Oct. 2007), https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx

15 S. I. Strong, 'Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation' (Nov. 17, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. For a discussion of the methodology employed in the survey, see S.I. Strong, 'Large-Scale Empirical Study of International Commercial Mediation and Conciliation Provides Support to UNCITRAL Process', *N.Y. Disp. Resol. L*, Spring 2015, at 36.

In October and November 2014, the *International Mediation Institute* ('IMI') conducted a short survey of internal counsel and business managers to assist the Working Group's deliberations. The survey sought to assess the extent to which a mediation convention was desired.

- As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so ('much more likely' or 'probably').
- In response to whether the existence of a widely-ratified enforcement convention would make it easier for commercial parties to come to mediation in the first place, 87% said yes ('definitely' or 'probably').
- With respect to whether the absence of any kind of international enforcement mechanism for mediated settlements presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said yes ('major impediment' or 'a deterring factor').[16]

IMI also put a proposition to 150 delegates, comprised of users, educators, providers and advisors, at its conference in October 2014:

> An international convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries.

73% of all delegates voted in favor. A sorting of the votes by delegate affiliations showed that not one user disagreed.[17]

A 2015 study by the *Queen Mary University of London* further supported such an effort with a majority (54%) agreeing that a convention on the enforcement of settlement agreements resulting from a mediation would encourage the use of mediation.[18]

16 Edna Sussman, 'A Path Forward; a Convention for the Enforcement of Mediated Settlement Agreements', 12(6) *Trade Disp. Mgmt*. (2016).

17 Id.

18 Queen Mary University of London School of Int'l Arb. and White & Case, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

The most recent relevant survey results were developed at the *Global Pound Conference Series* (GPC Series), which convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017.[19] The delegates who attended the GPC Series, and the hundreds who participated online, voted on a series of 20 Core Questions. In response to the question 'which of the following areas would most improve commercial dispute resolution' 51% selected legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.[20]

Roland Schroeder, speaking on behalf of the *Corporate Council International Arbitration Group*[21] at the UNCITRAL Working Group II session held on February 3, 2015, echoed the clear message delivered by users and strongly supported the US effort. He reported that it is often a challenge to convince counterparties to engage in a mediation process and many decline both because the process does not have a sufficiently international imprimatur and because the result is not easily enforceable cross-border. He was of the view that a convention like the New York Convention would be a catalyst that would drive an increased use of mediation. He noted that the benefits of mediation are generally recognised, but once one is already in a dispute, there is considerable concern about enforceability, suggesting a clear need for a cross-border enforcement mechanism. Mr Schroeder reported that he personally had experiences where he tried to enforce a settlement agreement but was ultimately required to re-litigate the merits of the underlying dispute.[22]

III - Existing enforcement mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement

19 Details about the GPC Series, global data trends, and regional differences are all available at www.globalpound.org. Also see, Amal Bouchenaki et al.; 'What Users Want and How to Address their Needs and Expectations Using the Results of the Global Pound Conference', *N.Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

20 International Mediation Institute, GPC Series 'Cumulated Data Results' (2017), https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf.

21 The Corporate Council International Arbitration Group (CCIAG) is an association of corporate counsel from approximately one hundred multinational companies which focuses on international arbitration and dispute resolution.

22 Confirmation on file with author.

agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. The Secretariat reported that there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that 'the diversity of approaches towards enforcing settlement agreements might militate in favor of considering whether harmonization of the field would be timely'.[23] The UNCITRAL report reviews a variety of methods for enforcement of mediated settlement agreements across jurisdictions.

In many jurisdictions, including the US, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the US, while there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, the mediated settlement agreements nonetheless remain a contract, such that all contract defenses are available to the parties.[24]

In other jurisdictions, mediated settlement agreements can be entered as a judgment. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on a mediated settlement agreement. Some jurisdictions have expedited enforcement mechanisms where settlement agreements can be enforced in a summary fashion provided the requirements are met. Other jurisdictions have opted for a mechanism of deposition or registration at the court as a way of making a settlement agreement enforceable. The practice of requesting a notary public to notarize the settlement agreement is also prevalent in several jurisdictions as a means of enforcement. In yet other jurisdictions, acts by a notary are required to make a mediated settlement agreement enforceable.[25]

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 155 countries that are signatories to the New York Convention. Thus, even if a judgment or court decree can be obtained, the difficulty of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This moreover leads to an anomalous result. As the US stated:

> [G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them.[26]

IV - Entry of an arbitration award based on mediated settlement agreements

At the UNCITRAL Working Group II sessions, certain delegates suggested that the simple solution was to have the mediated settlement agreement entered as an arbitral award which would then be recognized under the established enforcement mechanisms of the New York Convention. The rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.[27] Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides for such a process for international conciliations.[28]

23 Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, 8, A/CN.9/WG.II/WP.187 (Nov. 27, 2014).

24 For a treatment of all contract defenses in the context of enforcing mediated settlement agreements, see Edna Sussman, 'Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony', *IBA Mediation Committee Newsletter*, Apr. 2006, at 32.

25 'Rebooting the Mediation Directive', supra note 13 (reporting a wide variety of enforcement processes in the States of the EU).

26 Supra note 5, at 8.

27 See, e.g., Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

28 Cal. Civ. Proc. Code § 1297.401 (West).

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement,[29] the appointment of an arbitrator after the dispute is settled may not be possible in many jurisdictions because under local law, there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an 'arbitration agreement' means 'an agreement to submit to arbitration present or future disputes'. Similarly, New York state law provides that an 'agreement to submit any controversy thereafter arising or any existing controversy to arbitration' is enforceable.[30] As there is no *present or future dispute* or *controversy thereafter arising or existing* once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains.

Institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration.[31] Some jurisdictions explicitly give consent awards the same status and effect as arbitral awards.[32] Article 30(2) of the UNCITRAL Model Law on International Commercial Arbitration provides:

> An award on agreed terms... shall state that it is an award. Such an award has the same status and effect is any other award on the merits of the case.

But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties' needs. Commentators that have analysed this question have come to differing conclusions. Some have concluded that it is not enforceable.[33] Others have concluded that it is.[34] While yet others conclude that the result is not clear.[35]

The relevant New York Convention section provides in Article 1(1) that the Convention applies to the recognition and enforcement of awards 'arising out of differences between persons'. The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a 'present or future' dispute or a 'controversy thereafter arising or ... existing'. The reference to a 'difference' in Article 1(1) of the New York Convention does not specify when that 'difference' has to exist in time in relation to the time of the appointment of the arbitrator. Thus, the New York Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. But the differences of opinion as to the applicability of the New York Convention to consent awards issued by arbitrators appointed after a settlement agreement is reached suggests that the New York Convention is ambiguous on this point.[36]

Moreover, while it is generally accepted that consent awards are enforceable, at least if the arbitrators are appointed before the settlement is achieved,

29 See David Weiss & Brian Hodgkinson, 'Adaptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements', 25(2) *Am. Rev. of Int'l Arb.* (2014) (urging the enactment of such legislation).

30 N.Y. C.P.L.R. 7501 (McKinney).

31 See, e.g., UNCITRAL Arbitration Rules 2013, Article 36 (Settlement or other grounds for termination); ICC Arbitration Rules 2017, Article 33 (Award by Consent); ICDR International Dispute Resolution Procedures 2014, Article 32 (Settlement or Other Reasons for Termination); LCIA Arbitration Rules 2014, Article 26.9 (Consent award); SIAC Arbitration Rules 2016, Article 32.10 (The Award); HKIAC Administered Arbitration Rules 2013 Article 36 (Settlement or Other Grounds for Termination).

32 See, e.g., Arbitration Act, 1996, c. 23 §51 (Eng.) ('An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.').

33 Christopher Newmark & Richard Hill, 'Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?' 16(1) *Arb. Int'l 81* (2000); James T Peter, Med-Arb in International Arbitration', 8 *Am. Rev. Int'l Arb.* 83, 88 (1997)

34 Harold I. Abramson, 'Mining Mediation Rules for Representation Opportunities and Obstacles', 15 *Am. Rev. Int'l Arb.* 103 (2004).

35 See Edna Sussman, 'The New York Convention Through a Mediation Prism', Dispute Resolution Magazine, 8 (Summer 2009); Ellen E. Deason, 'Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide', 80 *Notre Dame L. Rev.* 553 (2005) (see footnote 173). See also, Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention', 54 *UCLA L. Rev.* 1385 (2007).

36 Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wish to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. See Nadja Alexander, 'SIAC-SIMC's Arb- Med- Arb Protocol', *N. Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

that matter too is not without some doubt.[37] The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states:

> The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.[38]

Two recent decisions in the United States confirmed the enforceability of consent awards issued by arbitrators appointed before settlement was achieved.[39] However, decisions of the French courts raise some uncertainty.[40]

Apart from concerns about enforceability, practical considerations make the enforcement of the mediated settlement agreement by means of a consent award unattractive for many reasons. Even if an arbitrator is already in place, the flexibility of the mediation process may lead to a resolution that is beyond the scope of the arbitrator's authority. If an arbitrator is not already in place, the parties would be required to identify an arbitrator who is willing to rubberstamp a resolution, even though he or she has no knowledge of the parties or the issues in dispute. This would no doubt be a difficult and costly exercise.

The lack of a uniform and certain mechanism for the enforcement and recognition of international mediated settlement agreements and the repeated call for the development of such a mechanism begged for a solution. The US proposal offered the path forward to its development.

37 Yaraslau Kryvoi & Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement', 40 *Brook. J. Int'l L.* 852 (2015).

38 *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 16-17, U.N. Sales No.: E.16.V.7 (2016).

39 *Albtelecom Sh.A v. Unifi Communications, Inc.*, 2017 WL 2364365 (S.D.N.Y. May 30, 2017); *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, 2018 WL 1251924 (S.D. Tex. Mar. 12, 2018).

40 *Société Viva Chemical (Europe) NV c APTD*, CA Paris, 9 April 2009, No 07/17769; *M A c Société´ B-C*, Cass civ 1e, 14 November 2012, (2013) *Rev arb* 138. The aforementioned case has been referred to as a 'death sentence for awards on agreed terms.' *See* Giacomo Marchisio, 'A Comparative Analysis of Consent Awards: Accepting their Reality', 32(2) *Arbitration International* 331, 343 (2016).

V - Working Group II deliberations: Issues raised and resolved

Launched by the US in 2014, over the course of the following years, the UNCITRAL Working Group II ('WGII') deliberations were conducted at eight UNCITRAL WGII sessions with 85 Member States and 35 non-governmental organizations participating. The delegates addressed and resolved numerous issues and looked for guidance both from the New York Convention and the 2002 Model Law on Conciliation.

For several issues that were difficult to resolve, the delegates continued to work on other aspects while leaving those for later resolution. In February 2017, a compromise proposal on those issues was achieved[41] and served to break through the impasse and ultimately led to the successful completion of the convention.

