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**SINGAPORE
MEDIATION CONVENTION
REFERENCE BOOK**



PREFACE

Lela P. Love

It is my great privilege to join Hal Abramson in ushering this reference book into the literature about the Singapore Mediation Convention. We were privileged to have drafters of the Convention and notable scholars converge at Cardozo Law School on March 18, 2019 for a symposium and to contribute to this book. And then we were able to share the excitement of the signing of the Convention by 46 countries in August 2019. Now we celebrate the publication of this reference book.

Cardozo and Touro Law Schools co-sponsored this event, joined by notable sponsors that we deeply appreciate: Jed D. Melnick, the sponsor of the Cardozo Journal of Conflict Resolution Annual Symposium, the International Academy of Mediators (IAM), the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), JAMS, the New York State Bar Association Dispute Resolution Section, the NJ City University Institute for Dispute Resolution, and the Federal Bar Association— Alternative Dispute Section, International Law Section, and Litigation Section. The depth and enthusiasm of our sponsors marked the importance of the occasion.

For me, looking at the arc of Cardozo's dispute resolution program—and also the arc of my career—this event marks a coming of age of mediation. It is now on the world stage as a co-equal (though different) process than arbitration. We have two wide and walked pathways for dispute resolution—that of crafting consensual agreements with the help of a third party neutral and that of third party decisions.

A few thanks are in order: to Nick Gliagias, the editor-in-chief of the Cardozo Journal of Conflict Resolution, whose positive and can-do attitude, ready smile, and hard and professional work made the project a pleasure and who contributed greatly to its success. To our sponsors, mentioned above. Above all, to Hal Abramson, whose enthusiasm and involvement with the drafting of the Convention sparked my own interest and enthusiasm and willingness to put a 100% effort into this venture. He was the major driver behind scoping the topics, inviting and spurring on various authors to write the articles, and reviewing each draft article.

LELA P. LOVE

Professor of Law, Cardozo School of Law
Director, Kukin Program for Conflict Resolution

August 2019

EDITOR'S NOTE & ACKNOWLEDGMENTS

The *Cardozo Journal of Conflict Resolution* would like to acknowledge the distinguished professors that made this reference book possible. We would like to thank Professor Hal Abramson, who served as the Faculty Editor of the Reference Book and Co-Chair of the Singapore Convention Symposium. Professor Abramson was instrumental in the procurement of articles and the organizational structure of the Reference Book. In addition, his expertise and editing work in the subject matter contributed greatly to the Reference Book's final published state.

We would like to thank Professor Lela Love, who contributed to the Reference Book as our Journal's Faculty Advisor and served as Co-Chair of the Singapore Convention Symposium.

We are grateful to all the esteemed delegates who took the time to write their insightful articles. Finally, we are grateful to Volume 20's Journal staff for their work throughout the year.

NICHOLAS GLIAGIAS

Editor-in-Chief

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SPONSORS OF THE REFERENCE BOOK

We sincerely thank all the sponsors for their generous support.

The primary financial sponsors were the Benjamin N. Cardozo School of Law and Touro College Jacob D. Fuchsberg Law Center.

Other valuable financial sponsors were the International Academy of Mediators (IAM), the Federal Bar Association Federal Litigation Section, and the Federal Bar Association Alternative Dispute Resolution Section.



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THE SINGAPORE MEDIATION CONVENTION: COMPLIANCE WITH CROSS-BORDER MEDIATED SETTLEMENT AGREEMENTS

SYMPOSIUM
March 18, 2019

Benjamin N. Cardozo School of Law
The Jed D. Melnick Symposium of the
Cardozo Journal of Conflict Resolution
and
Touro College Jacob D. Fuchsberg Law Center

PROGRAM

8:30–9:00 a.m. Coffee and Welcome Breakfast

Breakfast Sponsored by the International Center for Dispute Resolution/ American Arbitration Association

9:00–9:30 a.m. Welcome Remarks

- Melanie Leslie, Dean, Cardozo School of Law and
- Harry Ballan, Dean, Touro College Jacob D. Fuchsberg Law Center
- Professor Lela Love, Director of Cardozo's Kukin Program for Conflict Resolution
- Nicholas Gliagias, Editor-in-Chief of the Cardozo Journal of Conflict Resolution
- Professor Hal Abramson, Touro College Jacob D. Fuchsberg Law Center

9:30–10:20 a.m.

Panel 1. UNCITRAL's Connection to Mediation, The Multi-party Process of Creating the Convention, and the Convention's Significance

Moderator: Professor Lela Love, Cardozo School of Law

Panelists:

- Corinne Montineri, Legal Officer, UNCITRAL Secretariat:
UNCITRAL's function within the UN and the significance of the Convention
- Tim Schnabel, Former Head of U.S. Delegation:
From idea to formal proposal before UN Working Group II and the significance of the Convention
- Professor Hal Abramson, IMI and IAM Delegate:
Working Group II deliberations as a multi-party process

10:20–11:00 a.m.

Panel 2. The Need for a Convention: Legal Issues Engendered by Mediated Settlement Agreements

Moderator: Professor Donna Erez Navot, Cardozo School of Law

Speaker: Professor James Coben, Mitchell-Hamline School of Law

11:20–12:00 p.m.

Panel 3. The Need for a Convention: Users' Perspectives (Reports on Empirical Studies)

Moderator: Edna Sussman, Independent Arbitrator and Mediator

Panelists:

- Professor S.I. Strong, University of Missouri School of Law, American Society of International Law Delegate: *The role of empirical research and dispute system design in proposing and developing the Singapore Convention*
- Deborah Masucci, Independent Arbitrator/Mediator, Co-chair, International Mediation Institute (IMI), Head of IMI Delegation, Chair of the NYSBA Dispute Resolution Section: *Data from the Global Pound Conference*
- Professor David Weiss, New Jersey City University Institute for Dispute Resolution (NJCUI-DR), IMI Delegate: *Data regarding business users from the NJCU-DR report released under a joint task force with IMI*

12:00–1:00 p.m. Lunch

Lunch Sponsored by the International Academy of Mediators and the Federal Bar Association

1:00–1:40 p.m.

Panel 4. Key Issues for Mediators: Scope of the Convention and Proof of a Mediated Settlement Agreement

Moderator: Professor Jacqueline Nolan-Haley, Fordham Law School

Panelists:

- Professor Ellen Deason, Ohio State University Law School, American Society of International Law Delegate: *Limitation to commercial disputes and exclusion of family, employment, and consumer disputes (Art. 1 & 2)*
- Allan Stitt, Canadian Delegate: *The many different ways to prove that a mediation occurred (Art. 4(1))*

1:40–3:00 p.m.

Panel 5. Is the Convention an Improvement over the Status Quo? Expeditious Enforcement, Protection of Parties, and Defenses Against Enforcement

Moderator: Eric Tuchmann, General Counsel for AAA (American Arbitration Association)

Panelists:

- Michel Kallipetis, IAM Delegate: *Mediator misconduct defenses (Art. 5(1)(e) & (f))*
- Jean-Christophe Boulet, Belgian Delegate: *Other defenses, including contrary to public policy (Art. 5(1)(a-d) & (2))*
- Héctor Flores Sentíes, Mexican Delegate: *Other defenses, including contrary to public policy (Art. 5(1)(a-d) & (2))*

3:15–4:30 p.m.

Panel 6. Interactions with Other Instruments and Laws, “Recognition and Enforcement” Solution, and Opt-In/Opt-Out Provisions

Moderator: Kim Taylor, Chief Legal and Operating Officer, JAMS

Panelists:

- Tim Schnabel, Former Head of U.S. Delegation: *Recognition and Enforcement (Art. 3)*
- Norel Rosner, EU Delegate: *Coordination with other enforcement regimes, states’ opt-in option, and participation by regional economic integration organizations (Art. 1(3), 8(1)(b), & 12)*
- Itai Apter, Israeli Delegate: *Reservations, Opt-in and Opt-Out Options (Art. 8(1) & (2))*

4:30–5:00 p.m.

Closing Remarks: Reflections, Next Steps for Adoption by States, and Good Memories Song

Moderator: Professor Hal Abramson, IMI and IAM Delegate

Panelists:

- Tim Schnabel, Former Head of U.S. Delegation
- Corinne Montineri, Legal Officer, UNCITRAL Secretariat

5:00–6:30 p.m. Wine and Cheese Reception

Reception Sponsored by JAMS

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INTRODUCTION

Hal Abramson

OVERVIEW

This Reference Book focuses on the new Singapore Mediation Convention for enforcing cross-border mediated settlement agreements. It is designed to deliver on its title—as a reference book. We hope that it will inform discussions as states contemplate ratifying the Singapore Convention and will aid users when interpreting the Convention.

To serve as an accessible reference source, the book is organized into three parts. As explained more fully below, Part I includes three articles that offer three perspectives on the Convention and the process that produced it; Part II presents four articles that supply evidence of the need for a cross-border enforcement instrument and its likely effectiveness; and Part III includes eight articles that examine key provisions in-depth, explaining why particular choices were made and others rejected.

The articles in the book are expanded versions of presentations given at a symposium on the Singapore Convention. The symposium was co-sponsored by Cardozo and Touro Law Schools in New York City on March 18, 2019, three months after the U.N. General Assembly adopted the Convention. Most of the authors were delegates who were in the “room where it happened,” to quote a well-known phrase from Lin-Manuel Miranda’s break-out Broadway hit *Hamilton*.

The Singapore Convention is not perfect. It is the product of a complex negotiation involving diverse parties from around the world. Parties brought to the room varied professional, cultural, and political perspectives and experiences. The result reflects “compromises,” a word with mixed and not always positive meanings, especially for me. Compromise is often understood as an anemic conclusion to a quarrel, where the parties exhaustedly offer to “split the difference.” In this book, I will define the word “compromise” based on what I observed during the UNCITRAL Working Group II deliberations, the U.N. group responsible for drafting the Convention. “Compromise” proposals were usually not the

uncreative “split the difference” variety. Instead, they were frequently quite inventive ones that addressed to some extent the different interests and concerns that were holding up reaching a consensus (the criteria for agreement in a process with no voting). This usage is consistent with best practices in negotiations and left me with a more positive view of a “compromise.”

Realizing that the Convention reflects multiple compromises designed to meet conflicting interests, it is not surprising that the Convention may be viewed as imperfect from the perspective of some delegates and user groups. For this reason, each author that focused on the Convention’s specific provisions in Part III was asked to do more than explain the provisions that the author was covering. Each author was asked to highlight the rationale behind key compromises and any risks when implementing the provisions. By adopting this approach, I hope this book offers a realistic, not idealized, assessment of key provisions.

This reference book offers answers and explanations to many questions that will likely arise in any discussion of the new Convention. Is there a need for an enforcement convention? Given the availability of so many Article 5 defenses, does the Convention improve upon current enforcement mechanisms? Does Article 4 on proving a mediation and Article 5 on defenses against enforcement based on mediator misbehavior offer an easy way for a party to repudiate an agreement? Do Article 8 reservations risk gutting the Convention or offer a pathway for broader buy-in by states? Answers to these questions and many others can be found in these articles.

CONTENT

PART I: OVERVIEW OF THE SINGAPORE CONVENTION

The initial three articles provide an overview of the Convention.

The article by Natalie Morris-Sharma from Singapore who chaired UNCITRAL Working Group II that drafted the Convention provides what she describes as a “whirlwind tour of the Convention.” She explores the multilateral nature of the consensus-building process and how the Convention responds to diverse legal traditions while fashioning a simple, easy-to-use instrument that accommodates flexible mediation processes.

The article by Corinne Montineri, senior legal officer at UNCITRAL and Secretary of Working Group II for the enforcement project, describes how the UNCITRAL drafting process functions within the United Nations and the significance of the Convention in promoting cross-border trade and investment. She provides historical context in explaining how the Convention fits within UNCITRAL's history of mediation-related and enforcement initiatives.

The third article, by me, explains the multiparty negotiation process that produced the Convention and why a number of the key substantive choices were made from the perspective of a person who was present during much of the drafting process.

PART II: NEED FOR AND EFFECTIVENESS OF THE CONVENTION

The first three articles describe empirical studies that can be useful to states that are assessing whether a cross-border enforcement instrument is needed.

In an article designed to open up the black box of the early treaty making stages, Professor S.I. Strong, University of Missouri School of Law and an American Society of International Law Delegate, uses the Singapore Convention as a case study to illustrate how the combination of theoretical work and empirical studies can support the *treaty-proposing* process. Her article includes a summary of her original empirical study that can be useful to countries looking for evidence to support adopting an enforcement instrument. Her full study, published separately, in an article entitled *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973 (2016), identified existing difficulties enforcing mediated settlement agreements, and concluded that “the international legal community strongly supported the adoption” of an international enforcement treaty.

Four other relevant empirical studies are summarized in an article by Deborah Masucci, Co-chair of the International Mediation Institute (IMI) and head of the IMI Delegation. She summarizes studies that were conducted by Queen Mary/White and Case, International Mediation Institute (IMI) (2016 Survey), Institute for Dispute Resolution of the New Jersey City University School of Business, and the Global Pound Conference Series.

Two of these studies, the IMI and the Global Pound Series surveys, are reported in greater detail in an article by Professor

David Weiss, New Jersey City University Institute for Dispute Resolution (NJCU-IDR) and IMI Delegate.

The fourth and final article in Part II offers reassuring evidence that if the U.S. mediation litigation experience reflects the litigation experiences in other countries, the Singapore Convention should be efficacious even with the conditions that must be met in the Convention and the range of defenses that can be asserted in an enforcement proceeding. In an article by Professor James Coben from Mitchell-Hamline Law School and the leading expert on U.S. mediation-related litigation, the author reports on his empirically-based studies and conclusions.

PART III: KEY PROVISIONS—IN-DEPTH CONSIDERATION

Part III scrutinizes Convention provisions central to states' assessment of the treaty's effectiveness in establishing a cross-border enforcement regime that serves their needs. This part also provides guidance to mediation parties seeking to determine the ambit and content of the Convention.

Part A offers two articles that cover the scope of the Convention.

The first article explains why the Convention is limited to commercial disputes and settlement agreements that only result from mediation. It also gives background on the long-overdue change by UNCITRAL to replace the term "conciliation" with "mediation," in an article by Professor Ellen Deason, Ohio State University Law School and American Society of International Law Delegate.

The second article explains why the Convention only applies to mediated settlements and how easy it is to prove a mediation qualifies for enforcement under the Convention, in an article by Allan Stitt, Canadian Delegate and experienced mediator.

Part B offers four articles that delve deeply into the Convention's central features on enforcement and defenses.

The short and convoluted Article 3 that is simply titled "General Principles" is the essential "player" in the enforcement Convention according to Tim Schnabel, former head of the U.S. Delegation. He deciphers the Article while explaining why all the other provisions are "supporting players."

The other three articles cover the defenses.

The first defenses article considers claims of mediator misconduct that can be asserted as a defense against enforcement, a provision that has generated alarm within the mediation community because of how such defenses can be misused. Michel Kallipetis, IAM Delegate and experienced mediator, explains what triggered inclusion of these defenses, parses the language, and suggests why the fears of abuse are unwarranted due to the safeguards in the carefully crafted language.

Two delegates were asked to analyze the same Article 5 defenses because their implementation could be dispositive in determining the Convention's success. Each author also was asked to answer independently whether the new enforcement convention is better than the status quo (existing enforcement options)? The answer is not obvious as the Convention offers a wide range of defenses that could generate the same sort of litigation that can arise without the treaty. In two lengthy articles, one by the Belgium Delegate and lawyer, Jean-Christophe Boulet, and another by Mexican delegate and lawyer, Héctor Flores Sentías, the authors offer their insights on this pivotal provision.

Part C offers two articles that cover Reservations and two other significant provisions.

In a discerning analysis of Article 8 on Reservations, a common provision in treaties that can dilute their effectiveness, Israeli delegate and lawyer, Itai Apter, with a colleague, explains the rationale for these reservations including their benefits for promoting state buy-ins while preserving the Convention's benefits. He suggests that the provision may induce more states to ratify the Convention because states that are hesitant about the Convention's automatic application can file a reservation to reverse it so that the Convention would apply only if a disputing party elects to opt-in.

Finally, in an article that addresses three narrow and significant provisions, Norel Rosner, who represented the European Union at the UNCITRAL negotiations, considers how the Convention coordinates the Convention with other enforcement regimes, illuminates further the opt-in provision, and explains the Convention's involvement of regional economic organizations like the European Union as parties.

ACKNOWLEDGMENTS

I want to thank each of the authors for preparing their valuable and insightful articles. Only because they worked diligently and met a tight timetable with multiple deadlines could this book be published so soon after the Convention was adopted by the U.N.

I also want to thank Corinne Montineri from UNCITRAL's Secretariat for generously reviewing each article in Parts A and C from UNCITRAL's perspective as a safeguard against any major omissions or errors.

I want to join Lela Love in thanking the long list of distinguished sponsors that so generously supported the symposium and this reference book. I want to give special thanks to Touro Dean Harry Ballan who understood early the significance of the Convention's multilateral accomplishment and committed Touro Law School to be a co-sponsor with Cardozo Law School.

Of course, this reference book would not have been possible without the essential and quality work by the student editors of the *Cardozo Journal of Conflict Resolution* and its Editor-in-Chief, Nick Gliagias. I especially want to thank Nick for his professional dedication that went beyond his normal responsibilities, including working diligently and proficiently after graduating and taking the bar examination to format articles and getting the book in shape for the publisher.

And finally, it is my pleasure and privilege to thank Lela Love for suggesting that we put together a symposium on the Singapore Convention, her eagerness to expand the scope of the symposium and the reference book as we progressed, and her devotion and hard work to ensure a successful and worthwhile outcome.

STATUS OF CONVENTION AT TIME OF REFERENCE BOOK
PUBLICATION

On August 7, 2019, the Singapore Convention officially opened for signature at an elegant ceremony hosted by Singapore where 46 countries signed the convention. The official list of signatories that will be updated in perpetuity can be found on the UNCITRAL website by searching for "Singapore Convention on Mediation."

When you check, you will find two columns. The left one lists the countries that have signed the Convention so far. The right column lists the countries that have deposited an instrument of ratification, acceptance, approval, or accession in accordance with Article 14.1 of the Convention. The Convention will become effective six months after a third country shows up in the right column. At the time this book went to the publisher, there were no countries in the right column.

When a third country deposits an instrument and this first international treaty on cross-border commercial mediation becomes effective, mediation will be available for parties on an even playing-field with arbitration and its New York Convention. We hope that this book will help inform the discussions and decisions as countries weigh whether to join the new Singapore Mediation Convention. We also hope the book will be valuable to users when it comes time to implement this new Convention.

HAL ABRAMSON

Professor of Law, Touro Law Center
Faculty Editor of Reference Book and Co-Chair of Symposium
IMI and IAM Delegate at UNCITRAL Working Group II
Meetings on the Singapore Convention

August 2019

THE SINGAPORE CONVENTION IS LIVE, AND MULTILATERALISM, ALIVE!*

Natalie Y. Morris-Sharma**

I. INTRODUCTION

In the same year of claims and consternation that multilateralism may be dead,¹ the text of a multilateral treaty was finalised (alongside an amended model law) and adopted by the United Nations General Assembly.² This new treaty—the United Nations Convention on International Settlement Agreements Resulting from Mediation, which will also be known as the Singapore Convention on Mediation (hereinafter “the Singapore Convention”)³—will provide for the ability to enforce and invoke international mediated settlement agreements reached to resolve commercial disputes. When UNCITRAL finalised its work on the Singapore Convention and the amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (hereinafter “the Model Law”)

* The views expressed herein are the views of the author and do not necessarily represent the views of the Government of Singapore. Please note that at the time of this writing, the signing ceremony was some months away.

** Natalie Y. Morris-Sharma is Director of the International Legal Division in Singapore’s Ministry of Law, which handles a variety of international law and policy concerns. Previously, Natalie was legal advisor to Singapore’s Permanent Mission to the UN, and Deputy Senior State Counsel in the international law department of the Attorney-General’s Chambers. Natalie has participated in several bilateral and multilateral negotiations, including at UNCITRAL where her recent roles have included Chairperson of UNCITRAL Working Group II (Dispute Settlement), for its work on a Convention and draft amended model law on mediation; and Vice-Chairperson of the 50th UNCITRAL Commission session, where she chaired the discussions that led to the adoption of UNCITRAL’s mandate for ISDS reform.

¹ See, e.g., Meetings Coverage, Security Council, *Rising Nationalism Threatens Multilateralism’s 70-Year ‘Proven Track Record’ of Saving Lives, Preventing Wars, Secretary-General Tells Security Council*, U.N. Meetings Coverage, SC/13570 (Nov. 9, 2018); Andreas Michaelis, *Farewell to Multilateralism? Building a Strong Europe for a Strong World Order*, Remarks at Singapore Institute of International Affairs’ Seminar on “The EU and ASEAN in Uncertain Times: Integration, Tensions, and Trade” (Sept. 13, 2018) (transcript available online at <http://www.siiia.org/the-eu-and-asean-in-uncertain-times-farewell-to-multilateralism/>).

² G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018) [hereinafter G.A. Res. 73/198]. With respect to the Model Law, see G. A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law (Dec. 20, 2018).

³ G.A. Res. 73/198, OP3.

during the 51st Commission session in June 2018, the negotiators musically announced, through a song, composed to the tune of *Home on the Range*, that “The Singapore Convention is live.” Indeed, the Singapore Convention will not only “go live” on 7 August 2019, when it opens for signature in Singapore, but its negotiation and adoption demonstrated that multilateralism is still very much alive.

The Singapore Convention was inspired by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “the New York Convention”).⁴ The Singapore Convention will be to mediated settlement agreements what the New York Convention is to arbitral awards. The Singapore Convention recognises that, with a mediated process, the settlement agreement is not a mere contract, and can therefore be recognised and enforced (or enforced and invoked) in its own right, so long as the requirements of the Singapore Convention are met.⁵

The Singapore Convention applies to (i) international, (ii) commercial, (iii) settlement agreements, (iv) resulting from mediation.⁶

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

⁵ The Singapore Convention does not use the term “recognition.” This is because of the different understandings over what “recognition” means. As such, it was decided that the Convention would instead describe the legal effects of “recognition.” The terms “enforce” and “invoke” are intended to encapsulate how a mediated settlement agreement can be used as a “sword” as well as a “shield.” See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, September 12–23, 2016), U.N. Doc. A/CN.9/896, at 15 (Sept. 30, 2016) [hereinafter UNCITRAL WG II September 2016 Report]; UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016), U.N. Doc. A/CN.9/867, at 23 (Feb. 10, 2016) [hereinafter UNCITRAL WG II February 2016 Report]; UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, September 7–11, 2015), U.N. Doc. A/CN.9/861, at 14 (Sept. 17, 2015) [hereinafter UNCITRAL WG II September 2015 Report]. See also Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 35–42 (2019) (more generally, this article provides a superb explanation of the key provisions of the Convention, drawing in great detail from the records of the negotiations and from the author’s key role in the negotiations).

⁶ Singapore Convention on Mediation art. 1(1). In this chapter, the term “mediation” is used with the intention that it be understood the same way as the term “conciliation” as used in the context of UNCITRAL’s earlier work on conciliation. In the early stages of the discussions, a view was expressed that the work of UNCITRAL in this area should refer to “mediation” instead of “conciliation.” This was on the basis that “mediation” was the more widely used term. There was some hesitation to do this, even towards the end of the negotiations. It was recognised that these terms had been historically used in the relevant UNCITRAL texts. To address the concern that there be an inadvertent substantive change in meaning, the text accompanying the Convention will explain the historical developments of the terminology in the UNCITRAL texts

An “international” settlement agreement is identified in relation to the places of business of the parties to the settlement agreement.⁷ The Convention does not apply to consumer disputes, or to agreements relating to consumer disputes or to family, inheritance, or employment law.⁸ Unlike the Model Law, the Convention does not address itself to agreements to mediate, recognising that such agreements are not exclusive in nature unlike arbitration agreements⁹ and that there may not always be such an agreement concluded by the disputing parties as a basis for the mediation process.¹⁰ In order to avoid overlaps (and gaps) with existing and future Conventions which apply to arbitral awards and judgments—including the Convention on Choice of Court Agreements,¹¹ the anticipated judgments convention being negotiated at the Hague Conference, and the New York Convention—the Singapore Convention does not apply to all settlement agreements. It does not apply to settlement agreements approved by a court or concluded before a court in the course of proceedings and which are enforceable as a judgment. It also does not apply to settlement agreements which are recorded and enforceable as an arbitral award.¹²

This Chapter will explore the multilateral process and context which led to the development of the Singapore Convention as well as the amended Model Law. This Chapter will then examine how, as a product of multilateral consensus, the Singapore Convention responds to the diverse legal traditions and legal realities by being a treaty with requirements that are simple, easy to use, and accommodate the flexibilities inherent in mediation.

and emphasise that the term “mediation” is “intended to cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used.” See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, October 2–6, 2017), U.N. Doc. A/CN.9/929, at 16 (Oct. 11, 2017) [hereinafter UNCITRAL WG II October 2017 Report]; UNCITRAL WG II February 2016 Report, *supra* note 5, at 19.

⁷ Singapore Convention on Mediation art. 1(1).

⁸ Singapore Convention on Mediation art. 1(2).

⁹ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, February 2–6, 2015), U.N. Doc. A/CN.9/832, at 7 (Feb. 11, 2015) [hereinafter UNCITRAL WG II February 2015 Report].

¹⁰ UNCITRAL WG II October 2017 Report, *supra* note 6, at 7; UNCITRAL WG II September 2015 Report, *supra* note 5, at 6, 13.

¹¹ Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

¹² Singapore Convention on Mediation art. 1(3).

II. THE MULTILATERAL PROCESS

The Singapore Convention was developed through a multilateral process, and was developed by consensus. Multilateral consensus is a hallmark of the UNCITRAL tradition. UNCITRAL conducts processes that ensure that it is well-placed to identify common ground for the building of harmonised approaches and legal responses to a variety of issues in international trade law.¹³ Foremost of these are its convening power, which ensures input from different legal cultures and traditions as well as the relevant expertise.¹⁴ Its consensus-based decision-making enables the identification of points of convergence for viable options for harmonisation.

These factors converged in the negotiations that led to the adoption of the Singapore Convention and the amended Model Law. UNCITRAL's convening power ensured that we typically had at least a hundred delegations present at our meetings, with technical experts hailing from backgrounds in fields such as government, the judiciary, arbitration, mediation, business, and academia.¹⁵ The rich and varied experience that representatives brought to the meetings ensured that the UNCITRAL deliberations were rigorous and robust.¹⁶ That said, the road did not run smoothly. Not that this was a surprise.

The task of tackling an international mechanism for the enforcement of mediated settlement agreements was one that had been taken up by UNCITRAL in the course of its work on the

¹³ See generally UNCITRAL, Note by the Secretariat, *UNCITRAL rules of procedure and methods of work*, U.N. Doc. A/CN.9/638 (Oct. 17, 2007), and its addenda 1–6.

¹⁴ See, e.g., UNCITRAL, *A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 2* (2013) (“Members of UNCITRAL are selected from among States Members of the United Nations and represent legal traditions and levels of economic development”).

¹⁵ For example, the sixty-sixth session of the UNCITRAL Working Group II (Dispute Settlement), that met from February 6–10, 2017 in New York, was attended by sixty State delegations, two observer delegations, and forty-one intergovernmental and non-governmental organisations. See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, February 6–10, 2017), U.N. Doc. A/CN.9/901, at 3 (Feb. 16, 2017) [hereinafter UNCITRAL WG II February 2017 Report].

¹⁶ S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 *AKRON L. REV.* 495, 511, 512, 518 (2016) (noting how “[t]he high proportion of arbitration experts in Working Group II is troubling” but that “[i]f the mediation community can provide experts in arbitration with a sufficiently compelling account of the need for and benefits of a new treaty in this area of law, the two groups’ combined opinion will be difficult for state actors to resist”).

2002 UNCITRAL Model Law on International Commercial Conciliation.¹⁷ The Model Law identified “the smallest common denominator between the various legal systems” for how to address the enforcement of conciliated settlement agreements.¹⁸ The result was to leave the question to individual States that chose to enact the Model Law.¹⁹ In other words, no real agreement could be reached at the time.²⁰

It was almost 15 years later, in 2014, that UNCITRAL was brought back to the question, owing to a proposal from the U.S. delegation, led by Timothy Schnabel.²¹ However, the differences in views in 2002 over the possibility of an international mechanism for enforcement continued to persist in 2014.²² That we were able to reach a consensus outcome on a Convention and amendments to the Model Law is a testament to the negotiators (and members of the UNCITRAL Secretariat) who worked tirelessly—come hell or high water; or perhaps more aptly, come hail or snowy weather²³—to appreciate each other’s positions and interests, so that various understandings could be reached and necessary compromises could

¹⁷ G.A. Res. 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (Jan. 24, 2003).

¹⁸ UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-fifth session (Vienna, November 19–30, 2001), U.N. Doc. A/CN.9/506 (Dec. 21, 2001).

¹⁹ Article 14 of the UNCITRAL Model Law on International Commercial Conciliation states: “If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].”

²⁰ This fate is shared. See NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 301 (2009) (noting that the Model Law and EU Mediation Directive, which Alexander describes as “the primary international legal instruments on mediation”, “both fall short of establishing uniform standards in relation to the enforceability of mediated agreements”). See also Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC DISP. RESOL. BULL., Nov. 2018, at 43–44.

²¹ UNCITRAL, Note by the Secretariat, *Planned and possible future work—Part III, Proposal by the Government of the United States of America: future work for Working Group II*, U.N. Doc. A/CN.9/822 (June 2, 2014).

²² Schnabel, *supra* note 5, at 5; Natalie Y. Morris-Sharma, *The Changing Landscape of Arbitration: UNCITRAL’s Work On The Enforcement Of Conciliated Settlement Agreements*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 123, 126–30 (2018).

²³ This is in reference to the blizzard which led to meetings being cancelled on the Thursday of the Working Group’s sixty-sixth session in New York in February 2017. This threatened the momentum of the negotiations. However, pursuant to an invitation to all delegations to meet informally at a location off-site, interested delegations were able to continue their discussions. This enabled a number of key understandings to be reached. The five-issue packaged deal that emerged from the sixty-sixth session enabled a breakthrough on a number of difficult issues in the negotiations.

be made. A number of these negotiators are represented as authors in this volume on the Singapore Convention.

III. THE CONVENTION IN CONTEXT

The benefits of mediation as a form of alternative dispute resolution are well-known, and are also appropriately acknowledged in the preambular paragraphs of the Singapore Convention.²⁴ In gist, mediation offers the promise of cost-effective and time-effective dispute resolution, which translates into savings for commercial parties as well as by States. It allows parties to shape the way their disputes are resolved in a way that suits them and their needs. This better enables disputing parties to preserve their commercial relationship.

However, the lack of a cross-border mechanism for giving legal effect to international mediated settlement agreements has been said to be a major obstacle to the use of mediation to resolve disputes.²⁵ Without a cross-border mechanism, in short, there would be less certainty.²⁶ In Carrie Menkel-Meadow's recent Singapore Mediation Lecture in 2017, she had identified mediation's lack of an equivalent to the New York Convention as "one of the very big problems for mediation."²⁷ An IMI survey conducted in October and November 2014 found that 92.9% of those surveyed would be either much more likely or probably more likely to mediate a dispute with a party from another country if they knew that their country had ratified a United Nations convention on the enforcement of mediated settlements.²⁸ In another survey, the results

²⁴ For instance, the third preambular paragraph states: "*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."

²⁵ Though by no means the only obstacle. Other reasons for the low uptake of international commercial mediation include a lack of sensitivity to legal and cultural differences and the lack of a track record for businesses to trust. In this regard, *see* Lucy Reed, *Ultima Thule: Prospects for International Commercial Mediation*, Keynote Address at the Inaugural Schiefelbein Global Dispute Resolution Conference (Jan. 18, 2019), *video available online at* <https://www.indisputably.org/?p=13752>.

²⁶ UNCITRAL WG II February 2015 Report, *supra* note 9, at 5–6. *See also* UNCITRAL WG II September 2016 Report, *supra* note 5, at 24.

²⁷ Carrie Menkel-Meadow, *Mediation 3.0: Merging the Old and the New*, *ASIAN J. ON MEDIATION* 1, 7 (2018).

²⁸ International Mediation Institute, *IMI survey results overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements*, *INTERNATIONAL MEDIATION INSTITUTE* (2014), <https://www.imimediation.org/2017/01/16/users-view-proposal-un->

of which were shared with the Working Group, 74% of respondents indicated that they thought an international convention concerning the enforcement of settlement agreements would encourage mediation and conciliation.²⁹ Both of these studies are discussed in this Singapore Convention Reference Book.

Against this backdrop, by offering a cross-border mechanism for giving legal effect to international mediated settlement agreements, the Singapore Convention underscores the importance (and legitimacy) of mediation as a form of dispute resolution, and removes a significant barrier to the use of mediation for resolving disputes.³⁰ As stated in an open letter to the United States' Secretary of State Michael Pompeo, a number of business associations explained that the Singapore Convention will help "mitigate risk when entering into a commercial relationship with businesses in foreign markets and [raise] the standards of fair trade globally."³¹

Notwithstanding that UNCITRAL did manage to finalise the Singapore Convention, the outcome of a multilateral treaty was never certain.

There was a chicken-and-egg conundrum that bedevilled the negotiations. In the different states, there was not the same level of experience with mediation as there was with other methods of dispute resolution such as litigation and arbitration.³² Did this mitigate in favour of those who were calling for a cross-border mechanism of recognition and enforcement for mediated settlement agreements?³³ Or did this mitigate in favour of those who advised caution in the choice of harmonization instrument by suggesting

convention-enforcement-mediated-settlements/. The Working Group was informed of this survey in UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, at 6 (Nov. 27, 2014) [hereinafter UNCITRAL WP 187].

²⁹ 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* 45 (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, 2014). The Working Group was similarly informed of this survey in UNCITRAL WP 187, *supra* note 28, at 6.

³⁰ UNCITRAL WG II September 2016 Report, *supra* note 5, at 24.

³¹ The open letter to United States' Secretary of State Michael Pompeo, dated November 6, 2018, expressed strong support for the United States signing and ratifying the Singapore Convention. It was signed by the Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for International Business. It is available online at https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SingaporeConventiononMediation_11.6.18.pdf.

³² UNCITRAL WG II September 2016 Report, *supra* note 5, at 24; UNCITRAL WG II February 2015 Report, *supra* note 9, at 6.

³³ UNCITRAL WG II September 2015 Report, *supra* note 5, at 19–20.

that the time was not yet ripe for the development of an international convention on enforcement?³⁴

Every time the Working Group met, we would tackle these questions. Each time a decision on the form of the instrument would be postponed. A suggestion to consider preparing two separate but parallel instruments was made when the Working Group convened in September 2016.³⁵ It was said that the model legislative provisions could support states that are only ready for domestic implementation of an enforcement process, and a Convention would be available for states ready to join an international treaty.³⁶ But then there was the question of whether to do so simultaneously, or if not then which instrument should be developed first.³⁷

The decision on the form of the instrument to be developed was taken only at the Working Group's meeting in February 2017,³⁸ as part of the five-issue packaged deal or "compromise proposal" reached during that session.³⁹

In an unprecedented step, the decision was made to develop the Singapore Convention in parallel with an amended Model Law. The decision was reached "in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions."⁴⁰

IV. A PRODUCT OF CONSENSUS

As a product of multilateral consensus, the Singapore Convention responds to the diverse legal traditions and legal realities in the practice of mediation and relevant to the legal effects of mediated settlement agreements. The product? A treaty with requirements that are simple, easy to use, and accommodates the flexibilities inherent in mediation.⁴¹ Three aspects of the Singapore

³⁴ UNCITRAL WG II February 2015 Report, *supra* note 9, at 9–11. *See also* UNCITRAL WG II September 2016 Report, *supra* note 5, at 24–25.

³⁵ UNCITRAL WG II September 2016 Report, *supra* note 5, at 25, 36–37.

³⁶ *Id.* at 24.

³⁷ *Id.* at 36–37.

³⁸ UNCITRAL WG II February 2017 Report, *supra* note 15, at 17.

³⁹ UNCITRAL WG II February 2017 Report, *supra* note 15, at 10–11.

⁴⁰ UNCITRAL WG II February 2017 Report, *supra* note 15, at 17.

⁴¹ In the early part of the negotiations, it was suggested that the aim of UNCITRAL's work should be to provide "a simple mechanism" to enforce settlement agreements. Such a mechanism should preserve the flexibility of the mediation process. *See* UNCITRAL WG II February 2015 Report, *supra* note 9, at 6.

Convention, amongst others, illustrate these key features: (i) the definition of “mediation”; (ii) the form requirements for evidence that a settlement agreement resulted from mediation; and (iii) the grounds for refusal.

A. *The Definition of “Mediation”*

The Convention defines “mediation” broadly. Under the Convention, “mediation” is defined to refer to instances where the disputing parties sought to reach an amicable settlement with the assistance of a third party who lacked the authority to impose a solution at the time of the mediation.⁴² This broad definition was adopted in recognition of mediation as a flexible process, and the different techniques that are used in mediations.⁴³ It is intended to include mediations administered by, or undertaken under, the auspices of an institution.⁴⁴

It also acknowledges the practice of combined dispute resolution processes. The phrase “at the time of mediation” does not appear in the text of the Convention, as it was seen as unnecessary. Nevertheless, the understanding is that the lack of authority to impose a solution is confined to the time of the mediation. In this way, the Convention recognises hybrid processes such as med-arb.⁴⁵

Further, there is no limitation on the types of remedies that can be reflected in the settlement agreement. It can include monetary or non-monetary elements. This shows appreciation that, in a mediation, disputing parties are able to design a settlement that responds to their needs, and that takes a holistic view of the interests of the parties and their commercial relationship. Such a settlement often extends beyond pure monetary relief.⁴⁶

⁴² Singapore Convention on Mediation art. 2(3) states: ““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.”

⁴³ See, e.g., UNCITRAL WG II February 2016 Report, *supra* note 5, at 18–19. For an elaboration of the different models of and variations in mediation, see Laurence Boulle, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35, 48–56 (2014).

⁴⁴ UNCITRAL WG II February 2016 Report, *supra* note 5, at 19.

⁴⁵ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, at 6 (Feb. 19, 2018).

⁴⁶ UNCITRAL WG II September 2015 Report, *supra* note 5, at 10.

B. *The Form Requirements*

In terms of the form requirements in the Convention, these have been tailored, without being overly prescriptive, to accommodate how mediation is practised internationally.⁴⁷

There is a limited, exhaustive list of form requirements in the Convention. The only form requirements are that: (i) the settlement agreement be in writing; (ii) the settlement agreement be signed by the disputing parties (an exchange of emails could meet the requirements); (iii) there must be evidence that the settlement agreement resulted from mediation.⁴⁸

Evidence that the settlement agreement resulted from mediation could be in the form of the mediator's signature on the settlement agreement, or an attestation in a separate document by the mediator or administering institution that mediation had occurred.⁴⁹ When the Convention was being negotiated, it was recognised that it would be incongruous with some legal cultures and practices to have certain requirements, such as the mediator signing the settlement agreement as the only acceptable proof.⁵⁰ This is why the types of proof required under the Convention is reflected in an illustrative list, rather than an exhaustive one or one that establishes relative priorities between the different requirements.⁵¹

C. *The Grounds of Refusal*

The grounds for a court to refuse the recognition or enforcement of a mediated settlement agreement are limited to those set out in the Convention, and are tailored to the practice of mediation.⁵²

⁴⁷ UNCITRAL WG II September 2015 Report, *supra* note 5, at 12–13.

⁴⁸ Singapore Convention on Mediation art. 4(1).

⁴⁹ *Id.*

⁵⁰ UNCITRAL WG II September 2016 Report, *supra* note 5, at 13; UNCITRAL WG II September 2015 Report, *supra* note 5, at 11.

⁵¹ It was the intention of the negotiators that Article 4(1)(b) of the Singapore Convention on Mediation be an “illustrative and non-hierarchical list” of means to evidence that a settlement agreement resulted from mediation. *See* UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, at 7 (Feb. 19, 2018). *See also* UNCITRAL WG II October 2017 Report, *supra* note 6, at 9–10.

⁵² Singapore Convention on Mediation art. 5.

The grounds retain the relevant elements of the formal and mechanistic nature of the New York Convention, whilst responding to the difficulties posed when disputing parties seek to leverage the New York Convention to recognise and enforce their settlement agreements. For example, when disputing parties attempt to translate the grounds of refusal in the New York Convention to the mediation context, such as excess authority in Article V(1)(c) of the New York Convention and procedural irregularities in Article V(1)(d),⁵³ it becomes clear that “the fundamental characters and processes of mediation and arbitration are different.”⁵⁴ The grounds for refusal do not translate directly or transfer easily from the arbitration context to the mediation context.⁵⁵ Bearing this in mind, one can appreciate why these grounds for refusal, otherwise found in the New York Convention, are not found in the Singapore Convention on Mediation.

At the same time, there are grounds for refusal that have drawn inspiration from the regime of the New York Convention, as the negotiators assessed what would be appropriate to consider in the context of mediated settlement agreements. For instance, there are grounds of refusal in the Singapore Convention such as where there is incapacity of a party to the settlement agreement, which was inspired by Article V(1)(a) of the New York Convention;⁵⁶ and if the settlement agreement is null and void, for instance because of fraud, misrepresentation, and mistake, for which inspiration was drawn from Article II(3) of the New York Convention.⁵⁷ Like Article V(2) of the New York Convention, enforcement can be refused on grounds of public policy or if the subject matter was not capable of settlement by mediation, and these grounds can be raised *sua sponte* by a court before which relief is being sought.⁵⁸

Additionally, there are grounds of refusal specific to mediator misconduct.⁵⁹ Such misconduct must have a causal effect on the

⁵³ The negotiators specifically discussed whether or not to include a provision in the instrument along the lines of Article V(1)(d) of the New York Convention. See UNCITRAL WG II February 2016 Report, *supra* note 5, at 27–28. It was highlighted that mediation is a voluntary process from which the disputing parties may withdraw at any time and pursuant to which a settlement cannot be imposed on the disputing parties.

⁵⁴ Morris-Sharma, *supra* note 22, at 136–37.

⁵⁵ Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions And Directions for Future Research*, 7 CONTEMP. ASIA ARB. J. 87, 98 (2014).

⁵⁶ Singapore Convention on Mediation art. 5(1)(a).

⁵⁷ Singapore Convention on Mediation art. 5(1)(b)(i). See also UNCITRAL WG II September 2016 Report, *supra* note 5, at 18.

⁵⁸ Singapore Convention on Mediation art. 5(2).

⁵⁹ Singapore Convention on Mediation arts. 5(1)(e) & 5(1)(f).

disputing party entering into the settlement agreement, and includes misconduct such as a serious breach of applicable standards or a failure to disclose. It is up to the competent authority to determine the applicable standards, whether they be the applicable law governing the mediation or codes of conduct. Competent authorities can seek guidance from the illustrative list of examples in the text accompanying the Convention.⁶⁰ Initially, there were suggestions that the refusal grounds also address issues of fairness and impartiality, but those grounds were seen by some as not necessary and by others as not aligned with the realities of mediation practice.⁶¹

V. CONCLUSION

From our whirlwind tour of the Convention—of the scope of application, form requirements, and grounds for refusal—one can appreciate that an international mechanism has been designed to facilitate the efficient circulation of mediated settlement agreements without overly burdensome requirements. The Singapore Convention will offer certainty of reliance on mediated settlement agreements before Parties' domestic courts, while preserving the flexible nature of mediation. Efforts were made to ensure that the Convention accommodates different legal traditions. There is also an accompanying Model Law to accommodate the different levels of experience with mediation in different jurisdictions.

After revisiting the multilateral process and context that led to the development of the Singapore Convention and the amended Model Law, we see how multilateralism is still alive. But it takes work. Multilateral consensus does not come easy. The UNCITRAL process benefitted from having committed experts in the room, who were ready to engage constructively, so that creative compromises could be fashioned. Some of these compromises were part of the five-issue package referred to above, but there were many others along the way. There were earnest conversations and hardnosed discussions. The work of the UNCITRAL

⁶⁰ UNCITRAL WG II February 2017 Report, *supra* note 15, at 16. Dorcas Quek Anderson, *Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?*, in *PRIVATIZING DISPUTE RESOLUTION AND ITS LIMITS* (studies of the Max Planck Institute Luxembourg Summer School for International, European, and Regulatory Procedural Law) (Loic Cadiet & Burkhard Hess eds., forthcoming 2019).

⁶¹ Schnabel, *supra* note 5, at 50–51.

Secretariat was of immense value. Everyone brought something to the table, and left as friends, with mutual respect and newfound understandings between and amongst them.

Of course, the take up rate of the Singapore Convention will define its utility. Yet, in many ways, the Singapore Convention is already an important statement in favour of rules-based multilateralism.⁶²

⁶² For example, in a joint statement issued during an official visit by Chinese Premier Li Keqiang to Singapore in November 2018, it states (at paragraph 14): “Both sides reaffirmed their shared commitment to rules-based multilateralism, support for the purposes and principles of the United Nations Charter, adherence to international law, and would continue to maintain close communication and cooperation at the United Nations and other multilateral organisations. In this vein, both countries agreed that instruments such as the United Nations Convention on Mediation are important to the multilateral rules-based order and will consider signing it.” See *Full Text: Joint statement between Chinese, Singaporean governments*, XINHUA (Nov. 15, 2018), www.xinhuanet.com/english/2018-11/15/c_129994460.htm.

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AND THE SIGNIFICANCE OF THE SINGAPORE CONVENTION ON MEDIATION

*Corinne Montineri**

I. INTRODUCTION

This paper outlines how the UNCITRAL drafting process that produced the Singapore Convention on Mediation functions within the United Nations and explains the significance of the Singapore Convention for the United Nations and for promoting cross-border trade and investment.

Cross-border trade is considered an element of peace and stability for “friendly relations among nations,” as reflected in the Charter of the United Nations. The development of a harmonized international trade law framework contributes to facilitating cross-border trade and investment, which, in turn, contributes to the wider objective of development and security. Over the decades, the powerful relation between trade and development has been well-recognized and is now articulated in the UN 2030 Agenda for Sustainable Development.

With these objectives in mind, the United Nations Commission on International Trade Law (UNCITRAL) was established more than fifty years ago as a Commission of the United Nations General Assembly. UNCITRAL performs a crucial role in the development of the international trade law framework. It does so, first, by preparing legislative and non-legislative instruments in different key areas of commercial law; second, by promoting the use and adoption of these instruments as well as their proper implementation; and, third, by coordinating and cooperating with other standard formulating agencies.¹ In the years since its establishment, UNCITRAL has been recognized as the core legal body of

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¹ G.A. Res. 2205 (XXI) (Dec. 17, 1966).

the United Nations system in the field of international trade law. UNCITRAL's contribution to the achievement of the Sustainable Development Goals proceeds on several fronts and touches upon different and interrelated areas.²

UNCITRAL has developed instruments in different fields of international trade law, including sales of goods, public procurement, privately financed infrastructure projects, legal environment for small- and medium-sized enterprises, secured transactions, electronic commerce, and insolvency, as well as international dispute settlement.³

This last field has been on the agenda of UNCITRAL since its very first sessions. Noteworthy is the fact that UNCITRAL's origin and mandate partly resulted from the diplomatic process that led to the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"). Indeed, the United Nations Conference on International Commercial Arbitration, which worked on the preparation and adoption of the New York Convention from 20 May to 10 June 1958, highlighted in its final Act the relevance of measures for increasing the effectiveness of arbitration. The topics mentioned included collection and publication of information on existing arbitration laws and facilities, technical assistance in the development of arbitral legislation and institutions, and the preparation of a model law on arbitration. These topics found their way into the legislative work programme of UNCITRAL, at its very first sessions, and constituted a roadmap that has been followed over the past decades. Following a similar path, UNCITRAL has also been active in developing instruments in the field of international commercial mediation.