First, a seminal question was the form of the instrument. Some were of the view that the current divergence and, in some cases, non-existence of practice with respect to mediated settlement agreements did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach, offered by model legislative provisions. The model law would not aim at harmonizing respective legislative frameworks on mediation but focus on enforcement aspects, thus, harmonizing the approach to enforcement of settlement agreements, both in legislation and practice. Others expressed a strong preference for a convention since the 2002 Model Law on Conciliation was not widely adopted and a convention could more efficiently contribute to the promotion and harmonization of mediation given the cross-border nature of the enforcement and the need for a binding instrument to bring certainty. The success of international arbitration under the purview of the New York Convention of 1958 was emphasized as a reference and it was argued that a convention had additional benefits since it could provide State Parties flexibility through declarations or reservations, improving its chances of ratification by more States. As a compromise between the divergent views, it was agreed that WGII would prepare parallel instruments, complementary in nature: a model legislative text amending the 2002 Model Law on Conciliation, and a convention on the enforcement and recognition of international commercial settlement agreements resulting from mediation. The provisions of the draft amended model law would and do mirror in all essential respects the provisions of the convention.

41 Report of Working Group II (Dispute Settlement) on the Work of its Sixty-Sixth Session, 51-53, A/CN.9/901 (Feb. 16, 2017).

Second, consideration was given to whether an opt-in should be required. It was suggested that since mediation was by its nature a consensual process, the regime envisaged by the instrument should apply only where the parties consented to its application. An opt-in provision would ensure that parties were aware of the international framework to which they would be subjected and could avoid situations which they might not find desirable. Opposing views were expressed that making application of the convention the default would be more consistent with party autonomy because it is what parties would want and would reinforce that agreements should be respected. An opt-out, which the parties can include in their settlement agreement under the convention, would provide party autonomy and would be more consistent with the purpose of the convention. Moreover, an opt-in as a practical matter limits the draft instrument's application. Numerous studies have demonstrated that where a choice is required to opt-in, few elect it.[42] It was noted that the New York Convention does not have an opt-in provision. It was further suggested that it was counterintuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Moreover, there was concern that allowing flexibility on this issue could result in an imbalance between parties in different jurisdictions as the settlement agreement might be enforceable in one jurisdiction, but not in another. It was agreed that the convention would apply by default but that State Parties could include a reservation that the convention would only apply to the extent that the parties to the settlement agreement had agreed. A parallel footnote is inserted in the draft model law as an optional provision.

Third, whether or not the convention would provide for recognition of a mediated settlement agreement when it is presented to a State's competent authority by a party to prove that a claim brought against it had already been settled and resolved was a subject on which it was difficult to achieve consensus. Following further discussions, it was agreed that the convention would not only cover enforcement of mediated settlement agreements but also their recognition - and would do so without using the term 'recognition' - which was seen to imply different procedural consequences in different legal systems.

Fourth, in assessing the grounds for refusing to grant relief, there was concern that if there were too many bases upon which a party could resist enforcement, it would be an invitation to extensive and protracted litigation which would defeat the purpose of the convention. There was a particularly vigorous debate as to whether there should be any defenses based on the conduct of the mediator or a mediator's failure to make disclosures related to independence and impartiality, since that would open the door to some of the gamesmanship that has become problematic in the context of enforcement under the New York Convention. Others felt that it was crucial that these grounds be included in order to ensure the fairness of the mediation process. As part of the package of compromises, it was agreed that grounds related to the conduct of mediators would be included as grounds for refusing to grant relief but that they would only apply in narrow circumstances.

Fifth, there had been ongoing discussions as to how to handle mediated settlement agreements which resulted in a consent award or a court judgment. While some delegates disagreed, many thought it was essential to exclude mediated settlement agreements in these contexts in order to avoid conflicts with other enforcement mechanisms available pursuant to the New York Convention, the Hague Convention on Choice of Courts and the Hague Convention on Foreign Judgments in Civil and Commercial Matters. It was agreed that these would be excluded.

Other material issues considered included whether the convention should include enforcement of agreements to mediate, just as the New York Convention provides for enforcement of agreements to arbitrate. Whether or not agreements to mediate are enforceable and whether they are considered conditions precedent that preclude the progression to employing other dispute resolution modalities varies across jurisdictions. Moreover, mediations are not always employed by parties pursuant to an agreement and it was considered too difficult to achieve consensus on including enforcement of agreements to mediate. Thus, the consensus view was that the convention should be limited to only mediated settlement agreements.

What to call the process that was being addressed was the subject of considerable discussion. While there was some desire to preserve the word 'conciliation' which was the term used in previous UNCITRAL instruments, there was recognition of the fact that the term 'mediation' was currently more commonly and more broadly used. Moreover, some view conciliation as a process in which the neutral facilitator suggests a solution whereas mediation is a broad term that

42 See, e.g., SPARQ Social Psychological Answers to Real-World Questions, 'Opt Out' Policies Increase Organ Donation, Stanford, https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation (last visited Aug. 15, 2016) (demonstrating that in opt-out countries 90% of the population donates their organs while in such countries as the U.S. and Germany which are opt-in countries fewer than 15% donate their organs at death).

encompasses a variety of process design modalities. It was concluded that the word mediation would be used instead 'in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]'.[43] The change in terminology is not intended to have any substantive or conceptual implications.

Adopting what may be an emerging tradition in WGII, the new Convention on International Settlement Agreements Resulting from Mediation will be commonly referred to as the 'Singapore Convention', in honor of the home jurisdiction of the very able chair, Natalie Morris–Sharma of the Singapore Ministry of Law, who shepherded the deliberations in WGII. This designation follows the designation of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration as the Mauritius Convention on Transparency in honor of Salim Moollan from Mauritius, who chaired WGII in its deliberations on that convention.

VI - The Singapore Convention text

The final text of the Singapore Convention (the 'Convention') has not yet been released at the time of this writing. However, it is anticipated that no significant changes will be made. This review of the articles of the Convention is based on the draft of the Convention reviewed and approved at the United Nations Commission on International Trade Law at its 51st session held in June, 2018 subject to any further modifications provided by the Commission.[44]

Preambles

The Parties to the Convention recognized the value for international trade of mediation as a method for settling commercial disputes, noted the increasing use of mediation as an alternative to commercial litigation, considered the significant benefit in facilitating the administration of international transactions and producing savings in the administration of justice, and are convinced that the establishment of a framework for international settlement agreements resulting from mediation would contribute to the development of harmonious international economic relations.

Scope of application (Article 1)

Article 1 defines the essential parameters of the Convention. It identifies the requirements necessary for a settlement agreement to fall within the scope of the Convention, and it specifies the exclusions.

The Convention requires that the settlement agreements resulting from mediation be:

1) In 'writing'.
2) 'International' at the time of its conclusion based primarily on the place of business of the parties. The definition tracks the definition in the 2002 UNCITRAL Model Law on International Commercial Conciliation and resolved the debate as to when the international nature of the dispute should be determined in favor of ascertaining coverage at the time of the mediation's conclusion;
3) Specifies that it be 'commercial' by excluding transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family inheritance or employment law. With these limitations, the Convention avoids conflicts with local mandatory laws that address disputes that arise in connection with such transactions and relationships.
4) Excludes categories of settlement agreements that have been approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment and settlement agreements that have been recorded and are enforceable as an arbitral award.

Definitions (Article 2)

Article 2 provides further specification as to the meaning of certain terms.

1) The Convention clarifies further Article 1's 'internationality' requirement. It provides the solution to a situation where a party has more than one place of business. In such a case, the relevant place of business is the one that has closest relationship to the dispute resolved by the settlement agreement. Where the party does not have a place of business, the Convention prescribes that reference be made to the party's habitual residence.
2) The Convention then expands on what it means by 'writing.' and reflects that the writing requirement may be satisfied by various forms of electronic communication.

43 International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation, paras. 4-5, A/CN.9/WG.II/WP.205 (Nov. 23, 2017).

44 Supra note 6.

3) The Convention defines 'mediation' as 'a process, irrespective of the expression used or the basis upon which the process is carried out, where parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator"), lacking the authority to impose a solution upon the parties to the dispute'.

The Convention deliberately avoided defining 'mediation' *prescriptively* so as to allow for the wide range of differences in the understanding of the term among different jurisdictions. How mediations are conducted and what process modalities are permitted in mediation vary across jurisdictions. The Convention's broad definition resolves those differences by offering a definition that is simple and does not introduce any rigidity. It does not prescribe a specific technique of mediation; for example, the Convention does not specify whether the mediation must be evaluative, facilitative, or transformative, does not address whether or not caucus sessions can be used, and does not address whether or not the mediator can propose solutions. The Convention's usage of broad phrases provides coverage for all mediations, however, the process is carried out in different jurisdictions and by different mediators.

General principles (Article 3)

Article 3 addresses the obligations of the Parties to the Convention and provides both for affirmative enforcement of mediated settlement agreements and for recognition of mediated settlement agreements as a defense if a party seeks to relitigate a dispute already resolved in mediation.

1) Under the Convention, the Parties to the Convention have the substantive obligation to enforce a settlement agreement (subject to the exceptions, of course) 'in accordance with its rules of procedure.' With this provision, the drafters deftly circumvented the fact that enforcement mechanisms for mediated settlement agreements vary across jurisdictions, a fact which had stymied the earlier efforts to achieve an enforcement mechanism for cross-border mediated settlement agreements. Like the New York Convention which leaves procedural issues to be governed by the law of the seat, this Convention leaves those procedural issues to be governed by the State of enforcement.

2) The General Principles also addresses the claim which a party considers to be an attempt to relitigate a dispute already resolved in mediation and provides for recognition of a mediated settlement agreement. By meeting all the conditions set in the Convention, a party seeking relief would be allowed to prove that the dispute had been settled. Here again, the rules of procedure are the prerogative of the Party to the Convention.

Requirements for reliance on settlement agreements (Article 4)

Article 4 addresses what a party seeking to rely on the settlement agreement must provide to satisfy the Convention's requirements. The delegates vigorously debated whether or not confirmation in the state where the mediation took place should be required before enforcement could be sought elsewhere. It was concluded that there should be no such requirement. As a practical matter, it did not make sense. A mediation in a cross-border dispute might well take place in a jurisdiction with no connection to the parties or to the dispute. And more importantly, as was decided with respect to the New York Convention, requiring such a confirmation would require a double exequatur and contribute significantly to the complexity and cost of any enforcement process, precisely what the Convention is intended to remedy.

The draft Convention specifies what a party relying on a settlement agreement must supply to the competent authority of the Party to the Convention where relief is sought.

1) A settlement agreement signed by the parties.
2) Evidence that the settlement agreement resulted from mediation, which may be satisfied by the mediator's signature on the agreement, attestation by the mediator that a mediation was carried out, or an attestation by the administering institution. In order to allow for situations where none of these are available and to preserve the flexibility of the process, the Convention permits evidence of the fact that the mediation took place by means of any other evidence acceptable to the competent authority. A signature or an attestation would be only to prove the mediator's involvement in the process and is not to be construed as an endorsement of the settlement agreement nor as an indication that the mediator was a party to the settlement agreement. This requirement followed extensive deliberations by the delegates as to whether an unassisted negotiation which leads to a settlement agreement should also be covered by the

Convention. Delegates questioned whether there was a sound basis for distinguishing between those two contexts. Persuaded that mediation provides a qualitatively different process with many jurisdictions regulating the manner in which the mediation must be conducted and the conduct of mediations by many certified mediators, it was concluded that the Convention should be limited to mediated settlements. It is noted that the draft Model Law provides in footnote 5 that a State may consider the application of the Model Law to agreements settling the dispute irrespective of whether they resulted from mediation.

3) The draft Convention expands on how the requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication.

Grounds for refusing to grant relief (Article 5)

Article 5 is intended to encompass both the right of a party to seek enforcement as well as to invoke a settlement agreement. And both these reliefs may be refused by the competent authority if the objecting party furnishes the requisite proof with respect to any of the grounds provided under Article 5.