International mediation is a well-known alternative means for solving disputes that may arise in many different areas. In the field of international trade, mediation is often cited as a flexible method that is well-adapted to solving disputes among merchants who seek to preserve long-term commercial and investment relations and

² *Sustainable Development Goals*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <https://uncitral.un.org/en/about/sdg> (last visited July 3, 2019) (discussing information on the contribution of UNCITRAL to the Sustainable Development Goals).

³ UNCITRAL currently has six working groups, dealing with: (1) The creation of a favourable environment for small and medium sized enterprises; (2) Issues relating to expedited arbitration; (3) Investor-State dispute settlement (ISDS) reform; (4) Electronic commerce; (5) Insolvency; and (6) Secured transactions. See *Homepage*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <https://uncitral.un.org/en/content/homepage> (last visited Aug. 10, 2019).

produce savings in the administration of justice by States. As early as 1980, UNCITRAL adopted Rules on Conciliation, which is one of the first international instruments in the field.

Sixty years after the adoption of the New York Convention, UNCITRAL finalized at its annual session, in July 2018, the preparation of an instrument akin to the New York Convention in the area of mediation: the United Nations Convention on International Settlement Agreements Resulting from Mediation (“the Singapore Convention on Mediation” or “the Convention”), which was adopted by the United Nations General Assembly in December 2018. In addition, UNCITRAL finalized and adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018, amending the Model Law on International Commercial Conciliation (2002)) (“the revised Model Law”).

II. HOW UNCITRAL FUNCTIONS WITHIN THE UNITED NATIONS

A. *UNCITRAL, an Organ of the UN General Assembly*

According to the General Assembly resolution establishing UNCITRAL, “divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade.”⁴ Harmonisation and modernization of trade law help reduce legal uncertainty. A study, authored by Professor Schmitthoff in the sixties, which was presented to the United Nations at the time of the establishment of UNCITRAL, outlined that reduction of these obstacles and uncertainty can be achieved by developing either choice of laws rules or substantive standards. The report referred to the latter as “progressive harmonisation and unification” of the law of international trade.⁵

Progressive harmonisation is the core activity of UNCITRAL. The legal standards developed by UNCITRAL are meant to propose solutions that are widely acceptable. That is the reason why they are negotiated through an international process involving a diversity of participants, including invited intergovernmental and

⁴ See *supra* note 1.

⁵ U.N. Secretary-General, *Agenda Item 88: Progressive Development of the Law of International Trade*, U.N. Doc. A/6396 (Sept. 23, 1966).

non-governmental organizations. As a result of this inclusive process, these texts are widely accepted as offering solutions appropriate to different legal traditions and to countries at different stages of economic development.

UNCITRAL carries out its work at annual sessions held alternately in New York and Vienna.⁶ The work at these UNCITRAL sessions typically includes finalization and adoption of legal texts referred to the Commission by the working groups; consideration of progress reports of the working groups; selection of topics for future work or further research; reporting on technical cooperation and assistance activities and coordination of work with other international organizations; monitoring of developments in the CLOUT system and the status and promotion of UNCITRAL legal texts; consideration of General Assembly resolutions on the work of UNCITRAL; and administrative matters. In addition to State members of UNCITRAL, the meetings include other United Nations Member States, as well as invited international and regional organizations as observers (both intergovernmental and non-governmental) with expertise in the topics under discussion.⁷

The substantive preparatory work for topics on UNCITRAL's work programme is usually assigned to working groups, which generally hold one or two sessions per year and report on the progress of their work to the Commission. Once assigned a topic, a working group is generally left to complete its substantive task without intervention from the Commission, unless the working group asks for guidance or requests the Commission to make certain decisions with respect to its work, such as clarification of the working group's mandate on a topic or approval of the policy settings of a text.⁸

⁶ U.N. GAOR, 34th Sess., U.N. Doc. A/34/32, ¶ 32(e)(iii) (1979) (explaining that prior to the relocation of the UNCITRAL secretariat from New York to Vienna, sessions of the Commission alternated between New York and Geneva). See also G.A. Res. 2205 (XXI), § II, ¶ 6; G.A. Res. 31/140, § I, ¶ 4(c); G.A. Res. 40/243, § I, ¶ 4(c); G.A. Res. 66/94, ¶ 20. For information on the composition of the Commission, see *Frequently Asked Questions—Mandate and History*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/about/faq/mandate_composition/history (last visited Aug. 3, 2019).

⁷ For information on the participation of observers in UNCITRAL meetings, see Note by the Secretariat, *UNCITRAL rules of procedure and methods of work*, U.N. Doc. A/CN.9/638/Add.5, § IV (Oct. 22, 2007).

⁸ See, e.g., U.N. GAOR, 58th Sess., U.N. Doc. A/58/17, ¶¶ 172–197 (2002) (Working Group V requested the Commission to, inter alia, approve in principle the draft of the *Legislative Guide on Insolvency Law*). See also U.N. GAOR, 61st Sess., U.N. Doc. A/61/17, ¶ 13 (2006) (a similar approach was adopted in 2006 with respect to the recommendations of the *Legislative Guide on Secured Transactions*).

Various means are available to keep abreast of deliberations. For instance, reports of the sessions, prepared by the Secretariat, seek to reflect the deliberations in depth and to provide an overview of the progress of the work undertaken by UNCITRAL and its working groups. All reports are considered to be part of UNCITRAL's institutional memory (which constitute the *travaux préparatoires* of the UNCITRAL instruments) and are available to the public. Nowadays, recordings of the sessions are also available. The documentation and recordings for annual UNCITRAL sessions and working group sessions are posted on the UNCITRAL website;⁹ the documentation is available in the six official languages of the United Nations.

The International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat provides the secretariat for UNCITRAL. To assist the work of UNCITRAL, the secretariat undertakes a variety of tasks, which includes preparation of studies, reports, and draft texts on topics that are being considered as current work or for the possible future.

B. *UNCITRAL's Working Methods: Inclusiveness and Consensus*

The working methods of UNCITRAL are based on inclusiveness and consensus: from the identification of a topic until the finalisation of a given instrument. Decisions on the work programme are made by UNCITRAL at its annual sessions. Often a State or a group of States, or an international organization, propose a topic. Members of delegations then comment on the suggestion, based on prior consultations with various stakeholders and other States. Sometimes the Secretariat is tasked with providing further information based on relevant research regarding whether the suggestions put forward are feasible and relevant.

The decision to work on the preparation of an instrument on enforcement of settlement agreements resulting from international mediation is an illustration of the decision-making process on the work programme. The decision originated with a suggestion by a government to prepare a convention in the field of mediation, mirroring the New York Convention, with the aim to promote mediation. The proposal was based on the findings that one obstacle to

⁹ See generally UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <https://uncitral.un.org/en/content/homepage> (last visited Aug. 3, 2019).

greater use of mediation was that settlement agreements reached through mediation might be more difficult to enforce than arbitral awards; that settlement agreements reached through mediation are already enforceable as contracts between the parties but that enforcement under contract law cross-border can be burdensome and time-consuming; and that the lack of easy enforceability of such contracts was a disincentive to commercial parties to mediate.¹⁰

Before deciding whether to embark on the preparation of such an instrument, the Commission requested one of its Working Groups to preliminarily consider a number of issues, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements; (c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.¹¹

The sixty-second session of UNCITRAL Working Group II (Dispute Settlement) was partly devoted to that topic, and the Working Group reported back to the Commission on its deliberations.¹² The Commission followed the recommendation of the Working Group that a mandate be given to a Working Group to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions, or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account various approaches and concerns.¹³

Decisions at UNCITRAL are usually made by consensus. The decision to work on the basis of consensus has been taken at the

¹⁰ Report of the U.N. Comm'n on Int'l Trade Law on its forty-seventh Session (7–18 July 2014), U.N. GAOR, 69th Sess., Supp. No. 17, U.N. Doc. A/69/17, ¶ 123; *see also* Note by the Secretariat, *Proposal by the Government of the United States of America: Future Work for Working Group II*, U.N. Doc. A/CN.9/822 (June 2, 2014).

¹¹ U.N. Doc. A/69/17, *supra* note 10, ¶ 124.

¹² Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), U.N. Doc. A/CN.9/832 (Feb. 11, 2015).

¹³ *Id.* ¶ 59.

very first UNCITRAL session and has not been challenged since then.¹⁴ Since UNCITRAL's inception, consensus was considered "conducive to achieving a larger cooperation among countries" and thereby achieving a better result. "Long and patient research and discussion" might indeed not lead to a consensus in all cases. Where no consensus can be reached, a vote would be explicitly possible. Reaching consensus is a rewarding process, even though it may at times be a time-consuming endeavor. It is notable that the Singapore Convention on Mediation has been prepared and finalized through a fully consensual process gathering more than ninety States and forty international organizations.

The General Resolution establishing UNCITRAL outlines the most common instruments that could serve to harmonize the international legal framework, such as conventions, uniform laws, standard contract provisions, and standard trade terms. All these options were considered during the Singapore Convention deliberative process. The instruments selected depend on the degree of harmonization that is desirable at a certain point in time, such as a convention that achieves unification whereas other instruments such as model laws or guidance texts are more flexible. Combinations are possible, such as developing both a convention and a model law on the same topic (as was done regarding enforcement of international settlement agreements resulting from mediation) or a step by step approach (for instance, developing a legislative guide first, followed by a model law). UNCITRAL has prepared a number of conventions, which then have been adopted either through a diplomatic conference organized by a State or, in line with the prevailing practice in the recent years, have been presented to the General Assembly of the United Nations, which reviews and adopts the conventions acting as a conference of plenipotentiaries.¹⁵ Following this pattern, the Singapore Convention on Mediation was prepared by UNCITRAL in the years

¹⁴ U.N. GAOR, 41st Sess., U.N. Doc. A/41/17, ¶¶ 212, 213 (exemplifying a discussion in the Commission on modalities of adopting a convention, and its decision that UNCITRAL would proceed to finalize a text and to recommend its adoption in the General Assembly). *See also* U.N. GAOR, 42nd Sess., U.N. Doc. A/42/P.V.17, ¶ 304 (providing the first example of the adoption of a Convention through that mechanism).

¹⁵ U.N. GAOR, 41st Sess., U.N. Doc. A/41/17, ¶¶ 212, 213 (for a discussion in the Commission on modalities of adopting a convention, and its decision that UNCITRAL would proceed to finalize a text and to recommend its adoption in the General Assembly); U.N. GAOR, 42nd Sess., U.N. Doc. A/42/17, ¶ 304 (for the first example of the adoption of a Convention through that mechanism).

2015–2018, and adopted by the United Nations General Assembly in December 2018.

III. THE SIGNIFICANCE OF THE NEW FRAMEWORK FOR MEDIATED INTERNATIONAL SETTLEMENTS

A. *UNCITRAL Instruments on Mediation Since 1980*

UNCITRAL previously developed two instruments aimed at harmonizing international commercial mediation: the Conciliation Rules (1980) and the Model Law on Conciliation (2002), which form the basis of an international framework for mediation. It should be noted that UNCITRAL does not differentiate between the terms “mediation” or “conciliation” in its instruments, as both terms are used to refer to a process where a neutral third party assists the parties to solve their disputes, without having the possibility to impose a decision. In its recent instruments, UNCITRAL decided to use the term “mediation” instead of “conciliation” in an effort to adapt to what has become the more commonly used term with the expectation that this change will facilitate the promotion and heighten the visibility of the instruments. This change in terminology does not have any substantive or conceptual implications. In the 70s, UNCITRAL noted that conciliation or mediation was increasingly used to settle commercial disputes, that such a way for settling disputes should be promoted further and that work on a multilateral basis on the topic should be “geared to such promotion.”¹⁶ At that time, the term “conciliation” was more commonly used than the term mediation. However, it was clarified that terminology was not decisive: parties seeking an amicable settlement of their dispute with the assistance of an independent and impartial third party could agree on the application of the Conciliation Rules.

The Conciliation Rules were the first international step taken in harmonizing that field. Mediation was considered as a “possible and viable alternative.”¹⁷ The “value of conciliation as a method of amicably settling disputes” has also been acknowledged by the

¹⁶ See U.N. Comm’n on Int’l Trade Law, Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20–31 March 2000), U.N. Doc. A/CN.9/468, ¶ 18 (Apr. 10, 2000).

¹⁷ U.N. Secretary-General, *Report of the Secretary-General: conciliation of international trade disputes*, ¶ 13, U.N. Doc. A/CN.9/167 (June 18–29, 1979).

United Nations General Assembly in its resolution 35/52 which recommended the use of the Conciliation Rules. In that resolution, the General Assembly expressed its conviction that “the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.”

Going one step further, the Model Law on International Commercial Conciliation was adopted in 2002 and provides for a sound legislative framework regarding the main elements of the mediation proceedings, including a streamlined definition of conciliation/mediation. The Model Law, which addresses matters such as confidentiality, party autonomy, and fair treatment seeks to strike a balance between protecting the integrity of the mediation process and providing maximum flexibility. The United Nations General Assembly, when recommending that States give due consideration to the Model Law when enacting legislation on mediation, acknowledged 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.”¹⁸

B. *The Question of Enforcement of Settlement Agreements, So Far*

UNCITRAL considered the progress that had taken place in using mediation before deciding to undertake in 2015 the work on international settlement agreements. First, it noted that the use of mediation for settling commercial disputes has increased considerably since the adoption of the UNCITRAL Conciliation Rules in 1980. Legislation on mediation has been enacted in a growing number of jurisdictions; conciliation and mediation institutes have proliferated, and many institutions now offer specific training for conciliators and mediators.

UNCITRAL also circulated a questionnaire to States in the fall of 2014 in order to better understand how international settlement agreements were actually enforced and to assess the feasibil-

¹⁸ G.A. Res. 57/18, at 1 (Jan. 24, 2003).

ity of the proposed work.¹⁹ The replies to the questionnaire showed a diversity of approaches.²⁰ Some states have no special provisions on the enforceability of such settlements, with the result being that general contract law applies. Other states provide for enforcement of settlement agreements as court judgments, where a settlement agreement approved by a court is deemed an order of the relevant court and may be enforced accordingly. Such procedure may or may not include specific expedited enforcement mechanisms. The status of an agreement reached following mediation sometimes depends on whether the mediation took place within the court system as a legal proceeding. The practice of requesting a notary public to notarize the settlement agreement is adopted by a number of jurisdictions as a means of enforcement.

So national legislation is diverse and, as in 2002 during the preparation of the Model Law on Conciliation, no dominant trend could be identified. It was noteworthy that states with legislation on mediation provided for various solutions for enforcement of settlement agreements. The diversity of approaches with the objective of enforcing settlement agreements has militated in favour of considering moving toward harmonization of the field.

UNCITRAL, when adopting the Model Law on Conciliation, endorsed “the general policy that easy and fast enforcement of settlement agreements should be promoted.” Enforcement of settlement agreements is often cited as one crucial aspect that would make mediation a more efficient tool for resolving disputes. When preparing the Model Law in 2002, UNCITRAL discussed whether it would be desirable and feasible to prepare a uniform model provision on enforcement of settlement agreements that would be universally acceptable and, if so, what the substance of the uniform rule should be. At that time in 2002, various options were envisaged.²¹

¹⁹ See U.N. Secretariat, *Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts*, U.N. Doc. A/CN.9/946 (May 15, 2018); see also addenda 1–5.

²⁰ See U.N. Doc. A/CN.9/846/Add.1–Add.5 (Sept. 7–11, 2015).

²¹ One option considered by UNCITRAL was to provide that a settlement agreement should be dealt with as a contract. That solution was not retained because it was considered that a more effective enforcement regime should be established, through which a settlement agreement would be accorded a higher degree of enforceability than any unspecified contract. See U.N. Comm’n on Int’l Trade Law, *Working Group II: Arbitration and Conciliation/Dispute Settlement*, U.N. Doc. A/CN.9/506, ¶ 40 (Nov. 19–30, 2001). Another option was to prepare a model legislative provision that would give recognition to a situation wherein the parties had appointed an arbitral tribunal with the specific purpose of issuing an award based on the terms settled upon by the parties. Such an award, envisaged in article 30 of the UNCITRAL Model Law on Interna-

In 2002, it finally adopted a model legislative provision that stated the principle that settlement agreements are enforceable without attempting to specify the method by which such settlement agreements may be enforced. That matter was left to each enacting State.²² It is also noteworthy that the solution adopted in 2002 did not contain any form requirements and did not take a stand on the nature of a settlement agreement. It only expressed that a contractual obligation, “binding” on the parties, is “enforceable” by State courts. In the preparation of the Model Law, UNCITRAL was generally of the view that enforcement of settlement agreements should be promoted. However, it realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which did not easily lend themselves to harmonization by way of uniform legislation. However, States were encouraged to adopt expedited enforcement mechanisms or simplified procedures. In order to assist States in that regard, the UNCITRAL Secretariat illustrated various means for enforcing settlement agreements in the Guide to Enactment and Use of the Model Law.²³

tional Commercial Arbitration (“Model Law on Arbitration”) would be capable of enforcement as any arbitral award. That option was also rejected as it was considered inappropriate for a model legislative provision to suggest generally that all conciliation proceedings leading to a settlement agreement should result in the appointment of an arbitral tribunal. More generally, it was considered that uncertainties might arise from the interplay of the two legal regimes that might be applicable, namely the general law of contracts and the legal regime governing arbitral awards. For example, reasons that might be invoked for challenging the binding and enforceable character of a settlement agreement include the grounds listed in article V of the New York Convention and in article 36 of the Model Law on Arbitration for refusing enforcement, as well as the grounds listed under article 34 of that Model Law for setting aside an arbitral award. It was concluded that these might be insufficient or inappropriate to deal with circumstances such as fraud, mistake, duress, or any other grounds on which the validity of a contract might be challenged. See U.N. Comm’n on Int’l Trade Law, *Working Group II: Arbitration and Conciliation/Dispute Settlement*, U.N. Doc. A/CN.9/506, ¶ 43 (Nov. 19–30, 2001).

Another suggestion was that the legal regime of notarized acts in certain countries might constitute a useful model. It was pointed out, however, that such a model might require the establishment of form requirement for settlement agreements, thus introducing a level of formalism that could contradict existing conciliation practice.

²² The provision reads as follows: “Article 14. Enforceability of settlement agreement—If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].” UNCITRAL Model Law on International Commercial Conciliation, art. 14.

²³ See UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, ¶¶ 87–92 (2002).

C. The Response by the Singapore Convention on Mediation

In light of that background, the Singapore Convention on Mediation was prepared by UNCITRAL over six sessions of its Working Group II, together with revisions to the Model Law.

The Convention applies to international commercial settlement agreements resulting from mediation. It provides for Parties' obligations under the Convention regarding both enforcement of settlement agreements covered by the Convention and the right for a disputing party to invoke a settlement agreement out of a mediation. Each Party may determine the procedural mechanisms to be followed where the Convention does not prescribe any requirement.

The Convention will not apply to international settlement agreements that are concluded in the course of judicial or arbitral proceedings and which are enforceable as a court judgment or arbitral award. The purpose of these exclusions is to avoid possible overlap with existing and future conventions, namely the New York Convention, the Convention on Choice of Court Agreements (2005), and the preliminary draft convention on judgments, under preparation by The Hague Conference on Private International Law. The Convention will also not apply to settlement agreements concluded for personal, family, or household purposes by one of the parties (a consumer), as well as settlement agreements relating to family, inheritance or employment law. The courts of a contracting party will be expected to handle applications to enforce an international settlement agreement which falls within the scope of the Convention in accordance with its rules of procedure and under the conditions laid down in the Convention.

The Singapore Convention on Mediation provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements, akin to the framework that the New York Convention provides for arbitral awards.

The Convention has been designed to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes. It ensures that a settlement reached by parties becomes enforceable in accordance with a simplified and streamlined procedure. It thereby contributes to strengthening access to justice.

This new international framework is completed by a legislative framework that states can adopt, either as a stand-alone law, or as a piece of legislation implementing the Convention. The revised Model Law has been restructured and adjusted to be consistent with the Convention. It includes three sections. The first section provides for general principles; the second section focuses on the mediation procedure and restates the provisions of the 2002 version of the Model Law on procedural aspects, including appointment of conciliators, commencement and termination of mediation, conduct of the mediation, communication between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation issues, such as the mediator acting; and the third and last section focuses on settlement agreements, with its provisions reflecting the provisions of the Convention. The Model Law is a broader and more flexible instrument than the Convention. For instance, it permits states to enact the Model Law to apply its provisions to enforcement of settlement agreements regardless whether such settlement agreements result from a mediation process.²⁴

IV. CONCLUSION

Mediation, known for improving the efficiency of dispute resolution, has several advantages. Mediation is flexible. Parties can create their own process, discuss legal but also non-legal issues, and find the most convenient solution to their dispute. As the procedure is tailored to the needs and concerns of the parties, it may be less time and resource-consuming than adjudication. Until the adoption of the Singapore Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonized framework for cross-border enforcement of settlement agreements. It was in response to this need that the Singapore Convention has been developed and adopted by the United Nations.

UNCITRAL texts are negotiated with universal participation and are prepared with a view to ensure their compatibility with the various legal traditions. They may significantly contribute to building an open trading system that is rule-based, predictable and non-discriminatory and that supports good governance and develop-

²⁴ See 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).

ment in accordance with the Sustainable Development Goals and the 2030 Agenda for Development. The ratification of the Convention furthers the Sustainable Development Goal 16 “Peace, Justice and Strong Institutions.” It is expected that the Convention will contribute toward creating an attractive and stable investment climate. The hope is that the Convention and the revised Model Law will be widely adopted by States and will become useful tools for parties seeking to solve their disputes. There is no doubt that these instruments will become key indicators of a strong legal framework for cross-border dispute settlement.

THE NEW SINGAPORE MEDIATION CONVENTION: THE PROCESS AND KEY CHOICES†*

*Hal Abramson***

This article presents the backstory of the New Singapore Mediation Convention, which is really two stories: one on the multi-party negotiation process that produced the Convention and one on the substantive choices in the Convention. The two stories also illustrate the relationship between a well-designed process and result.

The most important milestone of this story occurred on February 9, 2018 when Working Group II of the United Nations Commission on International Trade Law (“UNCITRAL”) finished almost three years of drafting the Convention. On that day, Working Group II recommended a draft convention that would facilitate cross-border compliance with settlement agreements that result from qualifying mediations. The purpose of the Convention would be to offer a simpler and more expeditious alternative for enforcing mediated settlement agreements than expensive and uncertain breach of contract litigation. In December 2018, the United Na-

† This article is based on a book chapter written by the author and published in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* (Catharine Titi & Katia Fach-Gomez eds., Oxford Univ. Press 2019).

* You will notice that the word “enforcement” is not used in the title of this article, in this article (with a couple exceptions), or in the title of the Convention. The Convention is formally entitled “United Nations Convention on International Settlement Agreements Resulting from Mediation” and will be known as the “Singapore Convention on Mediation.” For more information, see U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex I (2018) [hereinafter Singapore Convention].

Common law attorneys will likely be surprised by this language choice even though the Convention fashions a process for “enforcing” cross-border mediated settlement agreements. Civil law lawyers also are likely to be surprised that the familiar phrase “recognition” is omitted in the Convention and replaced by a functional definition in the Convention. The background on this language choice is explained under Section III where the five-point compromise called “The Compromise” is described.

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tions General Assembly formally adopted the Singapore Mediation Convention.

What is UNCITRAL?

For those less familiar with UNCITRAL, you might find helpful this brief description before reading anything else. UNCITRAL was established by the UN General Assembly to help harmonize and modernize the law of international trade and commercial law. UNCITRAL's sixty state members are elected by the General Assembly and selected to ensure representation by geographic regions and principal economic and legal systems. As an organ of the General Assembly, UNCITRAL follows the General Assembly's rules of procedures for its sessions and working groups. UNCITRAL determines its work program based on proposals received from States or organizations. It sets its own agenda, reviews the work of its various working groups to which the Commission assigns projects, and prepares reports, models laws, and conventions for the UN.

This mediation settlement initiative was assigned by the Commission to Working Group II, which formerly focused on "Arbitration," then was expanded to cover "Arbitration and Conciliation," and currently is named "Dispute Settlement." Any recommendations from Working Group II are sent to UNCITRAL for its adoption, and any proposed conventions, as occurred in this case, are first sent to UNCITRAL and then to the General Assembly for consideration and adoption.¹

This article focuses primarily on the deliberations of Working Group II when drafting the mediation settlement convention.

My Vantage Point

At the outset, I should explain my vantage point. I present these two stories from the perspective of an active "observer," not as a member of a country delegation. I represented two NGOs (non-governmental organizations) with observer status, International Mediation Institute ("IMI") and International Academy of

¹ UNCITRAL, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 6, para. 48 (2013).

Mediators (“IAM”),² attended most of the drafting meetings over the three-year process, and participated in multiple discussions. I also served as an “expert consultant.” In that capacity, I organized and moderated three mediation education programs for delegates and the public under the auspice of UNCITRAL.³ Finally, I also bring the perspective of an arbitrator, mediator, and full-time academic in the field of dispute resolution for over 25 years and author of multiple publications on negotiations, mediation, and international conflict resolution.

I feel a need to explain the writing style that includes a disproportionate use of pronouns and passive voice over my preference for active voice and acknowledging the contributions of others. The writing style respects the norms of the UNCITRAL deliberative process where reports are written with pronouns, in passive tense, and with few references to individuals or organizations in order to promote candid discussions.⁴ Even though the public documents omit names, I will mention some key players and unreported exchanges thanks to the permission that I was given. Nevertheless, many of the heroes in these stories are sadly omitted although they are known to people who participated in the drafting process.

With these writing guidelines in mind, I will discuss the negotiation process and some of the illuminating stories on how key provisions came together.

I. INITIATING THE MEDIATED SETTLEMENT PROJECT

This Project officially started on Friday, March 21, 2014 at 3:54 p.m., at least for me, when I received an email from a Tim Schnabel with the U.S. Department of State. He introduced himself as the U.S. representative to UNCITRAL’s Arbitration and Conciliation Working Group. His office, he indicated, was considering propos-

² IMI is an international organization that develops global standards for mediators, advocates, and others in dispute resolution. *See About IMI*, IMI, imimediation.org (last visited Aug. 10, 2019). IAM is an organization of peer-selected top commercial mediators from around the world. *See About the IAM*, IAM, iamed.org (last visited Aug. 10, 2019).

³ *See* Part II.C (The three programs are briefly described in note 10).

⁴ When preparing this article, I was advised that I could safely discuss any information that is publicly available, but asked not to refer to any discussions that were not expected to be public. Consultations and informal discussions during breaks are productive in part because participants can speak freely without public attribution and need to anticipate reactions of constituencies as they are working through problems.

ing a project on the enforcement of mediated settlement agreements. He was interested in my thoughts on whether such a project would be desirable to pursue. In our telephone call, he mentioned that the project idea was initially raised at a State Department's advisory committee meeting by Professor Stacie Strong.⁵ I learned that Mr. Schnabel was systematically reaching out to various people to figure out whether the enforcement project was worth proposing to UNCITRAL.

After several months of consulting with various interest groups and experts, Tim Schnabel prepared a proposal for future work to UNCITRAL for its July 2014 Session. The proposal, formally submitted on behalf of the U.S., was referred by UNCITRAL to Working Group II for evaluation.⁶

At the Working Group II Session in New York in February 2015, the Delegates along with NGOs and other observer groups engaged in a thorough review of the U.S. proposal. The week-long session was conducted by Michael Schneider, the Swiss Delegate who served as a diligent and disciplined Chair. I sat in the room in awe as a first-time observer. The Chair tightly managed the substantive discussions among more than a hundred people representing 91 States and organizations. I was especially impressed by his skill in summarizing what he heard to be sure he understood each point and his incisive follow-up questions. He usually posed one or two probing questions to test the depth of understanding of the speaker and to delve deeper, although I was less enamored with his technique when I was in the hot seat.

Mr. Schneider seemed skeptical about the wisdom of this project as he engaged with speakers from topic to topic. For those of us favoring the project, the meeting was a cliff hanger. I recall us trying to guess whether the Chair was inclined toward or against the project by the questions he asked, his tone, and his body language—variables that those of us in the dispute resolution field

⁵ The idea for the convention was generated at a public meeting of the Department of State's Advisory Committee on Private International Law in February 2014. At that meeting, Professor S.I. Strong of the University of Missouri Law School presented her article comparing the legal environment surrounding international commercial arbitration with the legal environment surrounding international commercial mediation and suggested creating a new convention in the area of international mediated settlements. See S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11 (2014).

⁶ U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, *Planned and Possible Future Work—Part III, Proposal by the Government of the United States of America: Future Work for Working Group II*, U.N. Doc. A/CN.9/822 (June 2, 2014).

think we are pretty good at reading. During the breaks, we shared our guesses and tried to read the tea leaves, rarely confident about each of our predictions. We were acutely aware of how the meeting would end: Depending on how the Chair reads the group, he would declare a consensus to proceed or not. We were pleased that the week ended with a recommendation that the project be adopted by the Commission.

You can gain an understanding of the thoroughness and range of discussion by reviewing the detailed Working Group II report after the session. It neatly divides the discussion into General Remarks, Legal and Practical Questions, Feasibility and Possible Form of Future Work, and Recommendation to the Commission.⁷ Working Group II concluded that:

After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns. (See the Recommendation to the Commission after February Working Group II Session at U.N. Doc. A/CN.9/832, IV. D. Paragraph 59 (February 11, 2015)).

II. PROCESS STORY: WORKING GROUP II'S MULTI-PARTY NEGOTIATIONS

Before exploring the next section on the substantive choices in the Convention, you might find informative this brief description of the underlying multi-party process that produced the result. It was well-designed, in my view, to fully engage participants in a robust deliberative process.

Working Group II selected as Chair of this project, Natalie Morris-Sharma, a member of the Singapore delegation. Under her watchful and skillful supervision, she chaired this almost three-year deliberative process, in collaboration with the expert assistance of

⁷ Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), U.N. Doc. A/CN.9/832, paras. 57–59 (Feb. 11, 2015).

UNCITRAL's Secretary to Working Group II, Corinne Montineri. Ms. Morris-Sharma proved to be an impressive Chair due to her thoughtful use of "consultations" discussed below and active listening skills. I was astonished to learn afterwards that she had no formal mediation or facilitation training. She was a natural. She summarized comments succinctly, checked-in with speakers to verify that she accurately understood what she heard, and proficiently used open and closed questions to promote sharing and clarifying information among participants. She also effectively used instinctive humor that helped lubricate the serious deliberations. For example, when the discussions were moving too quickly at one point, she triggered collective laughter when apologizing for her hyperactivity while proclaiming that she had not even drank her first cup of coffee that day.

The Working Group met twice a year for one- to two-week sessions to deliberate issue-by-issue and draft section-by-section with input from the EU Commission and various NGOs in the room.

The consensus-building process featured six methods that were each employed to produce a productive process. I thought it illustrated best practices for managing a large multi-party negotiation.

A. *Whole Group Meetings*

Working Group II members primarily met together to deliberate in a General Assembly-style room. The Chair guided the discussions for each session by following an agenda and the numbered paragraphs in a report that was published in advance of each session. She piloted the Working Group with an attentive ear for any emerging consensus, opportune moments to break for a "consultation," and differences that may warrant deferring a topic for later discussion.

The room set-up placed the State Delegations in the front half at their delegation tables while the NGOs, regional representatives, and international organizations sat at their tables in the second half of the room. Each seat included an electronic or plastic placard that displayed the name of the country or organization along with headsets to connect with one of five simultaneous translators. Behind each seat were other chairs with headsets to accommodate other members of a delegation or organization. Some of

the State Delegations included two to six members so that the number of people in the front of the room could sometimes reach a hundred, and the number of NGOs and regional representatives could add another fifty to seventy-five participants.

The procedure for contributing was simple. Anyone wishing to speak could press a speaker button in NYC or turn the plastic placard upright in Vienna and wait to be called by the Chair. In NYC, where there was no screen that listed speakers waiting for their turn, a speaker did not know how many speakers were in the queue. In Vienna, speakers could gauge when they would be called by seeing the number of placards upright. Speakers were by and large savvy in diplomatic language, respectful, substantive, and worked at maintaining the deliberative thread by referring to prior presenters' remarks. This approach left me feeling that speakers were mostly listening to each other and not just giving speeches.

B. *Consultations*

The Chair strategically adjourned meetings for a “consultation” when she thought that no consensus was emerging on a significant issue and informal discussions might help. She would frame the issue and invite delegates to meet for thirty or more minutes in small groups to develop proposals for the full group. These consultations, that were used several times for each session, would lead to small group meetings, mini-negotiations, and draft proposals. The Chair would move around the floor listening unobtrusively to small group discussions and gently offer prompts to help keep the consultations on track. The method was exceptionally effective in resolving some of the most contentious issues. I think the consultations succeeded in part because key participants approached these opportunities with a mindset to learn from each other and reconcile differences.

C. *Educational Programs for the Delegates and Public*

Mediation programs were conducted to educate delegates and the public about issues relevant to key stages of the drafting process. UNCITRAL hosted or co-sponsored three mediation education programs that were organized at the initiative of experts in mediation. I was asked to organize each of the three programs that

were each scheduled to coincide with a concurrent Working Group II session.⁸ Like other UNCITRAL educational programs, the goal was to help inform the ongoing deliberative process. These programs appeared valuable because most of the state delegates were more expert on arbitration than mediation. I leave to others who attended to judge the programs' benefits.

D. Contributions by NGOs and EU

UNCITRAL encourages NGOs to attend, participate, and contribute to working group meetings. UNCITRAL values the experience and expertise of NGOs because they reflect the audience that will ultimately use the texts. When this new mediation project was announced, many mediation-related groups registered with UNCITRAL for observer status and sent representatives to the meetings. The format at the sessions made it easy for NGOs to contribute. They had full access to documents, were assigned seats with microphones and headsets, and could offer remarks during

⁸ After the first Working Group Session in Vienna in September 2015, the Executive Director of IMI, Irena Vanenkova, offered to put together a mediation education program for delegates who might be interested in gaining more background on mediation to help inform their contributions. UNCITRAL responded positively to the offer. IMI asked me to put together a program and recruited Professor Janet Martinez at Stanford Law School to participate. We designed the first program for the second working group session on February 2, 2016 at the U.N. in NYC. It compared mediation with the more familiar arbitration process.

After the NYC meeting, there was a sense that another program might be helpful. The second educational program was held during the next session at the U.N. in Vienna on September 21, 2016. That program was well-timed personally because I went to Vienna on the way to my son's wedding in Cyprus the following week! The program was hosted by the Vienna International Arbitral Center and co-sponsored with IMI and IAM. It included the following panelists: Eileen Carroll, QC (Mediator, Co-founder, CEDR, London), Birgit Sambeth Glasner (Mediator, Geneva), Michel Kallipetis (Mediator, London), Allan Stitt (Mediator, Member of Canadian Delegation, Toronto), Josephine Wan-Wen Hadikusumo (Senior Counsel, Asia, Texas Instruments, Singapore), Norris Yang (Mediator, Former Chair of Hong Kong Mediation Council, Hong Kong). I moderated the program that was entitled an opportunity to ask questions of mediators and users.

After the Vienna meeting, some felt that one more program might be useful. The third program was held at the next session at the U.N. in NYC on February 8, 2017. It was hosted by JAMS, and co-sponsored by IMI and IAM. The panel included: Michel Kallipetis (Mediator, London), Louise Otis (Mediator, retired justice of the Quebec Court of Appeals, President of the Administrative Tribunal of OECD, Montreal), Dr. Karl Mackie (Mediator, President, Co-founder, CEDR, London), Pedro Ribeiro (MCI Arb, Arbitrator and Mediator, Vice President of CAMARB—Câmara de Arbitragem Empresarial, Brazil), Roland Schroeder (General Electric Global Litigation Counsel, United States), and Allan Stitt (Mediator, Member of Canadian Delegation, Toronto). Similar to the previous program, I moderated it, and we invited participants to ask questions of mediators and users.

the formal meetings and freely talk with State delegates on the floor during breaks and consultations. NGO representatives participated in formal and informal ways as issues emerged. I will cite several examples in this section as illustrations although there were numerous other significant interactions.

An early issue was whether a mediation settlement instrument was even needed when Working Group II was assessing whether to recommend proceeding with the mediation project. At the first session in February 2015, Professor S.I. Strong of the University of Missouri Law School, representing the American Society of International Law, helped bolster the case for the initiative when she presented an empirical study she conducted as evidence of the need for the instrument.⁹

A second original supporting study was conducted by the Institute for Dispute Resolution at New Jersey City University. It was undertaken for IMI and presented at the September 2016 Vienna Session. The study found that the majority of users and stakeholders in the survey and at the Global Pound Conference believed that a global mechanism to enforce mediation settlements would improve commercial dispute resolution in international business transactions.¹⁰

Another issue that got my personal attention was whether the enforcement instrument should apply to only monetary terms in a settlement. At the first Working Group II meeting in February 2015, several delegations and at least one NGO representative asserted that any instrument should be limited because of the practical difficulties of enforcing non-monetary terms. This suggestion

⁹ The delegates were provided with a preliminary report that was subsequently published as a law review article. S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973 (2016). See also 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* (University of Missouri School of Law Legal Studies, Research Paper No. 2014-28). Preliminary findings from the study had previously been reviewed by the UNCITRAL Secretariat and the United States and were referenced in documents circulated prior to the February 2015 meeting. See UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, at 6 n.16 (Nov. 27, 2014). See also Comments Received From States, *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation—Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings*, U.N. Doc. A/CN.9/WG.II/WP.188, at 6 n.7 (Dec. 23, 2014).

¹⁰ SING. REF. BK., David S. Weiss & Michael R. Griffith, *Report on Empirical Study of Business Users Regarding International Mediation and Enforcement Mechanisms*, 20 CARDOZO J. CONFLICT RESOL. 1133 (2019).

was alarming, in my view. If an international treaty restricted enforcement to only monetary terms, parties may view mediation primarily for resolving this narrow class of disputes. This view would foreclose the full benefits of mediation for uncovering other terms that may better meet parties' interests. After researching whether enforcement was so limited for enforcing arbitration awards under the New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958), I presented to the working group the NY Convention precedent and its successful experience with a broader instrument and the substantive and policy reasons favoring that approach. Fortunately, a broader view was ultimately adopted by Working Group II, and the final convention covers compliance with all settlement terms.¹¹

Mediation-related NGOs especially rallied at the Vienna meetings in September 2016 when several difficult questions converged for discussion: Would the convention apply to private parties on an opt-in or opt-out basis? Should an enforceable agreement be certified as one that was the product of a private mediation, and if so, how would it be certified? And, would a defense to enforcement include certain types of misbehavior by the mediator, and if so, how narrow would the defense be framed? These questions fell clearly within the bailiwick of the mediation-related NGOs, and their representatives offered much formal and informal input into various proposals. These questions were ultimately resolved as part of the break-through "compromise" discussed in the next section.¹²

As these several examples illustrate, NGOs contributed in various ways during the drafting process. They were welcomed by many State delegations, in my experience. However, like any multi-party process, it is difficult to assess the impact of most individual contributions. Nevertheless, I think NGOs can safely claim that their participation enriched the discussion and understanding of a number of key issues.

In addition to various NGOs participating, the European Union ("EU"), as a regional economic integration organization represented by the European Commission, participated actively throughout the three years. EU member states made up more than

¹¹ One delegation, in an effort to find a solution that may appeal to all sides, proposed that the convention cover non-monetary features with the option for a State to file a reservation to exclude enforcement of long-term or complex obligations.

¹² See Section III.

25 percent of the delegates on the floor at any meeting.¹³ They were ably represented by Norel Rosner, Legislative Officer, who contributed much to the whole group meetings, during consultations, and in informal discussions.

E. *The Travaux Préparatoires (Official Record of the Negotiation)*

The *travaux préparatoires*, known as travaux, reports, and secretariat notes, were prepared before each session and at the end of each meeting day. These various documents aided the deliberations as they unfolded by creating a record so that participants could track where they have been and where they were going.

These documents stand out for two reasons. First, they offered a detailed contemporaneous record of what transpired (issues that were considered and what was discussed). Second, there were no personal names, countries or NGOs associated with the remarks and exchanges. The entire written record was anonymous in order to promote candid exchanges and reduce the need to grandstand for constituencies back home.

Corrinne Montineri, as the secretary of UNCITRAL Working Group II, performed the herculean task of preparing the numerous lengthy documents that aided the working group's deliberations. Ms. Montineri, with help from her colleague, Jae Sung Lee, prepared before each upcoming session a provisional agenda, a Report of Working Group II that covered what happened at the prior session, and a Note by the Secretariat as background and guide for the session. Then Ms. Montineri with her colleague prepared daily "draft" reports of what transpired each day and distributed them before the next day of meetings. At the end of each day, she would return to her office to meticulously prepare the draft report for the next day while the delegates and other representatives took a

¹³ UNCITRAL membership of 60 States included 13 members from the EU (21.6%). For the Working Group II meetings, attendance varied. For the February 2017 Session in NY, for example, 12 out of the 41 members in attendance were members of the EU (29%) plus 9 more EU countries as observers. UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, February 6–10, 2017), U.N. Doc. A/CN.9/901 (Feb. 16, 2017). In the last meeting in February 2018, when the final draft was adopted, 12 out of the 33 members in attendance were members of the EU (36%) plus 4 more countries as observers. See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934 (Feb. 19, 2018).

break for the evening to socialize and meet informally before returning for another work day.

These *travaux préparatoires* are posted on the UNCITRAL website, making them a widely available source for clarifying and interpreting the final model law and convention. You will see many references to these sources in this article.

F. *Voting*

Decisions were made by consensus. No formal voting took place as a general rule, so I was surprised to learn at my first meeting. The Chair, Ms. Morris-Sharma, had the responsibility of recognizing when the working group reached a consensus. She used various techniques to test for one. For example, she would declare “that not hearing any more comments or disagreements she will move on.” That comment would ferret out further concerns if there were any. Or, she would invite other comments with the remark that “if there are no more, she will declare a consensus.” These types of prompts helped surface an emerging consensus or an occasion for consultation or deferring an issue. This form of decision making imposed a heavy responsibility on the Chair to listen attentively, astutely read the group, and proactively build consensus.¹⁴

These six methods to engage participants were used throughout the week-long sessions over the almost three years of deliberations.

III. SUBSTANTIVE STORY: KEY ISSUES AND HOW RESOLVED

This section explains key provisions of the Convention including the five-point compromise that likely will be of interest to mediation-savvy readers and states that are contemplating adopting the Convention. For states that might not be ready to ratify the Convention, the working group prepared, as an alternative, an amendment to the Model Law on International Commercial Conciliation. The Model Law will not be discussed.

¹⁴ UNCITRAL, *supra* note 1, at 6, para. 14.

A. *Article 1. Scope of Application*

Article 1 frames the narrow scope of the Convention.

Article 1.1 limits its application to disputes that are international, presumably to little surprise, and includes a definition of international that focuses on the place of a party's business, where a "substantial part of the obligations under the agreement is performed," or where the subject matter is "mostly closely connected."

Article 1.2 and 1.3 further limits the scope by specifying what disputes and settlement agreements are *not* covered, with limits that will surprise and disappoint some.

Article 1.2 states that the Convention does not apply to settlement agreements that arise out of consumer transactions or relate to family, inheritance, and employment law.

Article 1.3 tries to avoid overlap with other enforcement regimes that might apply to mediated settlement agreements. Some delegations wanted to avoid duplicating regimes such as the Hague Conference instrument, while others were fine with states providing multiple avenues for relief under different instruments. They were less concerned with overlap and more concerned about avoiding gaps by other instruments imposing ceilings, not floors.

The Working Group ultimately decided to restrict the scope so that the Convention would not apply to settlement agreements that have been approved by a court or concluded in the course of a court proceeding and would be enforceable as a State court judgment. Also, it would not apply to settlement agreements enforceable as an arbitral award.

B. *Article 2. Definitions*

Article 2.3 offers a definitions section with a surprise that I suspect will be embraced by much of the contemporary mediation world. It replaced the word "conciliation" with the word "mediation." After UNCITRAL has used the word "conciliation" in the Conciliation Rules (1980) and in the Model Law on International Conciliation (2002), Working Group II made this long overdue word change. It then labeled the Convention as "United Nations Convention on International Settlement Agreements Resulting from *Mediation* (italics added)."

The Working Group offered the following explanation:

. . . 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 instruments. This change in terminology does not have any substantive or conceptual implications.¹⁵

Although some might object because they think there is a worthwhile distinction to maintain between mediation as a more facilitative process and conciliation as a more evaluative process, I would expect most of the mediation audience will welcome this change in terminology.

C. Article 4. Requirements for Reliance on Settlement Agreements

Parties must supply evidence of a “settlement agreement that resulted from mediation.” This unexpected proof requirement was subject to considerable discussion and reflects what the drafting group characterized as a “balance between, on the one hand, the formalities that are required to ascertain that a settlement agreement result from mediation and, on the other hand, the need for the draft convention to preserve the flexible nature of the mediation process.”¹⁶ It is in this spirit that this proof requirement should be interpreted.

This requirement was born out of the fear that the Convention might be used for illegitimate purposes. Some delegates wanted to be sure that the treaty would not be used for an illegal scheme like money laundering or for mediations that are not genuine in the view of some delegates such as when a couple of friends in a dispute meet in a pub. It is for these reasons that the Convention not only requires that the agreement be signed by the parties but also that there is “evidence that the settlement agreement resulted from mediation” by one of four ways: the mediator’s signature on the settlement agreement, the mediator’s signature on a separate document indicating a mediation was carried out, an attestation by an

¹⁵ U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of Commercial Disputes, International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation*, U.N. Doc. A/CN.9/942, at II.B(1) (Mar. 2, 2018).

¹⁶ U.N. Doc. A/CN.9/942, *supra* note 15, at II.B(7).

administering institution, or “any other evidence acceptable to the competent authority.”¹⁷

D. *Article 5. Grounds for Refusing to Grant Relief*

Article 5 on defenses posed the risk of crippling the Convention by establishing facially sound grounds for refusing relief that could be abused. Some delegates argued that preserving defenses was vital for protecting parties with a valid reason for not complying with a settlement agreement. At the policy level, they offered a persuasive argument. But if all or most possible defenses were preserved, the Convention would fail to serve its primary purpose of expediting compliance. This Article was subject to multiple rounds of discussion at different meetings including a gallant effort in the final session to regroup and refine the grounds to avoid overlap. As this last effort unfolded, I was hoping it would lead to changes that would reduce the risk of misuse. The failure to gain consensus was due to the “need to accommodate the concerns of different domestic legal systems”¹⁸ and left disconcerting space for abuse, in my view.

Preserving several limited defenses made sense like the opportunity to present proof that the party “was under some incapacity” or that the settlement agreement was not binding, was subsequently modified, or has been performed. Other defenses, however, leave space to ferment trouble by defendants who want to avoid compliance.