The development of these grounds for refusing to grant relief was extensively discussed by the delegates. It was concluded that the limited grounds of the New York Convention were insufficient in the context of a mediated settlement agreement where other potential defenses must be addressed. But it was important to limit the available grounds only to those that were necessary so as to prevent litigation over enforcement and defeat the purpose of the Convention. The grounds finally included in the Convention were the result of a compromise solution achieved by the delegates. The grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct. The Convention further adopts two of the principal grounds specified in the New York Convention.

Relief may be refused by the competent authority if the party opposing enforcement or recognition of a mediated settlement agreement furnishes proof with respect to any of the following grounds:

Substantive grounds	> Incapacity of a party to the settlement agreement, or > Settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it, or failing any indication, under the law applicable by the competent authority where relief is sought.
Grounds relating to the terms of the settlement agreement	> The settlement agreement is not binding, or is not final, according to its terms, or > The settlement agreement has been subsequently modified, or > Obligations in the settlement agreement have been *performed* or are *not clear or comprehensible*, or > Granting relief would be contrary to the terms of the settlement agreement.
Grounds relating to the mediator's conduct and the process	> Serious breach by the mediator of standards applicable to the mediator or the mediation without which breach the party would not have entered into the settlement agreement, or > Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.
Sua moto/ sua sponte grounds invokable by the competent authority of the Party to the Convention where relief is sought or a requesting party	> Granting relief would be contrary to the public policy of that Party, or > The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Parallel applications or claims (Article 6)

Article 6 grants discretion to the competent authority to adjourn the decision and/or order security in situations where the decision of another court or arbitral tribunal may affect the relief being sought before it. The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense.

Other laws or treaties (Article 7)

Article 7 preserves a Party's right to avail itself of a settlement agreement pursuant to other laws or treaties to which the Contracting State may be a party.

Reservations (Article 8)

Article 8 addresses two issues vigorously debated by the delegates: whether the Convention should apply to governments or governmental entities, and whether the parties should be required to opt-in for the Convention to apply. The compromise achieved by the delegates was to make these issues the subjects of permissible reservations.

1) The Convention provides State Parties with the option to make the following reservations:
   a. *States and other public entities:* This reservation permits a Party to the Convention to provide that the Convention will not apply to settlement agreements to which it or any government, governmental agency or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.
   b. *Opt-in*: This reservation permits a Party to the Convention to provide that the Convention will only be applicable if the parties opt-in, and have affirmatively agreed to the application of the Convention
2) No other reservations are permitted.

Generally, the rest of the provisions on reservations deal with temporal determinations of the applicable reservation, their confirmation and deposition with the depositary, and withdrawals.

Effect on settlement agreements (Article 9)

Article 9 specifies that the Convention and any reservation or withdrawal applies only to settlement agreements concluded after the date on which the Convention, reservation or withdrawal enters into force for the Party to the convention concerned.

Depositary (Article 10)

Article 10 designates the Secretary General of the UN as the depositary of this Convention.

Signature, ratification, acceptance, approval, accession (Article 11)

Article 11 opens the Convention for signature. In the context of the place of signing of the Convention, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the Convention, once adopted. That proposal was welcomed and supported by the WGII delegates and it was agreed to make the corresponding recommendation to the Commission.

Participation by regional economic integration organizations (Article 12)

Article 12 facilitates a regional economic integration organization ('REIO') in becoming a Party to the Convention. REIOs that accede to the Convention shall have the rights and obligations of a Party to the Convention to the extent that the organization has competence over matters governed by the Convention. At the time of accession, the REIO shall make a declaration specifying the matters in respect of which competence has been transferred to that organization by its Member States. The Convention specifies the circumstances under which the Convention should not prevail over conflicting rules of an REIO.

Non-unified legal systems (Article 13)

Article 13 permits Parties to the Convention to declare that the Convention would extend to all its territorial limits or only to one or more of them. State Parties may make such declaration at the time of signature, ratification, acceptance, approval or accession. Moreover, Parties to the Convention shall be free to amend its declaration by submitting another declaration at any time.

Entry into force (Article 14)

Article 14 provides that it shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

Amendment (Article 15)

Article 15 provides that any State Party may propose an amendment by submitting it to the Secretary General of the UN, who shall communicate the proposed amendments to the rest of the State Parties. A conference shall be convened if at least one-third of the State Parties favor such a conference. The adoption of any amendment would require a two-thirds majority vote of the State Parties present and voting at the conference.

The Convention also provides that amendments should enter into force for Parties to the Convention only when they expressly consent to it.

Denunciations (Article 16)

Article 16 provides that a State Party may denounce the Convention by a formal notification in writing addressed to the depositary (the Secretary General of the UN). Such denunciation shall take effect twelve months after the notification is received by the depositary.

However, it must be noted that the Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

Conclusion

The Singapore Convention will deliver the uniform enforcement and recognition mechanism for international mediated settlement agreements which has long been called for by scholars, practitioners, and users. It has already gained recognition. For example, the proposed changes to the ICSID rules on conciliation specifically suggests that the parties sign a settlement agreement embodied in the report so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention.[45] The invitation to accede to the Convention will shortly be before the State Parties. Their accession will ensure the success of the UNCITRAL effort, and pave the way for a clear, uniform framework for the enforcement and recognition of mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

45 'ICSID, Proposals for Amendment of the ICSID Rules — Synopsis', para. 95 (Aug. 2, 2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf.

UNPUBLISHED ARTICLE FOR CARDOZO DISPUTE RESOLUTION SYMPOSIUM

FROM SKEPTICISM TO REALITY—THE PATH TO THE CONVENTION FOR THE ENFORCEMENT OF MEDIATED SETTLEMENTS

Deborah Masucci[*]

I. INTRODUCTION

The United States Delegation[1] to the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group II submitted a proposal for the Convention for the Enforcement of Mediated Settlements ("Convention") in May 2014. The proposal was met with skepticism. Delegates questioned the necessity of a convention citing past discussions where similar proposals were tabled. Some commentators went so far as to call the proposal the "Mediators Full Employment Act." Despite the pushback, the Working Group II decided to proceed with discussions to determine what a convention would look like while gathering more information from business users about the need for a convention. What followed can only be described as multi-party cross-border mediation.

Clearly the mediation community supported a convention. The real interest was to find out whether there is a business interest for a convention. Surveys were scoured to examine viewpoints and new surveys were launched to measure interest including the Global Pound Conference Series. So what information was gathered and how did the process unfold, and what impact will the Convention have on the practice of mediation globally?

II. IS THERE BUSINESS INTEREST FOR A CONVENTION AND ADOPTION IMPACT MEDIATION USE?

There were several surveys or studies undertaken during the Working Group II deliberations. These included: the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration conducted by Queen Mary, University of London and White and Case[2] (Queen Mary/White and Case); the International Mediation Institute[3] (IMI) 2016 International Mediation & ADR Survey;[4] Report on International Mediation and Enforcement

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[1] The United States is one of sixty member States that consider proposals for recommendation and adoption by UNCITRAL.

[2] WHITE & CASE, QUEEN MARY UNIVERSITY OF LONDON, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION (2015), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf [hereinafter WHITE & CASE SURVEY].

[3] IMI is a not-for-profit charitable organization established under Netherlands law. IMI promotes high standards for the practice of mediation and offers certification criteria for mediators, mediation advocates, inter-cultural, and training. For more information, see INTERNATIONAL MEDIATION INSTITUTE, www.imimediation.org (last visited Mar. 24, 2019).

[4] *Results Published—IMI 2016 International Mediation & ADR Survey*, IMI, https://www.imimediation.org/2016/10/16/results-published-imi-2016-international-mediation-adr-survey/ (last visited Mar. 24, 2019); *see also* INTERNATIONAL MEDIATION INSTITUTE, 2016 INTERNATIONAL MEDIATION & ADR SURVEY (2016), https://www.imimediation.org/wp-content/uploads/2018/02/2016_Biennial_Census_Survey_Report_Results.pdf [hereinafter IMI SURVEY].

Mechanisms: Issued by the Institute for Dispute Resolution (IDR) New Jersey City University (NJCU) School of Business;[5] and the global and local reports from the Global Pound Conference Series.[6] What did they say?

In 2015, Queen Mary/White and Case published its International Arbitration Survey. There were 763 questionnaires received and 105 interviews.[7] After reviewing the data, the survey reports that a convention on enforcement of mediation agreements and settlement agreements resulting from mediations may or may not have any effect on the practice of mediation, particularly in terms of encouraging the use of mediation. The reason for this lack of a conclusion was because of the large number of "not applicable" answers given when respondents were asked whether, over the past five years, they had experienced difficulties enforcing agreements to mediate or whether they had experienced difficulties enforcing settlement agreements resulting from a mediation.

Since the focus of the survey was international arbitration, it was unsurprising that less than half of the respondents (44%) indicated they used mediation to resolve cross-border disputes when asked about their experience with different types of alternative dispute resolution (ADR) processes. Despite the lack of experience, 54% of respondents stated that a convention on the enforcement of settlements resulting from mediation would encourage them to use mediation more frequently.

There were both positives and negatives gathered from interviews about attitudes toward a convention. Proponents believed that a convention similar to the New York Convention for Arbitration Awards as well as any initiative that would give mediation more "teeth" would increase its popularity among users.[8] Some interviewees went further, believing that the limited use of mediation is a result of a deficient understanding of the benefits. Further, they thought that the demystification of "mediation voodoo" could increase its popularity.[9] Education through the adoption of a convention might go a long way to address this barrier to the use of mediation. On the opposite side, some interviewees already believe they are strong proponents of mediation and a convention would not increase their use of mediation. Others simply resisted enforcement of mediation agreements. Still, some interviewees believed that a convention is a solution looking for a problem.[10]

The IMI 2016 International Mediation and ADR Survey gathered statistics from 813 respondents[11] providing insights of stakeholders regarding Mediation and Appropriate Dispute Resolution Awareness globally. A majority of all stakeholders except mediators and educators stated that the enforcement of mediation outcomes is extremely important.[12] This was the first

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[5] *Survey on the Enforceability of Mediated Settlement*, IMI, https://www.imimediation.org/research/surveys/survey-enforceability-mediated-settlement/ (last visited Mar. 24, 2019); *see also* SING. REF. BK., David S. Weiss & Michael R. Griffith, *Report on International Mediation and Enforcement Mechanisms*, 20 CARDOZO J. CONFLICT RESOL. (2019) [hereinafter IDR REPORT].

[6] *Global Pound*, IMI, https://www.imimediation.org/research/gpc/ (last visited Mar. 24, 2019); *see also* GLOBAL POUND CONFERENCE SERIES: GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES (2017), Global-Data-Trends-and-Regional-Differences.pdf [hereinafter GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES].

[7] Respondents included in-house counsel, private practitioners, arbitrators, academics, experts, institutional staff, and third-party funders.

[8] *See* WHITE & CASE SURVEY, *supra* note 2, at 31.

[9] *Id.*

[10] *Id.* at 32.

[11] Respondents included users, advisors, service providers, educators, students, and government/non-governmental organization (NGO) stakeholders and mediators. Respondents also represented 67 countries speaking 49 different languages. *See* IMI SURVEY, *supra* note 4, at 5 (discussing further details).