Two troublesome defenses stand out. One is the defense that an agreement is “null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it. . . .”¹⁹ Another is the defense that the obligations in the agreement are “not clear or comprehensible.”²⁰ By asserting these defenses, defendants may be able to transform this new expedited process into a more protracted and expensive one similar to the one before the Convention. Courts should construe narrowly these defenses²¹ and others in view of the purpose of the Convention.

¹⁷ *Id.* at II.A, art. 4.1(a) & (b).

¹⁸ *Id.* at II.B, para. 8.

¹⁹ *Id.* at II.A, art. 5(1)(b)(i).

²⁰ *Id.* at II.A, art. 5(1)(c)(ii).

²¹ For the “null and void,” etc. defense, Working Group II specifically states that it intends a narrow interpretation based on adopting language from the New York Convention. See U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of Commercial Disputes, Inter-*

E. “*The Compromise*”

As the deliberations progressed from semi-annual meeting to semi-annual meeting, Working Group II resolved the easier issues while deferring the harder ones. Among those favoring a Convention, we feared that when deliberations reached the remaining more controversial and complex issues, the resolutions risked gutting the instrument. The fears were palpable in the hallways. Several worrisome questions occupied me: Would the Convention include a large hole for a stream of legal claims based on mediator misconduct that would be difficult to prove and would prolong the compliance process? Would the benefits be limited to only parties that elect to opt-in to the Convention? If so, only diligent parties who overcome the status quo bias will likely elect an enforcement process that is supposed to be the better one. Would the entire enterprise for a convention be derailed by the argument that formulating global standards is premature for what some viewed as an incipient field?

These sort of questions among others moved different sides toward a “compromise proposal.” The compromise was the result of numerous discussions among delegates, NGO representatives, and the EU in full working group meetings, consultations, informal gatherings, hallways, and over meals. The five elements of the compromise were initially “cobbled” together by about a dozen delegates during lunch on Tuesday, February 7, 2017 and presented after lunch to the full Working Group. The timing left the remaining three days of the session to flesh out the details. And then a snow blizzard on Thursday closed down the island of Manhattan, including the UN for the day. This lost day turned into an opportunity. Instead of enjoying the freshly fallen snow in Central Park, a number of delegates and NGOs met at a private law office near the UN. They worked together to overcome some final hurdles and solidify details that could be presented to the full Working Group.²² The five-point “compromise,” which it became known as, created a pathway for resolving the remaining most contentious issues.

national Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation, U.N. Doc. A/CN.9/WG.II/WP.202, para. 43 (July 14, 2017).

²² U.N. Doc. A/CN.9/901, *supra* note 13, paras. 51–93.

1. Opt-out Provision (Convention, Article 8.1(a) & (b))

Should the Convention apply automatically with an opt-out provision? Those favoring opt-out argued that the instrument should apply automatically like the New York Convention applies to enforcement of arbitral awards. This approach also would be consistent with the objective of the instrument to make it easier to secure compliance with settlement agreements. Others argued for party autonomy. Parties should opt-in only after they understood how the Convention operates and made an informed choice to do so.

This party autonomy argument appealed to several mediation experts, so I learned when preparing for the Vienna expert panel program in September 2016. During the evening before the program as the panelists were conferring, some panelists expressed concern that an opt-out provision ran counter to the principle of party self-determination that forms the foundation for the mediation process. Parties should make an informed choice to use the Convention, so they argued as some state delegates did during the meetings. I was stunned by the resistance because the benefits of an opt-out provision seemed so obvious. Instead of the after-dinner meeting offering a congenial opportunity to get acquainted over drinks and prepare for the next day, it turned into an intense and lively discussion. We met late into the night as we explored the pros and cons of opt-in and opt-out and the foundational principle of party self-determination.

By the end of the evening, I struggled to succinctly frame the issue as: Would the new instrument offer a better default process for enforcement than the one now in place without the instrument? If so, that process should apply subject an opt-out provision. If not, I suggested that we should not be supporting the new instrument. When we reconvened our planning meeting over lunch the next day, the panel unanimously favored the opt-out approach. It became apparent to all of us that opt-out favored the default process, and this enterprise was aiming to fashion a better process for enforcing mediated settlement agreements.

Ultimately, the Drafting Group adopted the policy of automatically applying the Convention with an opt-out option for a party to the settlement agreement.²³ Even though the Convention

²³ Art. 8 distinguishes between “parties to the convention,” which are Contracting States, and “parties to the settlement agreement,” which are private parties. For further explanation, see U.N. Doc. A/CN.9/942, *supra* note 15, at II.B(3).

omits explicitly authorizing private opt-outs, the understanding is that parties to a settlement agreement can agree to exclude the application of the Convention, and the clause will be upheld under Article 5.1(d) as a defense based on complying with the settlement terms.²⁴

However, Article 8.1(b) authorizes a State party to the Convention to opt-out of the Convention's automatic application in a declaration. If a State opts-out, private parties can still opt-in to the Convention by private agreement (such as in the settlement agreement or the agreement to mediate).

2. Grounds for Refusing to Grant Relief Based on Mediator Behavior (Convention, Article 5.1(e) & (f))

Some delegates wanted to include a defense to enforcement based on bad mediator behavior. They saw a need to protect parties against unfair treatment by a mediator or failure of a mediator to disclose information that calls into question his or her impartiality. Initial concerns related to the impact of a mediator's non-compliance with professional conduct standards or domestic law.

For people in the mediation field, this defense roused fears of abuse by parties who are looking for an excuse to get out of an agreement. Although it is rare that these mediator misbehaviors occur and have an impact, the claims are theoretically possible, and some delegates thought should be guarded against. For many in the mediation field as advocates or mediators, these claims are familiar ones that can be asserted by a party trying to avoid a commitment. These claims also can be used by a party to protract the compliance process and make it costlier as leverage for re-negotiating a settlement.

When discussing these concerns at the February 2016 New York session, it was considered how mediation is different than arbitration. It was recognized that parties voluntarily use mediation, a mediator lacked authority to impose a settlement, any resulting agreement is voluntarily entered into, and parties are free to withdraw from the process at any time. At the end of the discussions, delegates were encouraged to consider before the next meetings in Vienna whether these mediator misconduct risks might be covered

²⁴ U.N. Doc. A/CN.9/934, *supra* note 13, para. 78; U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session (25 June–13 July 2018), U.N. Doc. A/73/17, at III C.2., para. 68 (2018); U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session (25 June–13 July 2018), U.N. Doc. A/73/17, at III B.1., paras. 37–40 (2018).

by other defenses like the public policy defense in the instrument and to review the practical and judicial experiences in their jurisdictions.²⁵

At the following Vienna session in September 2016, a drafting process began with the goal of protecting against these risks of mediator misbehavior while limiting the opportunity for abuse and leverage to renegotiate settlements. One of the early drafts that stimulated an energetic drafting process stated:

Draft provision 8 (Grounds for refusing [recognition] and enforcement) (key language in italics)²⁶

(1) [Recognition and] enforcement may be refused . . . if that party furnishes . . . proof that:

(e) *The conciliator failed to maintain fair treatment of the parties, or did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence.*

After much discussion of divergent views, exchange of multiple drafts, and parsing of language that included active participation by NGOs, the emerging view was that serious mediator misconduct could probably be covered by other defenses in the instrument. The delegates that wanted additional protections emphasized the significant role of the mediator and the need to retain a defense even if it is difficult to prove a party has been treated unfairly. Unlike arbitration, it was asserted by those favoring a protective provision, there was no means to challenge the mediation process or the conduct of the conciliator.

As delegates searched for a proposal that met everyone's concerns, it was suggested that the scope of challengeable behavior be limited to when it has a "direct impact on the settlement agreement," to "exceptional circumstances," or when the conduct has a "material impact" or "undue influence." It also was suggested that subparagraph (e) above be divided into two separate subparagraphs: one on fair treatment and the other on disclosure.²⁷

²⁵ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016), U.N. Doc. A/CN.9/867, paras. 170–75 (Feb. 10, 2016).

²⁶ U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, *Settlement of Commercial Disputes, International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation*, U.N. Doc. A/CN.9/WG.II/WP.198, at II.D, para. 35 (June 30, 2016). The final draft became art. 5 in the Convention.

²⁷ See U.N.G.A., Daily Minutes, U.N. Doc. A/CN.9/WG.II/LXV/CRP.1/Add.4, paras. 5–11 (Sept. 16, 2016) (Draft report, addendum, distributed day after discussions); U.N.G.A., Daily

The final version approved by Working Group II adopted the two subparagraphs approach and retained narrow defenses that addressed the underlying goal of protecting parties from a badly behaving mediator while fashioning language that reduced the risk of parties exploiting defenses to evade commitments. The final language of Article 5, with italics to highlight safeguards against abuse, are:²⁸

Section 1(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 has a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement*.

3. Avoid Overlap with Other Enforcement Regimes (Convention, Article 1.3)

Another issue was whether the compliance mechanism in the Convention should avoid overlap with other compliance regimes. As discussed under Article 1.3 on Scope of Application above, the Working Group decided to try to minimize overlap by not applying the Convention to settlement agreements enforceable as a court judgment or arbitration awards.²⁹

4. Defining “Recognition and Enforcement” (Convention, Article 3)

Another issue was whether to use the language “recognition and enforcement” of settlement agreements in the Convention, a phrase that figures prominently and frequently in the New York Convention on arbitral awards including in its title.³⁰ Because part of the phrase, “recognition,” has a different meaning in civil law

Minutes, U.N. Doc. A/CN.9/WG.II/LXV/CRP.1/Add.7, paras. 15–18 (para. 18 refers to compromise solution) (Sept. 21, 2016) (distributed day after discussions).

²⁸ For a more complete analysis of this section on mediator misbehavior, including the hurdles to proving the defense, see SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based on Mediator's Misconduct: Articles 5.1(e) & (f)*, 20 *CARDOZO J. CONFLICT RESOL.* 1197 (2019).

²⁹ See Singapore Convention art. 1.3(a) & (b).

³⁰ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, arts. I–VII.

jurisdictions than in common law jurisdictions, delegates wanted to draft a convention that would reduce the risk of confusion. It was not easy at the meetings for me as a common law trained lawyer to understand the explanations and reconcile the different interpretations. The solution fashioned by the delegates was to omit the term “recognition” and design a separate article, that became the short and significant Article 3.

Article 3 separated the two concepts. Article 3.1 covers “enforcement” by giving each party to the Convention the right to enforce a settlement agreement in accordance with the Convention.³¹ Article 3.2 covers “recognition” without using the term. Instead, the “recognition” concept is replaced with a functional definition that uses other words to address key aspects of recognition such as the ability to assert a mediated settlement as a complete defense if another party tries to raise the underlying settled claims.

Other articles in the Convention do not repeat Article 3’s meticulously negotiated and somewhat convoluted language. Instead, the other articles use the blanket term “relief” when referring collectively to the concept of “enforcement” in Article 3.1 and the functional “recognition” description in Article 3.2.³²

For a full understanding of this two-paragraph, complex provision, read *Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation* by Timothy Schnabel in the Singapore Mediation Convention Reference Book.³³ In the article, Tim Schnabel emphasizes the central importance of this Article to the entire Convention when he points out that: “Yet only Article 3 imposes affirmative obligations on Parties to the Convention. All other articles merely play supporting roles, such as placing boundaries on the Convention’s application, setting forth procedural rules or exceptions, and providing the mechanics for the Convention to operate as a treaty. In other words, all the other articles are used to determine whether and how the Article 3 obligations apply, but only Article 3 itself imposes substantive duties on states that join the Convention.” Those duties are to enforce a settlement agreement in accordance with the terms of the Convention.

³¹ The term “enforcement” shows up in a few other places but for other purposes. See Singapore Convention arts. 1(3)(a)(ii) & (b), art. 12(4).

³² See the use of the term “relief” in Singapore Convention arts. 4, 5, 6, & 12.

³³ See SING. REF. BK., Timothy Schnabel, *Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1181 (2019).

5. Two Options for States: Convention or Model Law

Central to the five-point compromise was the dual instruments proposal. It resolved a distributive choice that was blocking progress: Would there be a convention or model law? The proposal avoided a choice that would have produced a winner and loser. It offered something to both sides. For those states that opposed a convention because they wanted more time to gain experience with mediation and compliance issues, they could adopt the model text in their domestic law and join the convention later. For those states that favored a convention because they are ready for its benefits, they could ratify it under the dual instruments resolution. The General Assembly, it also was suggested, should not express any preference between the two options.³⁴

The Working Group formulated this formal resolution to encapsulate its goals for adoption by the Commission and for the General Assembly:

Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL 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 cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument. See A/CN.9/942, II.B Annotations, Paragraph 12 (2 March 2018).

After the five-point compromise was reached, the delegates wrapped up the drafting process by addressing some standard and not particularly controversial provisions, although one routine provision provoked an entertaining exchange with substantive implications. It was proposed in the draft provision that the Convention become effective six months after the third state ratifies it. During the discussions, a delegate suggested that the Convention should not be effective until ten states ratify it, followed by other delegates suggesting other numbers ranging from three and ten ratifying states. The Chair, using her instinctive humor to make a point, remarked that this is starting to sound like a bingo game or haggling at a bazaar. She then asked delegates to support any proposed number with a rationale. In a very short time, the discussion

³⁴ U.N. Doc. A/CN.9/901, *supra* note 13, paras. 89–93; U.N. Doc. A/CN.9/942, *supra* note 15, at II.B Annotations, para. 12.

returned to the original number of three ratifying states and reached a consensus.³⁵

This last discussion highlighted another feature of the Convention mentioned by a delegate that is worth noting as a final point. The Convention is not a bilateral treaty. It is not limited to compliance with settlements “from” a State that is also a party. This means that settlements are subject to the Convention in any country that is a Party even if the person or entity suing is not from a country that ratified the Convention.

IV. CONCLUSION—WHAT HAPPENED NEXT?

The recommendations of Working Group II were adopted by UNCITRAL on June 25, 2018. On that warm day at the UN in NYC, delegates and representatives sang a celebratory song composed for the occasion.³⁶ It was entitled “Good Memories” and was sung to the melody of *Home on the Range*. It also paid tribute to Tim Schnabel’s leadership for moving this initiative forward and to Singapore for offering to host opening the Convention for signature.

Oh give me a forum
Where mediation is at home
Where debate and amendments flow free
Where seldom is heard, a discouraging word
And results are here for us to see

*Ohhhhh forum to engage, where each of us wrote a page, where
Tim took the lead and we followed with speed—mediation con-
vention hurray*

When the work first begun
And the quorum was found
With the New York Convention as guide
We all shared our views
And now we share the news
The Singapore convention is live *ohhhh forum to engage*

³⁵ U.N. Doc. A/CN.9/942, *supra* note 15, at II, art. 14.

³⁶ The song was composed by three UNCITRAL members who are too modest to be publicly recognized for their authorship of this original composition for the 51st Commission of UNCITRAL—New York—25 June 2018.

At the June 25th Commission meeting, the Commission adopted by consensus the following decision and recommendation for the General Assembly:³⁷

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 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,

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

Recalling General Assembly resolution 57/18 of 19 November 2002 noting the adoption of the UNCITRAL Model Law on International Commercial Conciliation and expressing the conviction that the Model Law, together with the UNCITRAL Conciliation Rules recommended by the General Assembly 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,

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,

Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL 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 cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,³⁸

Noting that the preparation of the draft convention on international settlement agreements resulting from mediation was the subject of due deliberation in the Commission and that the

³⁷ U.N. Doc. A/73/17, *supra* note 24, at III C.2, para. 68.

³⁸ U.N. GAOR, 72nd Sess., supplement no. 17, U.N. Doc. A/72/17, paras. 238 & 239 (2017).
See also U.N. Doc. A/CN.9/901, *supra* note 13, para. 93.

draft convention benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

Having considered the draft convention at its fifty-first session, in 2018,

Drawing attention to the fact that the text of the draft convention was circulated for comment before the fifty-first session of the Commission to all Governments invited to attend the meetings of the Commission and the Working Group as members and observers,

Considering that the draft convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States:

1. *Submits* to the General Assembly the draft convention on international settlement agreements resulting from mediation, as it appears in annex I to the report of the United Nations Commission on International Trade Law on the work of its fifty-first session;

2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group II (Dispute Settlement), consider the draft convention with a view to

(a) adopting, at its seventy-third session, on the basis of the draft convention approved by the Commission, a United Nations Convention on International Settlement Agreements Resulting from Mediation; (b) authorizing a signing ceremony to be held as soon as practicable in 2019 in Singapore, upon which the Convention would be open for signature; and (c) recommending that the Convention be known as the “Singapore Convention on Mediation”;

3. *Requests* the Secretary-General to publish the Convention, upon adoption, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies.

The General Assembly approved the Convention and the title as the Singapore Convention on Mediation on December 20, 2018.

The last step started on August 7, 2019 when the Convention opened for signature in Singapore and 46 countries signed it.³⁹ The opening ceremony launched the final stage of “ratification, accept-

³⁹ See Singapore Convention art. 11. The official list of signatories that will be updated in perpetuity can be found on the UNCITRAL website by searching for “Singapore Convention on Mediation.” See *Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, UNCITRAL, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited Sept. 10, 2019).

ance, approval, or accession” by the states.⁴⁰ The Convention becomes effective six months after the third state proceeds from signing to adopting the Convention. Each state has its own requirements for ratification.

I hope that this article will help inform discussions and choices as states study the Convention, assess its benefits, and decide whether to adopt it. I also hope that this article will be of value after the Convention becomes effective for when parties are implementing and interpreting the Convention.

⁴⁰ See Singapore Convention art. 14.

EVALUATING THE SINGAPORE CONVENTION THROUGH A U.S.-CENTRIC LITIGATION LENS: LESSONS LEARNED FROM NEARLY TWO DECADES OF MEDIATION DISPUTES IN AMERICAN FEDERAL AND STATE COURTS

*James R. Coben**

I. INTRODUCTION

This chapter assesses the likely efficaciousness of the Singapore Mediation Convention¹ based on nearly two decades experience of systematically tracking and studying mediation litigation in the U.S. federal and state courts.

In the Spring of 2006, my colleague Peter N. Thompson and I authored our first study analyzing our comprehensive five-year dataset documenting mediation litigation trends from 1999–2003. The article, entitled *Disputing Irony: A Systematic Look at Litigation About Mediation*,² made a number of findings relevant to the Convention, including among others:

- Litigation involving mediation issues increased 95% from 1999 to 2003.³
- Nearly half of all court opinions about mediation addressed enforcement of settlement agreements. Traditional contract defenses, although frequently raised in enforcement cases, were rarely successful.⁴
- Very few opinions raised the issue of mediator misconduct;⁵ in fact, only seventeen times in five years did parties assert a contract defense based on mediator conduct.⁶

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¹ U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex I (2018) [hereinafter Singapore Convention].

² James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

³ *Id.* at 47–48.

⁴ *Id.* at 48–49.

⁵ *Id.*

⁶ *Id.*

- Courts are inclined to order mediation on their own initiative and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute, or stipulated in the parties' pre-dispute contract.⁷
- Courts frequently consider evidence of what occurs in mediation; indeed, in over three hundred opinions courts addressed mediation communications without any mention of privilege or mediation confidentiality.⁸

A year later, we published a follow-up article detailing two additional years of data analysis (2004–2005) and speculating about future trends.⁹ Although we then stopped systematically coding every mediation case for inclusion in a master database, we continued to monitor gross annual counts and squib the years' most significant cases for continuing legal education presentations and a variety of publications,¹⁰ including most significantly since 2011, for our work as co-authors (together with Sarah Cole, Nancy Rogers, Craig McEwen, and Nadja Alexander) of *Mediation: Law, Policy & Practice*, a Thomsen Reuters Trial Practice Series Treatise.¹¹

As Professor Thompson and I wrote back in 2007, “[w]e, of course, found it ironic and unfortunate that mediation, a process designed as an alternative to litigation, can, in some circumstances, encourage rather than eliminate additional litigation.”¹² That disputing irony continues to the present day, and I continue to believe that valuable lessons can be learned from mining the data.

The run-up to the December 2018 General Assembly's approval of the Singapore Convention inspired me to put my mining

⁷ *Id.* at 105.

⁸ *Id.* at 58–59.

⁹ James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 *WORLD ARB. & MEDIATION REV.* 395 (2007).

¹⁰ See, e.g., James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 *DISP. RESOL. MAG.*, Winter 2017, at 6; James R. Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 *CARDOZO J. CONFLICT RESOL.* 779 (2015); Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, James R. Coben & Peter N. Thompson, *Where Mediation is Concerned, Sometimes 'There Ought Not to Be a Law'!*, 20 *DISP. RESOL. MAG.*, Winter 2014, at 34; James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 *PENN. ST. Y.B. ARB. & MEDIATION* 162 (2013); Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 *OHIO ST. J. ON DISP. RESOL.* 363 (2011).

¹¹ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* (2018–2019). The treatise, updated annually and available online in Westlaw, contains detailed analysis of case law, as well as statutes and court rules on all of the topics addressed in this article.

¹² Coben & Thompson, *supra* note 9, at 395.

gear back on in earnest. With the assistance of my extremely talented research assistant Caleb Gerbitz, I constructed a new dataset analyzing litigation about mediation for cases decided in 2013–2017. This article compares the new five-year dataset with the original 1999–2003 dataset to make some general observations about mediation litigation trends over the last nineteen years, with a specific focus on enforcement of mediated settlements, the topic addressed by the Singapore Convention.

Part II of this article provides a general overview of U.S. mediation litigation trends, including a detailed description of how the databases were created and caveats about their use, a summary of raw numbers, and a review of the common mediation issues litigated in U.S. Courts. Principal conclusions include the fact that litigation about mediation has steadily increased between 1999 and 2017, a time period when new civil filings in state and federal courts have been more or less constant, or in some years declined. Disputes about enforcement of mediated settlements remain the most commonly litigated topic; however, disputing about enforcement has significantly declined overall in proportion to all litigated mediation disputes.

Part III offers a detailed examination of mediated settlement enforcement litigation, including types of enforcement disputes, defenses to enforcement, the enforcement-confidentiality connection, and significance of the subject matter of the underlying dispute. Principal conclusions include the fact that mediated settlements continue to be enforced at a very high rate—68% on average for the 2013–2017 time period. The frequency with which parties raise “traditional” contract defenses such as whether there was a meeting of the minds or mistake, as well as challenges to fundamental fairness of the process through fraud or duress, have declined. In their place are a panoply of procedural and jurisdictional defenses which have increased in number as mediation gets institutionalized in statutes and court rules. As was true in the original 1999–2003 dataset, cases involving mediator malfeasance are exceedingly rare, and with a 95% settlement enforcement rate, virtually always a loser for the challenging party. Surprisingly, cases raising both enforcement defenses and confidentiality issues were far less common in 2013–2017 compared to 1999–2003, and settlement enforcement far more likely in such cases in the more recent time period.

Part IV applies lessons gleaned from the litigation data to evaluate the choices made by the drafters of the Singapore Con-

vention. From my perspective as a chronicler of “mediations gone bad,” there is much to praise in the drafters’ efforts.

First, the U.S. litigation experience strongly supports the Convention’s singular focus on enforcement, as well as having minimal formalities necessary to trigger treaty application. Second, the drafters’ choice to permit only an opt-out from treaty coverage and to generally assume that parties will want their agreements to be enforceable, arguably will maximize application of the treaty and in turn meet the drafters’ primary goal of promoting the use of mediation. More important, in light of the recent U.S. litigation experience showing that procedural and jurisdictional defenses are becoming more common, the decision not to use an opt-in approach holds promise for significantly reducing post-mediation disputing. Third, limiting treaty coverage to cross-border commercial disputes and explicitly excluding family and consumer matters is certainly understandable, given an oft-cited concern for power imbalances outside the business-to-business context. However, perhaps somewhat surprisingly, there is no evidence in the U.S. datasets to suggest that enforcement defenses are generally more common, or more successful outside the commercial context. Fourth, the grounds for refusal contained in Article 5 of the Convention will most certainly permit the wide range of “traditional” contract enforcement defenses parties typically raise post-mediation, but will wisely limit challenges based on domestic law procedural arguments and filing formalities, which given the recent U.S. experience, are an increasing share of enforcement litigation. That said, there is little in the litigation track record from the United States to suggest that the grounds for refusal based on mediation misconduct will be commonly invoked and even if invoked ever successful. Finally, the drafters made a defensible choice to decline to legislate mediation confidentiality. While I have in the past made a strong argument praising the merits of uniformity in confidentiality regulation,¹³ the political reality is that getting agreement on a single approach to this complex topic (which depending on jurisdiction and legal culture might involve statutes, court rules, judicial decisions, ethical codes, ADR institutional provider policies, and/or party contract), would likely take many more years of negotiation than the three the drafters devoted to the Singapore Convention.

¹³ See Coben, *My Change of Mind on the Uniform Mediation Act*, *supra* note 10.

II. THE BIG PICTURE: OVERALL U.S. MEDIATION LITIGATION TRENDS

A. *Building Datasets and Caveats About Their Use*

Both datasets¹⁴ were derived by searching for cases on Westlaw in the “ALLSTATES” and “ALLFEDS” databases that include the term “mediat!”. As you might imagine, this search brings up a large number of “hits” on opinions that include some mention of mediation (most commonly, the fact that mediation at some point occurred before or during litigation). The number of total hits per year on the search term has increased from 1,176 in 1999 to 5,137 in 2017 (by itself, a statistic implying considerable increased use of mediation in American courts).

We then read each of the case “hits” to determine which opinions arguably involved a judicial decision on some disputed mediation issue. Only those cases are included in the datasets.¹⁵ Admittedly, we made judgment calls about inclusion. For example, we excluded class action cases where the court merely acknowledged that a settlement resulted from mediation, but included class action cases where the court explicitly cited the fact the case was

¹⁴ The datasets are searchable Excel files, which can be viewed at the Mediation Case Law Project website I maintain at Mitchell Hamline School of Law (https://open.mitchellhamline.edu/dri_mcldata/). Cross-tab functions within the Excel program (available as “Filter” options in the Excel “Data” toolbar) allow you to quickly tailor searches and combine variables (e.g., generate a list of state supreme court decisions where a mediated settlement was enforced despite an allegation of mutual mistake; or create a list of federal trial court decisions in a specific year where a judge enforced a contractual obligation to mediate). Both datasets capture case information such as citation, year, jurisdiction, and level of court. Both datasets also identify the subject matter of the mediation disputing (e.g., enforcement, confidentiality, sanctions, duty to mediate, etc.). With respect to enforcement, the primary focus of this article, both datasets capture with specificity the nature of enforcement issues or defenses presented and their resolution (i.e., agreement enforced, not enforced, remanded, or modified or decided on other grounds). Due to time and workload limitations, the newer dataset has slightly fewer case variables. Also, unlike the initial dataset, the 2013–2017 compilation is organized by chapter sub-section of *MEDIATION: LAW, POLICY & PRACTICE*, the mediation treatise I co-authored for Thomson Reuters. See *COLE ET AL.*, *supra* note 11. The revised organizational structure, while making it slightly more difficult to compare and contrast results between the datasets, greatly facilitates our work with annual treatise updates. I encourage researchers to use the datasets and ask only in return that you attribute them to me and Professor Thompson in any published work.

¹⁵ It is important to keep in mind that some lawsuits involved multiple reported opinions. Because we wanted to study the extent to which mediation issues were being litigated and addressed by the courts, we treated each opinion involving a mediation issue as a separate entry. Consequently, the total number of opinions/entries is greater than the number of lawsuits. Moreover, a significant percentage of the cases involve more than one disputed mediation issue.

mediated as a reason to approve the mediated settlement.¹⁶ We included cases where the court referred to a “mediation” process involving a judge or court personnel unless we could clearly determine from the opinion text that the “neutral” did not act as a mediator. Conversely, we excluded cases the court labeled as judicial settlement conferences.¹⁷

There are several caveats about the datasets. First, we discovered that Westlaw continuously adds (and in some circumstances deletes) cases to its databases many months after case decisions occur. Our final cut-off date for the 1999–2003 dataset was January 31, 2005. The cut-off date for the 2013–2017 dataset varied slightly from year to year but usually was in May or June of the following year. Westlaw searches after these dates may likely reveal some additional cases and perhaps delete some we originally captured. Given the total number of potential dataset hits in these two five-year periods (23,812),¹⁸ I readily acknowledge our review process may not have succeeded in reporting every single case deciding a disputed mediation topic. Suffice it to say, we tried our best to be consistent in our inclusion/exclusion decisions.

Second, case opinions published on Westlaw by no means capture the full range of disputing in American courts. In many jurisdictions, jurists have discretion regarding which cases to publish. While a steadily increasing number of federal trial court decisions are on Westlaw, far fewer state court trial decisions make it into the online database. Presumably, a huge number of mediation disputes of all types are resolved at the trial court level with unreported decisions that are not appealed by any party to the dispute. Accordingly, it is quite possible that the big picture trends I report here could differ considerably from the reality of work in nation’s courthouses.

Third, even for those judicial decisions published on Westlaw, readers know only the facts about the case that a judicial author decided to include in the opinion to support the ultimate ruling on

¹⁶ See, e.g., *Gallucci v. Gonzales*, 603 Fed. Appx. 533, 534 (9th Cir. 2015) (noting that the court’s conclusion that party bargaining occurred without collusion “is bolstered by the fact that the settlement was negotiated with the aid of a retired magistrate judge and experienced mediator, who reported no evidence of collusion”). See also *infra* notes 50–61 and accompanying text.

¹⁷ See, e.g., *Cornell v. Delco Elecs. Co.*, 103 F. Supp. 2d 1116, 1117 (S.D. Ind. 2000) (addressing an agreement arrived at in a “settlement conference” where the Magistrate Judge acted as a “go-between during negotiations.”).

¹⁸ Over the entire seventeen years, “hits” on the search term yielded 63,078 opinions (which might partially explain why I am disinclined to create any future datasets on this particular topic)!

the merits. The legally relevant facts from the court's perspective may vary considerably from the parties' (or mediator's) perspective on what actually transpired during a mediation.

Fourth, the trends reported here, which arguably can be characterized as the maturation of mediation litigation over two decades of institutionalization, might not, in the end, be at all predictive of the experience of other countries and disputing cultures. That, of course, remains to be seen.

B. *Raw Numbers*

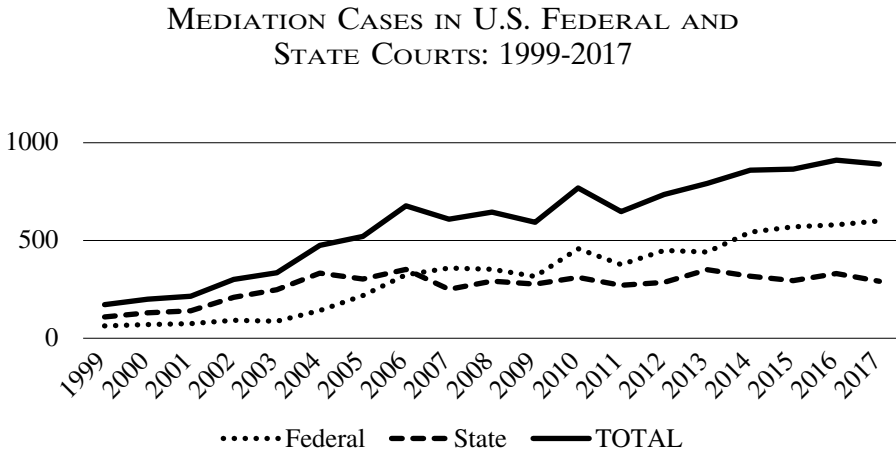
The number of judicial opinions actually deciding a disputed mediation issue has risen from 172 in 1999 to 891 in 2017, as illustrated in Tables 1 and 2. That more than five-fold increase in disputing has occurred over a time period when civil filings in U.S. federal and state courts have been more or less constant,¹⁹ or during the 2008 recession, in decline.²⁰ The increase in cases was particularly steep in the 1999–2006 timeframe, with growth steady but at a slower rate in more recent years. The total relevant number of opinions, 11,216 over nineteen years, might seem insignificant on a national scale, especially when it seems safe to assume the total number of mediations throughout the country has increased substantially over the same time period. Unfortunately, since many mediations are private matters, it is virtually impossible to determine with any accuracy the total number of mediations conducted in the United States on an annual basis. Even court-annexed mediations are difficult to quantify because court programs vary dra-

¹⁹ For example, according to the Administrative Office of the U.S. Courts, new civil case filings in the federal district courts numbered 260,271 in 1999: see *Judicial Business 1999*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/judicial-business-1999> (last visited Apr. 10, 2019); declined to 252,962 in 2003: see *Judicial Business 2003*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/judicial-business-2003> (last visited Apr. 10, 2019); increased to 267,257 five years later in 2008: see *Judicial Business 2008*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/judicial-business-2008> (last visited Apr. 10, 2019); rose again in 2013 to 284,604: see *Judicial Business 2013*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/judicial-business-2013> (last visited Apr. 10, 2019); and in 2017 declined to 267,769: see *Judicial Business 2017*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/judicial-business-2017> (last visited Apr. 10, 2019).

²⁰ See, e.g., NAT'L CTR. FOR STATE COURTS, TOTAL INCOMING CIVIL CASES IN STATE COURT TRIALS, 2007–2016, <http://www.courtstatistics.org/NCSC-Analysis/Civil/Civil-Caseloads-2016.aspx> (last visited Mar. 13, 2019) (documenting 16% decline in civil filings between 2007 and 2016).

matically from state to state, and there is no single source of national data for use of mediation.²¹

TABLE 1: NUMBER OF MEDIATION CASES PER YEAR, 1999–2017



One particularly interesting trend in the data is the shift from a majority of mediation disputes coming from state courts (true from 1999–2006) to a majority coming from federal courts (commencing in 2007 and continuing to the current day). This increase is most likely attributable to the 2005 Congressional enactment of the Class Action Fairness Act,²² designed to “federalize” class actions.²³ Indeed, according to a 2008 report of the Federal Judicial Center, federal class action diversity filings increased nearly three-

²¹ Even in the more unified federal court system, ADR data has been hard to come by. Just by way of example, it was not until 2018 that the Administrative Office of the U.S. Courts specifically referenced the extent of federal courts’ use of ADR in its annual report of court business. See *U.S. District Courts—Judicial Business 2018*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018> (last visited Apr. 10, 2019) (noting that “56 districts operated ADR programs of some form, and 53 of these districts provided mediation or judge-hosted settlement conferences. More than 25,500 civil cases were included in ADR programs.”).

²² Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (now codified at 28 U.S.C. § 1332(d)).

²³ See generally Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013) (describing CAFA goals and providing a detailed critique of the “mythology” of state class action abuses so routinely cited in support of the Act).

fold in 2006–2007.²⁴ As described in more detail in Part III, this increase in federal court caseload has in turn significantly increased the number of mediation disputes in the datasets, given the degree to which federal judges now routinely invoke the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.²⁵

TABLE 2: NUMBER OF MEDIATION CASES PER YEAR, 1999–2017
DETAILED CASE COUNTS

| Year | Federal Cases | State Cases | Total Cases |
|-------------|----------------------|--------------------|--------------------|
| 1999 | 63 | 109 | 172 |
| 2000 | 70 | 129 | 200 |
| 2001 | 76 | 139 | 215 |
| 2002 | 96 | 209 | 301 |
| 2003 | 88 | 248 | 335 |
| 2004 | 143 | 332 | 475 |
| 2005 | 218 | 303 | 523 |
| 2006 | 325 | 352 | 677 |
| 2007 | 359 | 250 | 609 |
| 2008 | 353 | 292 | 645 |
| 2009 | 316 | 277 | 593 |
| 2010 | 458 | 311 | 769 |
| 2011 | 377 | 271 | 648 |
| 2012 | 449 | 286 | 735 |
| 2013 | 441 | 351 | 792 |
| 2014 | 543 | 317 | 860 |
| 2015 | 570 | 295 | 865 |
| 2016 | 580 | 331 | 911 |
| 2017 | 600 | 291 | 891 |

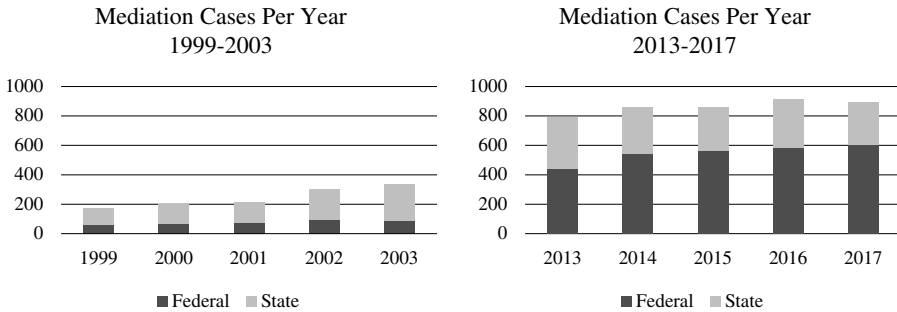
²⁴ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6–9 (2008).

²⁵ See *infra* notes 50–61 and accompanying text. I have written extensively about this phenomenon elsewhere, believing it to be an unjustifiable form of judicial deference to the opinions of class action mediators. See Coben, *Creating a 21st Century Oligarchy*, *supra* note 10; Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 790–95.

For the balance of this article, I will focus on two five-year time periods: 1999–2003 and 2013–2017. Why? First, while I tracked the total number of mediation cases throughout the nineteen-year period, I systematically coded case details only in twelve of those years (including the two five-periods). Second, comparing two five-year periods a decade apart strikes me as an effective way to evaluate big picture trends in disputing.²⁶

As illustrated in Table 3, there were 1,223 reported opinions involving significant mediation issues in the 1999–2003 five-year period. The number of opinions increased from 172 in 1999 to 335 in 2003, reflecting a 95% increase. State court opinions constituted 68% of the overall total, and more than doubled in number over five years. Federal court opinions constituted just 32% of the overall total, with the number of opinions issued each year remaining relatively constant over the five-year period.

TABLE 3: NUMBER OF MEDIATION CASES PER YEAR IN EACH 5-YEAR PERIOD



| | Total | 1999 | 2000 | 2001 | 2002 | 2003 |
|----------------|-------|------|------|------|------|------|
| Total | 1223 | 172 | 200 | 215 | 301 | 335 |
| Federal | 387 | 63 | 70 | 75 | 92 | 87 |
| State | 836 | 109 | 130 | 140 | 209 | 248 |

| | Total | 2013 | 2014 | 2015 | 2016 | 2017 |
|----------------|-------|------|------|------|------|------|
| Total | 4319 | 792 | 860 | 865 | 911 | 891 |
| Federal | 2731 | 441 | 543 | 570 | 580 | 600 |
| State | 1588 | 351 | 317 | 295 | 331 | 291 |

Quite a different picture emerges a decade later. While the total number of cases significantly increased (from 1,223 in 1999–2003 to 4,319 in 2013–2017), the pace in annual increases over the five-year period slowed substantially. In 2013, courts issued opinions about mediation disputes 792 times; in 2017, there

²⁶ For detailed reporting on the two years (2004 and 2005) left out of this comparison, see Coben & Thompson, *Mediation Litigation Trends*, *supra* note 9.

were 881 decisions, an overall caseload increase of just 12.5%. State court opinions constituted just 37% of the overall total and declined in number from 351 in 2013 to 291 in 2017. Federal court opinions constituted 63% of the overall total, with the number of federal court opinions increasing each year, from 441 in 2013 to 600 in 2017.

C. *Disputed Mediation Issues*

As illustrated in Tables 4 and 5, the disputes about mediation are quite diverse. Disputes about enforcement of mediated settlements constituted close to half of all mediation disputing in 1999–2003.²⁷ That percentage dropped to 39% in 2013–2017. In both five-year periods, disputes about fees and costs of mediation²⁸ were the second largest category of mediation litigation: 20% of all disputed cases in 1999–2003; 13% of all disputed cases in 2013–2017.

In 1999–2003, the third most frequent dispute was about court power to compel mediation,²⁹ occurring in 13% of the cases, followed by confidentiality disputes,³⁰ which occurred in 12% of the cases. Sanctions were a topic of disputing 10% of the time,³¹ as was condition precedent, most commonly whether a statutory or contract obligation to mediate before litigation or arbitration was satisfied.³² Ethics issues, including both alleged failures of mediators and judicial officers adjudicating mediated cases oc-

²⁷ For detailed analysis, see Part III *infra*, notes 46–72 and accompanying text.

²⁸ For a detailed analysis of mediation fee and cost cases, see COLE ET AL., *supra* note 11, §§ 9:17–9:20. See also Coben & Thompson, *supra* note 2, at 112–19.

²⁹ For a detailed analysis of cases addressing court power to compel mediation, see COLE ET AL., *supra* note 11, § 9:2 (noting “[s]uccessful challenges to judicially compelled mediation are rare.”). See also Coben & Thompson, *supra* note 2, at 105–08.

³⁰ Confidentiality disputes were wide-ranging, including among many other things: applicability of evidentiary exclusions and privilege law, waiver of privilege, discovery challenges, limitations on mediator reports, public right of access, court sanction for wrongful disclosure, as well as complex choice of law problems. For a detailed analysis of mediation confidentiality law, see COLE ET AL., *supra* note 11, §§ 8:1–8:49. See also Coben & Thompson, *supra* note 2, at 57–73.

³¹ For a detailed analysis of sanctions cases, see COLE ET AL., *supra* note 11, §§ 9:3–9:16. See also Coben & Thompson, *supra* note 2, at 119–23.

³² For a detailed analysis of condition precedent cases, see COLE ET AL., *supra* note 11, § 6:4. See also Coben & Thompson, *supra* note 2, at 105 (“[c]ollectively, the . . . opinions support a simple principle: courts are inclined to order mediation on their own initiative, and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties’ pre-dispute contract.”).

curred in 6% of the cases.³³ Procedural implications of a mediation request or participation constituted 4% of the disputing,³⁴ followed by lawyer malpractice at 3%,³⁵ and other acts and omissions as the basis for independent claims at 2%.³⁶

TABLE 4: DISPUTED MEDIATION ISSUE
(DETAILED BREAKDOWN)³⁷

| 1999–2003 (1223 total cases) | | DISPUTED ISSUE | 2013–2017 (4319 total cases) | |
|---------------------------------|-----|--|---------------------------------|-----|
| 569 | 47% | Enforcement | 1668 | 39% |
| 243 | 20% | Fees/Costs | 566 | 13% |
| 157 | 13% | Court Power to Compel Mediation | 238 | 6% |
| 152 | 12% | Confidentiality | 358 | 8% |
| 123 | 10% | Condition Precedent | 404 | 9% |
| 117 | 10% | Sanctions | 172 | 4% |
| 68 | 6% | Ethics (Judicial and Mediator) | 96 | 2% |
| 50 | 4% | Procedural Implications of Mediation Request or Participation | 498 | 12% |
| 31 | 3% | Lawyer Malpractice | 65 | 2% |
| 20 | 2% | Act or Omission as Basis for Independent Claims | 207 | 5% |
| 6 | 1% | Arbitration-Mediation Waiver | 59 | 1% |

By 2013–2017 the relative frequency of disputed issues shifted in some interesting ways. Most relevant to the Singapore Conven-

³³ For a detailed analysis of ethics cases involving judicial officers, see COLE ET AL., *supra* note 11, § 10:16. For detailed analysis of ethical claims against mediators, see COLE ET AL., *supra* note 11, §§ 10:5–10:14. See also Coben & Thompson, *supra* note 2, at 95–105.

³⁴ See COLE ET AL., *supra* note 11, §§ 5:12–5:16, where my treatise co-authors and I have grouped this wide array of case disputing into four broad categories: 1) cases raising tolling, laches, and failure to prosecute issues (§ 5:13); 2) cases where parties used mediation participation (or failure to participate) to influence litigation timelines and/or excuse rule violations (§ 5:14); 3) cases where mediation was used to establish waiver of rights, notice of claims, and exhaustion of administrative remedies (§ 5:15); and 4) cases where mediation participation impacted jurisdiction, venue, and transfer issues (§ 5:16).

³⁵ For a detailed analysis of lawyer malpractice issues, see COLE ET AL., *supra* note 11, § 12:4. See also Coben & Thompson, *supra* note 2, at 90–94.

³⁶ For a detailed analysis of acts and omissions leading to other claims, see COLE ET AL., *supra* note 11, §§ 15:17–15:19. See also Coben & Thompson, *supra* note 2, at 90–94.

³⁷ The total number of issues raised exceeds the number of total cases because opinions often address more than a single disputed mediation issue.

tion, the percentage of cases raising enforcement issues declined 17% (from 47% of all cases in 1999–2003, down to 39% in 2013–2017).³⁸ Disputes about confidentiality also showed marked decline, down 33%;³⁹ as did fee/cost disputes, down 35%;⁴⁰ disputes about court power to compel mediation, down 54%;⁴¹ disputes about sanctions, down 60%;⁴² and disputes raising ethical concerns about mediators or the judges deciding disputed mediation issues, down 66%.⁴³

The frequency of disputing about enforcing statutory or contractual obligations to mediate before litigation or arbitration remained more or less constant, with the issue being litigated in 10% of the cases in 1999–2003 and 9% of the cases in 2013–2017.⁴⁴ The same pattern held for disputes alleging waiver of arbitration rights by virtue of mediation participation, with the issue addressed in 1% of the cases in both five-year periods.

The growth area in mediation litigation are disputes about procedural implications of mediation request or participation. These disputes have increased three-fold, increasing from 4% of all cases in the 1999–2003 dataset to 12% of the cases in 2013–2017.⁴⁵ Cases alleging acts or omissions in mediation as a basis for new

³⁸ And, as detailed *infra* at notes 62–72 and accompanying text, the percentage of those enforcement cases raising “traditional” enforcement defenses (such as whether there was a meeting of the minds or mutual or unilateral mistake, as well as challenges to fundamental fairness of the process through fraud or duress) declined even more.

³⁹ Confidentiality disputes were raised in 12% of all cases in 1999–2003 but only 8% of cases in 2013–2017.

⁴⁰ Attorney’s fees and mediation costs were raised in 20% of all cases in 1999–2003 but only 13% of cases in 2013–2017.

⁴¹ Dispute about court power to compel mediation were raised in 13% of all cases in 1999–2003 but only 6% of cases in 2013–2017.

⁴² Sanctions disputes were raised in 10% of all cases in 1999–2003 but only 4% of cases in 2013–2017.

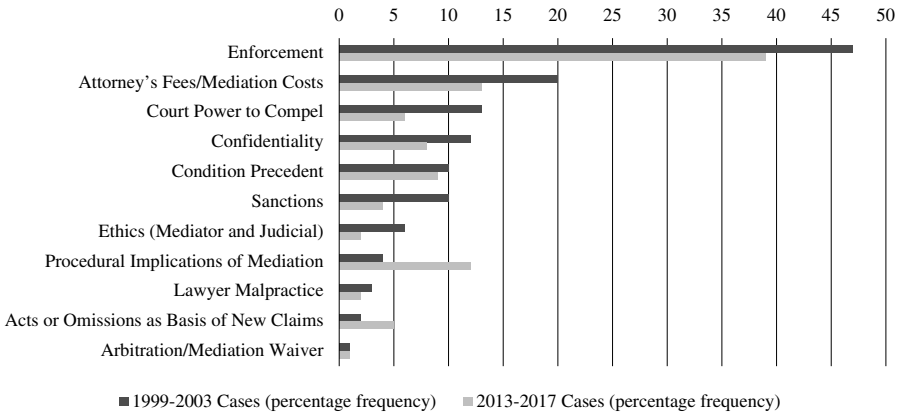
⁴³ Ethics issues were raised in 6% of all cases in 1999–2003 but only 2% of cases in 2013–2017.

⁴⁴ However, it should be noted that in this time period more than a third of the 404 cases (156 or 39%) came from a single state—Nevada, and involved that state’s foreclosure mediation statute. Without the disputing attributed to this single statute, the frequency of disputing about statutory obligations to mediate would have been closer to 6% of all cases, rather than 9%.

⁴⁵ As I wrote in the *Cardozo Journal of Conflict Resolution* in 2015, “[r]oughly a decade ago, I first began to joke that it might be possible for me to teach my first year civil procedure course using only case law decisions about disputed mediation issues. That is no longer a hypothetical.” Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 783 (following up the observation with a long list of case citations and parentheticals detailing disputes about mediation raising issues addressing, among other things, subject matter jurisdiction, venue, transfer, service of process, attachment, choice of law, discovery relevance, work-product, failure to state a claim, waiver of defenses, joinder, summary judgment, dismissals, appeals, and *res judicata*).

claims also have become more common, rising from just 2% of all cases in 1999–2003 to 5% of all cases in 2013–2017.

TABLE 5: DISPUTED MEDIATION ISSUE



Given that the Singapore Convention focuses exclusively on enforcement of mediated settlements, the next section explores in detail the data relevant to that topic.

III. DISPUTING MEDIATION SETTLEMENT ENFORCEMENT IN U.S. FEDERAL AND STATE COURTS

A. *Types of Enforcement Disputes*

As a threshold matter, it is helpful to divide enforcement disputes into three distinct categories. First, a considerable amount of litigation (29% in the 1999–2003 dataset; 23% in the 2013–2017 dataset) are disputes about interpretation and/or alleged breach of mediated settlements.⁴⁶ This is distinct from cases where a party

⁴⁶ See, e.g., *Lester v. Percudani*, 511 Fed. Appx. 174 (3d Cir. 2013) (interpreting the scope of a release); *Reilly v. Carpenter*, No. 14–1260, 2015 WL 6143382, *4 (W. Va. Oct. 16, 2015) (concluding that failure of both parties to timely perform the “contingencies” found in their mediated settlement agreement did not preclude the trial court’s conclusion that the agreement was binding and enforceable); *Butler v. Caldwell*, No. 48931-3-I, 622 WL 554952, at *3–4 (Wash. Ct. App. Apr. 15, 2002) (determining that a delivery of an appraisal by fax started the three day period for rejection set forth in the mediated settlement agreement); *Caswell v. Anderson*, 527 S.E.2d 582, 584 (Ga. Ct. App. 2000) (interpreting clause in mediated settlement agreement setting forth compensation for withdrawing partner).

raises a defense to settlement enforcement, the topic specifically addressed in Article 5 of the Singapore Convention.⁴⁷ Enforcement defenses, discussed in more detail below,⁴⁸ were raised in 65% of the cases in the 1999–2003 dataset, but only in 37% of the cases in the 2013–2017 dataset—a 43% reduction in disputing about defenses. Finally, a third category of enforcement cases in the datasets involve class action litigation or other contexts where courts exercise settlement approval authority, such as settlements on behalf of minors or Fair Labor Standards Act disputes, where the relevant statute requires judicial approval. Here, there is a dramatic change in case counts between the datasets, with virtually all the increase attributable to class action litigation. In 1999–2003, just 34 (31 federal and 3 state) or 6% of the enforcement cases involved judicial approval of class actions or other contexts demanding judicial approval of mediated settlements. In the more recent dataset, 2013–2017, there are 601 class action cases (595 federal and 6 state) constituting 36% of all enforcement disputes.⁴⁹ That is a rather remarkable six-fold increase in frequency, worth just a bit of explication here, despite the fact that the Singapore Convention excludes from its scope settlements, like court-approved class action settlements, that are enforceable as judgments.⁵⁰

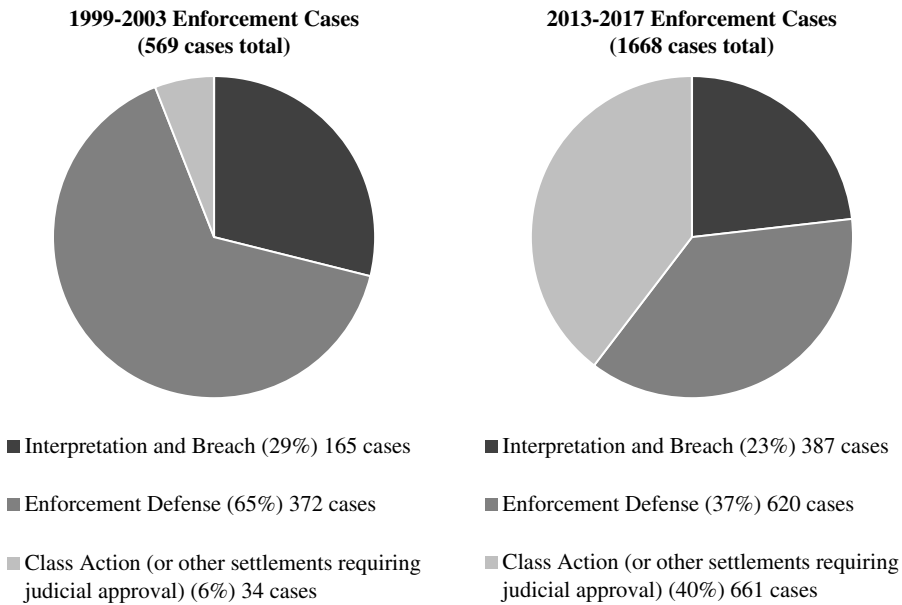
⁴⁷ Singapore Convention, *supra* note 1, art. 5 (Grounds for Refusing to Grant Relief).

⁴⁸ See Part III.B, *infra* notes 62–72 and accompanying text.

⁴⁹ The balance of 661 cases in this category are predominantly Fair Labor Standards Act cases, where courts approved mediated settlements and specifically referenced the mediation effort as an indicia of fairness. There were also in this category a handful of minor settlement approval cases.

⁵⁰ Singapore Convention, *supra* note 1, art. 1(3)(a). See generally Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 25–27 (2019).

TABLE 6: TYPE OF ENFORCEMENT DISPUTE



In the vast majority of civil disputes resolved by mediation in the United States, the parties' settlement ends any ongoing litigation without judicial review or approval of the settlement agreement.⁵¹ Most typically, the underlying lawsuit (assuming there was one) is dismissed with prejudice, and the parties' mediated settlement agreement is a new contract that, if breached, becomes the subject of an entirely new legal proceeding—a contract action for enforcement or breach.⁵² Class action settlements, in contrast, follow a different path to finality. Federal Rule of Civil Procedure 23(e) mandates that class actions may be settled “only with court approval.”⁵³ While the precise factors vary from federal circuit to federal circuit, the general objective of court review is to protect class members “whose rights may not have been given due regard by the negotiation parties.”⁵⁴ As I have documented elsewhere in

⁵¹ See Coben, *Creating a 21st Century Oligarchy*, *supra* note 10, at 163. See generally COLE ET AL., *supra* note 11, § 7:19 nn.50–51 and accompanying text.

⁵² *Id.*

⁵³ FED. R. CIV. P. 23(e) (providing that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).

⁵⁴ *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (noting that “[t]he class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks.”).

great detail,⁵⁵ judges increasingly discharge this oversight duty by invoking mediation evidence, all the more so in federal courts since the 2005 passage of the Class Action Fairness Act.⁵⁶ Specifically, judges cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.⁵⁷ Courts not only cite mediator testimony on process fairness, they often go further to recite and credit mediator evidence on substantive merits of the very settlement the mediator brokered,⁵⁸ a development that has always

⁵⁵ Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 790–93; Coben, *Creating a 21st Century Oligarchy*, *supra* note 10, at 167–74. *See also* COLE ET AL., *supra* note 11, § 7:17 nn.24–34 and accompanying text.

⁵⁶ *See supra* notes 37–39.

⁵⁷ *See, e.g.*, Jones v. Singing River Health Servs. Found., 865 F.3d 285, 295–96 (5th Cir. 2017), *cert. denied sub nom.* Almond v. Singing River Health Sys., 138 S. Ct. 1000, 200 L. Ed. 2d 252 (2018) (concluding that “objectors failed to show that, even if a conflict of interest existed, the settlement negotiations themselves were unfair or collusive” where “[t]o the contrary, the district court relied heavily on the fact that a well-recognized neutral mediator oversaw settlement negotiations of the federal cases to ensure they were conducted at arms’ length”); *In re* Fab Universal Corp. S’holder Derivative Litig., 148 F. Supp. 3d 277, 280 (S.D.N.Y. 2015) (stating that “[t]he Proposed Settlement was the product of extensive formal mediation aided by a neutral JAMS mediator, hallmarks of a non-collusive, arm’s-length settlement process”); ABF Freight Systems, Inc. v. U.S., Nos. C 10–05188 SI, 11–04663, 2013 WL 3244804 (N.D. Cal. June 26, 2013) (citing the fact that the agreement was reached in mediation with a neutral mediator as evidence that there was no collusion, fraud, or tortious conduct connected with obtaining the settlement); *In re* Citigroup Inc. Sec. Litig., 965 F.Supp.2d 369, 381 (S.D.N.Y. 2013) (observing that “[f]rom his front row seat, the mediator concluded that “negotiations in this case were hard fought and at arm’s-length at all times”); *In re* LivingSocial Mktg. and Sales Practice Litig., 298 F.R.D. 1, 11 (D. D.C. 2013) (reciting mediator testimony that “[t]here was never any type of collusion between the Parties in any of the negotiations,” and that the parties’ negotiations “were intense at every step of the way, and the Parties vigorously advocated for their respective positions”). For historical documentation of this practice and many more case citations and parentheticals, see *supra* note 55.

⁵⁸ *See, e.g.*, *In re* MGM Mirage Sec. Litig., 708 F. App’x 894, 897 (9th Cir. 2017) (emphasizing that “the parties reached a settlement after extensive negotiations before a nationally recognized mediator, retired U.S. District Judge Layn R. Phillips” and “the district court properly relied on Judge Phillips’s declaration stating that the settlement ‘represent[ed] a well-reasoned and sound resolution of highly uncertain litigation’ and was ‘the product of vigorous and independent advocacy and arm’s-length negotiation conducted in good faith.’”); Johansson-Dohrmann v. CBR Sys., Inc., No. 12-cv-1115-MMA (BGS), 2013 WL 3864341, *8 (S.D. Cal. July 24, 2013) (citing mediator testimony that “the settlement reached between the parties was the product of arm’s-length and good faith negotiations . . .” [and] “is non-collusive, fair and reasonable to all parties and provides significant benefits to the Settlement Class.”) (emphasis added); *In re* Visa Check/Mastermoney Antitrust Litig., 297 F.Supp.2d 503, 509–10 (E.D.N.Y. 2003) (citing mediator testimony that “it is my opinion that the [S]ettlement[s] w[ere] achieved through a fair and reasonable process and [are] in the best interest of the class . . . the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties”) (emphasis added).

struck me as a particularly unwarranted judicial abdication of power, not to mention the posing of a rather obvious conflict of interest.⁵⁹

Only a very small minority of judicial officers have resisted the trend, most notably the Honorable William Alsup, who in *Kakani v. Oracle Corp.*,⁶⁰ rejected the parties' joint motion for preliminary approval of a mediated class action settlement, and pointedly opined:

[i]t is . . . no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table.⁶¹

B. *Defenses to Enforcement*

1. Overall Enforcement Rates

While the relative frequency of enforcement defense disputes has declined, as shown in Table 7 below, the likelihood that a settlement will be enforced in the face of an alleged contract defense has increased from 57% of the time to 69%.

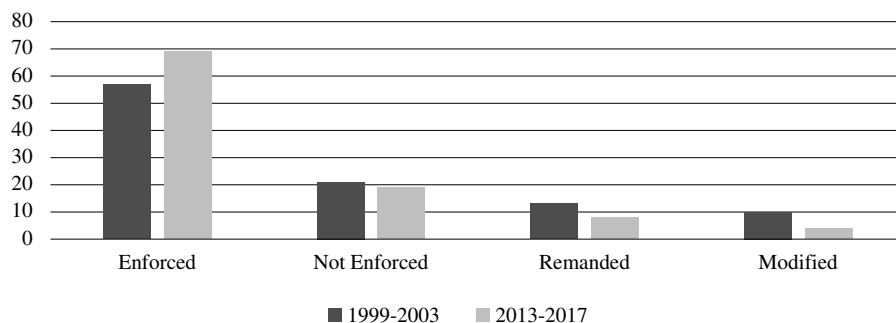
⁵⁹ See Coben, *Barnacles, Aristocracy, and Truth Denial*, *supra* note 10, at 175–87.

⁶⁰ *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 2221073 (N.D. Cal. June 19, 2007). See also *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (observing that “the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement”); *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 86 Fed. R. Serv. 3d 1593 (D. Minn. 2013) (stating that applying the presumption that a settlement reached through mediation was an arm’s length, fair settlement was highly doubtful where no formal discovery had taken place and the nature of any informal exchange of information was not presented to the court); *Lusby v. Gamestop, Inc.*, 297 F.R.D. 400, 413 (N.D. Cal. 2013) (expressing a concern when the mediation was conducted privately and not subject to court oversight).

⁶¹ *Kakani v. Oracle Corp.*, 2007 WL 2221073, *11.

TABLE 7: HOW OFTEN SETTLEMENTS ENFORCED WHEN DEFENSE RAISED (AS PERCENTAGE)

ENFORCEMENT RATE (AS PERCENTAGE)



| 1999–2003 (372 cases) | | DISPOSITION | 2013–2017 (620 cases) | |
|-----------------------|---------------------|--------------------------------------|-----------------------|---------------------|
| Number of Cases | Percentage of Cases | | Number of Cases | Percentage of Cases |
| 210 | 57% | Enforced | 426 | 69% |
| 77 | 21% | Not Enforced | 118 | 19% |
| 47 | 13% | Remanded | 50 | 8% |
| 38 | 10% | Modified or decided on other grounds | 26 | 4% |

2. Specific Enforcement Defenses: Frequency and Success Rates

Table 8 shows the frequency of particular defenses in each dataset. In 1999–2003, the six most common defenses raised—those adjudicated in 10% or more of the enforcement cases—were (in declining order of frequency): no meeting of minds; lack of formality;⁶² fraud; mistake (mutual or unilateral); agreement to agree; and duress.

⁶² Lack of formality includes such things as lack of a required writing or signature, or failure to include statutorily required language. *See, e.g.,* Haghghi v. Russian-American Broadcasting Co., 173 F.3d 1086, 1087–88 (8th Cir. 1999); Haghghi v. Russian-American Broadcasting Co., 945 F. Supp. 1233, 1234–35 (D. Minn. 1996), *certified question answered*, 577 N.W.2d 927 (Minn. 1998), *rev'd*, 173 F.3d 1086 (8th Cir. 1999) (refusing to enforce an otherwise fair mediation agreement signed by the parties that stated it was a “Full and Final Mutual Release of All Claims” but did not include the magic words required by relevant state statute that the parties intended the agreement to be binding). *See generally* James R. Coben & Peter N. Thompson, *The Haghghi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota*, 20 HAMLINE J. PUB. L. & POL’Y 299, 324 (1999) (arguing that the insistence on technical terms in mediated settlement agreements con-

TABLE 8: ENFORCEMENT DEFENSE FREQUENCY

| 1999–2003 (372 opinions) | | | 2013–2017 (620 opinions) | |
|--------------------------|--|--|--------------------------|--|
| Number of Opinions | Percentage of Total Enforcement Opinions ⁶³ | Enforcement Defense | Number of Opinions | Percentage of Total Enforcement Opinions ⁶⁴ |
| 78 | 21% | No Meeting of Minds | 78 | 13% |
| 62 | 17% | Lack of Formality | 76 | 12% |
| 54 | 15% | Fraud | 63 | 10% |
| 52 | 14% | Mistake | 43 | 7% |
| 47 | 12% | Agreement to Agree | 38 | 6% |
| 36 | 10% | Duress | 65 | 10% |
| 20 | 5% | Attorney Lack of Authority | 36 | 6% |
| 17 | 5% | Mediator Misconduct | 16 | 3% |
| 15 | 4% | Procedural/ Jurisdictional Challenges | 148 | 24% |
| 13 | 3% | Public Policy | 26 | 4% |
| 12 | 3% | Undue Influence | 6 | 1% |
| 11 | 3% | Unconscionability | 15 | 2% |
| 3 | 1% | Incapacity | 23 | 4% |
| 61 | 16% | Miscellaneous | 69 | 11% |

In the 2013–2017 dataset, the relative frequency of many of these “traditional” defenses declined, with procedural or jurisdictional challenges taking over a larger share of the overall disputing—24% of the cases, compared to only 4% of the cases in the earlier dataset. This most rapidly expanding category of disputing, which we did not even include in the original case coding questionnaire in 1999–2003 because so infrequent in that time frame, involves such things as whether the court had jurisdiction to hear the matter,⁶⁵ whether the parties had exhausted administrative reme-

trary to community expectations creates uncertainty in whether mediation settlements are enforceable “casting a pall over the development of ADR in Minnesota”).

⁶³ Since opinions often evaluate more than a single enforcement defense, the total exceeds 100%.

⁶⁴ *Id.*

⁶⁵ *See, e.g.,* Melchor v. Eisen & Son Inc., No. 15CV00113 (DF), 2016 WL 3443649, at *8 (S.D.N.Y. June 10, 2016) (finding no independent basis for federal jurisdiction for the enforcement of a mediated settlement agreement where the court had not expressly retained jurisdiction to enforce the settlement, but nonetheless granting relief under Fed. R. Civ. P. 60(b)(1) because the court’s premature dismissal was a “mistake” removing any incentive for compliance with the agreement); *In re* Paternity of S.A.M., 85 N.E.3d 879, 889 (Ind. Ct. App. 2017) (declaring the trial court’s order for the parties to conduct mediation, the resulting mediated agreement grant-

dies,⁶⁶ or had taken the necessary steps in the prior proceeding or in this proceeding to raise the issue or preserve the issue for review.⁶⁷

Duress cases constituted 10% of the disputing in both datasets. Disputing about attorney lack of authority and incapacity increased ever so slightly, the former increasing from 5% to 6%, the latter from 1% to 3%. Defenses based on public policy were also slightly more common, rising for 3% of cases in 1999–2003 to 4% of cases in 2013–2017.

The overall frequency of the miscellaneous category of defenses—admittedly a catch-all for a wide variety of attacks on enforcement ranging from allegations of general unfairness,⁶⁸ to assertion of “traditional” but rarely invoked contract theories,⁶⁹ to use of arguably creative but ultimately failed avenues of attack⁷⁰—fell slightly, with such cases representing 16% of all enforcement disputes in 1999–2003 but only 13% of disputes in 2013–2017.

And what do the datasets show about success of these various defenses? Table 9 shows how often agreements were enforced despite a particular defense being raised. In both datasets, defenses

ing visitation rights, and the trial court’s order approving the agreement all void *ab initio* because the father lacked standing to bring the underlying paternity action).

⁶⁶ See, e.g., *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 126 (Tenn. 2013) (holding that the plaintiff employee did not have to again exhaust administrative remedies before petitioning the trial court to set aside his mediated worker’s compensation settlement).

⁶⁷ See, e.g., *Boyd v. Texas Dep’t of Criminal Justice*, 697 F. App’x 397, 398 (5th Cir. 2017) (concluding that where no stipulation of dismissal had been filed and the trial court had not yet issued a final judgment, a party’s challenge to the validity of a mediated settlement agreement was premature); *Krechuniak v. Noorzoy*, 11 Cal. App. 5th 713, 726–27, 217 Cal. Rptr. 3d 740, 751–52 (Ct. App. 2017) (precluding party from arguing on appeal that a mediated settlement included an invalid penalty provision where the issue was not presented to the trial court).

⁶⁸ See, e.g., *Byrd v. Byrd*, No. 2150124, 2016 WL 3568725, at *9 (Ala. Civ. App. July 1, 2016) (rejecting the argument that financial hardship posed by imminent retirement made a mediated alimony agreement inequitable); *Peterson v. Peterson*, 765 N.E.2d 827 (Mass. App. Ct. 2002), *rev. denied*, 772 N.E.2d 590 (Mass. June 27, 2002) (rejecting theory that mediation process was so devoid of procedural safeguards “as to deprive the husband of due process”).

⁶⁹ See, e.g., *Nelson v. Levy Ctr., LLC*, No. CV 9:11-1184-SB-BHH, 2016 WL 1276414, at *5 (D.S.C. Mar. 30, 2016) (rejecting applicability of the doctrine of promissory estoppel where defendant failed to establish, among other things, any injury sustained in relying on alleged promises in the agreement); *Cook v. Hughston Clinic, P.C.*, No. 3:14-CV-296-WKW [WO], 2015 WL 6082397, at *3 (M.D. Ala. Oct. 15, 2015) (deeming both parties’ words and actions as inconsistent with the continued existence of the settlement agreement and applying the doctrine of rescission to find the otherwise valid and binding agreement no longer enforceable); *Gray v. Wells Fargo Home Mortg., Inc.*, No. 62408, 2014 WL 504605 (Nev. Jan. 21, 2014) (finding adequate consideration to support enforcement of a mediated settlement).

⁷⁰ See, e.g., *Edney v. Edney*, No. S.CT.CIV. 2015-0051, 2016 WL 3188938, at *3 (V.I. June 7, 2016) (confirming that a party’s misunderstanding of the law is not a valid ground to set aside a contractual obligation).

related to fundamental fairness of the process such as mediator misconduct, duress, undue influence, fraud, unconscionability, and incapacity were all rejected at a higher rate than the average for the respective five-year period. This rejection of fairness defenses is particularly robust in the more recent dataset. In 2013–2017, where the overall average enforcement rate was 69%: alleging mediator misconduct as a defense to enforcement failed 100% of the time; unconscionability claims were rejected 93% of the time; duress defenses were rejected 88% of the time; incapacity claims were rejected 87% of the time; and fraud defenses were only marginally more successful, with an enforcement rate of 86%.

The lowest enforcement rate is where parties raised procedural or jurisdictional arguments. In 1999–2003, such defenses were rejected outright only 33% of the time, with an additional 27% of the cases being remanded for additional proceedings. In 2013–2017, procedural/jurisdictional arguments continued to be the most successful attacks on mediated settlements, with an enforcement rate of just 53%, well below the 69% average rate. And as in 1999–2003, these defenses were also more likely than average to result in remand (11% when compared to the average remand rate of 8%).

TABLE 9: HOW OFTEN AGREEMENTS ENFORCED DESPITE DEFENSE ASSERTED

| 1999–2003 (372 opinions) 57% Overall Enforcement Rate | | 2013–2017 (620 opinions) 69% Overall Enforcement Rate |
|--|---|--|
| How Often Agreement Enforced Despite Defense Raised | Enforcement Defense | How Often Agreement Enforced Despite Defense Raised |
| 75% | Undue Influence | 83% |
| 71% | Mediator Misconduct | 100% |
| 69% | Fraud | 86% |
| 69% | Mistake | 74% |
| 66% | Incapacity | 87% |
| 64% | Duress | 88% |
| 64% | Unconscionability | 93% |
| 60% | Attorney Lack of Authority | 75% |
| 59% | Miscellaneous | 74% |
| 57% | No Meeting of Minds | 60% |
| 55% | Agreement to Agree | 68% |
| 50% | Lack of Formality | 67% |
| 46% | Public Policy | 69% |
| 33% | Procedural/Jurisdictional Challenges | 53% |

3. The Enforcement-Confidentiality Connection

The common wisdom is that enforcement and confidentiality are closely linked.⁷¹ The datasets, in contrast, suggest litigation only relatively rarely involves both issues. As shown in Table 10, between 1999 and 2003, courts considered both enforcement defenses and confidentiality challenges in thirty-eight cases (just 10% of all enforcement defense cases in that time period).

⁷¹ See, e.g., Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, DISP. RESOL. MAG., Fall 2015, at 32, 36 (noting that “presenting evidence of contract defenses often spawns tensions with confidentiality protections.”); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 515 (2004) (observing that “the penchant for confidentiality and secrecy, resulting in overlapping privilege rules, makes it difficult for parties to litigate claims of unfairness in the mediation process.”).

TABLE 10: THE ENFORCEMENT-CONFIDENTIALITY CONNECTION

| 1999–2003 (38 cases where a court considered both enforcement and confidentiality issues) 10% of all enforcement defense cases | | DISPOSITION | 2013–2017 (29 cases where a court considered both enforcement and confidentiality issues) 5% of all enforcement defense cases | |
|---|---------------------|--------------------------------------|--|---------------------|
| Number of Cases | Percentage of Cases | | Number of Cases | Percentage of Cases |
| 11 | 29% | Enforced | 19 | 66% |
| 13 | 34% | Not Enforced | 8 | 28% |
| 7 | 18% | Remanded | 2 | 7% |
| 7 | 18% | Modified or decided on other grounds | 0 | 0% |

In the more recent 2013–2017 time period, courts grappled with both enforcement defenses and confidentiality issues only twenty-nine times, just 4% of all cases raising an enforcement defense. The sharp decline in this issue-linking is somewhat surprising given that combining these issues together during the 1999–2003 time period significantly increased the likelihood that an agreement would not be enforced. Indeed, while the overall settlement enforcement rate in that time period was 57%, it dropped dramatically to 29% when parties disputed both enforcement and confidentiality. In 2013–2017, not only did the frequency of linking those issues substantially decline, but the dramatic differential in enforcement rates when the issues were linked virtually disappeared altogether (a 66% enforcement rate when linked, compared to a 69% enforcement rate when not). Together with the overall decline in litigation about confidentiality issues,⁷² these statistics suggest that confidentiality frameworks for mediation are working relatively efficiently and predictably for parties.

4. Significance of the Subject Matter of the Underlying Dispute

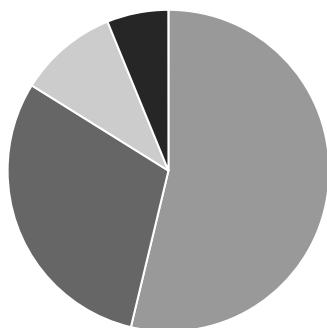
The underlying subject matter of the disputes involving enforcement defenses has been remarkably stable. As shown in Table 11, enforcement-defense disputing in the commercial context increased ever so slightly, from 54% of the cases in 1999–2003 to 56% of the cases in 2013–2017. Very slight increases also occurred

⁷² See Table 5, *supra* notes 27–45 and accompanying text (noting that confidentiality disputes constituted 12% of all mediation litigation in 1999–2003, but only 8% of all mediation litigation in 2013–2017).

in the family law and employment contexts. Family law cases were 30% of enforcement defense cases in 1999–2003 and 31% of the cases in 2013–2017. Employment law cases were 10% of enforcement defense cases in 1999–2003 and 11% of cases in 2013–2017. In contrast, estate/probate enforcement-defense disputes declined, dropping from 6% of all cases in 1999–2003 to only 2% in 2013–2017.

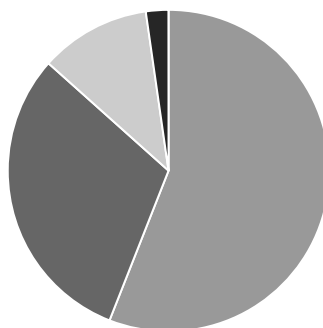
TABLE 11: SUBJECT MATTER OF CASES WHERE ENFORCEMENT DEFENSES RAISED

1999-2003 Cases Raising an Enforcement Defense (372 cases total)



- General Civil (54%) [200 cases]
- Family (30%) [112 cases]
- Employment (10%) [37 cases]
- Estate/Probate (6%) [23 cases]

2013-2017 Cases Raising an Enforcement Defense (620 cases total)



- General Civil (56%) [347 cases]
- Family (31%) [190 cases]
- Employment (11%) [69 cases]
- Estate/Probate (2%) [14 cases]

Do enforcement rates vary based on subject matter context? Table 12 shows the enforcement rates for the four categories of cases: general civil, family, employment, and estate/probate. In the 1999–2003 dataset, the enforcement rates were virtually identical for all four case types, with the exception that defenses raised in the estate/probate context were slightly less likely to fail (52% enforcement) when contrasted with the overall 57% average enforcement rate). In the 2013–2017 dataset, employment disputes were the most likely to be enforced despite defenses (71% enforcement rate), with general civil and family law cases both being enforced at a 69% rate. Once again, enforcement defenses were most successfully adjudicated in the estate/probate context, where agreements were enforced against challenges only 50% of the time.

TABLE 12: ENFORCEMENT RATE BY SUBJECT MATTER OF DISPUTING

| 1999–2003 (372 opinions) 57% Overall Enforcement Rate | | 2013–2017 (620 opinions) 69% Overall Enforcement Rate |
|--|--------------------------------------|--|
| How Often Agreement Enforced Despite Defense Raised | Subject Matter of Underlying Dispute | How Often Agreement Enforced Despite Defense Raised |
| 57% | General Civil | 69% |
| 56% | Family | 69% |
| 57% | Employment | 71% |
| 52% | Estate/Probate | 50% |

IV. EVALUATING THE SINGAPORE CONVENTION IN LIGHT OF THE U.S. LITIGATION EXPERIENCE

As noted above, there is certainly no guarantee that the U.S. litigation experience with mediation will be replicated in other jurisdictions. Nonetheless, these litigation trends provide at least some empirical data against which to evaluate decisions, both political and practical, made by the drafters of the Singapore Convention. In particular, I will focus on six things: 1) the choice to focus on enforcement; 2) the wisdom of minimal formalities and an opt-out approach; 3) subject matter treaty exclusions for vulnerable parties; 4) grounds for refusing to grant relief; 5) concerns about mediator malfeasance; and 6) confidentiality.

A. *A Sensible Focus on Enforcement*

The Singapore Convention creates a legal framework for recognition and enforcement of mediated settlement agreements made in the context of international commercial business disputes. As Timothy Schnabel, former head of the U.S. delegation to the Convention Working Group puts it, mediated settlements qualifying for enforcement under the Convention will “be able to circulate across borders in their own right, without the need to rely on domestic contract law or being transformed into an arbitral award on agreed terms.”⁷³

⁷³ Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 25 AM. REV. INT’L ARB. (forthcoming 2019), available at <https://www.americanreview.com/author/timothy-schnabel/>

Why elect to focus on enforcement? Perhaps most important is the perspective of international commercial mediation users. Recent empirical surveys suggest strong support for a global enforcement framework, akin to what the New York Convention accomplished for arbitration.⁷⁴ In a perfect world, since mediation is based on consent and self-determination, one might be excused for thinking that parties using the process would live up to their obligations. But the reality is that they do not always do so, as aptly demonstrated by the U.S. mediation litigation experience documented in Part III *infra*, which shows that disputing about enforcement of mediated settlement agreements has always been the most common issue addressed in mediation litigation.

The Convention drafters initially discussed whether to include enforcement of agreements to mediate in addition to enforcement of mediated settlement agreements.⁷⁵ That dual-track approach would have mirrored the New York Convention, which provides for enforcement of agreements to arbitrate,⁷⁶ as well as arbitral

ssrn.com/abstract=3320823, at 2. According to the Convention's Preamble, the enforcement framework will "contribute to the development of harmonious international economic relations." Singapore Convention, *supra* note 1, at Preamble.

⁷⁴ See, e.g., 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* (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, Nov. 17, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302 (reporting that 74% of survey respondents believe a Convention on enforcement would encourage increased use of mediation and conciliation in their countries, "with only 8% of respondents taking the contrary view."). See also Schnabel, *supra* note 50, at 3 (noting that "UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation to resolve disputes" and further noting that "[m]any companies find it hard to convince their business partners in some jurisdictions to engage in mediation based on views that it lacks a stamp of international legitimacy like the New York Convention has given to arbitration since 1958.").

⁷⁵ See generally S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 32-34 (2014) (recommending that a Convention address enforcement of agreements to mediate and suggesting that drafters could turn to the UNCITRAL Model Conciliation Law "for inspiration, since that instrument includes some very good language concerning the enforcement of an agreement to mediate as well as provisions relating to the rejection or termination of an offer to mediate").

⁷⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, art. II(1) (providing that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

awards.⁷⁷ The drafters ultimately declined to legislate enforcement of agreements to mediate, primarily out of concern the issue would overcomplicate the drafting effort.⁷⁸ The U.S. litigation experience would suggest this choice should be relatively non-controversial. As noted above in Part II(C), disputes about court power to compel mediation were just 6% of all cases in 2013–2017 (down from 13% in 1999–2003), while disputes about contractual or statutory obligations to mediate were 9% of all cases in 2013–2017 (down from 10% in 1999–2003).⁷⁹ Regardless of the overall frequency of disputing, successful challenges to court-compelled mediation are rare,⁸⁰ and courts “will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties’ pre-dispute contract.”⁸¹

B. *The Wisdom of Minimal Formalities and Opt-out Approach*

The Singapore Convention requires only minimal formalities as a condition of providing enforcement relief⁸² and permits opt-out from treaty coverage only by declaration⁸³—in other words, a default approach that generally assumes that parties want their agreements to be enforceable. Both were wise drafting choices that will limit the type of litigation about formalities and party in-

⁷⁷ *Id.* art. I(1) (providing that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”).

⁷⁸ See generally Schnabel, *supra* note 50, at 14. See also Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, 3 ICC DISP. RESOL. BULL. 42, 49 (2018) (noting that “[w]hether 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.”); Deason, *supra* note 71, at 34 (calling it sensible to separate enforcement of settlements from enforcement of agreements to mediate, noting that “as a practical matter, garnering support for a less ambitious legal instrument would probably be easier” and questioning whether enforcement is needed to initiate mediation).

⁷⁹ But see *supra* note 44 (emphasizing that more than a third of the condition precedent cases in 2013–2017 addressed the foreclosure mediation statute of a single state, Nevada).

⁸⁰ COLE ET AL., *supra* note 11, § 9:2.

⁸¹ Coben & Thompson, *supra* note 2, at 105.

⁸² Singapore Convention, *supra* note 1, art. 4.

⁸³ *Id.* art. 8(1)(b).

tion to be bound that regularly appears in the U.S. mediation litigation datasets, both old and new.⁸⁴

Under the Convention, a settlement must be signed by the parties,⁸⁵ with an authorized option for electronic signature.⁸⁶ The party seeking relief under the Convention must offer evidence that mediation has occurred,⁸⁷ including among other easy to prove options, the mediator's signature on the agreement.⁸⁸ While a number of delegations expressed concerns about the mediator being the source of such evidence,⁸⁹ it is a common exception to confidentiality in a number of U.S. statutory frameworks, including the Uniform Mediation Act,⁹⁰ which expressly authorizes a mediator to report whether mediation occurred, as well as party attendance and whether a settlement was reached.⁹¹ The 2005 AAA/ABA/ACR Revised Model Standards of Conduct for Mediators, the most widely cited ethical code of conduct for mediators in the United States, also expressly authorizes mediator reports regarding

⁸⁴ See COLE ET AL., *supra* note 11, § 7:19 (observing that “[i]ncreased formality requirements are intended to guard against surprise and uncertainty, to protect confidentiality, and to reduce litigation” but often end up “creat[ing] the surprise, uncertainty, and increased litigation”). See, e.g., Haghghi v. Russian-American Broadcasting Co., 945 F. Supp. 1233, discussed *supra* note 62; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 6326707 (N.D. Cal. 2013) (holding it insufficient that the parties intended, at the time of contract formation, to be bound by the mediated settlement terms, where their agreement did not include a statement to the effect that their settlement was intended to be enforceable or binding).

⁸⁵ Singapore Convention, *supra* note 1, art. 4(1)(a).

⁸⁶ *Id.* art. 4(2)(a).

⁸⁷ *Id.* art. 4(1)(b). See Schnabel, *supra* note 50, at 30–31 (noting that “[t]he stated reason for imposing this requirement was to reduce the risk of fraud and to make it easier for competent authorities to ensure that the settlement was indeed mediated”).

⁸⁸ Singapore Convention, *supra* note 1, art. 4(1)(b)(i). Other options for such evidence include the mediators' separate written attestation that mediation occurred, a written statement from the institution administering the mediation, or in the absence of those listed methods, “any other evidence acceptable to the competent authority.” See Singapore Convention, *supra* note 1, art. 4(1)(b)(ii)–(iv). For a more complete analysis of Article 4 proof, see SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019).

⁸⁹ See generally Schnabel, *supra* note 50, at 31–32 (noting, among other things, the concern that mediators in some jurisdictions are trained not to sign a settlement).

⁹⁰ For detailed information about the Act, including full text as adopted (with or without reporter's notes), superseded drafts, and legislative fact sheet, see *Mediation Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110w> (last visited Apr. 10, 2019).

⁹¹ See Unif. Mediation Act § 7(b)(1) (“A mediator may disclose . . . whether the mediation occurred or has terminated, whether a settlement was reached, and attendance”). For additional statutory and court rules addressing mediator reports, see COLE ET AL., *supra* note 11, § 8:40.

attendance and whether or not a settlement was reached.⁹² The European Code of Conduct for Mediators likewise authorizes mediator disclosure when “compelled by law or grounds of public policy.”⁹³ The bottom line: the Convention requirement for minimal formality will do little to chill mediator performance, is consistent with many jurisdictions’ existing approach to confidentiality, and will avoid a particularly robust category of litigation—disputing about enforcement of oral agreements⁹⁴ and “magic word” requirements like those in my home state of Minnesota⁹⁵ or California.⁹⁶

The Convention’s “opt-out” approach is also likely to significantly reduce overall litigation. Signing states may exercise a reservation right to declare that the Convention applies only if parties have agreed to its application,⁹⁷ but absent that reservation or express contractual agreement of parties to negate Convention application,⁹⁸ the Convention applies without the necessity of private party contracting on the topic. This seems best aligned with the common understanding of disputing parties.⁹⁹

⁹² See 2005 AAA/ABA/ACR REVISED MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V(A)(2) (permitting mediator to report “if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.”).

⁹³ See EUROPEAN CODE OF CONDUCT FOR MEDIATORS § 4 (“The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it.”).

⁹⁴ COLE ET AL., *supra* note 11, § 7:5 (cataloguing dozens of oral enforcement disputes, including seventeen state supreme court decisions).

⁹⁵ Under Minnesota’s Civil Mediation Act, a mediated settlement agreement must state specifically that the agreement is binding, that the parties were advised in writing that the mediator has no duty to protect the parties’ interests or to inform them about their legal rights, that signing the settlement agreement might adversely affect their rights, and that they should consult with an attorney before signing or if the parties are uncertain of their rights. See Minn. Stat. § 572.35(1).

⁹⁶ See CAL. EVID. CODE § 1123 (providing that a written mediated settlement agreement can be admissible only if the “agreement provides it is admissible,” “enforceable,” or contains “words to that effect.”).

⁹⁷ Singapore Convention, *supra* note 1, art. 8(1)(b) (“A Party to the Convention may declare that: . . . (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.”).

⁹⁸ Parties who affirmatively by agreement opt-out of Convention application would satisfy the refusal ground in Convention, art. 5(1)(d) (“granting relief would be contrary to the terms of the settlement agreement.”).

⁹⁹ See Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, *ASIAN J. INT’L L.* 1, 5–6 (2019) (noting that requiring affirmative opt-in could be contrary to the expectations of the parties as they would generally expect the other party to comply with the settlement agreement and thus its possible enforcement, citing Report of Working Group II (Dispute Settlement) on the Work of its Sixty-sixth Session, UNCITRAL, UN Doc. A/CN.9/901 (2017), para. 36.); Deason, *supra* note 71, at 36 (noting that “[a]n opt-out

C. Justifiable Exclusions?

The Convention applies to agreements resulting from mediation to resolve international commercial disputes.¹⁰⁰ Disputes arising from transactions involving consumers, as well as family, inheritance, and employment law are specifically excluded from coverage.¹⁰¹ A primary motivation for these exclusions is the perception that in these contexts parties are more likely to be victims of unequal bargaining power.¹⁰² As one commentator has opined, “crafting desirable protections for relatively unsophisticated parties subject to adhesion agreements would overly complicate a convention. Furthermore, absent this exclusion, a convention would run afoul of mandatory laws protecting such parties, which frequently are stronger outside the United States.”¹⁰³

Does the litigation track record in the United States provide any evidence to support the assumption that parties might be more “at risk” when mediating in certain subject matter categories? Surprisingly, there is very little in the datasets to justify this concern.

framework makes sense from the perspective of maximizing use of the convention’s enforcement mechanisms” as “[r]esearch has shown that default rules are ‘sticky,’ meaning that parties tend not to alter them.”). That said, the opt-in, opt-out choice was hotly debated. See Schnabel, *supra* note 50, at 57–59. See also Sussman, *supra* note 78, at 49 (summarizing the underlying policy conundrum as offering contrasting views of self-determination and party autonomy, with one perspective positing these prime values would be best served by convention application only where the parties have expressly consented to be bound, whereas others emphasize the counter-intuitiveness of requiring parties “to confirm their consent to enforce their obligations under a settlement agreement.”).

¹⁰⁰ Singapore Convention, *supra* note 1, art. 1(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 . . .”).

¹⁰¹ *Id.* art. 1(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.”).

¹⁰² See generally Schnabel, *supra* note 50, at 23–24.

¹⁰³ Deason, *supra* note 71, at 33–34; SING. REF. BK., Ellen E. Deason, *What’s in a Name? The Terms “Commercial” and “Mediation” in the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1149 (2019). See also Dorkas Quek Anderson, *Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?* in MAX PLANCK INSTITUTE LUXEMBOURG SUMMER SCHOOL-INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW SUMMER SCHOOL 2018: PRIVATIZING DISPUTE RESOLUTION AND ITS LIMITS para. 43 (Nomos, 3d ed. 2018), available at <https://ssrn.com/abstract=3304587> (noting it is “common practice in commercial mediations to have legal representation to protect parties against any pressure exerted by the mediator. Hence, the assumption of arms-length negotiations within contract law may not be too far from the reality in cross-border commercial mediations.”).

As noted *supra* in Table 12, the percentage at which agreements in a particular subject matter context are enforced despite an enforcement defense tend not to vary from the overall enforcement averages. Estate/probate cases are a clear exception, with enforcement defenses succeeding in that context at a relatively higher rate when compared to the average (52% settlement enforcement rate in 1999–2003 dataset compared to the average rate in that time period of 57%; 50% settlement enforcement rate in 2013–2017 dataset compared to the average rate of 69%). On the one hand, this disparity might well be attributable to the vulnerability of parties in that particular bargaining context, exactly as the Convention drafters feared. It is also possible, however, that the relative paucity of estate/probate cases in the datasets simply skews the numbers.

D. Striking the Right Balance on Contract Defenses (for the most part)

Article 5 of the Convention lays out an exclusive list of grounds on which a court may refuse enforcement or block a party's ability to invoke a mediated settlement agreement in defense of an attempt to relitigate the underlying dispute (what many jurisdictions would refer to as "recognition").¹⁰⁴ A detailed explication of the grounds for refusal is beyond the scope of this short article. Comprehensive summaries are available elsewhere, including essays published in the chapters in this Singapore Reference Book¹⁰⁵ The chart below authored and recently published by Edna Sussman offers a beautifully succinct summary¹⁰⁶:

¹⁰⁴ For a detailed explication of the complex negotiations regarding the absence of the word "recognition" from the Convention, see Schnabel, *supra* note 50, at 35–42.

¹⁰⁵ See SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based on Mediator's Misconduct: Articles 5.1(e) & (f)*, 20 *CARDOZO J. CONFLICT RESOL.* 1197 (2019); SING. REF. BK., Jean-Christophe Boulet, *The Singapore Convention and the Metamorphosis of Contractual Litigation*, 20 *CARDOZO J. CONFLICT RESOL.* 1209 (2019); SING. REF. BK., Héctor Flores Senties, *Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention*, 20 *CARDOZO J. CONFLICT RESOL.* 1235 (2019). See also Schnabel, *supra* note 50, at 42–56.

¹⁰⁶ Sussman, *supra* note 78, at 52 (noting that "[t]he grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct.").

| | |
|---|---|
| Substantive grounds | Incapacity of a party to the settlement agreement, ¹⁰⁷ 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. ¹⁰⁸ |
| Grounds relating to the terms of the settlement agreement | The settlement agreement is not binding, or is not final, according to its terms, ¹⁰⁹ or The settlement agreement has been subsequently modified, ¹¹⁰ or Obligations in the settlement agreement have been performed ¹¹¹ or are <i>not clear or comprehensible</i> , ¹¹² or Granting relief would be contrary to the terms of the settlement agreement. ¹¹³ |
| 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, ¹¹⁴ or Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence. ¹¹⁵ |
| <i>Sua moto/sua sponte</i> grounds invocable 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, ¹¹⁶ or The subject matter of the dispute is not capable of settlement by mediation under the law of that Party. ¹¹⁷ |

During the March 2019 symposium, more than one speaker emphasized the necessity to interpret these Convention grounds for refusal language with particular policy objectives in mind. Allan Stitt, the Canadian Delegate to the UNCITRAL Working Group, offered two very helpful framing questions: 1) Who are we trying to help? and 2) What are we protecting them from? His answers: “We are trying to help the person who wants to enforce a

¹⁰⁷ Singapore Convention, *supra* note 1, art. 5(1)(a).

¹⁰⁸ *Id.* art. 5(1)(b)(i).

¹⁰⁹ *Id.* art. 5(1)(b)(ii).

¹¹⁰ *Id.* art. 5(1)(b)(iii).

¹¹¹ *Id.* art. 5(1)(c)(i).

¹¹² *Id.* art. 5(1)(c)(ii).

¹¹³ *Id.* art. 5(1)(d).

¹¹⁴ *Id.* art. 5(1)(e).

¹¹⁵ *Id.* art. 5(1)(f).

¹¹⁶ *Id.* art. 5(2)(a).

¹¹⁷ *Id.* art. 5(2)(b).

mediated settlement agreement. We are protecting that person from the other contracting party who wants to renege on the agreement.”¹¹⁸

Michal Kallipetis, the IAM Delegate to the UNCITRAL Working Group, noted that the entire purpose of drafting the Convention was to avoid litigation, not encourage it.¹¹⁹ And he urged attendees to remain cognizant of three key words (highlighted in bold in his impressive memorable PowerPoint presentation) which govern all of the defenses outlined in Article 5:

- 1) the word “may”, which refers to the fact that all of the grounds for refusal of relief are permissive, rather than mandatory;¹²⁰
- 2) the word “only”, which mandates that this permissive refusal authority is conditioned on the party challenging enforcement meeting its burden of proof to establish entitlement to a refusal ground;¹²¹ and
- 3) the word “proof”, which is what a party opposing enforcement must offer with respect to any of the grounds.¹²²

Eric Tuchman, General Counsel for the American Arbitration Association, reminded symposium participants to remember the treaty’s primary promise: to give legitimacy to mediation, an amicable process based on consent and self-determination that in theory should not result in significant amounts of litigation. The assumption that litigation would be the exception rather than the rule came early in the Working Group deliberations, where it was noted that “very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement.”¹²³

¹¹⁸ See SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 *CARDOZO J. CONFLICT RESOL.* 1173 (2019).

¹¹⁹ See Kallipetis, *supra* note 105.