[12] *See* IMI SURVEY, *supra* note 4, at 25.

time regional disparity was uncovered on the importance of enforcement of mediation settlements. Enforcement of mediations constituted the lowest level of extreme importance in North America and Australia/NZ, compared to higher levels in other regions.[13] This result may reflect a greater experience with the mediation process in North America and Australia/NZ and support of mediation through judicial enforcement of settlement agreements.

The Report on International Mediation and Enforcement Mechanisms: Issued by the IDR of the NJCU School of Business sought responses particularly from users about the effect of a convention on their attitudes towards mediation of cross-border disputes. Users/respondents answered (80%) that they would be more likely to include a mediation clause into their agreements if there was a global mechanism to enforce cross-border mediated settlements.[14] Similarly, users (84%) responded that they were more likely to increase their use of mediation to resolve cross-border disputes if there was a mechanism to enforce settlements secured through mediation.

The final survey was accomplished under the umbrella of Global Pound Conference events. Between March 2016 and June 2017, 28 such events were held in 24 countries with more than 3,000[15] participants. The same 20 questions were posed at each event to attendees who voted their opinions before discussing the different views. Towards the end of the series, there was an opportunity for interested persons not able to physically attend an event to participate in an on-line survey covering the same questions. Approximately 750 people participated in this on-line survey.

Participants were divided into 5 categories[16]: 1) Parties that are end-users of dispute resolution, generally in-house counsel and executives (15%); 2) Advisors, private practice lawyers, and other external consultants (25%); 3) Adjudicative Providers such as judges, arbitrators, and their supporting institutions (13%); 4) Non-Adjudicative Providers such as mediators, conciliators, and their supporting institutions (32%); 5) Influencers such as academics, government officers, and policy makers (15%). The category was self-selected by the respondents after being asked in which pocket they spend most of their time.

The twenty questions were divided into 4 categories: 1) Access to Justice & Dispute Resolution Systems: What do users want, need, and expect?; 2) How is the market currently addressing parties' wants, needs, and expectations?; 3) How can dispute resolution be improved? Overcoming obstacles and challenges; 4) Promoting better access to justice: What action items should be considered and by whom?[17]

Two questions provided insight into business interest for a convention. First, Session 3 Question 3 asked which areas would improve commercial dispute resolution? The global results reflecting all events and on-line voting reflect that the adoption of a convention would most improve commercial dispute resolution. This was the first choice for all stakeholders (over 50% for each of the stakeholder groups) except mediation providers who selected use of protocols. The second choice selected is the use of protocols promoting mediation before litigation or similar adjudicative processes. Here, mediation providers selected adoption of a convention as their second choice. Clearly the adoption of a convention was seen as a priority to improve commercial dispute resolution. When looking at local results, in 15 events including the on-line reporting, users selected adoption of a convention as their first choice. In 10 events users included the

[13] *Id.*
[14] *See* IDR REPORT, *supra* note 5, at 14.
[15] *See* GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES, *supra* note 6, at 2.
[16] *See id.* at 6.
[17] *See id.* at 7.

adoption of a convention in their top 3 choices.[18] Second, Session 4 Question 3 asked where policy makers should focus their attention to promote better access to justice for those involved in commercial disputes. Users and advisors believe that policy makers should focus their attention on a convention and legislation in their top 3 choices in 22 events including the on-line voting.

Two questions provided interest about how mediation will be used in the future and who is best positioned to bring about change. First, Session 3 Question 2 asked what processes and tools should be prioritized to improve the future of commercial dispute resolution. Overwhelmingly, the responses in all events indicated an interest in combining binding and non-binding processes. This result evidences that mediation is gaining support not only as a stand-alone process but also in case management approaches. As the data is analyzed, it is clear that users have the most interest in combining processes. They are willing to test the timing to meet the needs of the individual case and are flexible about integrating mediation whether as a preliminary step to other adjudicative processes or at key milestones as a matter moves through the dispute resolution spectrum.[19] Surely, a convention will compliment this increased use in mediation processes by strengthening enforcement of settlements without having to rely on arbitration or litigation. Second, Session 3 Question 5 asked which stakeholders have the potential to be most influential in bringing about change in commercial dispute resolution. Governments and ministries of justice, as well as courts and adjudicators, are seen as having a pivotal role in influencing future change. However, in terms of sustaining change, respondents rely on in-house counsel, advisors, and parties. Here is where regional and cultural differences in approach may have a hand in change. In Asia, roll-up responses reflect the importance of governments and ministries of justice having a primary role in creating change. In North America and other parts of the world, courts' active promotion of mediation through court annexed programs, including the establishment of court ADR programs, are driving greater use of mediation and enforcement of pre-dispute resolution agreements.

III. How did the Working Group II Process Unfold?

For many who participated as delegates or observers, the Working Group II deliberations proceeded very much like a multi-party mediation. The Chair of each session served as the lead mediator, framing questions, feeding back commentary by delegations and observers by reframing and synthesizing, summarizing conclusions and next steps, and providing homework during breaks between sessions. The member state delegations might be seen as the mediation parties. When discussions started, the member state delegations included arbitrators in their ranks. It quickly became clear that mediation experts were also needed so the composition of the delegations either changed or were expanded to include them. The mediation experts in each of the delegations and the observer groups served as co-mediators, especially during consultation breaks. When the Working Group was in session, convening all delegates, it served as a joint session with the consultation breaks operating as private caucuses. The Secretariat was the Chair's expert arm. They provided information on previous deliberations or rules and decisions as well as drafting

[18] In two events, adoption of a Convention was the fourth choice and in two events no users responded to this question.