¹²⁰ Singapore Convention, *supra* note 1, art. 5(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 . . .”) (emphasis added). In other words, a court could exercise discretion to enforce an agreement even if a particular ground for refusal might apply.

¹²¹ *Id.*

¹²² *Id.* Moreover, the party challenging enforcement carries the burden of proof to establish the ground.

¹²³ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015)*, U.N. Doc A/CN.9/861, at 8, para. 33 (Sept. 17, 2015). See also Quek Anderson, *supra* note 103, para. 42 (characterizing Article 5 as “a safety valve to deal with instances when autonomy is compromised, but ideally one that is not frequently utilized.”); Schnabel, *supra* note 50, at 4 (“Ideally, the Convention will rarely need to be

As the co-author of *Disputing Irony*¹²⁴ and compiler of the two massive mediation litigation datasets described in Part II above, please forgive me if I take a somewhat skeptical view of the anticipated minimal use for the “grounds for refusal.” That said, all in all, with my U.S. litigation experience in mind, I feel like the drafters mostly got it right.¹²⁵ The grounds are certainly broad enough to permit the wide range of “traditional” contract defenses parties typically raise post-mediation. As documented in Part III above, disputing about those defenses has substantially declined over time in the United States. That may well be the pattern under the Convention as well.

More important, the grounds for refusal are intended to foreclose defenses based on unique domestic law requirements, “such as any requirements that mediators be licensed in a particular jurisdiction or that mediations must be conducted under certain rules or by certain institutions, or that mediated settlements must be notarized or meet other (extra-Convention) formal requirements.”¹²⁶ The U.S. litigation experience shows that these technical formalities and procedural hoops have become the growth sector in the mediation litigation industry. Cutting them off from the very beginning is a very wise choice.

E. *Much Ado About Nothing: Overblown Concerns About Mediator Malfeasance?*

As noted in the previous section, Article 5 provides for refusal based on mediator malfeasance.¹²⁷ Specifically, Article 5(1)(e) authorizes discretionary refusal to grant enforcement relief if there is proof of 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.”¹²⁸ Article 5(1)(f) authorizes discretionary refusal to grant enforcement relief based on proof the mediator failed “to disclose to the parties cir-

invoked in court, as in most cases, parties will abide by the mediated settlements they conclude.”).

¹²⁴ Coben & Thompson, *supra* note 1.

¹²⁵ See Part IV.E *infra* for an important caveat.

¹²⁶ Schnabel, *supra* note 50, at 45.

¹²⁷ *Id.* at 50 (characterizing these grounds for refusal as relating “less to the agreement reached by the disputing parties than to the conduct of the third party who helped them resolve the dispute, and the consequences of such conduct.”).

¹²⁸ Singapore Convention, *supra* note 1, art. 5(1)(e).

cumstances that raise justifiable doubts as to the mediator’s impartiality or independence” but only if “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.”¹²⁹

Whether to include any defenses premised on third-party conduct was a topic of hot debate, with the compromise solution being inclusion but only in a very narrow set of circumstances.¹³⁰ As succinctly summarized at the March 18, 2019 Cardozo Symposium by speaker Michel Kallipetis,¹³¹ the Article 5(1)(e) defense premised on mediator breach of standards is significantly cabined by the requirement that any alleged breach of standards be “serious” and proven to effectively vitiate party consent—a but/for standard that will be extremely difficult to prove in practice.¹³² Kallipetis also forcefully argued that the Article 5(1)(f) defense based on failure to make disclosures about conflicts was similarly restricted in scope

¹²⁹ *Id.* art. 5(1)(f).

¹³⁰ *See, e.g.,* Sussman, *supra* note 78, at 49:

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.

See also Chua, *supra* note 99, at 8 (describing the provisions as reflecting compromise in three key ways):

First, it limits the scope of the defences to instances where the mediator’s misconduct or failure to disclose had a direct impact on the settlement agreement in that the “party would not have entered into the settlement agreement”. Second, it adjusts the language of the defences to highlight the exceptional circumstances that can be raised by using adjectives such as “serious” and “material”. Third, by having the text accompanying the instrument, it provides an illustrative list of examples of applicable standards. Although it would take the development of a substantial body of case-law or other pronouncements by enforcing authorities before it can be said with any certainty what types of conduct would cross the line, the words used in the defences are sufficient to establish that the threshold should be high. Whether or not the misconduct of the mediator was such that a party would not have entered into the settlement agreement without it would be a finding of fact that courts and other enforcing authorities are in a position to make based on available evidence.

¹³¹ Mr. Kallipetis was the International Academy of Mediators Delegate to the Convention Working Group.

¹³² *See also* Schnabel, *supra* note 50, at 51–52 (highlighting, among other things, that alleged breaches of standards must be serious, “not just questionable conduct or a minor breach,” and the authority considering refusal cannot “apply standards on a post hoc basis (e.g., . . . cannot deny relief based on an argument that the mediator should have followed certain best practices or other jurisdictions’ requirements.”).

because of the necessity that doubts about mediator impartiality/independence be “justifiable,” and even if justifiable, would only be actionable if those justifiable doubts had such material impact that without the failure to disclose the party would not have entered the agreement.¹³³

In short, this compromised focus on mediator behavior is in large part likely to be entirely symbolic in practice, which is exactly what the track record from U.S. litigation suggests (despite the fact that the defense is not nearly as circumscribed under common law in the United States as it is in the Convention). As Professor Thompson and I wrote in 2006 with respect to the 1999–2003 dataset which, as noted above in Part III(B)(2), included just seventeen cases where parties asserted mediator misconduct as a defense to enforcement:

[d]espite considerable academic ink devoted to the subject of mediator liability and ongoing debates about quasi-judicial and statutory immunity, there is a surprising dearth of cases alleging mediator misconduct or ethical violations. As other authors have observed, the chance of a mediator being successfully sued is remote. Nor is mediator misconduct commonly used as an enforcement defense.¹³⁴

In the 2013–2017 dataset, the total number of cases alleging a mediator misconduct defense was even smaller (sixteen total), with not a single one being successful. In other words, much ado about nothing in a practical sense.

F. *A Defensible Choice to Decline Legislating Mediation Confidentiality*

The Singapore Convention does not address confidentiality, instead leaving this topic to be determined by applicable domestic law.¹³⁵ In the past, I have praised the merits of uniformity in confi-

¹³³ *Id.* at 53–54 (highlighting, among other things, that “[j]ustifiable doubts” is intended to establish an objective standard, not affected by whether the party in question subjectively doubts the mediator’s independence and impartiality.”).

¹³⁴ Coben & Thompson, *supra* note 2, at 95.

¹³⁵ See Schnabel, *supra* note 50, at 18. While the Convention is silent on confidentiality, the newly approved UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting From Mediation (2018) expressly authorizes disclosure of mediation information “for the purposes of implementation or enforcement of a settlement agreement.” See Article 10 Confidentiality (“Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is

dentality regulation,¹³⁶ and specifically endorsed the Uniform Mediation Act (“UMA”) as a statutory framework where reasonable exceptions to confidentiality permit parties to sensibly litigate about enforcement disputes.¹³⁷ That said, getting global agreement on a single approach to this complex topic (which depending on jurisdiction and legal culture might involve statutes, court rules, judicial decisions, ethical codes, ADR institutional provider policies, and/or party contract) would likely take many more years of negotiation than the three the Singapore drafters devoted to the Convention. Indeed, the drafting history of the UMA in the United States was a case study in the difficulty of herding cats, which in the end has resulted in adoption of the end product in only twelve U.S. jurisdictions.¹³⁸

Moreover, the U.S. litigation data suggests that confidentiality, an issue that impacts many aspects of mediation litigation beyond just enforcement, may be far less critical in the context of enforcement disputes than one might assume. Indeed, in our 2006 report on the 1999–2003 dataset, Professor Thompson and I highlighted a surprising phenomenon:

The large volume of opinions in which courts considered detailed evidence of what transpired in mediations without a confi-

required under the law or for the purposes of implementation or enforcement of a settlement agreement.”). U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/, annex II (2018) (emphasis added). This confidentiality provision, albeit renumbered and with the word “mediation” replacing the word “conciliation,” is identical to Article 9 of the 2002 UNCITRAL Model Law on International Commercial Conciliation. See Report of the United Nations Commission on International Trade Law on Its Thirty-Fifth Session, U.N. GAOR, 57th Sess., Supp. No. 17, annex 1, at 54, U.N. Doc. A/57/17 (2002). See also Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, U.N. Commission on International Trade Law, 35th Sess., at 1, U.N. Doc. A/CN.9/514 (2002) (noting that “[a]lthough the Working Group that prepared the Model Law initially considered including a list of specific exceptions, it was strongly felt that listing exceptions in the text of the Model Law might raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive.”).

¹³⁶ See Coben, *My Change of Mind on the Uniform Mediation Act*, *supra* note 10.

¹³⁷ *Id.* See also COLE ET AL., *supra* note 11, § 8:15 (detailing the rather limited litigation history for the Uniform Mediation Act, now adopted in twelve U.S. jurisdictions) and § 8:28 (detailing the litigation perils of California’s more absolute approach to mediation confidentiality protection).

¹³⁸ See generally COLE ET AL., *supra* note 11, § 8:13 and multiple secondary sources cited therein (noting that negotiating the Act’s confidentiality provisions “proved to be the most contentious part of the Act because many interested commentators had strong but conflicting beliefs about the need for confidentiality in mediation and the tension among privacy, fairness and access to the courts” and that “[d]rafting was also difficult because over 250 state mediation privilege statutes existed at the time the UMA was drafted and mediators from those states sometimes advocated for their state’s statute.”).

confidentiality issue being raised—either by the parties, or *sua sponte* by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediators' statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct—all without objection or comment. In sum, the walls of the mediation room are remarkably transparent.¹³⁹

I did not code the 2013–2017 dataset with equal specificity regarding source of disclosure and whether disclosure occurred without objection or comment. But as detailed above in Table 12, in the more recent 2013–2017 dataset, litigating parties only relatively rarely joined enforcement and confidentiality issues in the same dispute. Indeed, parties joined those two issues in enforcement defense cases only 5% of the time. And even when the issues were joined, the enforcement rate changed only marginally.¹⁴⁰

V. CONCLUSION

If the U.S. mediation litigation experience tells us anything, it is that disputing about mediation is an inevitable part of institutionalization of the mediation process. As statutes, rules, and other regulations are created and applied, lawyers inevitably learn to exploit the rules universe on behalf of their clients. That said, with institutionalization has also come evolution in disputing trends. Perhaps most relevant to the Singapore Convention effort, the U.S. litigation experience suggests that party disputing about enforcement will decline over time, especially challenges to mediation settlement enforcement based on contract formation or fairness concerns. In that respect, the drafters might take comfort in the hope that the primary goal of the Convention—to promote the use of mediation and confidence in its use—will in fact be its primary legacy, as opposed to ramping up the global count of mediation enforcement disputes.

¹³⁹ Coben & Thompson, *supra* note 2, at 58–59.

¹⁴⁰ In cases where parties disputed both confidentiality and an enforcement defense, the overall enforcement rate dropped from 66%, as opposed to 69% when enforcement defenses were raised without also litigating confidentiality.

THE ROLE OF EMPIRICAL RESEARCH AND DISPUTE SYSTEM DESIGN IN PROPOSING AND DEVELOPING INTERNATIONAL TREATIES: A CASE STUDY OF THE SINGAPORE CONVENTION ON MEDIATION

*S.I. Strong**

I. INTRODUCTION

Although specialists in international law are well-versed with the formalities associated with negotiating an international treaty, little if anything is known or written about how national and international actors decide to develop and pursue particular proposals for new international instruments.¹ Indeed, the initial process of determining which ideas to develop is almost entirely hidden from public view, even though these choices are critical to international law and policy, “since whoever controls the agenda has control over the scope of the governance system and its ability to change over time.”²

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¹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 609–11 (7th ed. 2008). Although international treaties are not the only type of instrument that can be promulgated by international actors, they are often considered the “quintessential” type of international law project and therefore form the basis of the current analysis. Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1575, 1595 (2011); see also A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS INTERNATIONAL TRADE COMMISSION 13 (2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> [hereinafter UNCITRAL GUIDE] (discussing international treaties (conventions) as well as model laws, legislative guides, and model provisions).

² Eric B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT’L L. 139, 162 (2005) (noting that “[s]elf-interest may dominate such agenda-setting formulations, as actors with an interest in the status quo may reject change through the formulation of the agenda”).

This Article seeks to provide insights into the “black box” of early treaty-making processes by undertaking a case study of the development of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known colloquially as the Singapore Convention on Mediation (Singapore Convention).³ The discussion focuses on several issues that have seldom been addressed in the legal literature, including the way in which a proposal for an international treaty makes its way to the relevant decision-makers and how those decision-makers determine which of the various alternatives to pursue.⁴ The analysis also considers how interested individuals can assist the treaty-proposing process, particularly if they are not a member of a non-governmental organization (“NGO”).

When considering these issues, this Article contemplates the role that dispute system design (Section II) and empirical research (Section III) played in the early development of the Singapore Convention before turning to questions relating to how interested individuals can assist the development of international instruments, using the Singapore Convention as a case study (Section IV).⁵ The Article then ties together the various strands of analysis and provides some observations about how the various techniques described herein can be applied to future projects (Section V).

II. DISPUTE SYSTEM DESIGN AND THE TREATY-MAKING PROCESS

The discussion begins by applying dispute system design (“DSD”) theory to the development of the Singapore Convention.⁶ DSD “is not a dispute resolution methodology itself” but instead reflects “the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique

³ See U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex I (2018) [hereinafter Singapore Convention]. Black-box decision-making involves analytical processes that are largely or entirely hidden from public view. See Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1124–25 (2015); Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 429–30 (2008).

⁴ In this context, the relevant decision-maker may be a national government or an intergovernmental organization such as the United Nations (U.N.).

⁵ See Singapore Convention, *supra* note 3.

⁶ See *id.*; see also S.I. Strong, *Applying the Lessons of International Commercial Arbitration to International Commercial Mediation: A Dispute System Design Analysis*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 39, 39–60 (Catharine Titi & Katia Fach Gómez eds., 2019).

needs of a particular system.”⁷ DSD has been used to analyze law-making efforts in both domestic and international settings,⁸ and, according to Professors Stephanie Smith and Janet Martinez, is useful in

three contexts: 1) Analyzing a system historically to understand its evolution, functioning, and impacts . . . ; 2) Advising on the best process to create the design, or more likely redesign, mechanism for a system; and 3) Designing (or redesigning) a system itself.⁹

All three of these elements were reflected in a 2014 law review article that triggered the development and adoption of the Singapore Convention.¹⁰ That article, which was written by Professor S.I. Strong and which consciously applied DSD to questions involving international commercial mediation, fulfilled Professor Smith and Professor Martinez’s first criterion by providing a historical overview of the development and legal status of international commercial mediation in the twentieth and early twenty-first century.¹¹ In particular, the article discussed how the legal environment surrounding international commercial mediation compared to that of international commercial arbitration and international commercial litigation, two other means of resolving cross-border commercial disputes.¹² In so doing, the article sought to determine whether there was a need for systemic reform of the legal framework surrounding international commercial mediation, ultimately concluding that such reform was required if mediation was to exist on an

⁷ Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 177–78 (2007); see also NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 4–5 (2d ed. 2018).

⁸ See, e.g., Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 76–78 (2011); Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 176 (2009); Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334, 337 (2017); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 23, 130 (2011); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT’L L. 1, 46–47 (2010).

⁹ Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 124 (2009).

¹⁰ See Singapore Convention, *supra* note 3; S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL’Y 11 (2014) [hereinafter Strong, *Promise*]; see also Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 4 n.17 (2019) [hereinafter Schnabel, *Convention*] (noting Professor Strong’s article as the genesis of the Singapore Convention).

¹¹ See Smith & Martinez, *supra* note 9, at 124; Strong, *Promise*, *supra* note 10, at 19–28.

¹² See Strong, *Promise*, *supra* note 10, at 19–28.

equal playing field with arbitration, which had become the primary means of resolving international commercial disputes in the latter part of the twentieth century.¹³

The article also reflected the second type of DSD analysis, which focuses on suggesting possible means of redesigning existing systems.¹⁴ For example, Professor Strong focused on the need to engage in reform at the level of public international law, stating that:

businesses may be more likely to choose international commercial mediation over international commercial arbitration and litigation if mediation agreements and settlement agreements were as easily enforceable as arbitration agreements and arbitral awards. If this hypothesis is correct, then it may be necessary to adopt an international enforcement regime similar to that which applies in international arbitration [meaning the system based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention].¹⁵

The 2014 article met Professor Smith and Professor Martinez's third criterion by providing early proposals regarding the way the law relating to international commercial mediation might be redesigned so as to achieve the system's enunciated goals.¹⁶ In particular, Professor Strong offered specific guidance on how a new convention in the area of international commercial mediation could and should be shaped.¹⁷

Although Professor Strong's 2014 article complied with best practices in DSD, academics routinely call for the adoption of new treaties,¹⁸ which raises questions about why and how this particular

¹³ See *id.* at 12–13, 31–32.

¹⁴ See Smith & Martinez, *supra* note 9, at 124; Strong, *Promise*, *supra* note 10, at 38.

¹⁵ Strong, *Promise*, *supra* note 10, at 38; see also United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

¹⁶ See Smith & Martinez, *supra* note 9, at 124; Strong, *Promise*, *supra* note 10, at 38.

¹⁷ See Strong, *Promise*, *supra* note 10, at 16–32. The proposals in the 2014 article did not match the Singapore Convention in all particulars. See Singapore Convention, *supra* note 3. For example, Professor Strong called for a convention that addressed recognition and enforcement of both mediation agreements and settlement agreements, noting that the success of the New York Convention was due, at least in part, to the fact that it addressed both the front end and the back end of the arbitration process. See New York Convention, *supra* note 15, arts. I–II; Strong, *Promise*, *supra* note 10, at 32. The Singapore Convention only addresses settlement agreements at the back end of the process. See Singapore Convention, *supra* note 3, art. 1(1).

¹⁸ Though legal academics routinely call for new international instruments as part of their scholarship, non-academics have also been known to suggest new treaties in various areas of law. See Draft Model Bilateral Arbitration Treaty, <https://www.wilmerhale.com/uploadedFiles/>

proposal gained sufficient traction to trigger development of a new international instrument.¹⁹ Interestingly, the answer can again be found by recourse to the field of DSD.²⁰

As it turns out, the deciding factor involved a public meeting of the U.S. Department of State's Advisory Committee on Private International Law ("ACPIL"), when Professor Strong presented a pre-publication draft of the 2014 article to Tim Schnabel, then an Attorney-Adviser in the U.S. Department of State's Office of Private International Law.²¹ According to the official notice of the February 2014 meeting published in the Federal Register, the purpose of the ACPIL meeting was "to discuss possible topics for future work related to arbitration or conciliation in the United Nations Commission on International Trade Law (UNCITRAL)."²²

Shared_Content/Editorial/News/Documents/Draft-Model-BAT.pdf; Gary Born, *BITS, BATS, and Buts: Reflections on International Dispute Resolution*, Speech at the University of Pennsylvania (Apr. 16, 2014), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf; Sebastian Perry, *BITS, BATS and Buts*, *GLOBAL ARB. REV.*, Jan. 28, 2013; Lauren Walker, *Snowden, Greenwald, Miranda to Introduce U.N. Treaty to End Mass Surveillance and Protect Whistleblowers*, *NEWSWEEK* (Sept. 24, 2015), <https://www.newsweek.com/snowden-greenwald-miranda-introduce-un-treaty-end-mass-surveillance-and-376386>.

¹⁹ For example, scholars elsewhere in the world were making similar suggestions about a convention on mediation at about the same time as Professor Strong. See Laurence Boule, *International Enforceability for Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 *CONTEMP. ASIA ARB. J.* 35, 65 (2014); Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements*, 7 *CONTEMP. ASIA ARB. J.* 119, 135 (2014); Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research*, 7 *CONTEMP. ASIA ARB. J.* 87, 110 (2014); see also Schnabel, *Convention*, *supra* note 10, at 4 n.17. However, these works do not appear to have had quite the same amount of practical impact, likely because those individuals do not appear to have had the same opportunity to present their ideas to someone with the authority and inclination to pursue the proposals.

²⁰ See ROGERS ET AL., *supra* note 7, at 16.

²¹ See Schnabel, *Convention*, *supra* note 10, at 4 n.17 (noting Professor Strong's article as the genesis of the proposal that led to the Singapore Convention).

²² 79 Fed. Reg. 7497-02 (Feb. 7, 2014). The Federal Register notice of the meeting further stated that:

UNCITRAL's Working Group II (Arbitration and Conciliation) is currently working on the development of a convention on transparency in treaty-based investor-state arbitration. Once this negotiation is completed, however, it is unclear what the Working Group should address next. One project that has been suggested is updating the UNCITRAL Notes on Organizing Arbitral Proceedings.

The purpose of the public meeting is to obtain the views of concerned stakeholders on two topics: (1) Whether updating the Notes would be a worthwhile project for the Working Group and, if so, what areas should be addressed in such an update, and (2) which other projects, if any, related to international arbitration and conciliation UNCITRAL should undertake.

Several ideas were discussed at the meeting, but Professor Strong's call for a new convention involving international commercial mediation caught Mr. Schnabel's attention, likely as a result of the strong theoretical foundation that had been laid for such an instrument in the 2014 article.²³ Following the ACPIL meeting, Mr. Schnabel and the Office of Private International Law further refined the suggestion by conferring with U.S. stakeholders and other national governments, and in June 2014, the U.S. Government submitted a formal proposal to UNCITRAL for a new convention on the recognition and enforcement of settlement agreements arising out of international commercial mediation.²⁴ The Commission supported the proposal and directed UNCITRAL Working Group II on Arbitration and Conciliation/Dispute Settlement to consider the matter further.²⁵ Deliberations ensued over the next four years, eventually producing the final draft of the Singapore Convention and the 2018 revisions to the UNCITRAL Model Law on International Commercial Mediation.²⁶

While this series of events can be analyzed from a variety of perspectives,²⁷ a DSD-oriented paradigm appears particularly appropriate, given the subject matter of the convention. Authors of one of the leading texts in the field claim that DSD includes four stages: "(1) taking design initiative, (2) assessing or diagnosing the current situation, (3) creating systems and processes, and (4) implementing the design, including evaluation and process or system

Id.

²³ See Strong, *Promise*, *supra* note 10, at 19–38.

²⁴ See UNCITRAL, Note by the Secretariat, *Proposal by the Government of the United States of America: Future Work for Working Group II*, at 9, U.N. Doc. A/CN.9/822 (June 2, 2014) [hereinafter U.S. Proposal].

²⁵ Documents memorializing deliberations can be found at the Working Group II website. See Working Group II, UNCITRAL, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited Jan. 21, 2019).

²⁶ See Singapore Convention, *supra* note 3; U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex II (2018) [hereinafter Model Mediation Law] (amending the UNCITRAL Model Law on International Commercial Conciliation from 2002).

²⁷ See Ryan M. Scoville, *International Law in National Schools*, 92 *IND. L.J.* 1449, 1450–51 (2017) (suggesting various theories regarding the efficacy of international law are incomplete and that the extent to which international law is taught has significant bearing on compliance with and efficacy of international law); Anne van Aaken, *Behavioral International Law and Economics*, 55 *HARV. INT'L L.J.* 421, 423 (2014) (adopting a law and economics approach to international lawmaking).

modification.”²⁸ Under this rubric, Professor Strong, Mr. Schnabel, and the U.S. Department of State²⁹ all took the design initiative, albeit in slightly different ways, consistent with their individual areas of expertise and authority.³⁰ For example, Professor Strong took the initiative by conducting the underlying theoretical research and DSD analysis, charting a preliminary course of action, and presenting the idea to the State Department through ACPIL’s public consultation process. Mr. Schnabel took the initiative by shepherding the idea through the State Department, convening follow-up meetings with U.S. stakeholders and other governments to identify the depth of support for an international convention in this area of law, and developing a detailed proposal that would be acceptable to a wide national and international audience. Finally, the U.S. Department of State took the initiative by convening the ACPIL meeting in February 2014 and submitting the proposal to UNCITRAL in June 2014.

Taking the design initiative is only the first step in the DSD process.³¹ The second step of the DSD analysis—i.e., assessment of the field in question—is of at least equal importance, particularly in international matters, and is discussed in the next section.³²

III. EMPIRICAL RESEARCH AND THE TREATY-MAKING PROCESS

DSD assessments can involve a variety of different methodologies, both theoretical and practical.³³ The historical development

²⁸ ROGERS ET AL., *supra* note 7, at 16. Other commentators suggest a seven-step process. See Hallie Falder, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 486–87 (2008).

²⁹ Although the U.S. Department of State is often conceived of as a singular unit, the work of developing the proposal was carried out by specific individuals who saw the benefit of a convention in this field. Thus, Tim Schnabel has recognized the work of John Kim, then an Assistant Legal Adviser for Private International Law, as instrumental to the process. See Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 25 AM. REV. INT’L ARB. (forthcoming 2019) [hereinafter Schnabel, *Self-Execution*].

³⁰ To some extent, UNCITRAL can also be considered to have taken the design initiative in the sense that it indicated that it was open to new projects on which to work, but that is a somewhat more passive role than that exhibited by Professor Strong, Mr. Schnabel, and the U.S. Department of State. See 79 Fed. Reg. 7497-02 (Feb. 7, 2014) (noting that UNCITRAL was ready to consider a new project in the area of international arbitration and mediation).

³¹ See ROGERS ET AL., *supra* note 7, at 16.

³² See *id.*

³³ See Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 5–9 (2008) (discussing theoretical assessments); Falder, *supra* note 28, at 486 (discussing practical assessments).

of the Singapore Convention demonstrates how each type of evaluation contributes to the treaty-making process.³⁴

The theoretical assessment of the field of international commercial mediation began with Professor Strong's 2014 article, which focused on describing the legal environment in which international commercial mediation operated, historically and in the current day.³⁵ While this study was sufficient to trigger the interest of Mr. Schnabel and the U.S. Department of State in pursuing a new convention, it was not enough to convince all of the members of UNCITRAL Working Group II of the merits of the U.S. proposal.³⁶ Indeed, early reception of the U.S. proposal was mixed.³⁷ Instead, when faced with the U.S. proposal, a number of state delegates at the first Working Group II meeting called for empirical data regarding the use of mediation in national and international commercial disputes so as to be in a better position to evaluate and develop the U.S. proposal.³⁸

At the point the request was made, no such data existed, and the UNCITRAL Secretariat was not in a position to undertake that type of time-intensive research within the relevant time frame.³⁹ Fortunately, scholars and non-governmental organizations stepped in to fill the gap.⁴⁰

³⁴ See Singapore Convention, *supra* note 3.

³⁵ See Strong, *Promise*, *supra* note 10, at 16.

³⁶ See Schnabel, *Convention*, *supra* note 10, at 4 n.17.

³⁷ See U.S. Proposal, *supra* note 24; Schnabel, *Convention*, *supra* note 10, at 5.

³⁸ See Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), ¶ 56, U.N. Doc. A/CN.9/832 (Feb. 11, 2015) (noting the need for empirical information in this field); Report of the United Nations Commission on International Trade Law on its forty-seventh Session (7–18 July 2014), U.N. GAOR 69th Sess., Supp. No. 17, at 24, U.N. Doc. A/69/17.

³⁹ See UNCITRAL GUIDE, *supra* note 1, at 9–10 (discussing the role of the Secretariat); S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 1990 (2016) [hereinafter Strong, *Empirical*]. However, the UNCITRAL Secretariat did compile comments from various state delegates regarding the enforceability of settlement agreements in their individual jurisdictions. See Comments Received From States, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation—Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, U.N. Doc. A/CN.9/WP.II/WP.188, at 6 n.7 (Dec. 23, 2014) [hereinafter States' Comments].

⁴⁰ See Strong, *Empirical*, *supra* note 39, at 1989–90; see also IMI, How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements (Nov. 27, 2014) [hereinafter IMI, Users], <https://www.imimediation.org/wp-content/uploads/2018/06/IMI-UN-Convention-on-Enforcement-Survey-Summary-final-27.11.14.pdf>; IMI, Survey—UN Convention on the Recognition and Enforcement of Mediated Settlement Agreements (Oct. 16, 2014) [hereinafter IMI, Convention], <https://www.imimediation.org/research/surveys/survey-enforceability-mediated-settlement/>.

The most detailed analysis was conducted by Professor Strong in late 2014 and involved a mixed qualitative-quantitative study focusing on the use and perception of international commercial mediation in the international legal and business communities.⁴¹ The analysis was based on an electronic survey with thirty-four different questions, although the use of conditional branching (skip logic) meant that not every participant answered each of the thirty-four questions.⁴² The survey generated randomized responses from 221 participants in 51 countries and included private practitioners and neutrals (arbitrators, mediators, conciliators, and judges) as well as those who worked as in-house counsel or in governmental or institutional settings, such as arbitral institutions.⁴³

The study had two goals.⁴⁴ First, the survey was designed to discover and describe current behaviors and attitudes relating to international commercial mediation.⁴⁵ This information was sought through questions concerning: (1) the extent to which mediation is currently used in the international commercial context; (2) the means by which mediation is initiated in the international commercial context; (3) the reasons why parties do or do not use mediation in international commercial disputes; (4) the methods of encouraging parties to use mediation in the international commercial context; and (5) the types of international commercial disputes that either are or are not amenable to mediation.⁴⁶

This data was extremely useful in that it provided a baseline understanding of current practices and beliefs relating to international commercial mediation, something that had never before been investigated in detail.⁴⁷ This aspect of the study also provided dispute system designers (in this case, state delegates to UNCITRAL) with a broad understanding of the legal and social environment surrounding international commercial mediation, a necessary

⁴¹ See Strong, *Empirical*, *supra* note 39, at 1998. The other studies conducted at that time were somewhat problematic in that they were very brief and not sufficiently randomized. See IMI, Convention, *supra* note 40, at 4–5 (noting the study was conducted at an IMI conference); IMI, Users, *supra* note 40 (reflecting a survey that was directed on to those who already supported the idea of a convention on international commercial mediation).

⁴² See Strong, *Empirical*, *supra* note 39, at 2001.

⁴³ See *id.* at 2017, 2019–20.

⁴⁴ See *id.* at 1998.

⁴⁵ See *id.* at 1998–99.

⁴⁶ See *id.*

⁴⁷ See *id.* at 1999.

step given that delegates to UNCITRAL meetings are not always expert in every matter that arises.⁴⁸

However, the survey was not only descriptive in nature. Instead, Professor Strong included questions relating to normative issues such as: (1) the future of international commercial mediation; (2) the need for an international convention addressing international commercial mediation; and (3) the shape of any future convention addressing international commercial mediation.⁴⁹ This line of inquiry not only identified the difficulties associated with enforcing settlement agreements arising from international commercial mediation in the then-existing legal regime,⁵⁰ it also provided evidence indicating that the international legal community strongly supported the adoption of an international treaty concerning the enforcement of settlement agreements arising out of commercial mediation.⁵¹

It is impossible to summarize the findings of the empirical study in the space available here, particularly given that the research both confirmed and questioned a number of long-held theories about the nature, purpose, and function of mediation in international commercial settings.⁵² Instead, the important feature

⁴⁸ See *id.* Delegates to UNCITRAL meetings are not always expert in every matter that arises. See S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 *AKRON L. REV.* 495, 503 (2017) [hereinafter Strong, *Epistemic Communities*].

⁴⁹ See Strong, *Empirical*, *supra* note 39, at 1999.

⁵⁰ See *id.* at 2053–55. For example, only 4% of respondents indicated that enforcement of a purely domestic settlement agreement would be impossible or very difficult in their home jurisdiction, while 18% indicated that it would be somewhat difficult. See *id.* Most respondents (62%) indicated that enforcement of domestic settlement agreements was easy in their home jurisdiction. See *id.* However, 9% of respondents indicated that it would be impossible or very difficult to enforce an agreement to mediate an international commercial dispute in the respondent's home jurisdiction. See *id.* Approximately 28% of respondents indicated that enforcement would be somewhat difficult, while only 35% of the respondents thought that it would be easy. See *id.* When the question involved enforcement of a settlement agreement arising out of an international commercial mediation when the mediation took place elsewhere, 15% of respondents indicated that it would be impossible or very difficult to enforce these types of agreements, while 36% of the respondents stated that enforcement would be somewhat difficult. See *id.* Only 14% of the respondents thought it would be easy to enforce a settlement agreement in their home jurisdiction when the settlement agreement arose out of an international commercial mediation seated in another country. See *id.*

⁵¹ See *id.* at 2055 (noting 74% of respondents supported a convention to enforce mediated settlement agreements, with only 8% of respondents taking a contrary view). The open comments section of the survey demonstrated the intensity of support for a convention in this area of law. See *id.* at 2061–63.

⁵² See *id.* at 2010–11, 2026–27, 2031–32, 2034–35, 2067.

to note here involves the role that the research played in the development of the Singapore Convention.⁵³

While empirical legal research is nothing new, numerous studies fail to generate any real change in their relevant fields.⁵⁴ What was different about this particular project? Again, the answer lies in the way in which the material was conveyed to individuals and institutions with the power to move the proposal forward.⁵⁵ In this case, a preliminary report containing findings from the research study was posted on the Social Sciences Research Network (SSRN) in November 2014 and provided to the UNCITRAL Secretariat and various governments in advance of the February 2015 Working Group II meeting.⁵⁶ The preliminary report was subsequently cited by the Secretariat and various governments in their submissions to state delegates.⁵⁷ The preliminary report was also discussed orally during the UNCITRAL Working Group II meeting in February 2015.⁵⁸

While the empirical study was by no means the only reason that the Singapore Convention was ultimately promulgated by UNCITRAL,⁵⁹ it nevertheless complied with best practices in DSD by providing dispute system designers (in this case, state delegates to UNCITRAL) with robust and objective data about the current state of national and international commercial mediation around

⁵³ See Singapore Convention, *supra* note 3.

⁵⁴ Some fields, such as international law, would benefit from more empirical work. See Adam Chilton & Dustin Tingley, *Why the Study of International Law Needs Experiments*, 52 COLUM. J. TRANSNAT'L L. 173, 180 (2013). Other specialties have a sufficient number of empirical studies but suffer from a lack of receptiveness on the part of the relevant decision-makers. See Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 L. & CONTEMP. PROB. 13, 13 (1988) (discussing “an old truth: Lawyers are suspicious or fearful or both when they confront the methods and findings of the social sciences”).

⁵⁵ See *supra* notes 21–23 and accompanying text (discussing how relevant theoretical research made its way into the hands of decision-makers).

⁵⁶ See 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* (University of Missouri School of Law Legal Studies, Research Paper No. 2014-28), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

⁵⁷ See UNCITRAL, Note by Secretariat, *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, at 6 n.16 (Nov. 27, 2014); States' Comments, *supra* note 39, at 6 n.7.

⁵⁸ See UNCITRAL, Working Group II, Sound Recordings of Meetings, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html; Schnabel, *Convention*, *supra* note 10, at 4 n.17. Professor Strong attended the Working Group II meeting as a non-governmental observer and provided an oral report of the research findings.

⁵⁹ Indeed, early deliberations almost stalled. See Schnabel, *Convention*, *supra* note 10, at 5.

the world⁶⁰ as well as the extent to which end users supported the proposed project.⁶¹ Notably, while the latter type of information can be very useful in bolstering political will regarding a particular international lawmaking initiative, mere opinion polls are not enough; instead, the persuasiveness of any empirical research is tied directly to the scientific rigor of the project and the absence of bias associated with the author(s) of the study.⁶²

IV. FINDING AND CONNECTING WITH THE APPROPRIATE DECISION-MAKERS

As the preceding paragraphs suggest, individuals seeking to assist with the international lawmaking process must not only comply with best practices in DSD, they must also cultivate connections with individuals and institutions with the skills, knowledge, and desire to take and sustain the design initiative.⁶³ Because international lawmaking is for the most part a state-centric process,⁶⁴ prospective reformers are therefore advised to find a way to connect with representatives in their national governments.

Although international lawyers often speak of states and inter-governmental organizations as independent entities, the reality is that such institutions are actually made up of individual people and agencies who may have conflicting priorities and agendas.⁶⁵ As a result, it is necessary for those who want to take the design initiative to find a way to gain access to those particular persons who can

⁶⁰ See Strong, *Empirical*, *supra* note 39, at 2022–44.

⁶¹ See *id.* at 2044–63.

⁶² See *id.* at 1994–2005 (discussing methodological issues); *id.* at 2016–21 (discussing demographics of respondents). For example, so-called “research studies” that simply seek to promote a particular perspective cannot provide a suitable basis for designing or redesigning a dispute system or for assisting in the development of an international treaty. See GERALD M. STEINBERG ET AL., BEST PRACTICES FOR HUMAN RIGHTS AND HUMANITARIAN NGO FACT-FINDING 30 (2012) (discussing a document known as the Guidelines on International Human Rights Fact-Finding Visits and Reports, which emphasizes “objectivity, transparency, and proper sourcing to ensure that a report . . . ‘can be reasonably relied upon, thus enhancing the efficacy and credibility of the report’”).

⁶³ See ROGERS ET AL., *supra* note 7, at 60–61.

⁶⁴ See Cedric Ryngaert, *Non-State Actors: Carving Out a Space in a State-Centered International Legal System*, 63 NETH. INT’L L. REV. 183, §§ 1, 6 (2016).

⁶⁵ See Broude, *supra* note 2, at 1126, 1129; Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a “They,” Not an “It”*, 96 MINN. L. REV. 194, 197 (2011).

and will champion the idea both within the relevant organization and with external audiences.⁶⁶

The experience with the Singapore Convention demonstrates several possible routes.⁶⁷ First, prospective dispute system designers can offer their assistance directly to their national governments, as Professor Strong did when she presented her 2014 article to the U.S. Department of State at a public meeting of ACPIL.⁶⁸ Individuals who are based in the United States are fortunate, in that the Federal Advisory Committee Act (“FACA”) requires the U.S. Department of State to establish Advisory Committees in a number of different fields, thereby providing interested individuals with an established route to first-level decision-makers.⁶⁹ Notice of these meetings is provided through the U.S. Federal Register.⁷⁰ However, there is no guarantee that the Department of State will adopt any particular proposal. Indeed, some ideas languish for years without any forward movement, thereby underscoring the need to conduct proper research and analysis before presenting the idea to the relevant decision-makers.⁷¹

The United States is not the only country with a public consultation process. Other nations have adopted similar mechanisms to

⁶⁶ See Strong, *Epistemic Communities*, *supra* note 48, at 508–09 (discussing internal and external audiences in the international lawmaking process). This concept of finding support within the hierarchical line of authority is evident in the history of the Singapore Convention. See Schnabel, *Self-Execution*, *supra* note 29 (noting the support of John Kim, then Assistant Legal Adviser for Private International Law, in the proposal process).

⁶⁷ See Singapore Convention, *supra* note 3.

⁶⁸ See *supra* notes 21–23 and accompanying text. ACPIL confers regularly with stakeholders on issues relating to the development of private international law. See, e.g., 82 Fed. Reg. 43068-01 (Sept. 13, 2017) (giving notice of a meeting to discuss upcoming work at UNCITRAL involving arbitration and mediation); 81 Fed. Reg. 72639-01 (Oct. 20, 2016) (giving notice of a meeting to discuss ongoing projects involving private international law); 81 Fed. Reg. 50591-01 (Aug. 1, 2016) (giving notice of a meeting to discuss the work of UNCITRAL on international settlement agreements); 80 Fed. Reg. 51864-01 (Aug. 26, 2015) (giving notice of a meeting to discuss ongoing projects involving private international law, including those involving mediation and conciliation); 79 Fed. Reg. 60229-01 (Oct. 6, 2014) (providing notice of a meeting to discuss ongoing projects at UNCITRAL); 79 Fed. Reg. 38642-01 (July 8, 2014) (providing notice of a meeting to discuss the U.S. proposal to UNCITRAL prior to the UNCITRAL Working Group II meeting).

⁶⁹ See FACA Database, <https://www.facadatabase.gov/FACA/FACAPublicPage> (last visited Jan. 21, 2019). ACPIL and other State Department Advisory Committees not only allow the State Department to gauge stakeholder support for various international initiatives but also to obtain ideas from the public about areas where law reform is necessary or useful.

⁷⁰ See *supra* note 68.

⁷¹ See *supra* notes 10–17 and accompanying text (discussing the various elements of Professor Strong’s initial research in the area of international commercial mediation). Indeed, the author attended several ACPIL meetings where it was noted that certain ideas for future work of UNCITRAL had been raised unsuccessfully a number of times in the past.

allow interested individuals and organizations to provide input on proposed actions. For example, Australia engages in public consultations in a number of fields, including the Department of Foreign Affairs and Trade.⁷² However, not all public consultation procedures are the same. While ACPIL appears open to receiving new ideas for international initiatives from members of the public, other advisory committees in both the United States and elsewhere may limit the type of assistance that is sought.⁷³ For example, Canada's Department of Justice has stated in its Policy Statement and Guidelines for Public Participation that

[r]ather than a broad commitment to public participation on every issue, the Policy Statement supports participation activities only where the issues and timelines are such that public input will make a contribution to the policy development process. . . . Determining the policy areas that will include a public participation component is the responsibility of the appropriate departmental authority.⁷⁴

While these types of restrictions undoubtedly appear reasonable from the perspective of a government agency seeking to streamline its operations and focus on its own policy priorities, mechanisms that limit the ability of individuals and groups to propose new projects involving international law can pose problems as a matter of both practice and principle.⁷⁵ Fortunately, individuals seeking to take the design initiative have other ways of conveying their ideas and research to the appropriate authorities.

One way that individuals interested in helping the international lawmaking process can become engaged is through direct communications with supranational organizations responsible for promulgating international law. Perhaps the most forward-looking body in this regard is the European Union, which has created the European Citizens' Initiative ("ECI") to provide "a unique and innovative way for citizens to shape Europe by calling on the Euro-

⁷² See *Business Consultation*, AUSTRALIAN GOV'T, <https://consultation.business.gov.au/Consultation/Common/Search/ConsultationAdvancedSearch.aspx> (last visited Jan. 21, 2019).

⁷³ See *supra* notes 22, 69 and accompanying text.

⁷⁴ *Policy Statement and Guidelines for Public Participation—Department of Justice*, GOV'T OF CANADA, <https://www.justice.gc.ca/eng/cons/pol.html> (last visited Jan. 21, 2019).

⁷⁵ For example, Professor Diane Desierto has argued that recent initiatives regarding transparency and public consultations in international law have done little to increase the diversity of voices in the realm of international lawmaking. See Diane Desierto, *Are "Transparency" Procedures and Local Community "Consultations" Enough? A Human Rights "Feedback Loop" to International Economic Law Reforms of 2018*, *EJIL: TALK!* (Dec. 12, 2018), <https://www.ejiltalk.org/are-transparency-procedures-and-local-community-consultations-enough-a-human-rights-postscript-to-2018-reforms-in-international-economic-law/>.

pean Commission to make a legislative proposal.”⁷⁶ Although this initiative has a number of problems, most notably with respect to the level of discretion exercised by the Commission in deciding whether to pursue a citizen proposal, the ECI at least provides people with no formal connection to government agencies with an opportunity to shape international law.⁷⁷

Another model is seen at UNCITRAL, which occasionally issues open calls for interested individuals and organizations to engage in discussions about possible future works.⁷⁸ However, this type of direct communication is relatively infrequent.⁷⁹ Instead, UNCITRAL, like many other U.N. and international bodies, typically obtains the views of non-state-affiliated individuals and groups through recognized NGOs.⁸⁰ While this process is meant to foster transparency and public participation in the international lawmaking process, there can be significant discrepancies in how and when NGOs can participate in international discourse.⁸¹ For example, NGOs may be allowed to observe proceedings freely but

⁷⁶ See *Take the Initiative*, OFFICIAL REGISTER, THE EUROPEAN CITIZENS’ INITIATIVE, <http://ec.europa.eu/citizens-initiative/public/welcome> (last visited Jan. 21, 2019) (noting that the process is initiated through a petition with one million signatures).

⁷⁷ See Nikos Vogiatzis, *Between Discretion and Control: Reflections on the Institutional Position of the Commission Within the European Citizens’ Initiative Process*, 23 EUR. L.J. 250, 250–51 (2017).

⁷⁸ See, e.g., *Events*, UNCITRAL, <https://uncitral.un.org/en/events/25-26.03.2019> (last visited Jan. 21, 2019) (advertising an open public meeting for “experts from governments, private sector, academic and the non-profit sector” to assist UNCITRAL Working Group I on Micro, Small, and Medium-sized Enterprises (MSMEs) regarding possible work involving multiparty contracts).

⁷⁹ See *FAQ—Methods of Work*, UNCITRAL, http://www.uncitral.org/uncitral/en/about/methods_faq.html (discussing whether individuals can take part in UNCITRAL and Working Group sessions). However, such interactions may be on the rise. See U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Forty-third session, U.N. Doc. A/65/17, annex III, ¶¶ 11, 15 (2010) [hereinafter UNCITRAL Working Procedures] (encouraging increased contact between the Secretariat and outside experts, including through the convening of colloquia).

⁸⁰ See UNCITRAL GUIDE, *supra* note 1, at 8; Strong, *Epistemic Communities*, *supra* note 48, at 507.

⁸¹ See Alexander Gillespie, *Transparency in International Environmental Law: A Case Study of the International Whaling Commission*, 14 GEO. INT’L ENVIRON. L. REV. 333, 337 (2001). Some of the most detailed guidance on NGO participation at the U.N. is found in a 1996 document adopted by the Economic and Social Council (ECOSOC), which gives effect to Article 71 of the United Nations Charter regarding NGO participation in international lawmaking at the United Nations. See ECOSOC Res. 996/31, Consultative Relationship Between The United Nations And Non-Governmental Organizations, 49th plen. mtg. (July 25, 1996); see also U.N. Charter, art. 71 (giving NGOs status in ECOSOC); UNCITRAL, Note by the Secretariat, *UNCITRAL Rules of Procedure and Methods of Work*, U.N. Doc. A/CN.9/638/Add.5 (2007) at 12 [hereinafter UNCITRAL Methods of Work] (discussing the rights of observers).

may be limited with respect to the extent to which they can contribute to floor debate, provide materials for the consideration of delegates and/or propose new initiatives.⁸² This latter feature is particularly important since, as has been previously stated, the ability to control the agenda of a particular group or meeting has a significant impact on the lawmaking process.⁸³

While some differences in the treatment of NGOs can be found in the rules of procedure governing the relevant body, other protocols are less transparent, since they may be due to unwritten discretionary norms such as the preferences of the chair of the group in question.⁸⁴ Although UNCITRAL has tried to minimize these types of differences by instituting a standardized work process for chairs to follow, discretion is of course necessary when managing complex multiparty deliberations.⁸⁵ Nevertheless, the lack of transparency can be problematic, particularly for those who are new to the system. Indeed, the effectiveness of new and diverse voices in international lawmaking can be severely hindered by disparities involving funding, sophistication, and institutional knowledge.⁸⁶

⁸² See UNCITRAL GUIDE, *supra* note 1, at 1, 8, 11–12; UNCITRAL Working Procedures, *supra* note 79, at annex III (outlining the working methods of UNCITRAL); UNCITRAL Methods of Work, *supra* note 81, at 11–18; Gillespie, *supra* note 81, at 337, 339–40. At UNCITRAL and particularly Working Group II, the norm has been to allow NGOs to contribute in the debate concurrently with state delegates. However, there is no way to know how the chair prioritizes interventions that are pending, since he or she has broad discretion to decide how to control the course of discussion. See UNCITRAL, Note by the Secretariat, *UNCITRAL Rules of Procedure and Methods of Work*, U.N. Doc. A/CN.9/638/Add.3 (2007) at 2–3 [hereinafter UNCITRAL Presiding Officer]. Furthermore, NGOs at UNCITRAL do not appear able to independently propose new work projects. See UNCITRAL Working Procedures, *supra* note 79, at annex III, ¶¶ 5, 7.

⁸³ See Bluemel, *supra* note 2, at 162.

⁸⁴ Potentially significant variations arise across different fields of substantive expertise. See, e.g., Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 579, 591–92 (1999); see also *supra* notes 81–82 and accompanying text.

⁸⁵ See UNCITRAL Presiding Officer, *supra* note 82, at 3–6 (discussing the duties of the presiding officer).

⁸⁶ See Melissa J. Durkee, *The Business of Treaties*, 63 *UCLA L. REV.* 264, 267–68 (2016) (noting that businesses can experience a marked advantage over other groups in terms of access to and influence over the international lawmaking process); Genevieve Tung, *International Trade Law and Information Policy*, 42 *INT'L J. LEGAL INFO.* 241, 251–52 (2014) (noting the U.S. Trade Act of 1974 gave corporate NGOs a preferential role in advising on international treaties). The persuasiveness of a particular NGO can also vary depending on the field of endeavor (since some issues may be considered more suitable for NGO participation than others) or on the reputation of the NGO itself, in that those organizations that have relevant technical expertise and that demonstrate unbiased analysis will likely be more influential than those that appear

Perhaps the best way to overcome the advantages associated with historically powerful NGOs is to provide more information about the process to prospective participants through case studies and other guides to the international lawmaking process.⁸⁷ Indeed, that is precisely what this Article has attempted to do.

V. CONCLUSION

Despite increased transparency in the field of international law, the international treaty-making process is something of a black box, particularly during the early stages of the process, when governments and intergovernmental organizations are deciding which projects to pursue.⁸⁸ The preceding paragraphs have sought to cure this lacuna by providing some insight into those procedures, using the Singapore Convention, one of the newest treaties in the area of private international law, as a case study.⁸⁹

In so doing, this Article has adopted a dispute system design perspective, focusing particularly on how the design initiative was taken and how various theoretical and empirical assessments of international commercial mediation helped decision-makers at UNCITRAL develop an appropriate instrument.⁹⁰ With respect to the first of these steps, taking the design initiative, the Article discussed how interested individuals might find the “right” person to hear a proposal, meaning someone who has the authority—or access to the authority—to move the proposal forward.⁹¹ However, the discussion also described the importance of making the “right” proposal, meaning one that is based on sound empirical and theoretical research.⁹²

Because international treaties are adopted through consensus,⁹³ they must appeal to a broad range of public and private inter-

largely or entirely self-interested. See UNCITRAL GUIDE, *supra* note 1, at 11; Strong, *Epistemic Communities*, *supra* note 48, at 507.

⁸⁷ See, e.g., Gillespie, *supra* note 81, at 333 (providing a case study of the International Whaling Commission); Strong, *Epistemic Communities*, *supra* note 48, at 495 (providing a case study of UNCITRAL Working Group II).

⁸⁸ See Broude, *supra* note 2, at 1124–25.

⁸⁹ See Singapore Convention, *supra* note 3.

⁹⁰ See ROGERS ET AL., *supra* note 7, at 49–99.

⁹¹ See *supra* notes 21–23 and accompanying text.

⁹² See *supra* note 62 and accompanying text.

⁹³ See UNCITRAL GUIDE, *supra* note 1, at 6 (noting UNCITRAL works through consensus rather than through voting processes).

ests in the signatory states.⁹⁴ This requirement underscores the need for dispute system designers to undertake objective, comprehensive, comparative research when developing their recommendations, since proposals that are biased or ill-informed will generally not be taken up by champions who must sell those ideas to national or international constituencies.⁹⁵ Instead, it is preferable to consider the needs of all relevant stakeholders through a broad, interest-based analysis.⁹⁶

Although the current analysis has focused on the first two steps of the DSD process,⁹⁷ that approach does not seek to minimize the importance of other aspects of DSD. Instead, the methodology was chosen because the second two stages of the DSD four-step process are better understood by international lawyers than the first two elements. For example, the third step in the DSD process involves “creating systems and processes,” which in the case of an international treaty involves the deliberation and negotiation of the treaty language.⁹⁸ Not only have the negotiations surrounding the Singapore Convention been discussed at length elsewhere,⁹⁹ but an extensive amount of commentary exists about how states negotiate and deliberate international treaties as a practical and theoretical matter.¹⁰⁰ As a result, it is not necessary to address those issues here.

The fourth step of the DSD process involves “implementing the design, including evaluation and process or system modification.”¹⁰¹ Implementation of an international treaty begins with the initial signing of the instrument (occurred with the Singapore Convention on August 7, 2019, when an unprecedented 46 nations signed the instrument),¹⁰² the subsequent ratification, accession,

⁹⁴ See ROGERS ET AL., *supra* note 7, at 73–83; Strong, *Epistemic Communities*, *supra* note 48, at 507.

⁹⁵ See STEINBERG ET AL., *supra* note 62, at 30 (discussing how NGOs can undertake objective, transparent, and properly constructed social science research that can be relied upon by decision-makers).

⁹⁶ See ROGERS ET AL., *supra* note 7, at 70–80 (discussing interest-based negotiation and identification of stakeholders).

⁹⁷ See *id.* at 17–26.

⁹⁸ *Id.* at 16.

⁹⁹ See Singapore Convention, *supra* note 3; Schnabel, *Convention*, *supra* note 10, at 4–8; Strong, *Epistemic Communities*, *supra* note 48, at 495.

¹⁰⁰ See BROWNLIE, *supra* note 1, at 609–11.

¹⁰¹ ROGERS ET AL., *supra* note 7, at 16.

¹⁰² See Status, Singapore Convention on Mediation, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en; BROWNLIE, *supra* note 1, at 610–11; ROGERS ET AL., *supra* note 7, at 261; Schnabel, *Convention*, *supra* note 10, at 8.

approval, acceptance and/or integration of the treaty into domestic law,¹⁰³ and adoption or revision of various ancillary instruments necessary to facilitate the proper operation of the system in question.¹⁰⁴ Again, these processes have been well-discussed both in general terms and in the context of the Singapore Convention and do not require additional analysis here.¹⁰⁵

This last step includes the periodic re-evaluation and, if necessary, revision of the system to ensure that the goals of the system are being met.¹⁰⁶ In many ways, it can be said that the Singapore Convention is itself a result of the re-evaluation and revision of a pre-existing system, since many people initially believed that the international regime relating to international commercial mediation (traditionally referred to as international commercial conciliation) was both complete and effective prior to Professor Strong's 2014 article.¹⁰⁷ However, now that the Singapore Convention has been promulgated, it will need to be reviewed at some point in the future, just as other international treaties are.¹⁰⁸ However, it is hoped that the Singapore Convention—like the New York Convention that inspired its creation—will endure for decades to come,

¹⁰³ See Schnabel, *Self-Execution*, *supra* note 29 (discussing how the Singapore Convention might be implemented into domestic U.S. law); S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, in *BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM & DUALISM* 547 (Marko Novakovic ed., 2013) (noting challenges to implementation in matters involving cross-border procedural law).

¹⁰⁴ See, e.g., Model Mediation Law, *supra* note 26 (amending the UNCITRAL Model Law on International Commercial Conciliation from 2002).

¹⁰⁵ See BROWNLIE, *supra* note 1, at 610–11; ROGERS ET AL., *supra* note 7, at 261; Schnabel, *Self-Execution*, *supra* note 29.

¹⁰⁶ See ROGERS ET AL., *supra* note 7, at 313.

¹⁰⁷ See Strong, *Empirical*, *supra* note 39, at 1986; Strong, *Promise*, *supra* note 10, at 31–32.

¹⁰⁸ For example, there is an ongoing debate about whether the New York Convention should be revisited and perhaps revised. See New York Convention, *supra* note 15; Emmanuel Gaillard, *Is There A Need to Revise the New York Convention?*, 2 *DISP. RESOL. INT'L* 187, 187 (2008); V.V. Veeder, *Is There A Need to Revise the New York Convention?*, 2 *J. INT'L DISP. SETTLEMENT* 499, 499 (2010). Some people believe that it is more important to increase adoption of existing instruments and/or improve compliance with the terms of international laws that are already in effect than it is to draft more international treaties, since many international agreements are ineffective, either as a result of sub-optimal compliance levels or because they have not yet come into force due to a failure to obtain the necessary number of signatory parties. See Martin Köppel, *The Effectiveness of Soft Law: First Insights From Comparing Legally Binding Agreements With Flexible Action Programs*, 21 *GEO. INT'L ENV. L. REV.* 821, 824–25 (2009); Lawrence Susskind, *Strengthening the Global Environmental Treaty System*, 25 *ISSUES SCI. & TECH.*, Fall 2008, <https://issues.org/susskind/> (last visited Jan. 21, 2019).

providing parties and states with a reliable and effective means of resolving international commercial disputes.¹⁰⁹

Process philosopher Alfred North Whitehead once said that “[t]he tragedy of the world is that those who are imaginative have but slight experience, and those who are experienced have feeble imaginations. Fools act on imagination without knowledge, and pedants act on knowledge without imagination.”¹¹⁰ Hopefully this Article has provided those with imagination a bit more insight into the black box of international treaty-making so that innovation and experience can come together and produce international instruments that are both useful and beneficial to all.

¹⁰⁹ See New York Convention, *supra* note 15; Singapore Convention, *supra* note 3; U.S. Proposal, *supra* note 24, at 3; Strong, *Promise*, *supra* note 10, at 32.

¹¹⁰ Alfred North Whitehead, *Universities and Their Function*, in *THE AIMS OF EDUCATION AND OTHER ESSAYS* 93 (1967).

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

*Deborah Masucci**

I. INTRODUCTION

The United States Delegation¹ 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?

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

II. IS THERE BUSINESS INTEREST FOR A CONVENTION AND WILL 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 Case² (Queen Mary/White and Case); the International Mediation Institute³ (IMI) 2016 International Mediation & ADR Survey;⁴ Report on International Mediation and Enforcement 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”

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].

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 Empirical Study of Business Users Regarding International Mediation and Enforcement Mechanisms*, 20 *CARDOZO J. CONFLICT RESOL.* 1133 (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.

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 respondents¹¹ 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 time regional disparity was uncovered on the importance of enforcement of mediation settlements. Enforcement of mediations constituted the

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.

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 NJC 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 3,000¹⁵ 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 categories¹⁶: 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 par-

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.

ties' 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 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 dis-

¹⁷ See *id.* at 7.

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

pute 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

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.imimmediation.org/about-imi/who-are-imi/mixed-mode-task-force/> (last visited Mar. 24, 2019).

Chair's expert arm. They provided information on previous deliberations or rules and decisions as well as drafting 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

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/>.

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.

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 systems²² (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 ac-

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

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).

knowledging 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 Institute²⁴ 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

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

²⁵ For a list of countries that have signed the Convention in Singapore, see *Singapore Convention Signed*, IMI, <https://www.imimediation.org/2019/08/07/singapore-convention-signed/> (last visited Aug. 20, 2019).

states must ratify the Convention to ensure 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.

REPORT ON EMPIRICAL STUDY OF BUSINESS USERS REGARDING INTERNATIONAL MEDIATION AND ENFORCEMENT MECHANISMS

*Issued by the Institute for Dispute Resolution (IDR) NJCU
School of Business to the International Mediation Institute for the
benefit of delegates attending the UNCITRAL Working Group II
(Dispute Settlement) 67th Session*

Professor David S. Weiss, Esq. & Michael R. Griffith, Esq.***

I. INTRODUCTION

This report seeks to present the research gathered by an international quantitative-qualitative study of users' assessments of the enforcement of international commercial settlement agreements

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resulting from conciliation.¹ This report found that the majority of users and stakeholders in this survey and the GPC believe that a uniform global mechanism to enforce mediation settlements would improve commercial dispute resolution. This study was created by the International Mediation Institute (“IMI”)² and the New Jersey City University Institute for Dispute Resolution (“NJCU IDR”)³ in order to assist the United Nations Commission on International Trade Law (“UNCITRAL”) and UNCITRAL Working Group II (Dispute Settlement), in particular, to address questions raised in the Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session.⁴ This report will additionally analyze responses on the desirability for a Convention for the enforcement of mediated settlements from the Global Pound Conference Survey Data Results from March 2016 to September 2017 (“GPC Survey”).⁵ This report seeks to further the objectives of the research conducted by Dr. S.I. Strong on the use and perception of international commercial mediation and conciliation in the international legal and business communities.⁶

This report will proceed as follows. Part II describes the methodology of the IMI and NJCU IDR study in conjunction with analyzing the GPC Survey. Part III provides basic information of the demographics of the users, their sectors of business, and other pertinent data that can be useful for further academic scholarly review. Part IV analyzes the user’s response to the surveys. Part V will analyze pertinent questions from the GPC Survey. Finally, Part VI provides concluding thoughts on the results of this report.

¹ The use of conciliation in this report is mutually inclusive with mediation.

² See INTERNATIONAL MEDIATION INSTITUTE, <https://imimediation.org/> (last visited Aug. 3, 2019).

³ See NJCU SCHOOL OF BUSINESS INSTITUTE FOR DISPUTE RESOLUTION, <http://www.njcu.edu/academics/institute-dispute-resolution-idr> (last visited Aug. 3, 2019).

⁴ See U.N. Comm’n on Int’l Trade Law, Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Sixth Session, U.N. Doc. A/CN.9/901 (Feb. 16, 2017).

⁵ GLOBAL POUND CONFERENCE SERIES 2016–2017, CUMULATED DATA RESULTS MARCH 2016–SEPTEMBER 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>. For the most recent data from the GPC, please visit the website at <http://globalpoundconference.org/>.

⁶ 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* (University of Missouri School of Law, Legal Studies Research Paper No. 2014–28, 2014) (available at <https://ssrn.com/abstract=2526302>).

The responses to the survey questions will be provided if requested with personal identifying information removed for confidentiality purposes.⁷

II. METHODOLOGY

This report follows the pedagogical and methodological process as reflected in the report issued by Dr. S.I. Strong, titled *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* (November 17, 2014), which this report adopts.⁸ Empirical studies concerning international law is an emerging field which creates and records valuable information allowing for informed assessments and advocacy by interested parties. Past studies have established that international commercial mediation and conciliation can form the basis of an empirical study when the study's methodology is in compliance with the social science research norms.⁹ This report has used prior international law empirical research and the guiding principles of social science research as the foundation for the drafting of survey questions more fully explored *infra*.

This report will reflect the increase in mediation interest from the business sector and a need for policy stakeholders to provide support to foster growth and clarity of process in this field. One of the key elements for adopting mediation for the business community is enforceability of international commercial settlement agreements.¹⁰ This report seeks to gather the opinions of those who would most likely be affected by the adoption of any prospective drafts or proposals by Working Group II (Dispute Settlement) with emphasis on the users. This report seeks to extract the views of the wider business community, their advisors, providers, and those that may influence the mediation space because there currently is no

⁷ The NJCU IDR/IMI Survey was launched online between June 2016 and up until March 4, 2017. The data was collected using Survey Monkey Analytics and was disseminated through the International Mediation Institute platform, various international chambers of commerce, and targeted stakeholders through the IDR platform.

⁸ For a complete review of methodology concerning gathering data from a survey, please see *id.*

⁹ See *id.* at 4–5 and note 6.

¹⁰ See David Weiss & Brian Hodgkinson, *Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, 25 AM. REV. INT'L ARB. 275 (2014).

convention for the enforcement of cross border mediated settlements by seeking responses to questions concerning:

- The extent commercial users use or were advised to use mediation in a cross-border dispute.
- The reasoning as to why parties do not seek to solve cross-border disputes through mediation.
- The consideration of including a mediation clause in a cross-border contract.
- Potential methods which would increase the use of mediation clauses in cross-border contracts, and mediation in cross-border disputes.
- The user's experience finding qualified mediators.
- Opt In/Opt Out opinion of a universal mediation instrument.
- Negative effects of including various types of defenses under such mediation instruments.
- Whether legislation or conventions that promote recognition and enforcement of settlements reached in mediation would improve the future of commercial dispute resolution.
- Where should policy makers, governments, and administrators focus their attention to promote better access to justice for those involved in commercial disputes?

The GPC provided twenty “Core Questions”¹¹ that were asked to stakeholders during the conference with five core questions asked in the beginning of each session.¹² The “Core Questions” were created with input from representatives of all stakeholders’ groups and members of the GPC’s Academic Committee.¹³

¹¹ *GPC Series 2016–17 Core Questions For Commercial Disputes To Be Used At All GPC Events*, GLOBAL POUND CONFERENCE SERIES 2016–17, [http://www.globalpoundconference.org/Documents/GPC%20Series%202016-17%20-%20Core%20Questions%20-%20Publication%20Copy%20\(March%206%202016\).pdf](http://www.globalpoundconference.org/Documents/GPC%20Series%202016-17%20-%20Core%20Questions%20-%20Publication%20Copy%20(March%206%202016).pdf) (last visited Sept. 13, 2017). GPC defines commercial disputes in its introduction to the core questions, “For the purposes of the GPC Series, ‘commercial disputes’ includes disputes between business entities, business partners, or business entities and public sector entities, whether arising from contract, tort or any other grounds. They include disputes between individual entrepreneurs, small and medium-size enterprises, multinationals and state-owned enterprises.”

¹² For a complete overview of the GPC methodology, see JEREMY LACK, A SUMMARY OF THE PRELIMINARY GLOBAL POUND CONFERENCE (GPC) DATA IN 2016: TRENDS AND THEMES, <https://www.attorney-mediators.org/resources/Documents/GPC%20Series%20-%20A%20Preliminary%20Summary%20of%20the%20GPC%20Results%20in%202016%20by%20Jeremy%20Lack.pdf>.

¹³ *Id.*

III. DEMOGRAPHICS

The IMI and NJCU IDR survey was composed of a wide variety of users from the international arena. Of those users who chose to identify their location, the IMI and NJCU IDR survey received responses from users from Ghana(1), Australia (3), Mexico (1), Italy (3), Luxembourg (1), Ireland (6), United Kingdom (4), China (9), USA (6), Switzerland (7), Spain (1), Afghanistan (1), Germany (4), Jordan (6), Turkey (2), Kenya (1), Portugal (3), Austria (2), Guyana (1), Sweden (1), France (2), Slovenia (4), Serbia (2), and Slovakia(1).

Users represented various fields and professions such as law, construction, energy, architecture, international business, health-care, food and beverage service, water and waste management, tourism, trading, education, and finance.

Twenty-eight GPC events were held across 22 countries in Africa, the Americas, Asia, Europe, and the Middle East, and additional votes were also collected by online voting.¹⁴ Approximately 2,500 stakeholders having a wide range of expertise involved in the prevention and resolution of commercial disputes shared their votes to explore possible ways of shaping the future of dispute resolution and improving access to justice in the 21st century who worked both domestically and internationally.¹⁵

The mix of voters varied slightly from session to session, but on average was comprised of: 15% users; 26% advisors; 14% adjudicative providers; 30% non-adjudicative providers; and 15% influencers.¹⁶

Users (also referred to as “Parties” in the GPC Series) are defined as those who are involved in disputes and benefit from commercial dispute resolution services.¹⁷ Advisors are defined as those who assist users/parties in managing their disputes, such as lawyers, experts, and forensic accountants.¹⁸ Adjudicative providers are defined as those who provide adjudicative commercial or civil dispute resolution services or organizations providing such services (e.g., judges or arbitrators).¹⁹ Non-adjudicative providers are defined as those who provide non-adjudicative commercial or

¹⁴ See *supra* note 5, at slide 2.

¹⁵ See *supra* note 5, at slides 9–11.

¹⁶ *Id.* These numbers are taken from the demographic results for Session 1 at slide 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

civil dispute resolution such as conciliators, mediators, or ombudsmen.²⁰ Influencers are defined as people who do not participate but are influential in commercial disputes, such as academics, government officials, educators, and policy advisors.²¹

IV. USERS' RESPONSES TO SURVEY QUESTIONS

This section of the Report will more fully analyze the questions and answers to the IMI and NJCU IDR Survey. Subsections A–K focus on the IMI and NJCU IDR Survey.

- a. As a Commercial User, how often have you used or were advised to use mediation in a cross-border dispute as a best practice in business?

Of the 103 possible responses, 99 users answered the question with 4 users choosing to skip this question. Users had the option of answering: “Always,” “Frequently,” “Infrequently,” or “Not at all.” The most commonly selected answer was “Infrequently” with 40% (40 responses) of users selecting this option. The second and third most popular selections were “Frequently” with 26% (26 responses) and “Not at all” with 24% (24 responses), a narrow margin. The least chosen answer was “Always” with 9% (9 responses) of users selecting this option.

A surprisingly low number of users are being advised to use mediation in a cross-border dispute. Perhaps even more eye-opening is that 24% of respondents selected “not at all,” meaning they have received no advisement about using mediation. Further, in the GPC data we find that advisors are the primary stakeholders responsible for ensuring parties involved in commercial disputes understand their process options and the possible consequences of each process before deciding which process to adopt.²² This may be a failure of both educating lawyers and business leaders about the mediation process.

- b. Please rank the reasons why you believe parties do not try to solve their commercial cross-border dispute through mediation? (1 is the most frequent reason, 4 is the least frequent experience).

²⁰ *Id.*

²¹ *Id.*

²² See Session 2 Question 4 of the GPC Survey, where “external lawyers” and “in-house lawyers” were the parties primarily responsible for educating parties about dispute resolution. See *supra* note 5, at slide 34.

Of the 103 possible responses, 99 users answered the question with 4 users choosing to skip this question. Each answer could be ranked by the users by selecting a number between 1 and 4, with 1 representing the most frequent reason and 4 representing the least frequent reason. The following answers were available to be ranked: “They are unfamiliar with mediation,” “They had a bad experience previously with mediation,” “They had a bad experience previously with arbitration,” and “There is no universal mechanism to enforce a mediated settlement.” The results of this survey are given in the table below.

| | 1 | 2 | 3 | 4 | TOTAL | SCORE |
|--|--------------|--------------|--------------|--------------|-------|-------|
| They are unfamiliar with mediation | 57.14% 48 | 17.86% 15 | 10.71% 9 | 14.29% 12 | 84 | 3.18 |
| They had a bad experience previously with mediation | 10.81% 8 | 27.03% 20 | 29.73% 22 | 32.43% 24 | 74 | 2.16 |
| They had a bad experience previously with arbitration | 7.89% 6 | 21.05% 16 | 34.21% 26 | 36.84% 28 | 76 | 2.00 |
| There is no universal mechanism to enforce a mediated settlement | 28.09% 25 | 32.58% 29 | 20.22% 18 | 19.10% 17 | 89 | 2.70 |

This question further solidifies the conclusion that there is a surprising lack of knowledge about mediation amongst users, with 57.14% of users responding that being unfamiliar with mediation was the most frequent reason that they believed parties do not try to solve their commercial cross-border dispute through mediation. As knowledge about mediation expands, we would expect to see this number rise. Also of note is the second-highest ranked reason that respondents listed, which was that there is no universal mechanism to enforce a mediated settlement. A lack of a universal enforcement mechanism may drive parties to other dispute resolution processes that users know have a guaranteed enforcement manner, providing certainty to the outcome of the dispute.

- c. How often does your business consider including a mediation clause in a cross-border contract between you and a counterparty?

Of the 103 possible responses, 99 users answered the question with 4 users choosing to skip this question. Users had the option of answering: “Always,” “Sometimes,” and “Never.” The most common answer was “Sometimes” with 49% (49 responses) of users selecting this option. The second most common answer was “Always” with 27% (27 responses) of users selecting this choice and the least selected answer was “never” with 23% (23 responses) of users selecting this choice.

This survey shows a general positive direction of users to incorporate mediation clauses into cross-border contracts, though as time progresses and parties become more knowledgeable about mediation this number should increase. If there was a universal enforcement mechanism, one would expect the numbers to shift towards an increase in “always” answers, because more certainty of outcome would be provided, though more research should be conducted into why 23% of respondents never consider including a mediation clause in a cross-border contract.

- d. Would you be more likely to include a mediation clause if there was a uniform global mechanism to enforce mediation settlements, i.e. similar to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)?

Of the 103 possible responses, 98 users answered the question with 5 users choosing to skip this question. Users had the option of answering: “Yes,” “No,” “No opinion,” or “Comment.” By far the most common choice was an answer of “Yes” with 80% (79 responses) of users selecting this choice. The second most common choice was “No opinion” with 8% (8 responses) of users selecting this choice. “No” was selected by 7% (7 responses) of users, and 4 users commented on the question. Comments appear to synchronize with the possible selected answers with three comments aligning with a “yes” answer and four comments aligning with a “no” or “no opinion” answer.

Two comments stood out, with a user commenting “Lack of uniform enforcement mechanism is a problem” and another commenting that a global enforcement mechanism would not increase their use of mediation clauses because “Clients are afraid because of corruption, influence, etc. . . .” Ensuring users have faith and trust in the process is critical for parties to be able to engage in

good-faith mediation. It may be that as more countries adopt mediation as a viable dispute resolution process, there is a growing period where confidence in the process needs to be built, which will come with time as more users engage in mediation.

The high majority response of “yes” to this question strongly supports the proposition that a uniform global mechanism to enforce mediation settlements will increase the number of mediation clauses included in contracts. This may be because of the added certainty of being able to enforce a mediated settlement agreement where currently there is no such guarantee.

- e. How often is the inability of the parties to find a qualified mediator an impediment to mediation?

Of the 103 possible responses, 98 users answered the question with 5 users choosing to skip this question. Users had the option of answering: “Frequently,” “Infrequently,” or “Never.” The most common answer was “Infrequently” with 41% (41 responses) of users selecting this answer, by a narrow margin compared to the 39% (39 responses) of users who selected “Frequently.” The least common answer was “never” with 18% (18 responses) of users selecting this option.

The question reflects a lack of available qualified mediators as 39% of users responded that they are frequently unable to find a qualified mediator. While it is generally positive that 61% of users are generally able to find qualified mediators, there is a vast amount of room for improvement. The inability to find a qualified mediator has an impact on the use of mediation, and guaranteeing a level of “quality control” of mediators will likely help to promote mediation and increase its advancement.

- f. Would you be more likely to use or increase your use of mediation in a cross border dispute with another party or multiple parties of different jurisdictions if a uniform global mechanism was in place similar to the New York Convention to enforce a settlement agreement reached in the mediation process?

Of the 103 possible responses, 94 users answered the question with 9 users choosing to skip this question. Users had the option of answering: “More Likely,” “Less Likely,” “No difference,” or “Comment.” By far the most selected answer was “More likely” with 84% (79 responses) of users selecting this option. The second highest selected answer was “No difference” with 6% (6 responses) of users selecting this choice. Two percent (2 responses) of users

chose “Less likely”; and seven percent (7 responses) of users chose to leave a comment.

Much like question 4, the overwhelming majority of users answered that a global enforcement mechanism would increase their use of mediation. A global mediation enforcement agreement would promote and increase the use of mediation in cross-border disputes.

- g. If there was a uniform global mechanism for enforcement of a mediated settlement should the parties have the chance to: opt-in, opt-out, comment?

Of the 103 possible responses, 93 users answered the question with 10 users choosing to skip this question. Users had the option of answering: “Opt-in,” “Opt-out,” or “Comment.” The most selected answer was “Opt-in” with 60% (56 responses) of users choosing this selection. Thirty percent (28 responses) of users chose the selection of “Opt-out.” Nine users chose to comment on this question. Four users commented, in favor of an opt-out provision, while one user believes it should be an “opt-in” system.

Here the majority of users support creating an “opt-in” system. This could be because parties would like to use this as a bargaining chip or a negotiation tactic as parties draft contracts.

- h. How often do you face post-mediation challenges to a mediated settlement agreement in a cross-border dispute on the grounds of capacity, duress, or fraud?

Of the 103 possible responses, 92 users answered the question with 11 users choosing to skip this question. Users had the option of answering, “Often,” “Sometimes,” “Never,” or “Comment.” The most common answer was “Never” which 47% (44 responses) of users selected. The second most common answer was “Sometimes” which 36% (34 responses) of users selected. Only 2% (2 responses) of users selected “Often” while 13% (12 responses) of users chose to comment on this question.

One user commented, “I haven’t come across this personally, but I know it exists, as with arbitrary awards.” Four users commented a variation of, “I have not experienced that situation.” Another user echoed a similar sentiment with, “Very rarely.”

It appears from the answers provided in the comment section as well as the majority of responses to the survey that parties are not facing the challenges of fraud, duress, or lack of capacity when a mediated settlement agreement is challenged. As mediation grows it is possible or more probable for more users to face an

increase of challenges of these defenses to their mediated settlement agreements.

- i. Would you be less likely to use mediation if a Uniform Global Mechanism of Enforcement of mediation settlements included any defenses?

Of the 103 possible responses, 93 users answered the question with 10 users choosing to skip this question. Users had the option of answering, “Yes,” “No,” “No opinion,” or “Comment.” The most common selected answer was “No” with 44% (41 responses) of users selecting this option. The second most commonly selected answer was “Yes” with 27% (26 responses) of users selecting this choice. Twenty percent (19 responses) of users had no opinion. 7.5% (7 responses) of users chose to comment on this question.

Three users commented no, so long as the defenses were limited to the New York Convention, while another user provided that it depends on how the relevant rules are structured. Another user commented, “Everything helps which encourages the parties to find a negotiated/mediated settlement of their dispute.”

The user comment seems to be crucial here, as ultimately the goal is to help parties resolve their disputes. Defenses do not appear to particularly limit the willingness of users to engage in mediation.

- j. Have you ever reached a mediated settlement agreement that was not honored therefore requiring you to re-litigate the enforcement of the agreement in national court based on general contract defenses?

Of the 103 possible responses, 92 users answered the question with 11 users choosing to skip this question. Users had the option of answering, “Frequently,” “Infrequently,” “Never,” or “Comment.” The most frequently selected answer was “Never” with 48% (44 responses) of users selecting this option. The second most selected choice was “Infrequently” with 35% (32 responses) of users selecting this choice. Nine percent (8 responses) of users selected “Frequently” and 9% (8 responses) commented on this question. All eight comments expressed that this event had not occurred to them personally.

Surprisingly, 35% of users selected “Infrequently,” which provides that this is an occurrence that is impacting users. This means that 44% of users have had a mediated settlement agreement that was not honored and they were required to re-litigate the enforcement of the agreement in a national court. If this was not a prob-

lem, we would expect to see users answering “Infrequently” at a much lower percentage.

- k. Would you prefer that a Uniform Global Mechanism for Enforcement of mediation settlement include limited defenses similar to Article V of the New York Convention such as invalidity of the award under the law or incapacity?

Of the 103 possible responses, 92 users answered the question with 11 users choosing to skip this question. Users had the option of answering, “Yes,” “No,” “No Opinion,” or “Comment.” The most common selected answer was “Yes” with 54% (50 responses) from users. The second most common selection was “No” with 22% (21 responses) of users selecting this choice. Seventeen percent (16 responses) of users had no opinion on this question, while five users commented on the question.

Here it is expected that users would support similar defenses as to that of the New York Convention as the users’ experience with the New York Convention allows them to be familiar with process, and would provide a degree of familiarity to a global mediation enforcement convention.

A uniform global mechanism to enforce mediation settlements would provide a strong increase in the use of mediation in cross border disputes and an increase of mediation clauses in contracts. In the questions asked about a uniform global mechanism to enforce mediation settlements, users overwhelmingly answered that such a mechanism would encourage users to mediate. Further, this result can be seen in the GPC survey as well.

V. GPC SERIES QUESTIONS

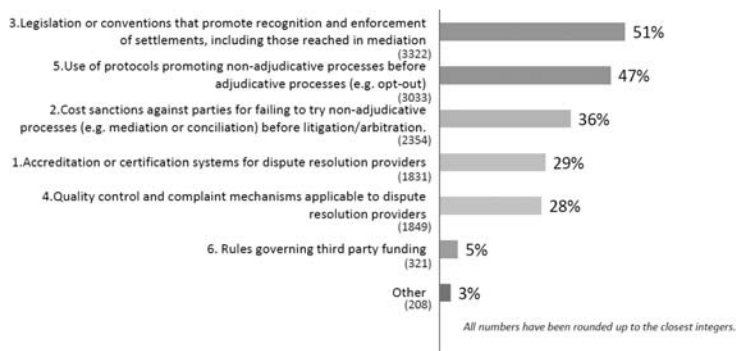
1. GPC Session 3 Question 3: Which of the following areas would most improve commercial dispute resolution? (Please rank your three preferred answers in order of priority: “1st choice” = 3 points, “2nd choice” = 2 points, “3rd choice” = 1 point)



Session 3 Question 3: Global Results

Which of the following areas would most improve commercial dispute resolution?

(Please rank your 3 preferred answers in order of priority: '1st choice'= 3 points, '2nd choice'= 2 points, '3rd choice' = 1 point)
(12710 points; 2159 voters; total possible points per answer = 3 x 2159 = 6477)



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Stakeholders had seven choices to select: (1) accreditation or certification systems for dispute resolution providers; (2) cost sanctions against parties for failing to try non-adjudicative processes (e.g., mediation or conciliation) before litigation/arbitration; (3) legislation or conventions that promote recognition and enforcement of settlements; (4) including those reached in mediation; (5) quality control and complaint mechanisms applicable to dispute resolution providers; (6) rules governing third party funding; and (7) other. The most common first choice was Answer option 1 with a 51% average popularity ranking (3322/6477 possible points): “legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.” The second most popular choice was Answer option 5, with a 47% average popularity ranking (3033/6477 possible points): “use of protocols promoting non-adjudicative processes before adjudicative processes (e.g., opt-out). The third most common choice was Answer option 2, with a 36% average popularity ranking (2354/6477 possible points): “cost sanctions against parties for failing to try non-adjudicative processes (e.g., mediation or conciliation) before litigation/arbitration.” The next most common selection was Answer option 1: “Accreditation or certification systems for dispute resolution providers” (with a 29% popularity ranking); followed by Answer option 4: “quality control and complaint mechanisms applicable to dispute solution providers” (with a 28% popularity ranking). Answer option 6: “Rules governing third party funding,” received a 5% ranking (321/6477 possible points). Answer option 7 “Other” received 3% (208 points).

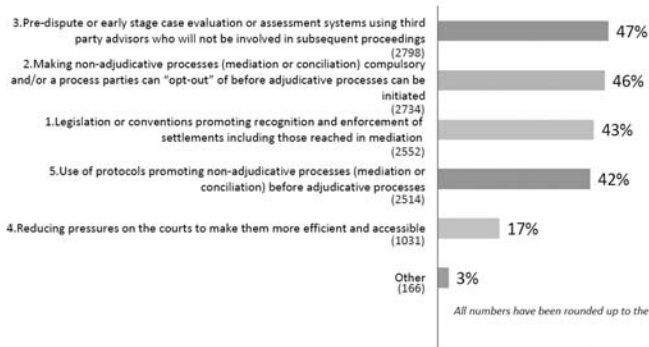
The majority of the stakeholders in the GPC believe that a uniform global mechanism to enforce mediation settlements would improve commercial dispute resolution, with 51% of users clearly supporting a uniform global mechanism to enforce mediation settlements as their first preference. This is consistent with the findings of the IMI and NJCU IDR survey where users overwhelmingly voted that such an agreement would increase their use of mediation.

- m. Session 4 Question 3: To promote better access to justice for those involved in commercial disputes, where should policy makers, governments, and administrators focus their attention? (Please rank your three preferred answers in order of priority: “1st choice” = 3 points, “2nd choice” = 2 points, “3rd choice” = 1 point)

Session 4 Question 3: Global Results

To promote better access to justice for those involved in commercial disputes, where should policy makers, governments and administrators focus their attention?

(Please rank your 3 preferred answers in order of priority: ‘1st choice’= 3 points, ‘2nd choice’= 2 points, ‘3rd choice’ = 1 point) (11795 points; 1972 voters; total possible points per answer = 3 x 1972 = 5916)



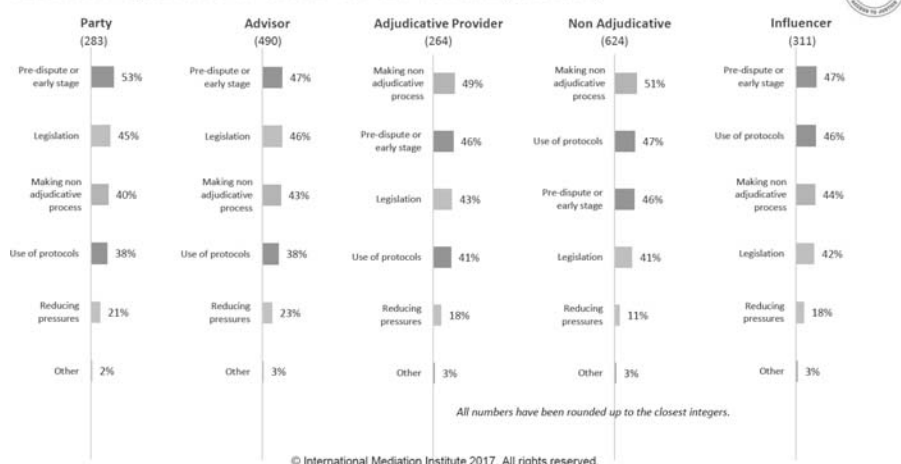
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Stakeholders had six options to select: (1) legislation or conventions promoting recognition and enforcement of settlements including those reached in mediation; (2) making non-adjudicative processes (mediation or conciliation) compulsory and/or a process parties can “opt-out” of before adjudicative processes can be initiated; (3) pre-dispute or early stage case evaluation or assessment systems using third party advisors who will not be involved in subsequent proceedings; (4) reducing pressures on the courts to make them more efficient and accessible; (5) use of protocols promoting non-adjudicative processes (mediation or conciliation) before adjudicative processes; and (6) other: (please specify). Interestingly,

Answer options 3, 2, 1, and 5 scored almost equally. Answer option 3 “Pre-dispute or early stage case evaluation or assessment systems using third party advisors who will not be involved in subsequent proceedings” was the most popular with 47% percent of possible votes (2798/5916 points). Answer option 2 “Making non-adjudicative processes (mediation or conciliation) compulsory and/or a process parties can “opt-out” of before adjudicative processes can be initiated” received 46% (2734/59916 possible points). Answer option 1, with a 43% popularity ranking (2552/5916 points) came in third place for “Legislation or conventions promoting recognition and enforcement of settlements including those reached in mediation.” The fourth most popular choice was Answer option 5 “Use of protocols promoting non-adjudicative processes (mediation or conciliation) before adjudicative processes” with a 42% ranking (2514/5916 points). Answer option 4 was distinctly less popular, with a 17% popularity ranking (1031/5916 possible points). Answer option 6 “Other” received 3% (166/5916 points).

While the global results ranked Answer option 1 in third place with an average 43% popularity ranking, this choice was the second most popular option for Parties and Advisors. The average was interestingly brought down by the votes of non-adjudicative providers (e.g., conciliators and mediators) and influencers (e.g., academics), who only ranked this option in fourth place. A breakdown of the cross-sorted results for the answers to this question are given below.

Session 4 Question 3: Cross-Sorted Results (1972 voters)



This supports the proposition that Parties want legislation that allows for the enforcement of mediated settlements.

VI. CONCLUSION

The global enforcement of a mediated settlement agreement is not just visionary, but a necessary tool for encouraging mediation, as this report reflects. Leadership promulgated by policy stakeholders providing for practical certainty of mediated settlement agreements will improve access to justice and increase efficiency for the wider international business community. Mediation is now a modernization and advancement feature in the field of law as much as it is an important asset for global trade.

In order to advance trading systems and aide businesses, certainty and predictability are important factors for both risk mitigation and dispute resolution. Users need an international mechanism congruent with the methodological approach that was adopted by the arbitration community through the New York Convention. This enforcement treaty of arbitral awards is an internationally recognized enforcement mechanism aiding global trade for more than sixty years.

The pioneering field of dispute resolution now expands in the direction of non-adversarial modalities, inclusive of mediation which necessitates a similar measure for enforcement purposes. This report is an attempt to aid the business community through empirical research to find solutions and policy to improve mediation. As the mediation field continues to develop, more scholarly work will necessitate further evaluation of mediation as a tool for advancement and promotion of international commerce.

WHAT'S IN A NAME? THE TERMS “COMMERCIAL” AND “MEDIATION” IN THE SINGAPORE CONVENTION ON MEDIATION

*Ellen E. Deason**

*“What’s in a name? That which we call a rose by any other name
would smell as sweet.”*

—William Shakespeare†

The terms “commercial” and “mediation” are central to defining the scope for the application of the new United Nations Convention on International Agreements Resulting from Mediation,¹ which has been christened, for short, the Singapore Convention on Mediation. The Convention, along with an accompanying instrument—the revised United Nations Commission on International Trade Law (“UNCITRAL”) Mediation Model Law²—provide a method for the enforcement of international settlements of commercial disputes that are reached in mediation. The goal, in brief, is to encourage growth in the use of mediation as an efficient method for resolving cross-border disputes that can help preserve

* Joanne Wharton Murphy/Classes of 1965 and 1973 Professor of Law, Moritz College of Law, The Ohio State University. I thank the American Society of International Law for credentialing me as an observer to several of the deliberations of UNCITRAL Working Group II in New York that led to the Convention. This article was improved by discussions with participants at the March 2019 symposium on *The New Singapore Convention: Compliance with Cross-Border Mediated Settlement Agreements* sponsored by the *Cardozo Journal of Conflict Resolution* and Touro Law Center. I would like to especially acknowledge the contributions of Hal Abramson, Corinne Montineri, Tim Schnabel, and the staff of the *Cardozo Journal of Conflict Resolution*.

† WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act II, Scene II (OUP Oxford 2008) (1599).

¹ G.A. Res. 73/198, annex (Dec. 20, 2018) [hereinafter Singapore Convention]. For an account of the negotiation of the Convention, which was approved by the General Assembly in December 2018 and was opened for signature in August 2019, see generally SING. REF. BK., Hal Abramson, *The New Singapore Mediation Convention: The Process and Key Choices*, 20 CARDOZO J. CONFLICT RESOL. 1037 (2019). For a detailed explication of its provisions, see Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1 (2019).

² The full name of the Model Law is the 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). UNCITRAL, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex II (2018) [hereinafter Mediation Model Law].

business relationships. The Convention creates a legal framework that signals the importance of mediation internationally and provides a mechanism that allows mediated settlements to be relied upon and readily enforced.³

One could interpret Shakespeare's famous quote as standing for the proposition that labels do not alter the essence of the thing named. In this article I draw inspiration from the quote to provide a foil for examining the use of the terms "commercial" and "mediation" in the Singapore Convention and Mediation Model Law. I will consider how the terms are framed and defined, the extent to which the names and their associated meanings introduce new ideas, and how their use might matter for the interpretation of important concepts in these instruments. Part I of the article discusses the term "commercial" and compares the way UNCITRAL treats the concept in the Convention and the Mediation Model Law. Part II considers UNCITRAL's introduction of the term "mediation" as a substitute for "conciliation."

I. WHAT DOES "COMMERCIAL" MEAN FOR THE SCOPE OF THE CONVENTION AND MEDIATION MODEL LAW?

UNCITRAL deals primarily with commercial relationships. Its mandate is to further "the progressive harmonization and modernization of the law of international trade."⁴ Within that framework, its work primarily concerns commercial law, and it has prepared instruments involving "international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods," as well as dispute resolution.⁵ While UNCITRAL's initial focus in dispute resolution was on arbitration, it soon broadened its efforts to include mediation/conciliation and other forms of dispute resolution.⁶ Prior to the deliberations that led to the Singapore Convention and the Mediation Model Law, UNCITRAL adopted the

³ See, e.g., Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, DISP. RESOL. MAG., Fall 2015, at 32, 33; Schnabel, *supra* note 1, at 2–4.

⁴ UNCITRAL, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ¶ 1 (2013), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf>.

⁵ *Id.*

⁶ In 1980, UNCITRAL provided rules that parties can use to govern their conciliations: the UNCITRAL Conciliation Rules. See G.A. Res. 35/52 (Dec. 4, 1980). The course of UNCI-

Model Law on International Commercial Conciliation (Conciliation Model Law) in 2002.⁷ The central purpose of the Conciliation Model Law was to provide legal mechanisms to protect the confidentiality of the process;⁸ it left the method for enforcing agreements reached in conciliation to each enacting State.⁹ As of 2019, thirty-three jurisdictions have adopted the Conciliation Model Law or used it as the model for their legislation.¹⁰

The Conciliation Model Law followed the example of the previously prepared Model Law on International Commercial Arbitration (Arbitration Model Law)¹¹ in explaining the concept “commercial.” Both instruments are limited to commercial matters,¹² but neither Model Law defines the term explicitly. Instead, both rely on a footnote with an open-ended list of illustrations to convey the types of relationships that constitute “commercial” transactions. The provision from the 2002 Model Law on International Commercial Conciliation¹³ reads in relevant part:

TRAL’s expanding focus is indicated by the changes in the designation of Working Group II’s subject area from Arbitration, to Arbitration and Conciliation, to Dispute Settlement.

⁷ G.A. Res. 57/18, annex (Nov. 19, 2002) [hereinafter Conciliation Model Law].

⁸ See Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Law: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 189 (2003) (“[Confidentiality] safeguards are ‘the centerpiece of the conciliation regime’ and the single most important reason why legislation on conciliation is needed.”).

⁹ G.A. Res. 57/18, *supra* note 7, art. 14.

¹⁰ Status: *UNCITRAL Model Law on International Commercial Conciliation (2002)*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status (last visited Aug. 3, 2019).

¹¹ The Arbitration Model Law was adopted in 1985 and amended most recently in 2006. U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law on the work of its eighteenth session, 3–21 June 1985, U.N. Doc. A/40/17, annex I (1985), & U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law on the work of its thirty-ninth session, 19 June–7 July 2006, U.N. Doc. A/61/17, annex I (2006).

¹² In contrast, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter the New York Convention], is not limited to commercial disputes. However, States may introduce this limitation by making a reservation. Art. I(3) of the New York Convention provides: “When signing, ratifying, or acceding to this Convention . . . any State may . . . declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national laws of the State making such declaration.” Of the 159 parties to the New York Convention as of 2019, the table with the status of adoptions indicates that 45 have limited its application to commercial relationships. See *Status of Treaties, Chapter XXII*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited Aug. 3, 2019).

¹³ Conciliation Model Law, *supra* note 7, art. 1(1).

Art. 1. Scope of application and definitions

1. This law applies to international commercial² conciliation.

² 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; carriage of goods or passengers by air, sea, rail, or road.