[19] IMI, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution, Pepperdine School of Law established a Mixed Mode Task Force to develop practical guidance for mixed mode processes including ethical considerations. *See Mixed Mode Task Force*, IMI, https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/ (last visited Mar. 24, 2019).

advice to reduce internal conflict among previously adopted UNCITRAL Conventions. During and between sessions, educational programs were conducted to ensure a constant flow of information supporting decision-making. Between sessions, member state delegations conferred with their ministries of justice and governments because outcomes would ultimately have to be considered for adoption by them. It was up to the member delegations to explain deliberations and decisions as well as bring concerns back to the next Working Group session. In the end the Secretariat provided advice as to a way forward by recommending the adoption of both a convention and uniform law. As in any mediation involving governments or boards of directors, it is not up to the member state delegations to convince the member states to adopt the Convention or model law. Here's where the real work starts.

IV. WHAT IMPACT WILL THE CONVENTION HAVE ON THE PRACTICE OF MEDIATION GLOBALLY?

In 2014, a comment was published in the Kluwer Arbitration Blog opining that mediation growth has stalled.[20] While the comment was published to provide rationale for the Global Pound Conference, the reasoning is equally relevant to the impact the Convention will have on the practice of mediation globally. While mediation is established in a number of countries there is still an opportunity for huge expansion. The surveys described herein all focus on cross-border commercial dispute resolution, where a convention would have a greater impact rather than disputes that are local or national in nature. When these surveys were launched mediation was almost never used in investor-state cases, international trade disputes, class actions, or other cross-border commercial disputes. Mediation is available under international arbitration rules but too often parties don't take advantage of the process.

The Queen Mary/White and Case study found it was inconclusive whether the adoption of a convention would have an impact on the future growth of mediation. But as stated above, 54% of respondents replied that a convention on the enforcement of mediation settlements would encourage them to use mediation more frequently. The IDR survey reported that users were more likely to include pre-dispute clauses and use mediation for cross-border disputes if a convention for enforcement of mediation settlements was available. The Global Pound Conference series results were the strongest in naming a convention a priority to improve dispute resolution of commercial disputes in the future. These results foreshadow a future increase in the use of mediation for cross-border commercial disputes.

One area where we already have seen interest is in the use of mediation to resolve investor-state disputes. Since 2014, IMI has been working with the investor-state community to advance the use of mediation through training and rulemaking conducted by its Investor-State Task Force.[21] This work includes delivering training to interested parties and mediators, developing standards, and commenting on rule making and protocols offered by the International Centre for the Settlement of Investment Disputes, the Energy Charter Secretariat, UNCITRAL, the European Union, and others. A convention will only push interest and action further.

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[20] *See* Deborah Masucci, *Time for Another Big Bang in Alternative Dispute Resolution: The World Needs a Global Pound Conference*, KLUWER MEDIATION BLOG (Feb. 18, 2014), http://mediationblog.kluwerarbitration.com/2014/02/18/time-for-another-big-bang-in-alternative-dispute-resolution-the-world-needs-a-global-pound-conference/.

[21] *See Investor-State Mediation Task Force*, IMI, https://www.imimediation.org/about-imi/who-are-imi/ism-tf/ (last visited Mar. 24, 2019).

However, a convention alone is not the final answer. Since its establishment in 2007, IMI has promoted global standards for mediation practice. Part and parcel of these standards is ensuring the quality of mediators and the practice of mediation through certification and quality control. This infrastructure needs to be reinforced to ensure confidence and trust.

While a convention is seen as the priority to improve commercial dispute resolution in the future, certification systems[22] (29%) and quality control (28%) were high on the list of options that respondents sought. However, certification has been resisted. Proponents of certification believe it is a process to ensure quality by providing objective, measurable criteria for the performance of mediation. Opponents believe certification is unnecessary because the market self-regulates when users select mediators who they or someone they respect trusts mediators with a proven track record.

To begin with, there needs to be clarification of terms.[23] An individual who takes a mediation course receives a diploma acknowledging that the person understood the course material. The real test comes as the person secures case appointments. After receiving a diploma, the person may or may not be eligible to be placed on provider rosters. Inclusion on a roster is a form of attestation that the person has what it takes to be a mediator. The information provided to parties considering mediators on a list is basically biographical information. Feedback about the mediator's style or process skills or other expertise is shared by word of mouth. Being certified, however, should be the highest form of acknowledgement for mediators who are experienced and have secured feedback from people who experienced the mediator's performance firsthand. IMI and the Singapore International Mediation Institute[24] publish feedback digests consolidating the feedback so future users can have access to the information. The digests are compiled by independent reviewers and are publicly available at no cost.

Certification standards include criteria covering knowledge, training, and performance that establish quality. A Code of Ethics followed by certified mediators ensures professionalism and engenders trust.

The expansion of mediation that is expected from a convention will reinforce the need for a mediator quality assurance system and a mechanism to share information about the performance and competency of mediators to resolve complex cases especially involving cross-border or investor-state disputes.

V. CONCLUSION

The results are in. There is interest in and a need for the Convention for the Enforcement of Mediated Settlements. More work is necessary and will be undertaken through education and training so that potential users will understand the benefits of mediation and tear down the impediments to the effective use of the process. A signing ceremony was held on August 7, 2019 in Singapore[25]. Substantial support for the convention was shown with 46 countries signing the document during the proceedings. Now member states must ratify the Convention to ensure

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[22] *See* Deborah Masucci, *Moving Mediation Practice Forward—Is It Time for Certification?*, N.Y. DISP. RESOL. LAW., Spring 2019, at 40–42 (discussing the pros and cons to certification).

[23] *See* Thierry Garby, *What is a Good Mediator?*, CORP. MEDIATION J. (2018).

[24] For more information, see SINGAPORE INTERNATIONAL MEDIATION INSTITUTE, http://www.simi.org.sg/ (last visited Mar. 24, 2019).

[25] See https://www.imimediation.org/2019/08/07/singapore-convention-signed/
For a list of countries signing the convention in Singapore.

meaningful implementation and use. At least three member states must ratify for the convention to activate. The big bang generating interest in mediation has commenced. Now let's see it accelerate.