As stressed in the text of footnote 2, and reiterated in the Guide to Enactment and Use that accompanied the Conciliation Model Law,¹⁴ the purpose of this approach is to provide for a broad application of the concept “commercial” to conciliation. This emphasis on an expansive reach was designed to make clear that the scope of “commercial” is not limited to what might qualify as commercial under national law. Transcending national law was seen as important in order to avoid technical difficulties that might otherwise arise in determining which transactions are commercial under a particular law.¹⁵ The Guide to Enactment explained that the limitation to commercial matters was both a reflection of UNCITRAL’s traditional mandate and based on the “realization that conciliation of non-commercial matters touches upon policy issues that do not readily lend themselves to universal harmonization.”¹⁶ Yet UNCITRAL also considered the Conciliation Model Law to be appropriate for a more general application. It invited nations to broaden the scope of the law even further by entirely eliminating its restriction to commercial matters. The Guide to Enactment states: “[N]othing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover conciliation *outside the commercial sphere*.”¹⁷

The Singapore Convention takes a very different approach. Like the 2002 Conciliation Model Law, it specifies that it applies to

¹⁴ UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE 2002 (2002) [hereinafter GUIDE TO ENACTMENT].

¹⁵ *Id.* ¶ 29. This approach was different from that of the New York Convention, which allows States to make reservations limiting the application of that Convention to commercial relationships, as defined by the law of that nation. *See supra* note 12.

¹⁶ GUIDE TO ENACTMENT, *supra* note 14, ¶ 29.

¹⁷ *Id.* (emphasis added).

commercial disputes.¹⁸ And, like the 2002 Conciliation Model Law, it does not define the term “commercial.” But the Convention eschews the expansive interpretive footnote found in the Conciliation Model Law. In fact, instead of embracing a broad interpretation of “commercial,” it takes steps to ensure that the scope of this concept is narrow. However, rather than achieving this goal with a definition or illustrations, the Convention instead explicitly excludes from its coverage settlement agreements on certain subjects: consumer transactions and matters of family, inheritance, or employment law. Article 1(2) of the Convention provides:

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.¹⁹

In essence, it places these subjects outside the sphere of “commercial” relationships for purposes of the Convention’s mediated settlement agreement enforcement process.

Why did UNCITRAL Working Group II take such a different approach in the Singapore Convention? Although consumer, employment, family, and probate disputes are a significant source of litigation about the enforcement of mediated settlements in the United States,²⁰ the original proposal for a convention from the United States did not include coverage for these disputes,²¹ and it was observed that “[s]uch limitations to the scope of the proposed convention are likely to reinforce its acceptability.”²² There was a desire to avoid the experience of UNCITRAL Working Group III,

¹⁸ See Singapore Convention, *supra* note 1, at annex, art. 1(1):
“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”

¹⁹ *Id.* art. 1(2).

²⁰ See SING. REF. BK., James R. Coben, *Evaluating the Singapore Convention Through a U.S.-centric Litigation Lens: Lessons Learned From Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. 1063 (2019) (these categories constitute 46–47% of U.S. court cases about enforcement of mediated agreements).

²¹ UNCITRAL, Note by the Secretariat, *Planned and possible future work—Part III, Proposal by the Government of the United States of America: future work for Working Group II*, U.N. Doc. A/CN.9/822, annex at 3 (June 2, 2014) [hereinafter U.S. Proposal].

²² UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, ¶ 33 (Nov. 27, 2014).

which had attempted to draft an instrument for online dispute resolution of cross border electronic transactions but ran into disagreements over how to treat pre-dispute arbitration agreements with consumers.²³ The acceptance of such pre-dispute agreements differs under national law, and this ultimately blocked progress on a convention and led UNCITRAL to instead merely adopt technical notes on the subject.²⁴ An additional consideration that supported narrowing the scope of the Singapore Convention was avoiding overlap with the work of the Hague Conference on Private International Law, which had a legislative project on the enforcement of voluntary agreements in the family law context.²⁵

Perhaps the most crucial consideration, however, was that consumer, employment, family, and probate disputes can involve parties with unequal bargaining power and less sophistication with legal proceedings. Thus, there was a danger that a broad scope for the concept “commercial” would create barriers to consensus on an efficient procedure and make the instrument less attractive to States considering its ratification. These issues were summarized cogently in comments submitted by the Government of Germany at the start of the deliberations.²⁶ Germany maintained that the basis for any enforcement of a mediated agreement must be “full party autonomy” and concluded, “[c]onsequently, the scope must be limited to commercial agreements between businesses only.”²⁷ It advocated for excluding consumer, labor, and housing (rental) contracts and expressed the following concerns about the outcome of the process in the absence of these limitations:

Otherwise, serious conflicts will arise out of the need to take account of mandatory laws aimed at protecting the interests of weaker parties. If those problems had to be tackled (and it is

²³ See Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 *LOY. U. CHI. INT’L L. REV.* 11 (2012); Schnabel, *supra* note 1, at 24.

²⁴ UNCITRAL, *UNCITRAL TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION* (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf; see also U.N. GAOR, 71st Sess., Supplement No. 17, U.N. Doc. A/71/17, ¶ 257 (2016).

²⁵ See *Family Agreements Involving Children*, HCCH, <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements> (last visited Aug. 3, 2019).

²⁶ UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation*, *Comments received from States*, U.N. Doc. A/CN.9/WG.II/WP.188, at 2 (Dec. 23, 2014).

²⁷ *Id.* at 3.

unclear whether any solution would be possible), the instrument might become overly complex and difficult to use.²⁸

Germany's warnings about potential complexity and the risk of difficulty in reaching consensus on an instrument that would apply to consumers, employment, and family matters had actually been borne out by the earlier experience of the drafters of the Uniform Mediation Act ("UMA") in the United States. The UMA covers a broader swath of mediations than the Singapore Convention in that it is not limited to international or commercial subject matter.²⁹ When the UMA drafting committees tried to formulate a provision for expedited enforcement of mediated settlement agreements, they concluded that adding protections sufficient to protect weaker parties would result in onerous procedures that would not improve on the status quo of contract litigation.³⁰ As a result, the Uniform Mediation Act was adopted without an enforcement provision. For the Singapore Convention, which is focused on enforcement, restricting its reach to the least controversial application—business disputes that are less likely to raise difficult issues of imbalances of power—avoided such problems. In doing so, the exclusions were also a practical step designed to encourage acceptance of the instrument by States that might be reluctant to embrace it.

The principle that the instrument would exclude consumer, employment, and family disputes took shape early in the deliberation process. After preliminary consideration of the potential for developing an instrument on the enforcement of mediated settlement agreements, Working Group II suggested to the Commission that it be given a mandate to work on the topic.³¹ The Commission agreed in its July 2015 meeting that this was an appropriate project for the Working Group,³² and work began in earnest. At their fall 2015 meeting, the delegates reached "general agreement to exclude settlement agreements involving consumers from the scope of the instrument," and it was also "generally felt" that settlement agreements dealing with family and labor law matters "and other areas

²⁸ *Id.*

²⁹ Uniform Mediation Act § 3 (2003).

³⁰ Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 584–85 (2005).

³¹ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), U.N. Doc. A/CN.9/832, ¶ 59 (Feb. 11, 2015) [hereinafter 62nd Sess. Rep. (Feb. 2015)].

³² U.N. GAOR, 69th Sess., Supplement No. 17, U.N. Doc. A/69/17, ¶ 142 (2014).

where party autonomy was limited due to overriding mandatory rules or public policy” should be excluded.³³

There were, of course, details that remained to be worked out. Some delegations felt that limiting the instrument to “commercial” matters would eliminate any need to specifically exclude family and employment law matters because those subjects do not fall within the scope of the term “commercial.”³⁴ There were also differing opinions on whether to specify the subjects excluded from the scope of the instrument or, given the risk that a list of exclusions might not be exhaustive, to list those included within the concept of “commercial.”³⁵ Over the course of the subsequent meetings, the Working Group discussed the concept of “commercial,”³⁶ decided in favor of an explicit and exhaustive list of exclusions to be included in the scope section of the Convention,³⁷ and worked through drafts with specific phrasing.

Many of the drafting issues tended to arise due to variations in concepts among legal systems. For example, the word “consumer,” without more elaboration, was problematic for some delegations in that it was seen as too generic and thus susceptible to different understandings in different jurisdictions.³⁸ To solve this issue, the phrase “for personal, family, or household purposes” was borrowed from the formulation of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”),³⁹ where it is used to provide objective criteria for excluding sales of goods for consumer purposes.⁴⁰ There were also concerns that the scope of

³³ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7–11 September 2015), U.N. Doc. A/CN.9/861, ¶¶ 41–42 (Sept. 17, 2015) [hereinafter 63rd Sess. Rep. (Sept. 2015)].

³⁴ *Id.* ¶ 42.

³⁵ *Id.* ¶ 43.

³⁶ See UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1–5 February 2016), U.N. Doc. A/CN.9/867, ¶¶ 102–105 (Feb. 10, 2016) [hereinafter 64th Sess. Rep. (Feb. 2016)].

³⁷ *Id.* at ¶ 106; UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, 12–23 September 2016), U.N. Doc. A/CN.9/896, ¶¶ 55–56 (Sept. 30, 2016) [hereinafter 65th Sess. Rep. (Sept. 2016)]; UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 1–6 October 2017), U.N. Doc. A/CN.9/929, ¶ 16 (Oct. 11, 2017) [hereinafter 67th Sess. Rep. (Oct. 2017)].

³⁸ 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 107.

³⁹ CISG art. 2(a), Apr. 11, 1980, 1489 U.N.T.S. 3.

⁴⁰ 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶¶ 57–58. The use of parentheses to refer to “consumers” in article I(2)(a) of the Singapore Convention follows the example of the Choice of Court Convention. Hague Convention on Choice of Court Agreements art. 2(1)(a), June 30, 2005, 44 I.L.M. 1294. See 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶ 59.

what is considered family law differs among jurisdictions.⁴¹ To clarify, and to accommodate different national approaches, the list of exclusions was expanded to explicitly include settlement agreements relating to inheritance.⁴²

During Working Group II's early deliberations, there was no consensus on the appropriate form of the instrument, leading to a view that further consideration was needed in order to decide whether to prepare a convention, a model law, or a guidance document.⁴³ The issue was ultimately resolved in favor of preparing both a convention and a model law.⁴⁴ As stated in the General Assembly resolution approving the Convention, this dual approach has the advantage of providing States with a choice of instruments that accommodates "different levels of expertise with mediation in different jurisdictions."⁴⁵ It thus encourages as many States as possible to use consistent standards for cross-border enforcement, including those who might hesitate to join the Convention until they have a more-fully developed domestic legal framework for mediation.⁴⁶

For the new Model Law, the Working Group amended the 2002 Conciliation Model Law to include a section on enforcement drawn from the Convention,⁴⁷ and renamed the Model Law using the term "Mediation."⁴⁸ Overall, the new Mediation Model Law's approach to the concept "commercial" is a new hybrid of the original Conciliation Model Law and the Singapore Convention. It did not, in general, alter the broad commercial scope of the original Conciliation Model Law. The revision retains, in a provision that applies to the entire instrument, the footnote from the Conciliation Model Law with expansive illustrations of commercial activities.⁴⁹ But although the Mediation Model Law as a whole endorses a

⁴¹ 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 108.

⁴² 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶ 60.

⁴³ *See, e.g.*, 63rd Sess. Rep. (Sept. 2015), *supra* note 33, ¶¶ 108–09.

⁴⁴ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (New York, 6–10 February 2017), U.N. Doc. A/CN.9/901, ¶ 93 (Feb. 16, 2017). The agreement to prepare two instruments simultaneously was part of a five-point compromise that provided a breakthrough in the deliberations. *See* Abramson, *supra* note 1, at Part III(E)(5).

⁴⁵ G.A. Res. 73/198, *supra* note 1, at 2.

⁴⁶ *Id.* *See also* Schnabel, *supra* note 1, at 8–9.

⁴⁷ Mediation Model Law, *supra* note 2, arts. 16–20.

⁴⁸ *See supra* note 2.

⁴⁹ UNCITRAL, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex II, art. 1(1) n.1 (2018). The language is quoted *supra* in the text accompanying note 13.

broad concept of commercial relationships, its section on settlement agreements imports from the Singapore Convention the exclusion of consumer transactions and employment, family, and inheritance law disputes.⁵⁰

Will this hybrid approach to scope in the Mediation Model Law create problems? I think not, but there is some potential for confusion in the fact that the law's expansive conception of "commercial" applies to the entire instrument, including the portion on enforcement of settlement agreements. Section 3, which is titled "International settlement agreements," governs "international agreements resulting from mediation and concluded in writing by parties to resolve a *commercial* dispute ('settlement agreement')." ⁵¹ Under the terms of the Mediation Model Law, "commercial" is to be understood broadly in the sense inherited from the Conciliation Model Law, including "matters arising from all relationships of a commercial nature" as illustrated in footnote 1.⁵² Those illustrations encompass several categories that could include consumer transactions, such as banking, insurance, and carriage of goods or passengers by air, sea, rail, or road.⁵³

The wide conception of "commercial" was appropriate for the Conciliation Model Law, which sought to cover mediations—and protect confidentiality—comprehensively within the scope of commercial arrangements. It is still appropriate for Section 2 of the Mediation Model Law, which has the same purpose and retains most of the original provisions from the Conciliation Model Law, thus covering international commercial mediation generally. For the reasons discussed above, however, UNCITRAL decided that this broad scope was not appropriate for the provisions on enforcement of mediated settlement agreements. It could have narrowed the concept of commercial relationships subject to the section on enforcement with a limited definition of "commercial" or by providing a more restricted set of illustrations. Instead, UNCITRAL limited the reach of enforcement for mediated settlement agreements by using the Convention's exclusions. This avoided the problems that would have been created by using one term ("commercial") with two different meanings in the same instrument. At the same time, the instruments manage to convey two very different conceptions of the appropriate scope of "commercial" and pro-

⁵⁰ *Id.* art. 16(2).

⁵¹ Mediation Model Law, *supra* note 2, art. 16(1) (emphasis added).

⁵² *Id.* art. 1(1).

⁵³ *Id.* art. 1(1) n.1. See *supra* text accompanying note 13.

wide coverage that is tailored to the goals of their provisions. This also has practical benefits. The way UNCITRAL structured the scope of the instruments should allow a State that enacted the Conciliation Model Law—with its broad application through expansive illustrations of “commercial”—to seamlessly ratify the Convention—with its exclusions that narrow its application for the enforcement of mediated settlement agreements.⁵⁴

II. “MEDIATION”—A NEW TERMINOLOGY FOR UNCITRAL

The substitution of the term “mediation” for “conciliation” presents a different situation from the shift in the idea behind “commercial.” The key to understanding the meaning of the term “commercial” is that, while the name stayed the same (and its illustrations stayed the same in the Model Law), UNCITRAL changed the scope of the concept—in both the Convention and in the section on enforcement in the Mediation Model Law—through the use of exclusions. In contrast, with “mediation” UNCITRAL introduced a new term, but it drew its meaning from the prior definition of “conciliation” in the Conciliation Model Law.⁵⁵ This left the notion of what is entailed in the process underlying the name largely unchanged in both the Convention and the Mediation Model Law. This Part of the article examines UNCITRAL’s choice to change the name of the process, the definition and intended meaning of the new term, and the instruments’ limitation of enforcement procedures to “mediated” settlement agreements.

A. *Substituting “Mediation” for “Conciliation”*

Throughout its proposal for UNCITRAL to develop a convention, the United States used the word “conciliation,”⁵⁶ which was, of course, consistent with the terminology of the 2002 Conciliation

⁵⁴ Even if a State had accepted the invitation to adopt the Conciliation Model Law without its limitation to “commercial” conciliation, see *supra* text accompanying note 17, it could now adopt the Singapore Convention or the section on enforcement in the Mediation Model Law without confusion about its narrower scope.

⁵⁵ Unlike the Conciliation Model Law, the UNCITRAL Conciliation Rules do not define “conciliation.” They do, however, include an article on the role of the conciliator, which can be interpreted as delineating boundaries and essential ingredients for the process. See UNCITRAL Conciliation Rules art. 7.

⁵⁶ U.S. Proposal, *supra* note 21.

Model Law. Fairly early in the UNCITRAL deliberation process, however, one of the delegations expressed the view that the instrument should use the term “mediation” rather than “conciliation.” The reasoning was the perception that “mediation” is more widely used in national legal systems.⁵⁷ This led to an objection by some delegations who maintained that in their countries “conciliation” is the recognized term. Interestingly, when the governments submitted information to the Secretariat on their legislative frameworks for enforcing international commercial settlement agreements, they used widely-varying terminology.⁵⁸ A few referred to the process as “conciliation” in their comments.⁵⁹ A far greater number of States used the term “mediation.”⁶⁰ Many used both names, often in the compound form of “mediation/conciliation” or “conciliation/mediation,”⁶¹ and some used a mixture of labels.⁶² The names for

⁵⁷ 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 120.

⁵⁸ This information was submitted in response to a questionnaire circulated to States by the UNCITRAL Secretariat to collect information on whether States had already adopted legislation on enforcement of settlement agreements. The questionnaire used the term “conciliation/mediation” with a footnote emphasizing that the names were used interchangeably and with broad meaning. See UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846, at 3 & n.2 (Mar. 27, 2015) [hereinafter *Compilation*].

⁵⁹ See UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846/Add.1, at 17 (Apr. 15, 2015) (U.S.) [hereinafter *Compilation Add.1*]; UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846/Add.2, at 5 (Apr. 22, 2015) (China) [hereinafter *Compilation Add.2*]; UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846/Add.3, at 5 (June 4, 2015) (Mex.) [hereinafter *Compilation Add.3*].

⁶⁰ See *Compilation*, *supra* note 58, at 12, 19 (Ecuador, Hung.); *Compilation Add.1*, *supra* note 59, at 3, 8, 13, 14 (Isr., Nor., Slov., Swed.); *Compilation Add.2*, *supra* note 59, at 2, 11 (Austl., Port.); *Compilation Add.3*, *supra* note 59, at 9, 12, 16 (Phil., Spain, Viet.); UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846/Add.5, at 2 (June 30, 2015) (Czech).

⁶¹ See *Compilation*, *supra* note 58, at 4, 5, 16 (Arm., Austria, Ger.); *Compilation Add.1*, *supra* note 59, at 2, 9, 15 (Indon., Congo, Thai.); *Compilation Add.2*, *supra* note 59, at 7 (Geor.); *Compilation Add.3*, *supra* note 59, at 2, 3, 11 (Alg., Cameroon, Qatar).

⁶² See *Compilation*, *supra* note 58, at 8 (Can.); *Compilation Add.1*, *supra* note 59, at 11 (Sing.); *Compilation Add.2*, *supra* note 59, at 10 (Pol.); UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments*, U.N. Doc. A/CN.9/846/Add.4, at 2 (June 12, 2015) (Russ.). The most distinctive term was “reconciliation/mediation,” which was used by Turkey. See *Compilation Add.1*, *supra* note 59, at 16.

relevant domestic legislation and court rules varied similarly,⁶³ and some States reported that they use different terms for court-connected and private processes.⁶⁴ The Working Group itself, in its first report to the Commission on the subject, varied from past practice by using the compound form when it titled its agenda item as “Enforcement of settlement agreements resulting from international commercial conciliation/mediation.”⁶⁵

In addition to the question of the most prevalent usage, there was also a complicating factor regarding the effect of any change in terminology on the existing UNCITRAL texts that used the word “conciliation.”⁶⁶ At the relatively early point in the deliberations when the suggestion to switch to “mediation” was first raised, it was assumed that the Working Group would produce either a convention *or* a model law. If the instrument were a convention, then a change in its terminology to “mediation” would conflict with the language used in the 2002 Conciliation Model Law, which argued against a change.

Later in the drafting process, after the decision had been made to prepare both a convention and a model law,⁶⁷ the question of nomenclature was raised again.⁶⁸ There was some hesitation to change the terminology that had historically been used in UNCITRAL texts and a concern that a change might be interpreted as signaling a substantive change in meaning.⁶⁹ But there was impetus for the change based on the Working Group’s judgment that the terms “mediation” and “mediator” are now more widely used and recognized on a global basis than “conciliation.” Therefore, changing terminology would make the new instruments more visible and understandable, and thus easier to promote.⁷⁰ Concerns that the substitution of “mediation” for “conciliation” would lead

⁶³ See Compilation, *supra* note 58, at 6 (Mediation Act of the Republic of Belarus); Compilation Add.1, *supra* note 59, at 5, 7 (Japan: Civil Conciliation Act, Mauritius Supreme Court (Mediation) Rules); Compilation Add.3, *supra* note 59, at 12 (Spain: Act on mediation in civil and commercial matters).

⁶⁴ See Compilation Add.1, *supra* note 59, at 10 (S. Kor.); Compilation Add.2, *supra* note 59, at 8 (Para.); Compilation Add.3, *supra* note 59, at 4 (Chile).

⁶⁵ 62nd Sess. Rep. (Feb. 2015), *supra* note 31, at 4.

⁶⁶ See UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, U.N. Doc. A/CN.9/WG.II/WP.198, ¶ 17 (June 30, 2016).

⁶⁷ See *supra* text accompanying notes 43–46.

⁶⁸ 67th Sess. Rep. (Oct. 2017), *supra* note 37, ¶¶ 102–104.

⁶⁹ *Id.* ¶ 102.

⁷⁰ *Id.* ¶ 103.

to confusion about the nature of the process could be allayed by adding text clarifying that the “change in terminology does not have any substantive or conceptual implications” and emphasizing that the terms are interchangeable.⁷¹ The desire to create interest in adopting the instruments won out, and the Working Group reached a shared understanding in favor of the substitution of “mediation” for “conciliation” in the Singapore Convention, the Mediation Model Law, and also in the UNCITRAL Conciliation Rules.⁷²

B. *The Meaning of “Mediation”*

Although UNCITRAL changed the terminology from “conciliation” to “mediation,” in both cases the names are actually used as terms of art, and the core meaning did not change. The definition of mediation in the Singapore Convention reads as follows:

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.⁷³

This definition is drawn, with some rewording, from two provisions in the 2002 Conciliation Model Law: its definition of “conciliation” and its provision designating a wide range of acceptable bases for engaging in conciliation.⁷⁴ The Conciliation Model Law defined “conciliation” in Article 1(3) as:

3. For the purposes of this Law, “conciliation” means a process whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising

⁷¹ Mediation Model Law, *supra* note 2, art. 1(1) n.1.

⁷² 67th Sess. Rep. (Oct. 2017), *supra* note 37, ¶ 104; *see also* UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation*, U.N. Doc. A/CN.9/WG.II/WP.205, ¶¶ 4–6 (Nov. 23, 2017); UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018), U.N. Doc. A/CN.9/934, ¶ 16 (Feb. 19, 2018) [hereinafter 68th Sess. Rep. (Feb. 2018)].

⁷³ Singapore Convention, *supra* note 1, at annex art. 2(3).

⁷⁴ 67th Sess. Rep. (Oct. 2017), *supra* note 37, ¶ 28.

out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.⁷⁵

Then it added in Article 1(8) a provision that makes the source of the impetus to conciliate irrelevant:

8. . . . this Law applies irrespective of the basis upon which the conciliation 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.⁷⁶

The Singapore Convention's definition of "mediation" retains the four core concepts that were expressed in these two Conciliation Model Law provisions. First, whatever terminology the parties use to describe their process is not definitive. "Mediation" is being used as an *umbrella concept* that includes processes under various names and thus accommodates variations in regional and national practice. Second, the Convention's definition stresses that the process can be mediation regardless of the basis for carrying it out. It can stem from a contract, a legal obligation, a court order, or a spontaneous decision of the parties. The *basis for engaging in mediation does not matter*. Third, the reason the parties are using the mediation process is for the *purpose of settling a dispute*. And fourth, the disputants are aided in this effort by a third-party who *does not have the authority to decide the outcome*.

There is a minor difference between the definition of mediation in the Convention and in the Mediation Model Law. Whereas the Convention definition blends and rewords two Conciliation Model Law provisions, the Mediation Model law retains the original language exactly, except for substituting in the term "mediation."⁷⁷ The Model Law's definition of "mediation" applies to the entire instrument.⁷⁸ But the provision applying the law irrespective of the basis for conducting the mediation applies only to the general treatment of mediation in section 2, not the settlement agreement enforcement provisions in section 3.⁷⁹ These slightly different definitions of mediation for the enforcement provisions of the Convention and section 3 of the Model Law will be a problem only if a party tries to argue against enforcement of a settlement agreement

⁷⁵ Conciliation Model Law, *supra* note 7, at annex art. 1(3).

⁷⁶ *Id.* art. 1(8).

⁷⁷ Mediation Model Law, *supra* note 2, arts. 1(3), 3(6).

⁷⁸ *Id.* art. 1(3) (stating "For the purposes of this Law . . .").

⁷⁹ *Id.* art. 3(6) (stating "this section applies . . .").

under the Model Law on the ground that the different definition has significance. In addition, the party would have to show that the basis under which the mediation was conducted disqualifies the settlement agreement from enforcement. It will be up to the courts to interpret the instruments consistently to avoid any anomaly. This should not be difficult, as there are many references in the *travaux préparatoires* to UNCITRAL's intention that the basis for mediation, and whether or not an institution was involved in administering it, is not meant to restrict enforcement of mediated settlement agreements.⁸⁰

There was a suggestion from some delegations to narrow the Convention definition to specify that mediation must be a “structured” or “organized” process. They thought this addition was necessary in order to emphasize the role of the third party, distinguish the process from negotiation, and rule out agreements made in an informal setting.⁸¹ The delegations framed their concerns with a hypothetical about three people in a pub reaching an agreement, calling it mediation, and seeking to enforce it.⁸² After much discussion, eventually the Working Group decided against using this proposed limitation.⁸³ In my view, this was a wise decision. First, it would have created a discrepancy in the scope of the concept of “mediation” and “conciliation” for those States that have adopted the Conciliation Model Law. Second, specifying a structured procedure would have gone too far in restricting the flexibility of mediation. Third, it would also have ignored global experience with a wide range of processes and settings that are suitable for third-party interventions in disputes.⁸⁴ Unless the judgment of the pub-goers was impaired by drink to the extent that they lacked capacity

⁸⁰ See, e.g., 63rd Sess. Rep. (Sept. 2015), *supra* note 33, ¶ 24; 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶¶ 119, 122–131; 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶¶ 48–54, 169–176, 205–210; see also Schnabel, *supra* note 1, at 17 (citing specific interventions).

⁸¹ 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 117; 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶¶ 42–44, 164–167.

⁸² See Schnabel, *supra* note 1, at 15–17.

⁸³ 67th Sess. Rep. (Oct. 2017), *supra* note 37, ¶ 42; see also Schnabel, *supra* note 1, at 16–17. This rejection was consistent with decisions made during the course of drafting the 2002 Conciliation Model Law. That earlier Working Group rejected a phrase that, if included in the definition of “conciliation,” would have limited it to a process in which a third person assisted the parties “in an independent and impartial manner.” See UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-fifth session (Vienna, 19–30 November 2001), U.N. Doc. A/CN.9/506, ¶¶ 28–29 (Dec. 21, 2001). In both situations, the rejected language would have narrowed the definition of the dispute resolution processes the instruments cover, and excluded some useful formats.

⁸⁴ Cf. Paul F. Kirgis, *Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana*, 16 *CARDOZO J. CONFLICT RESOL.* 101, 104–07 (2014) (describing a

to decide, there is nothing objectionable about settling a dispute in an environment that encourages discussion, compromise, and possibly reconciliation, even if it is informal.

A key aspect of the Convention's definition of "mediation" is that it is a term of art. It retains the umbrella concept from Conciliation Model Law, meaning that in both instruments the terms "conciliation" and "mediation" are defined to include the other, and also any dispute resolution mechanism that falls within the parameters of the definition without regard to its label.⁸⁵ The understanding underlying UNCITRAL's terminology (using the term "conciliation") is summarized as follows:

In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute. The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.⁸⁶

This, in essence, is a general description of many forms of non-binding dispute resolution processes that use a third party or parties. The Guide to Enactment for the Conciliation Model Law stressed that the "methods may differ as regards the technique, the degree to which the third person is involved in the process and the kind of involvement (e.g. whether just by facilitating the dialogue or also by making substantive proposals as to possible settlement)."⁸⁷ Unfortunately, there is no term in general usage that represents the collection of processes under this umbrella. "Alternative Dispute Resolution" ("ADR") does not capture the concept because in many legal systems it is not limited to consensual processes; the notion of ADR often includes arbitration, a process that entails a binding adjudicatory decision.⁸⁸ So UNCITRAL chose "conciliation," and now "mediation," as the term of art to represent a range of processes.

The downside of using "mediation" as a specifically-defined term, especially when coupled with changing that term from "conciliation," is that it appears to endorse the idea that the processes

legal proceeding held in a gazebo in a courtyard that led to the settlement of a commercial dispute).

⁸⁵ See *supra* text accompanying note 72 ("irrespective of the expression used").

⁸⁶ GUIDE TO ENACTMENT, *supra* note 14, ¶ 6 (citation omitted).

⁸⁷ *Id.* ¶ 32.

⁸⁸ See *id.* ¶ 7.

of mediation and conciliation are indistinguishable, or at least interchangeable. Unfortunately, using a label that is typically associated with one process to represent another does not contribute to overall clarity or understanding in the world of dispute resolution. Although the differences may not be important for the purposes of the UNCITRAL instruments, in practical experience conciliation often *is* a different process from mediation, although neither label is used consistently around the world.⁸⁹ Both processes are consensual, and many understand the differences to center on the role of the neutral in applying the law and suggesting remedies.⁹⁰

The comments that States submitted to the Commission describing their domestic procedures for enforcing mediated/conciliated settlement agreements illustrate some of the distinctions between the two processes.⁹¹ In India, for example, a conciliator has a “greater role than a mediator” and may make proposals for settlement and formulate the terms of a possible agreement.⁹² In both processes the neutral may be appointed by either the parties or a court, but conciliators and mediators operate under different authorities. Conciliation is governed by the Arbitration and Conciliation Act of 1996, which defines a conciliator’s powers. There is no specific law dealing with mediation, but a mediator applies the provisions of the Mediation Rules of 2003.⁹³ The distinction between the processes also has consequences for enforcement of a resulting settlement agreement: with conciliation, the settlement agreement has the same status and effect as an arbitral award on agreed terms.⁹⁴

⁸⁹ See, e.g., Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 *TULANE L. REV.* 1401, 1406 n.7 (2004) (“the terms ‘mediation’ and ‘conciliation’ often have different meanings as one crosses jurisdictional lines”).

⁹⁰ See, e.g., *id.* (describing examples from Australia and New Zealand); Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT’L L.J.* 578, 584 (2014) (characterizing conciliation as more formal than mediation with the conciliator typically submitting written proposals for resolution); Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution*, 14 *CARDOZO J. CONFLICT RESOL.* 33, 63 (2012) (describing the conciliation process as procedurally facilitative but substantively evaluative because the conciliator identifies possible outcomes and objective norms and criteria).

⁹¹ See *supra* note 58.

⁹² UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes, Enforcement of settlement agreements, Compilation of comments by Governments*, U.N. Doc. A/CN.9/WG.II/WP.191, at 3 (Aug. 4, 2015) (India).

⁹³ *Id.* at 2–3.

⁹⁴ *Id.* at 3.

In other States that discussed using both processes, the legal authority for them may differ and they may have different relationships to court proceedings. For example, Paraguay reported that its legislation makes a clear distinction between mediation and conciliation. Mediation is a voluntary mechanism for conflict resolution, whereas conciliation is provided for in the Civil Procedure Code and may be conducted only by judges.⁹⁵ In the Republic of Korea, there is a distinct court-annexed process called conciliation, while parties can privately work out a compromise using either mediation or conciliation.⁹⁶ There may also be distinctions in practice based on the subject-matter of the dispute. In Chile, the legal system has incorporated mediation, especially in the areas of family and labor law. But it is distinct from conciliation, which may be conducted under the Civil Procedure Code in any civil action in which settlement is permissible.⁹⁷

In the international realm, the International Centre for Settlement of Investment Disputes (“ICSID”) is a notable example of an institution that recognizes both mediation and conciliation, and distinguishes between them. The ICSID Rules of Procedure for Conciliation Proceedings specify conciliators’ functions.⁹⁸ Their tasks include clarifying the disputed issues, and to this end they are instructed to hear both parties and to try to obtain any information that may further this goal.⁹⁹ To promote an agreement between the parties, conciliators may make recommendations to the parties. These recommendations may include specific terms for settlement or requests that during the conciliation the parties refrain from specific acts that might aggravate the dispute, and conciliators are directed to point out to the parties the arguments in favor of their

⁹⁵ Compilation Add.2, *supra* note 59, at 8.

⁹⁶ Compilation Add.1, *supra* note 59, at 10.

⁹⁷ Compilation Add.3, *supra* note 59, at 4.

⁹⁸ See ICSID Convention, Regulations, and Rules, Part E, R. 22 [hereinafter ICSID Rules], <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/basic-en.htm> (last visited Oct. 12, 2019). A parallel set of rules, the Conciliation (Additional Facility) Rules apply when one of the parties is not an ICSID Member State or a national of an ICSID Member State and the parties agree to their use. Proposed amendments would modify the rules slightly. See ICSID, Proposals for Amendment of the ICSID Rules, Working Paper #3, at 92, 180 (Aug. 2019) (Conciliation Rules for ICSID Convention Proceedings, R. 24 & Conciliation Rules for Additional Facility Proceedings, R. 32), https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf (last visited Oct. 12, 2019) [hereinafter ICSID Proposed Amendments].

⁹⁹ ICSID Rules, *supra* note 98, R. 22(1). Conciliators may request explanations and documents from either party and seek evidence from third parties. With the consent of the concerned party and with the parties’ participation, conciliators may visit sites connected to the dispute and make inquiries there. *Id.* R. 22(3).

recommendation.¹⁰⁰ ICSID has proposed rule amendments that would create a separate set of mediation rules. If approved as currently drafted, the mediation rules will describe the mediator's role as simply assisting the parties "in reaching a mutually acceptable resolution" of their dispute. They will also specify that the mediator does not have authority to impose a settlement and shall treat the parties equally.¹⁰¹

Mentioning these domestic understandings of distinctions between mediation and conciliation and the separate ICSID rules is part of a larger point: one of the challenges facing the field of dispute resolution is a lack of consistent vocabulary. Even within one country, there can be long-standing disagreements about how dispute resolution processes should be defined and identified.¹⁰² In addition, the flexibility of dispute resolution processes has generated significant variations in the practices that are associated with a single label,¹⁰³ and an associated lack of predictability. These factors mean that confusion about terms is often accompanied by confusion about the nature of the processes. This poor awareness can interfere with parties' ability to understand their options and to make informed decisions in choosing a process. Furthermore, the greater variety of approaches at the international level only exacerbates the problem for trans-boundary disputes. Using the same vocabulary to signify a group of different processes, as UNCITRAL has done in the Convention and Model Laws, does not help bring clarity.

But using an umbrella term in the Convention and both Model Laws does have multiple justifications. The use of a single term with a broad definition certainly makes for easier, less ponderous, drafting. It also has the significant advantage of including processes other than mediation and conciliation. Other processes that can fall within the umbrella definition are neutral evaluation, mini-trial, and, in general, consensual processes with third-party as-

¹⁰⁰ *Id.* R. 22(2).

¹⁰¹ ICSID Proposed Amendments, *supra* note 98, at 218 (Rules for Mediation Proceedings, R. 16).

¹⁰² See, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937 (1997); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U.L. REV. 949 (1997).

¹⁰³ For example, does med-arb entail using the same third-party neutral as both the mediator and arbitrator? Some assume yes, others emphatically say no. The answer, for some, is crucial in deciding if the combined process is acceptable.

sistance.¹⁰⁴ Thus, the umbrella approach also can accommodate variations in processes, and in names, that are used in a variety of legal systems. Furthermore, there is merit in making the meaning of “mediation” in the Convention as consistent as possible with the Conciliation Model Law, which also used the umbrella approach. This became especially important to avoid major discrepancies once the decision was made to amend the Conciliation Model Law as well as develop a Convention.¹⁰⁵ Most fundamentally, however, a defined umbrella term of art is consistent with its function in the Singapore Convention and the Mediation Model Law. With definitions of processes that vary among countries, the purpose of the term is not to define any process specifically, but to identify a group of processes and distinguish them from arbitration and negotiation.¹⁰⁶

C. *The Distinction from a Negotiated Settlement*

UNCITRAL Working Group II decided at its first deliberation session on the Convention that the instrument should cover only settlement agreements reached in conciliation, broadly defined.¹⁰⁷ As an alternative, it considered addressing settlement agreements in general, regardless of the process that the parties employed to reach them. This would have included negotiated settlements that did not involve the assistance of a third-party. The idea did not receive support because it was felt that such a broad approach would complicate an enforcement procedure.¹⁰⁸ Instead, the delegations supported limiting the scope of the instrument to settlement agreements from processes involving a third party, under the name “conciliation.” There was a technical reason: the limitation would be consistent with the mandate to the Working Group from the Commission.¹⁰⁹ There were also substantive reasons to support a more limited scope. In particular, it would promote mediation as an effective means of resolving disputes and

¹⁰⁴ This aspect of the definition of “mediation” was drawn from the Conciliation Model Law. See 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶¶ 116, 121; GUIDE TO ENACTMENT, *supra* note 14, ¶ 7.

¹⁰⁵ See 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶ 47.

¹⁰⁶ Cf. GUIDE TO ENACTMENT, *supra* note 14, ¶¶ 5–6.

¹⁰⁷ 63rd Sess. Rep. (Sept. 2015), *supra* note 33, ¶¶ 17–19.

¹⁰⁸ *Id.* ¶ 18.

¹⁰⁹ *Id.* ¶ 19.

avoid ancillary disputes over whether a settlement agreement fell within the scope of the instrument.¹¹⁰

Throughout the course of the deliberations, however, some delegations repeatedly suggested expanding enforcement to include negotiated settlements.¹¹¹ It is a fair question to ask why a mediated settlement agreement should be treated more favorably than a negotiated settlement agreement.¹¹² The theoretical case for a distinction is weak. A mediator is supposed to be neutral, so it is hard to argue that her presence should make a significant difference in terms of producing a settlement agreement that is suitable for enforcement. In line with this reasoning, the proponents of expanding the scope to include negotiation argued that the goal should be to promote alternative dispute resolution methods generally without singling out conciliation for favorable treatment.¹¹³ They also pointed out that the assistance of a third party can be costly and burdensome and argued that eligibility for enforcement procedures should not require these extra resources.¹¹⁴

Nonetheless, the initial decision to cover only settlements reached in mediation was never changed. For some delegations, the requirement for a third party to be involved was important to distinguish mediated settlements from ordinary contracts, as the goal was not to provide every contract with a special route to enforcement.¹¹⁵ Moreover, if negotiated agreements were included, an enforcing authority would need to determine that a negotiated agreement was actually a settlement (i.e., resolved a dispute), which would complicate the procedure.¹¹⁶ There was also a general feeling that a more restrained instrument would garner more support from States and that a limited Convention could serve as a building block, toward greater international acceptance of consensual methods for resolving disputes.

The decision to cover only settlement agreements resulting from mediation had effects on the content of other parts of the instruments. Most significantly, a party who seeks enforcement of

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 115; 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶¶ 40–41; *see also* Schnabel, *supra* note 1, at 18–19.

¹¹² The question may be especially relevant if negotiating parties want to exercise their self-determination to agree that the Convention or Model Law should apply. *See* 64th Sess. Rep. (Feb. 2016), *supra* note 36, ¶ 115.

¹¹³ *Id.*

¹¹⁴ 65th Sess. Rep. (Sept. 2016), *supra* note 37, ¶ 40.

¹¹⁵ Schnabel, *supra* note 1, at 19.

¹¹⁶ 63rd Sess. Rep. (Sept. 2015), *supra* note 33, ¶ 18.

a settlement agreement must demonstrate that the settlement agreement resulted from mediation. The Convention specifies a list of evidence that will satisfy this requirement,¹¹⁷ including the mediator's signature on the settlement agreement, another document signed by the mediator indicating that mediation was held, or an institution's attestation that it administered the mediation.¹¹⁸ If none of these are available, other forms of evidence are permissible.¹¹⁹

The decision that the instrument would cover only settlement agreements resulting from mediation also led the Working Group to consider a subsidiary question: whether the instruments should allow individual States to broaden their scope to include other processes.¹²⁰ The decisions on this issue resulted in a difference between the Convention and the Mediation Model Law. Several delegations supported granting States the flexibility to go beyond the definition of "mediation," and one could argue that the definition already includes so many processes that adding negotiation would be harmless. But there was disagreement as to whether an option to expand the definition would be beneficial or would instead defeat the purpose of the instruments and have negative consequences for the effort to streamline enforcement.¹²¹ In the end, the Working Group decided that the Convention would *not* include a reservation allowing a State to declare that the instrument would apply to negotiated settlement agreements, or any others that were not reached through a "mediation" process.¹²² For the Model Law, in contrast, the delegations decided to highlight the ability of States to broaden their legislation to include agreements not reached in mediation. Section 3 on International settlement agreements includes the following footnote: "A State may consider enacting this

¹¹⁷ For more on this aspect of the Convention, see SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019). This aspect of the Convention has proved controversial. See, e.g., F. Peter Phillips, *Concerns on the New Singapore Convention*, BCM (Oct. 9, 2018), <http://www.businessconflictmanagement.com/blog/2018/10/concerns-on-the-new-singapore-convention/> (criticizing the requirement for a mediator's signature as inconsistent with Western mediation practice).

¹¹⁸ Singapore Convention, *supra* note 1, art. 4(1)(b)(i)–(iii).

¹¹⁹ *Id.* art. 4(a)(b)(iv). The parallel provision in the Mediation Model Law, *supra* note 2, is found in Article 18(1)(b).

¹²⁰ See 67th Sess. Rep. (Oct. 2017), *supra* note 37, ¶¶ 68–72.

¹²¹ *Id.* ¶¶ 69–70. In addition, there were differing opinions as to the operation of a State's more favorable domestic regime for settlement agreement enforcement under Article 7 of the Convention. *Id.* ¶¶ 70–71.

¹²² *Id.* ¶ 72; see also Schnabel, *supra* note 1, at 19 (maintaining that "[n]o good reason was ever provided for not permitting states to extend the Convention via a declaration").

section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation.”¹²³ It will be interesting to see if States that enact the Mediation Model Law will accept this invitation and include negotiated settlements within the scope of the enforcement provisions.

III. CONCLUSION

In summary, let me return to the initial allusion to a rose and its name. In the case of the term “commercial,” a rose is still called a rose. But it has a different scent in the context of enforcement. Perhaps it is a different cultivar. The name for the concept “commercial” is still “commercial,” but its significance in the Singapore Convention (and the enforcement section of the Mediation Model Law) is altered from its original use in the Conciliation Model Law. This was not done directly by changing a definition, but by excluding settlement agreements that might otherwise be considered “commercial” from coverage under the settlement provisions.

In contrast, with “mediation” we now have a rose by another name. UNCITRAL has changed its term from “conciliation” to “mediation,” but the underlying concept and its scope remain the same. It also continues the problems associated with lumping separate processes under a single name. Nonetheless, I disagree with Shakespeare that this newly named rose merely smells “as sweet.” Because it is more widely used and understood, the term “mediation” is actually *sweeter* than “conciliation” for the purposes of the Singapore Convention and the Mediation Model Law.

¹²³ Mediation Model Law, *supra* note 2, at n.5; *see also* 68th Sess. Rep. (Feb. 2018), *supra* note 72, ¶¶ 133–136.

THE SINGAPORE CONVENTION: WHEN HAS A MEDIATION TAKEN PLACE (ARTICLE 4)?

*Allan J. Stitt**

I. OVERVIEW

As delegates to UNCITRAL Working Group II, our task was to come up with a Convention that would facilitate enforcement of mediated settlements by assisting the parties who are seeking enforcement while making it harder for those who try to renege on their commitments. This is an important lens through which to view and understand the Convention drafted by the Working Group.

In effect, we wanted to create a document that was a deterrent. To use an analogy, one of the purposes of criminal law is to dissuade criminals from committing criminal acts for fear of negative consequences. Effective criminal laws would result in no crimes because everyone would prefer to be law-abiding rather than suffer the consequences of not. As a result, effective criminal laws would never need to be used. Their measure of success would be whether they encourage socially responsible conduct.

Similarly, we wanted to create a convention that would never be used. If the Singapore Convention is effective, everyone participating in international mediations would know that agreements they reached would be enforced. Then, everyone would abide by the agreements that they reach. So the perfect convention is one that is viewed as having few “outs.” It would be easy to use and hard to resist valid enforcements. Defences to enforcement should be only for egregious situations where enforcement of a consensual agreement is not valid. That would be a rare occurrence. We wanted to protect the rights of those seeking enforcement, not those trying to evade their commitments.

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II. DIFFERENT MEDIATION EXPERIENCES SHAPED THE DISCUSSION

One of the challenges faced by the Working Group with representatives from countries all over the world was that our experiences with mediation varied. Also, many of the delegates were representatives of their Governments without first-hand experience with mediation, while those few delegates with significant mediation experience brought with them primarily their particular experience within their jurisdiction.

All of the delegates agreed that mediation, regardless of the form, shared some common traits: mediation involved a third party; the third party did not have authority to impose a solution; and the process is designed for the parties to determine whether a settlement is better than continuing with their dispute.

Some delegates saw our debate as an opportunity to promote the way that mediation was conducted in their countries, and to attempt to impose that style of mediation as the “right” style. They wanted their style to be adopted by others if they wanted agreements enforced.

Other delegates recognized that while mediation was conducted differently in different parts of the world, none of the forms of mediation was “wrong” and deals reached at any mediation should be enforced, even if the process was not the same in every country. Those delegates with broad mediation experience were adamant that there be flexibility in what was deemed a mediation. They ultimately were successful in making sure that there were options in Article 4 to accommodate the different ways that mediation is evolving around the globe.

III. THE ARTICLE 4 DISCUSSION

A. *Article 4: Generally*

Article 4 sets out how parties can prove that the settlement agreement was the result of a mediation, a threshold requirement that must be met in order to seek enforcement under the Convention. Some delegates expressed concern that parties would try to enforce an agreement that they claimed was reached at mediation when the agreement was not the product of a “real” mediation.

We therefore set out to determine what the parties had to show a court to satisfy the requirement that a mediation occurred.

It may be that this Article will never be used in practice as there may never be a dispute about whether a mediation occurred. If a party is trying to enforce a mediated settlement, it would seem strange to claim that the agreement was reached, but not at what one should properly consider a “mediation.” But if there is a dispute about whether there actually was a mediation, the Convention deals with it.

B. *Article 4.1(a) and 4.2*

Article 4.1 provides that:

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;

It is the norm in mediations for parties to a mediation who reached an agreement to sign the settlement agreement. As a result, there was consensus that there should be a requirement that the agreement be signed. Those who wanted this requirement were concerned that parties may fraudulently create settlement documents. The signed requirement would make it harder to commit fraud.

Article 4.2 on electronic communications, not reproduced here, was necessary so that if a mediation were conducted online, or if a settlement agreement were drafted where parties were not physically in the same location, the parties could still meet the requirement to “sign” the agreement if one of the options listed in Article 4.2 were met.

C. *Evidence of Mediation*

Article 4.1(b) sets out what evidence is necessary to prove that a mediation has occurred. Disagreement among members of the Working Group about the appropriate content of this section produced a lively debate.

Mediation practice has developed in a number of countries where the mediator both drafts and signs the settlement agreement. For example, that is the norm in some European countries

(though not in the U.K.) and in Israel. Delegates from a number of these countries, believing that their process was the best one, argued that the mediator's signature should be required as a condition for enforcement.

In North America and the U.K., on the other hand, mediators are taught that there are dangers if the mediator drafts the agreement. For example, the drafting could be construed as legal work, and if a mediator were a lawyer and provides legal work for two parties, that lawyer would be required to make full disclosure to both parties and not be entitled to keep any confidential information from one party. Then, the mediator would be required to disclose to the other side any information learned in confidence during the mediation. That requirement would eliminate key benefits of private caucuses that are widely used in North America and the U.K.

If the mediator were not a lawyer, the drafting of the settlement agreement could be construed as the unauthorized practice of law.

Also, if there were a dispute about the meaning of a word in the settlement agreement, the mediator who drafted the agreement may be called as a witness in a future proceeding to help interpret the agreement.

As a result of these and other risks and problems, mediators in North America are taught not to draft agreements, and they generally do not do so. Similarly, mediators in North America are taught not to sign the mediated settlement agreement and rarely do so. The mediator does not want to be viewed as either endorsing the agreement's content nor attesting to its fairness. They view the settlement agreement as one between the parties.

While the Working Group was able to come to a consensus that mediators should not be required to draft settlement agreements, there was no consensus on whether the mediator should be required to sign them.

The compromise solution that focuses on proving a mediation is found in Article 4.1(b). It states:

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:
 - (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.

While there does have to be some proof that the mediation occurred, there are many ways it can be proven. The first method, the mediator's signature on the document, meets the needs of those jurisdictions where a mediator's signature on a settlement agreement is the norm.

A second method is a document signed by the mediator indicating that the mediation has occurred. That option could be met, for example, by producing the *Agreement to Mediate*. Some jurisdictions require mediators to send in a form to the courts confirming that a mediation has occurred, and that document would presumably suffice. Alternatively, the mediator might supply a note to the parties indicating that a mediation has occurred.

A third alternative is for the parties to get a letter from the organization that administered the mediation (if there is such an organization) stating that the mediation occurred.

But the fourth alternative was the most important for those of us who wanted to make sure that this Article did not provide a way for parties to avoid enforcement and evade their obligations. This fourth alternative is a catch-all. It allows a party to prove that a mediation has taken place by producing any evidence that is acceptable to the court. A party might submit an affidavit stating that the mediation has occurred; a party might submit a copy of the bill for the facilities indicating that it was used for the mediation; a party might submit a letter from someone who happened to be at the same facility when the mediation was occurring, confirming that the mediation occurred. There is no limit to the type of evidence that one may put forward to prove that a mediation occurred, so long as it is "acceptable to the competent authority."

D. *Article 4 Takeaway*

In my view, there are two key takeaways from Article 4. First, parties should make sure that they sign the settlement agreement (in person or electronically).

Second, parties need to show a court evidence that a mediation took place. In view of the multiple ways for doing so, proving a mediation when one has occurred will be easy and rarely (if ever) an issue.

IV. FINAL THOUGHTS ON INTERPRETING ARTICLE 4

Lawyers are creative thinkers. We can always find things to argue about. We can make arguments about issues that people thought were resolved and find ambiguity in statements that people thought were clear. I hope the Singapore Convention doesn't get too "lawyered." It is a simple document with a simple premise. Parties who reach an agreement at mediation should abide by their commitments and should expect that if they do not, the other party can enforce those commitments.

There are two distinct groups of people who mediate international disputes: those who are familiar with and will satisfy the procedural requirements for enforcement under the Singapore Convention, and those who are not familiar with the Convention, or are familiar with it and forget to address the procedural requirements.

No one is worried about the first group. When parties who are familiar with (and are thinking about) the provisions of the Singapore Convention reach agreement at mediation, they will make sure that they go through the steps necessary to ensure that the agreement is enforceable. They will, of course, ask each other whether they want the agreement to be enforceable, but it is inconceivable that someone would say that they would not. No one will reach an agreement if the other party does not want the agreement to be enforceable. Those of us who mediate know that never occurs; and so the parties will take the steps necessary to make sure their agreement is enforceable.

The only people we need to worry about are those who don't know about the Convention, or those who reach agreement at 2:00 a.m. and forget that they need to meet the Convention's requirements for the agreement to be enforceable. The question we need to ask is: what should we deem their intent to be? If they had thought about it, would they have said that the agreement should be enforced?

For me, the answer is obvious. Parties who reach agreement at mediation assume that both sides will fulfill their obligations and

assume that their agreement is and will be enforceable. So when we interpret the provisions of the Convention, and when countries decide issues such as whether they should make a Reservation (Article 8) that requires parties to specifically opt-in to the Convention to make it applicable, we should remember that we are trying to make agreements enforceable. Courts should interpret agreements in a way that supports parties who want to follow through on their settlements, not those who want to renege. We should assume that people who don't specifically address the requirements in the Convention still want their agreements to be enforced, and not help those who are trying to avoid their commitments.

RECOGNITION BY ANY OTHER NAME: ARTICLE 3 OF THE SINGAPORE CONVENTION ON MEDIATION

*Timothy Schnabel**

I. INTRODUCTION

The heart of the Singapore Convention is contained in its third article.¹ Other parts of the treaty's text, such as Article 1 (addressing the scope of the Convention), consumed more hours of the negotiations, and Article 5 (addressing grounds for refusal) will likely be the focus of most of the eventual litigation regarding the Convention's application to particular disputes.² Moreover, most of the Convention's fifteen other articles are longer and more detailed than Article 3. Yet only Article 3 imposes affirmative obligations on Parties to the Convention. All other articles merely play supporting roles, such as placing boundaries on the Convention's application, setting forth procedural rules or exceptions, and providing the mechanics for the Convention to operate as a treaty. In other words, all the other articles are used to determine whether and how the Article 3 obligations apply, but only Article 3 itself imposes substantive duties on states that join the Convention.

Nevertheless, despite the importance of Article 3, it may be the most awkwardly drafted and confusing article in the Convention (particularly its second paragraph), and it hides its substantive nature behind a vague title:

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.

* Author served as head of the U.S. Delegation during the UNCITRAL negotiations and presented the initial proposal to develop a convention. Anything in this chapter is his personal opinion and not offered in his official capacity.

¹ See G.A. Res. 73/198, U.N. Doc. A/Res/73/198, annex (Jan. 11, 2019) (providing the text of the United Nations Convention on International Settlement Agreements Resulting from Mediation [hereinafter Singapore Convention or the Convention]).

² For discussion of the other parts of the Convention, see Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1 (2019). Much of the analysis herein is also drawn from that article.

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.³

This chapter will discuss the requirements of Article 3, the history behind why it is not drafted in a more straightforward manner, its interaction with other parts of the Convention, and why its presence is vital for the purposes of the Convention.

II. WHAT ARTICLE 3 REQUIRES

Article 3 contains two separate but related obligations: enforcement and recognition.

A. *Enforcement*

First, upon a request by a party to a mediated settlement agreement covered by the Convention, a state that is a Party to the Convention must enforce the agreement.⁴ This obligation, contained in Article 3.1, provides for a state to affirmatively compel compliance with a settlement agreement when one party to the settlement agreement claims that the other party has breached its obligations.⁵

In many cases, enforcement may consist of an order to pay an amount of money provided in the settlement agreement, but the Article 3.1 obligation is not limited to enforcement of monetary obligations. Such a limitation was considered during the negotiations but rejected.⁶ Although in some cases, ordering compliance with certain non-monetary obligations may be challenging for

³ Singapore Convention art. 3.

⁴ *Id.* art. 3(1). The use of “Party” (capitalized) or “Party to the Convention” should be understood as referring to states or regional economic integration organizations who join the Convention, whereas “party” (uncapitalized) should be understood as referring to a party to a particular dispute. *See also* Schnabel, *supra* note 2, at 40 n.243.

⁵ *See* Schnabel, *supra* note 2, at 39–40.

⁶ *See, e.g.*, intervention of Switzerland, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 62nd Session, Feb. 2, 2015, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/b62a662a-2fa7-452b-9b04-9c4587c4e032>; Schnabel, *supra* note 2, at 12–13.

courts—such as when a settlement agreement establishes or modifies a long-term prospective business arrangement—restricting the Convention to monetary obligations would have disincentivized parties from searching for creative solutions in mediation, thus undermining one of the most significant benefits of this form of dispute resolution.⁷ Thus, as Article 3 does not include such a restriction, a state that is a Party to the Convention has to order compliance with all types of obligations that were undertaken in the settlement agreement (subject, of course, to the exceptions provided in Article 5, which among other effects ensure that states are not required to enforce elements of settlement agreements that would be contrary to public policy).

The obligation to enforce settlement agreements does not require the use of any particular procedures, but merely requires that enforcement occur. Article 3.1 provides that a state can enforce settlement agreements “in accordance with its rules of procedure”—an approach that should make it easier for states to implement the Convention into their existing legal systems.⁸ Of course, this freedom to use existing rules of procedure does not permit states to impose requirements that would be inconsistent with the Convention—e.g., requiring formalities (such as notarization of settlement agreements) beyond those provided in Article 4 of the Convention or providing grounds for refusal beyond those listed in Article 5.⁹

The Convention’s agnosticism toward procedural approaches extends to the topic of execution, which falls outside the Convention’s scope.¹⁰ The Convention does not require a state to alter its rules on topics such as the attachment of specific assets to satisfy an enforcement order. States will likely take different approaches to their implementation of Article 3.1 and how it interacts with their existing procedures for enforcement and execution. Some states may choose to rely upon administrative officers such as bailiffs who are used to following simple instructions rather than performing

⁷ See, e.g., intervention of South Africa, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 62nd Session, Feb. 3, 2015, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f7f8fc60-434c-4965-9b2d-79dee3f85403>; intervention of International Mediation Institute (IMI), in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 62nd Session, Feb. 2, 2015, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/b62a662a-2fa7-452b-9b04-9c4587c4e032>; Schnabel, *supra* note 2, at 12–13.

⁸ Singapore Convention art. 3(1); see also Schnabel, *supra* note 2, at 39.

⁹ See, e.g., Schnabel, *supra* note 2, at 39–41.

¹⁰ *Id.*

complex analyses, whereas other states may provide for a substantial judicial role.¹¹

In both respects—deferring to a state’s existing rules of procedure, and remaining silent on issues regarding execution—the Convention mirrors the approach taken in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹² A similar variety in states’ methods of implementation is thus also to be expected.

The Article 3.1 enforcement obligation contains one additional qualification: enforcement is only required “under the conditions laid down in this Convention.”¹³ This reference to “conditions” encompasses the other articles of the Convention that determine whether the Article 3.1 obligation applies. In other words, a settlement agreement must meet the scope and definitional requirements of Articles 1 and 2, and relief must be sought in accordance with Article 4, before the state will be obligated to enforce the settlement agreement. If an Article 5 exception is found to apply (when raised by the party resisting relief, under Article 5.1, or by the court itself under Article 5.2), the state is also not obligated to apply Article 3.1.¹⁴

B. *Recognition*

The second obligation contained in Article 3 corresponds to the concept that would be understood in many states (including generally in common law systems) as “recognition” of settlement agreements, although the word “recognition” is not used.¹⁵ This obligation, located in Article 3.2, is not set forth in the most elegant drafting. Its meaning, however, was clearly understood by the delegations participating in the negotiations, as the intent behind

¹¹ *Id.* See also intervention of Switzerland, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 21, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/89138891-3434-4923-8b18-da2ef1003f27>.

¹² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]. See also intervention of Switzerland, *supra* note 11.

¹³ Singapore Convention art. 3(1).

¹⁴ See, e.g., Schnabel, *supra* note 2, at 39.

¹⁵ Singapore Convention art. 3(2). See also, e.g., intervention of Finland, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 67th Session, Oct. 2, 2017, 10:00–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/1ad3377d-7994-49a2-8de4-d6a05cfd6e2a>; Schnabel, *supra* note 2, at 38.

the provision was explained (without any disagreement being expressed) on multiple occasions.¹⁶

If one party to a settlement agreement seeks to reopen the underlying dispute that was already settled through mediation (e.g., that party attempts to litigate that dispute), the other party is entitled to seek relief under Article 3.2. That other party may invoke the settlement as a defense, and “by meeting all of the conditions laid down in the [Convention], the party seeking relief is thereby able to prove that the dispute has been settled.”¹⁷ (The reference to “conditions” has the same implications in Article 3.2 as under Article 3.1, as does the reference to rules of procedure.) In other words, the settlement agreement provides a complete defense to claims based on the underlying dispute—essentially, “recognition” as it is understood in many legal systems.

Article 3 thus provides for the use of settlement agreements as both a “sword” (the offensive use of a settlement agreement via a request for enforcement, to compel compliance with the obligations in the settlement agreement) and as a “shield” (the ability to use a settlement agreement as a complete defense). This concept is fairly straightforward; the contorted drafting of Article 3.2 will be explained further below.

C. *What Article 3 Does Not Cover*

The limits of Article 3 are worth noting briefly. Although the Convention requires states to enable parties to use a settlement agreement as both a “sword” and a “shield,” the Convention’s rules do not have to be applied in all situations in which a court may be called upon to examine a particular mediated settlement agreement (even one that meets the Convention’s various requirements, such as that it resolved a dispute that was “commercial” and “international”).

¹⁶ See intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; intervention of the United States, in UNCITRAL Audio Recordings: Working Group II, 67th Session, Oct. 3, 2017, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62404311-9810-4e93-a063-5864787a8b4c>. See also Schnabel, *supra* note 2, at 40–42.

¹⁷ Intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>.

In particular, if a state's non-Convention law permits parties to use settlement agreements in ways beyond those contemplated by Article 3, the state is not bound to apply the Convention's framework. For example, to the extent that a state provides access to its courts for the mere interpretation of agreements—even in situations in which neither party is affirmatively seeking to have the agreement enforced, nor seeking to rely on the agreement in defense against a claim—then the proceeding falls outside the scope of the Convention.¹⁸ In such a proceeding, the court would not have to follow the procedural requirements of Article 4, nor would the Convention's other rules generally be relevant.

III. WHY THE PHRASING OF ARTICLE 3(2) IS CONVOLUTED

To those with an eye for the tragic, the phrasing of Article 3(2) and the absence of the word “recognition” may evoke some Shakespearean connotations:

What's in a name? That which we call a rose
By any other word would smell as sweet.
So Romeo would, were he not Romeo called,
Retain that dear perfection which he owes
Without that title. Romeo, doff thy name,
And, for thy name, which is no part of thee,
Take all myself.¹⁹

As noted above, the common understanding of the delegations that negotiated the Convention was that Article 3.2 would have an effect essentially equivalent to that implied by the term “recognition” in many legal systems. So why does the Convention not simply provide for the “recognition and enforcement” of settle-

¹⁸ See, e.g., interventions of Sweden and the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Resolution), 67th Session, Oct. 4, 2017, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/9fdfe98f-1382-4d45-833f-47b0b08bd961>; Schnabel, *supra* note 2, at 40.

¹⁹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act 2, Sc. 2 (OUP Oxford 2008) (1599). Such a reference seems particularly appropriate given that UNCITRAL's Working Group II, which developed the Convention, previously generated what seems to be the world's first multilaterally-drafted sonnet, in the course of earlier treaty negotiations. See intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 60th Session, Feb. 7, 2014, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/c228e59d-f1e1-42ed-a182-d6bd002524d0> (presenting “A Sonnet Most Favored,” co-authored by the United States, Australia, Singapore, Canada, Israel, and—to the extent it related to portfolio investment instead of foreign direct investment, due to E.U. competence issues—the United Kingdom and the Czech Republic).

ment agreements in those words? Why did the venerable concept of recognition have to “doff [its] name” to be part of the Convention?

For much of the negotiations, many delegations argued in favor of a straightforward approach that would mirror the New York Convention in terminology.²⁰ These delegations pointed out that in many legal systems, recognition is a prerequisite to enforcement, and that the purposes of the Singapore Convention (as discussed below) would be undermined if the Convention did not clearly provide parties with both a “sword” and a “shield.”²¹

Yet at the same time, other delegations argued that the Convention should only provide for enforcement, not recognition.²² Some of these delegations argued that only acts of states, such as court-issued judgments, could be the proper subjects of recognition (even though the New York Convention requires the recognition of arbitral awards and agreements to arbitrate).²³ Others argued that the inclusion of “recognition” of settlement agreements could have consequences beyond those intended by its proponents: they made the case that, in some legal systems, providing for “recognition” would, in some situations, prevent courts from even opening a case and evaluating whether evidence outside the settlement

²⁰ See, e.g., interventions of Colombia and Ecuador, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62da59e8-138e-4226-9753-0ea15c3b706f>; intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 15, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/5b1bd013-83f3-4439-83b4-e9e7a676f37f>; Schnabel, *supra* note 2, at 36–37.

²¹ See, e.g., intervention of Vietnam, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 22, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2b7d9b79-b703-4ddf-ad34-b2d9101f794f>; intervention of Australia, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/c0ba5de5-130e-4672-9ab8-2f514121df77>; intervention of Mexico, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 15, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/5b1bd013-83f3-4439-83b4-e9e7a676f37f>; Schnabel, *supra* note 2, at 36–37.

²² See, e.g., intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 14, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f5c9b0ea-5f54-4158-a198-d0ea83b3c9a3>; Schnabel, *supra* note 2, at 35–36.

²³ See, e.g., interventions of Germany, Bulgaria, and the European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62da59e8-138e-4226-9753-0ea15c3b706f>; Schnabel, *supra* note 2, at 35–36.

agreement itself would affect the possible applicability of Article 5 defenses.²⁴

One of these delegations explained that, in terms of the “sword” and “shield” analogy, its legal system provided two types of “shields”—one in which court acceptance of a document would prevent the court from opening a case entirely, and another that would treat the document as one piece of evidence (potentially among many) that the court could consider in deciding a case.²⁵ The term “recognition” was said to imply the first of those two shields in that system. Such an outcome was not desired by those advocating for the inclusion of “recognition” in the Convention. Instead, they argued that the Convention needed to take a third approach, in between those two extremes—i.e., providing that a settlement agreement would not merely be one piece of evidence among others, but would be conclusive proof of a dispute being resolved, while not preventing a court from opening a case to consider defenses.²⁶

Given that the term “recognition” evidently carried different implications to delegations from different legal systems, the decision was made to seek a solution that did not use the term, but instead functionally described the intended result.²⁷ One approach

²⁴ See, e.g., intervention of Denmark, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/c0ba5de5-130e-4672-9ab8-2f514121df77>; intervention of Denmark, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 64th Session, Feb. 4, 2016, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/c6fba5cc-d219-4d96-a5c0-b72884881b06>; Schnabel, *supra* note 2, at 37.

²⁵ See intervention of Denmark, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 20, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/0c295bca-1470-41cc-b71f-9fb9c672228c>.

²⁶ See, e.g., intervention of the United States, in UNCITRAL Audio Recordings: U.N. Comm’n Int’l Trade Law, 50th Session, July 7, 2017, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/015ae34e-320f-4d49-a0cd-b5d0cb0511e2>; interventions of Japan and the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 67th Session, Oct. 3, 2017, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62404311-9810-4e93-a063-5864787a8b4c>. See also intervention of Switzerland, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 22, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2b7d9b79-b703-4ddf-ad34-b2d9101f794f>; Schnabel, *supra* note 2, at 37.

²⁷ See, e.g., intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 8, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/708ce97b-d27a-4c4b-9e9e-7b5a6ee13ee4>; intervention of the United States, in UNCITRAL Audio Recordings: U.N. Comm’n Int’l Trade Law, 50th Session, July 7, 2017, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/015ae34e-320f-4d49-a0cd-b5d0cb0511e2>. See also intervention of Canada, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 9:30–12:30, <https://>

that was considered was obligating states to give settlement agreements the same effect when raised as a defense that they would be given in enforcement proceedings. Although this approach might have worked, it failed to attract sufficient support when a caveat was attached to it—i.e., that the “same effect” rule would only apply to the extent that national law provided such a defense. This approach would have made the availability of this form of relief depend on the choices made in each state’s domestic law.²⁸ Another suggestion was to provide that states would be obliged to treat settlement agreements as “binding.”²⁹ This approach also failed to build sufficient support, as the delegations that wanted the Convention to cover “recognition” were not persuaded that treating settlement agreements as “binding” would give settlement agreements greater effect than mere contracts, let alone that they would be treated as definitive proof of a dispute being resolved.³⁰

Ultimately, a breakthrough on this issue was made as part of a package of compromises on five significant issues in the negotiations.³¹ This set of compromises balanced the goals of the delegations who sought an ambitious Convention with the concerns of other delegations who advocated for a more cautious approach. For those who were concerned about possible negative effects of any overlap with the New York Convention and two Hague Con-

icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62da59e8-138e-4226-9753-0ea15c3b706f; intervention of Norway, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/c0ba5de5-130e-4672-9ab8-2f514121df77>; Schnabel, *supra* note 2, at 38.

²⁸ *See, e.g.*, intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 20, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/0c295bca-1470-41cc-b71f-9fb9c672228c>; Schnabel, *supra* note 2, at 38.

²⁹ *See, e.g.*, interventions of the United States and the European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 15, 2016, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/5b1bd013-83f3-4439-83b4-e9e7a676f37f>; Schnabel, *supra* note 2, at 38–39.

³⁰ *See, e.g.*, interventions of Argentina and Switzerland, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 19, 2016, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f61a25d9-fcc5-4f13-bea5-afc92f9660e7>; Schnabel, *supra* note 2, at 38–39.

³¹ *See generally* U.N. Comm’n on Int’l Trade Law, Report of Working Group II (Dispute Settlement) on Its Sixty-Sixth Session, U.N. Doc. A/CN.9/901, ¶ 10 (2017), <http://legal.un.org/docs/?symbol=A/CN.9/901>. *See also* intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; intervention of the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 10, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f619271a-e928-400e-b6d0-08b213c54710>; Schnabel, *supra* note 2, at 6–8.

ference instruments, the text in Article 1.3 was added to minimize such interactions between treaties.³² For those who were concerned about mediator misbehavior, two grounds for refusal were added in Article 5.1(e)–(f).³³ In exchange, for those who sought an ambitious approach, the Convention was bolstered in two key ways. The Convention would apply to covered settlement agreements by default (rather than requiring parties to a settlement agreement to opt in), although individual states could make declarations altering this approach.³⁴ Also, using the Article 3.2 language, the Convention would provide for settlement agreements to be used as a complete defense against claims, even though the word “recognition” would not be used.³⁵ The final element of the package of compromises was the decision to develop a model law text at the same time as the Convention, so that states who did not yet feel ready to join a treaty could still choose a model law as a step in the direction of reforming their laws to encourage mediation.³⁶

³² See, e.g., intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 64th Session, Feb. 2, 2016, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/35633c76-b3fd-4a5e-acd6-c34f2783c6cb>; intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 8, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/708ce97b-d27a-4c4b-9e9e-7b5a6ee13ee4>; intervention of the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 8, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/708ce97b-d27a-4c4b-9e9e-7b5a6ee13ee4>; intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 8, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/d977fb46-494f-48c0-878e-225c68ee8745>; Schnabel, *supra* note 2, at 25–28.

³³ See, e.g., intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; Schnabel, *supra* note 2, at 50.

³⁴ See Singapore Convention art. 8(1)(b). See also intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; Schnabel, *supra* note 2, at 57–59.

³⁵ See, e.g., intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; intervention of the United States, in UNCITRAL Audio Recordings: U.N. Comm’n Int’l Trade Law, 50th Session, July 7, 2017, 14:00–17:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/015ae34e-320f-4d49-a0cd-b5d0cb0511e2>; Schnabel, *supra* note 2, at 38–42.

³⁶ See, e.g., intervention of Israel, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 7, 2017, 15:00–18:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b>; Schnabel, *supra* note 2, at 8–9.

In terms of the Article 3.2 text, this compromise took a functional approach, describing the aspects of recognition that needed to be covered by the Convention, without using the term that created concerns about unintended consequences in some legal systems.³⁷ The resulting text, although not a model of clarity, was discussed repeatedly in the negotiations without any sign that delegations differed on their understanding of the agreed approach. This understanding held up throughout the rest of the negotiations, with only minor changes occurring subsequently. (Even minor drafting suggestions were resisted; a suggestion was later made that Article 3.2 should be clarified by specifying that invoking the settlement agreement would “conclusively” prove that the dispute had been resolved, but such an addition was deemed unnecessary, as it would not have changed the intended meaning of the clause.)³⁸

IV. SUBTLE IMPLICATIONS FOR OTHER ARTICLES

Because Article 3 is the core of the Convention, the choices made with respect to that article rippled throughout the rest of the text. Some of these effects are less obvious than others. For example, because a long and complex clause was—for understandable

³⁷ The phrasing that was eventually incorporated into the text drew on the model of drafting suggestion made earlier by the European Union, though significant changes were made. *See, e.g.*, intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 6, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/7d3f064d-ed33-41e3-be7b-6d430a3bde44>; Schnabel, *supra* note 2, at 41 n.245. For example, the E.U. proposed a drafting approach that would have referred to invoking the mere “existence” of the settlement agreement (rather than the settlement agreement itself). Moreover, instead of referring to a state’s rules of procedure (as in the New York Convention), the E.U. drafting suggestion would have only allowed a party to invoke a settlement agreement in accordance with “the law” of the state where relief was sought—reminiscent of the earlier proposal to give settlement agreements the “same effect” when raised as a defense as in the context of enforcement requests, but only to the extent permitted under each state’s law. The intended implications of the E.U.-proffered language were never fully explored and were questioned by a number of delegations. *See, e.g.*, interventions of Israel, Mexico, Honduras, Australia, the United States, the Russian Federation, and the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 6, 2017, 10:00–13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/7d3f064d-ed33-41e3-be7b-6d430a3bde44>. In any event, the questions raised were in the end not relevant, as the E.U. drafting suggestion was soon superseded by the compromise text.

³⁸ *See* interventions of Spain, Israel, the United States, and Uganda, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 67th Session, Oct. 3, 2017, 9:30–12:30, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62404311-9810-4e93-a063-5864787a8b4c>.

reasons—used in place of the term “recognition,” other parts of the Convention could not as easily cross-reference the obligations imposed under Article 3. Thus, rather than having Article 4 refer to the procedures for seeking recognition and enforcement of settlement agreements and having Article 5 refer to grounds on which recognition and enforcement could be refused, a more creative approach had to be employed. Referring only to “enforcement” in those other articles would not work, as it might have implied either that the Convention applied only to enforcement (and not the defensive use of settlement agreements) or that these other articles did not apply to Article 3.2. At the same time, paraphrasing Article 3.2 in other articles or finding some other one-word term to substitute for “recognition” in cross-references elsewhere was also not feasible. If a less convoluted way to describe the obligations in Article 3.2 could have been identified while still satisfying interested delegations, that drafting approach would have been used in Article 3 itself.

In the end, other articles were drafted simply to refer to the two halves of Article 3 jointly as the “relief” that a party could seek under the Convention.³⁹ (As the Convention was being finalized, a definition of “seeking relief” was considered but determined to be unnecessary.)⁴⁰

The decision to include the concept of recognition (if not the term itself) also increases the relevance of Article 12.4, which addresses the interaction of the Convention with the internal rules of regional economic integration organizations (“REIOs”), should any of them (e.g., the European Union) ever join the Convention.

Article 12.4 provides two instances in which the internal rules of a REIO can prevail over the Convention in the event of a conflict, including “as concerns the recognition or enforcement of judgments” between member states of the REIO.⁴¹ If a REIO has internal rules requiring a member state to recognize a judgment from another member state, such an obligation can excuse the member state from an obligation to provide relief under Article 3 of the Convention. Thus, for example, if party 1 to a settlement agreement commences litigation in REIO member state A, and party 2 claims that the dispute was already resolved in the settlement agreement, but the court in A declines to recognize the set-

³⁹ See, e.g., Singapore Convention arts. 4(1), 4(3), 5(1), 5(2), 6, 12(4).

⁴⁰ U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm. on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/17, ¶ 24 (2018).

⁴¹ Singapore Convention art. 12(4).

tlement agreement under Article 3.2 because it finds that the public policy exception in Article 5.2(a) applies, that court may issue a judgment that member state B is then obligated to recognize due to the REIO's internal rules. In that instance, B could recognize the judgment rather than the settlement agreement without violating its Article 3.2 obligations (even if it did not share state A's public policy concerns regarding the settlement agreement) thanks to Article 12.4. However, if state B were not a member state of the REIO, the mere existence of an inconsistent judgment from another state would not, on its own, suffice as a reason to deny relief under Article 3.

V. ARTICLE 3.2: ESSENTIAL FOR THE SUCCESS OF THE CONVENTION

As noted at the outset, Article 3 may not jump out at the casual reader as the most vital part of the Convention, given its relative brevity and the convoluted phrasing of its second paragraph. Moreover, given the controversy about whether to address the concept of "recognition" (however phrased) within the Convention, the inclusion of Article 3.2 was not a foregone conclusion. Yet without this key section, the main purposes of the Convention would have been significantly undermined in at least two connected ways.

First, in terms of the Convention's practical effects, the absence of Article 3.2 would have hamstrung the Convention's utility to parties seeking to avoid needless litigation after entering into a settlement agreement. If the Convention merely obliged states to enforce settlement agreements but not also to treat settlement agreements as conclusive proof that a dispute had been resolved, many parties would not have been able to rely on the Convention to ensure that their settlement agreements would be given effect. The Convention's relevance would have depended on how a particular dispute developed. A party that fulfilled its obligations under the settlement agreement could not have been assured that it would be able to avoid relitigating the dispute to secure compliance by the other party. Moreover, a party that later came to regret entering into a settlement agreement could have sought to avoid the Convention's application by initiating litigation on the underlying dispute, as the other party's ability to raise the settle-

ment agreement in defense would have depended on the domestic law in that forum rather than the provisions in the Convention.⁴²

Second, and even more significant than the above-described effects on post-settlement litigation, the omission of Article 3.2 would have made it extremely unlikely that the Convention would fulfill its primary purpose of encouraging the use of mediation for the resolution of cross-border commercial disputes. Although the Convention was drafted so as to be practically usable as an efficient legal framework under which parties could rely on settlement agreements in courts in various jurisdictions, a more important role of the Convention will likely be its effect on a far greater number of disputes that will hopefully never go to court.⁴³

To the extent that the existence of the Convention encourages parties to use mediation in the first place, many additional disputes would be resolved through settlement agreements that the parties would never breach (and thus would not need to take to court). But this effect on the use of mediation is plausible primarily to the extent that the Convention helps to reshape the perception of mediation in legal cultures where it is not yet accepted as a coequal form of dispute resolution. Establishing a cross-border regime for mediation that is perceived as roughly equivalent to that which the New York Convention provides for arbitration would be a necessary part of such a cultural shift, or else mediation would likely not be able to overcome the resistance it still faces in many corners.

Just as commercial parties trust the New York Convention as a vital though imperfect tool that enables them to use arbitration with confidence, the Singapore Convention must play the same role for mediation—and it would not likely achieve such a status if it were seen by litigators as providing merely a sword but no shield, leaving the use of settlement agreements in defense against claims to the vagaries of domestic contract law and procedure. The Convention would not have sufficiently altered litigators' risk calculus regarding whether engaging in mediation would be worth the resources.

Only the passage of years will reveal the extent to which the Convention will ultimately achieve the lofty goal of elevating mediation's accessibility and status for cross-border dispute resolution. But without the "shield" in Article 3.2, such aspirations would likely have been beyond reach from the outset. Given that the existence of this inartfully-drafted provision keeps these hopes alive,

⁴² See, e.g., Schnabel, *supra* note 2, at 36.

⁴³ See, e.g., *id.* at 2–4.

what we would otherwise call recognition truly does still “smell as sweet” even when its new name might be seen as a grammatical tragedy.

SINGAPORE CONVENTION DEFENCES BASED ON MEDIATOR'S MISCONDUCT: ARTICLES 5.1(e) & (f)

*Michel Kallipetis, QC, FCI Arb**

I. INTRODUCTION

At the February 2019 ICC Mediation Competition in Paris, Damien Cote from Canada and David Lewis from New York moderated a “debate” on the Singapore Convention.¹ One of the panellists launched into a full-scale attack on the Convention, in which he dismissed it on the basis that the “whole document resembled the New York Convention and was redolent of arbitration rather than mediation.” The speaker focused on Article 5 and the Grounds for Refusing Relief, and he was particularly critical of Articles 5.1(e) and (f). He expressed his view that these articles were apposite to the setting aside of an arbitral award and therefore had no relevance to mediation and ought not to be a basis for a challenge to a consensual settlement of an international commercial dispute.

At first blush, a cursory reading of the Convention might justify his observation. It was apparent to the experienced mediators who attended the Vienna and New York Working Group II discussions that many of the delegates did not appear familiar with mediation in practice and were approaching this project as if a mediator were akin to an arbitrator. This explains why a great deal of time was spent discussing “traffic lights” disqualifications, bias, undue influence, and all the fascinating issues with which the arbitration world has become obsessed in recent years! However, if that panellist had considered the wording of the Convention, he may well have appreciated that those drafting the Articles which prompted his attack had chosen their words with care, and the panellist may have realised that his initial judgment was hasty and uninformed.

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¹ See G.A. Res. 73/198, U.N. Doc. A/Res/73/198, annex, United Nations Convention on International Settlement Agreements Resulting from Mediation (Jan. 11, 2019) [hereinafter Singapore Convention].

The earlier Articles of the Convention are for others to deal with and in any event had been mostly decided in the earlier sessions before this author attended the Working Group's meeting in Vienna in September 2016. This paper will deal solely with Articles 5.1(e) and (f) on mediator behaviour which provide for Grounds for Refusing to Grant Relief, a section that I have personal knowledge of how it came together.

II. DISCUSSION

There was a fairly robust discussion in Vienna over whether any mediator protections ought to be in the Convention. The experienced mediators present pointed out that the Working Group was dealing with international commercial mediations where the disputants were invariably represented by teams of lawyers and experts so that there was no need for the special protections given to individuals facing a large commercial organisation. Furthermore, once the delegates understood that the mediator's role was not to render a decision and that the parties themselves decided how they wished to resolve their differences, some delegates thought that there was no need to provide the familiar safeguards for protecting a party from an overbearing judge or arbitrator.

Fuelling this particular debate was the explanation from the experienced mediators among the delegates that large commercial entities and their legal teams invariably made sure that the settlement agreement provided for: 1) A mechanism for fulfilling the parties' respective obligations; 2) safeguards for transferring any real or incorporeal property as part of the settlement with guarantees, escrow accounts, or other mechanisms to avoid the possibility of further litigation to enforce the settlement; and 3) an agreed jurisdiction, law, and dispute resolution process in the event of any breakdown or non-fulfilment of the settlement terms.

The Vienna meeting ended with a grudging realisation that in some quarters safeguards, even though not needed, may be required if the Convention or Model Law was going to be approved.

The next meeting in February 2017 began for me with a sobering stroll past N.Y.C.'s Trump Tower. The agenda included the issues which ultimately became enshrined in Articles 4 and 5. There was a wide range of views about the right of a party to resist attempts to enforce a Settlement Agreement. Experienced mediators warned against pandering to "Settlors Remorse." There

was a strongly argued suggestion that a Party seeking to set aside a mediated settlement agreement should be able to reopen *all* the issues in the mediation and advance all defences that would have been available had the dispute gone to court. On Wednesday of that week the issues surrounding the wording of Articles 4, 5.1(c),(e), and (f) were the subject of fierce debate. Then came the snowstorm

New York pretty much closed down along with the U.N. for the day. Allan Stitt, one of the Canadian Government's representatives, and a Distinguished Fellow of the International Academy of Mediators, persuaded a colleague to open his offices for as many delegates as could be contacted. We all gathered together in the main boardroom and sitting round the table continued the discussions. What had been a confrontational negotiation became a mediation! Sustained by New York deli sandwiches and other local delicacies, thoughtfully provided by the Chair of the Secretariat, we worked until the late afternoon and thrashed out the compromise wording for Article 4 and the wording for Article 5.1(e) and (f) on the Grounds for Refusing to Grant Relief. The potentially contentious provisions of Article 4.1(b) on the need for some form of mediator certification are examined in another chapter by Allan Stitt.² This one will deal with Article 5.1(e) and (f).

The Report of the Working Group II on the progress in Vienna in September 2016 summarises the conflicting views on the question of relieving a party from its obligations on the basis of misbehaviour or non-disclosure by the mediator. Many of the arguments advanced reflected the approach adopted internationally in respect of arbitral awards where allegations of impropriety or bias by the arbitrator called the validity of an award into question. In Vienna it was decided to leave the question open to the next session in New York, in February 2017.

At the end of the Wednesday afternoon session in New York, I, as the IAM representative, put forward a draft for both (e) and (f) which highlighted the essential differences between arbitration and mediation, which some of the arguments being advanced had failed to recognise. The mediation community appreciates the fundamental distinction between an arbitrator *deciding* the issues between disputants and a mediator *facilitating* the disputants to achieve *their* consensual solution. Whereas bias, improper behaviour, or a non-disclosed personal interest might affect an arbitra-

² See SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019).

tor's decision to the detriment of one party, such behaviour by a mediator can only be relevant if it vitiates a party's consent to a settlement. Bearing in mind that the Convention is expressly designed for international commercial disputes, in which the parties are invariably represented by lawyers and experts, parties wishing to resile from the agreement on the grounds that they were forced to consent by the mediator should seek redress against their lawyer. Their lawyer is there to protect their interests, guide their decisions, and ensure that their consent to the settlement was informed and genuine.

However, some delegates were under instructions from their respective governments to ensure that any defences against enforcement included protection for individuals who are disadvantaged by an unfair, biased, or misbehaving mediator. Some accommodation had to be reached.

Gradually, sustained by the New York classic delicacies while the snowstorm raged outside, the following principles were established by all present: 1) Any alleged breach or failure had to be material; *and* 2) materiality was to be judged objectively; *and* 3) the party seeking relief had the burden of establishing that such breach or failure vitiated their consent to the settlement agreement from which they were seeking to resile.

III. ARTICLE 5.1(e) BACKGROUND

Article 5.1(e) states: "There was a serious breach by the mediator of standards . . . without which breach that party would not have entered into the . . . agreement."

A. *Standards*

Every mediator who engages in international commercial mediation subscribes to a Code of Conduct or a Code of Ethics which is likely identified in the Mediation Agreement under which the parties and the mediator have agreed to operate. Several codes were recognized, and there are currently discussions to try and establish a uniform Code of Conduct for mediators. However, this is not without difficulty given the different approaches by some countries to defining the style of mediation, diverse constraints placed upon mediators, and cultural variations that exist, let alone the

fact that mediation as a flexible process needs to be adapted to the needs of the parties. Until an acceptable universal Code of Conduct or Ethics is established, mediators performing under the Singapore Convention should identify the applicable Code of Conduct or Ethics in their mediation agreements.

B. *Serious Breach*

The agreement on the adjective was after much discussion where views ranged from such tests as “any breach,” “egregious breach,” “material breach,” and “unacceptable breach.” The adjective was needed to introduce an objective assessment of the gravity of the alleged breach in order to avoid claims that are fanciful, immaterial, and subjective.

C. *Vitiating of Consent*

“. . . [W]ithout which breach that party would not have entered into the settlement agreement.” These words encapsulate the essential feature that the burden of causation is on the party seeking to resile from a Settlement Agreement.

The requirements of Article 5.1(e) are cumulative. If a party can surmount the first two hurdles on standards and serious breach, the party still must prove that in spite of being represented and presumably advised by his lawyers and experts, the behaviour of the mediator caused him to consent to a settlement against his will. Given that the Convention only applies to international commercial disputes, the prospects of an international party successfully convincing a tribunal that a mediator’s behaviour brought about their unwilling consent will be extremely rare!

IV. ARTICLE 5.1(f) BACKGROUND

Article 5.1(f) states: “. . . [F]ailure . . . to disclose . . . circumstances that raise justifiable doubts as to the mediator’s impartiality or independence.” “Justifiable” introduces an objective assessment for the relevant tribunal to apply and places the burden of satisfying that test on the party seeking to resile from a settlement agreement. Once again, the discussions had ranged from such tests

as “any doubt,” “serious doubt,” and “significant doubt,” to “unequivocal doubt.” “Justifiable” is a clever adjective because it imports the concept of a judicial determination and rules out arguments based on a subjective assessment by the party seeking to raise it.

“ . . . [S]uch failure to disclose had a material impact or undue influence on a party”: The second hurdle that the resiling party needs to overcome is to prove to the tribunal that the failure to disclose had a material impact or undue influence on him. “Material” requires a sufficient element of judicial determination to elevate the complained effect above the trivial. “Undue influence” is a well-established legal concept to ensure an objective judicial conclusion.

“ . . . [W]ithout which failure that party would not have entered into the settlement agreement”: As with Article 5.1(e), the cumulative effect of the requirements of Article 5.1(f) imposes a further hurdle to overcome by the party seeking relief. The party needs to prove that the failure to disclose vitiated his consent to the settlement agreement. As with Article 5.1(e), given that the Convention only applies to international commercial disputes, the prospect of an international party successfully convincing a tribunal that a mediator’s failure to make a relevant disclosure resulted in both his lack of impartiality or independence and resulted in unwilling consent will be rare! One can imagine that a court might conclude that the consent was not informed and grant relief only where it is satisfied that the conduct complained of amounted to undue influence or which had a material impact upon the parties and presumably also the minds of their legal and professional advisers.

The initial scepticism of many experienced mediators might be assuaged once the key words and safeguards against abuse in Articles 5.1(e) and (f) are properly understood. Certainly, the implications of these two sections should be recognised by lawyers representing parties in a mediation. Most experienced mediation advocates already know to rebuff any attempt by an officious mediator to browbeat their client, undermine their clients’ reliance upon their advisers’ counsel, and employ other ways to induce consent. Experienced mediation advocates will, as a matter of course, satisfy themselves that their client understands the terms of any settlement and that any consent is informed and genuine. If enforcement of the settlement agreement is governed by the Singapore Convention, these sound lawyer responsibilities will be all the

more important, and will need attention by lawyers for *all* the parties in order to minimise the possibility of challenges under either Articles 5.1(e) and (f).

V. CONFIDENTIALITY

A key feature of mediation of course is the confidential nature of the process that parties rely on in order to promote candour in their discussions with the mediator and other parties. Different jurisdictions throughout the world have established their own rules for the conduct of commercial mediations and virtually all the rules afford a degree of confidentiality/privilege. There are however wide differences which have a bearing upon applications seeking relief under Article 5 of the Singapore Convention. How is a party going to establish for example the behaviour of a mediator which the party complains is a serious breach of acceptable standards? Establishing the applicable standards does not involve any examination of what transpired in the mediation, but an examination of the alleged breach will. How is a party in California, for instance, going to be able to describe what happened in support of his application given the strict provisions of the California Evidence Code?

There is a difference between the approach of the common law jurisdictions and the civil law ones; and even the common law jurisdictions do not have a universal approach towards mediation confidentiality. The common law countries, with which I am more familiar, are divided in their approach. There are two distinct views: some jurisdictions consider that mediation is “no more than assisted without prejudice negotiations” while others consider that mediation has an entirely separate privilege of its own. In the former case, the courts have regarded meditation privilege/confidentiality as subject to all the usual challenges with which we are familiar. In the latter case of a separate mediation doctrine, some jurisdictions regard the mediation privilege as absolute and will not admit any evidence of what transpired in a mediation, while others that recognize the privilege permit the courts to admit evidence “in the interests of justice.”

This dichotomy in approach is troubling, not least because in England and Wales, different courts have adopted different approaches. I wonder sometimes whether judges really understand the mediation process at all! In the U.K., as in other jurisdictions, judges receive mediation training, but, as with all skills, there is no

substitute for actual experience. As my great friend and mentor Allan Stitt puts it: “in theory there is no difference in practice, but in practice there always is!”

This is not the place for a treatise on mediation privilege, but if the Singapore Convention is going to be useful, at some point the question of mediation privilege/confidentiality will need to be addressed especially for when a party is seeking to rely upon mediator’s conduct to establish a defence under Article 5. Given the increasingly wide-spread use of mediation, the judicial encouragement to mediate rather than litigate, and the statements in the Preamble of the Singapore Convention, it is important that the question of mediation confidentiality/privilege be reviewed. Some form of consensus in the common law countries, if not all jurisdictions, need to be achieved in order for Article 5 to become practically operational.

A few examples from English jurisdiction will serve to demonstrate the probable approach by the English Courts if the U.K. Government decides to adopt the Convention. From 2007, there were a series of cases in which parties sought successfully to introduce evidence of what had been done or said in mediation in support of a variety of applications. Some sought to establish that an agreement had been reached other than in the form prescribed in the mediation agreement to which the parties had subscribed. Others sought to set aside an agreement on the grounds of an alleged impropriety. And, in one bizarre case, a party supported a claim for the recovery of costs of a mediation on the grounds of the other party’s unreasonable behaviour in the mediation. The trend has been to follow the “assisted without prejudice negotiations” line and admit the evidence either where the parties have themselves waived their privilege, or where the court has been persuaded that the evidence was admissible under one of the exceptions adumbrated by Walker, L.J. in *Unilever PLC v. Procter & Gamble*.³

Of the exceptions listed by Walker, L.J., the only one which might be appropriate for the purposes of relief under the Singapore Convention is “Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other ‘unambiguous impropriety.’” However, the court would only allow the

³ *Unilever PLC v. Procter & Gamble Co.* [2000] 1 WLR 2436 (Eng. & Wales).

exception to be applied in the clearest cases of abuse of a privileged situation.”⁴ In *Forster*, the behaviour was alleged blackmail.

There have been other cases in which the court has been asked to waive privilege on the grounds of unambiguous impropriety. Of relevance to the issue of the Convention is the decision of Ramsey, J. in *Farm Assist Limited (in Liquidation) v. The Secretary of State for Environment, Food and Rural Affairs (No. 2)*⁵ where a party applied to set aside the settlement agreement on the grounds that it was entered into under economic duress, and other complaints including oppression. Apart from the highly unusual procedural circumstances surrounding the application itself, the bizarre nature of the complaint is highlighted by the fact that at the mediation (some six years previously!) both parties were represented by Queens Counsel, solicitors, and each had experts to advise them. The issue before the court was an application by Farm Assist for a witness summons requiring the mediator to give evidence about what had occurred in the mediation. Anathema to most jurisdictions, but Ramsey decided that it was in the interests of justice to allow the witness summons to stand. The irony is that the parties resolved their dispute before the matter came back to court, but the Judge was persuaded to hand down his judgment nonetheless.

The decision was roundly criticised in mediation circles and required a convoluted procedural change to the Civil Procedure Rules.⁶ In *Ferster v. Ferster*,⁷ the Court of Appeal upheld the decision of Mrs. Justice Rose to allow one party to put in evidence in his shareholder’s unfair prejudice petition an e-mail sent to the mediator by the other party for onward transmission to him, which in the Judge’s opinion amounted to a blackmail threat. Even though normally such a communication was protected by mediation privilege, the Judge thought its contents “fell within the ‘unambiguous impropriety’ exception to that privilege.”⁸ It seems therefore that if the U.K. Government decides to adopt the Singapore Convention, there will be no confidentiality obstacles to applying Article 5.

But in other jurisdictions, the result might be different. The decision of the California Supreme Court in *Cassel v. Superior Court*⁹ approving the decision in *Wimsatt v. Superior Court*

⁴ *Forster v. Friedland C.A.* (Civil Division), Transcript No. 205 of 1993 (Eng. & Wales).

⁵ *Farm Assist Ltd. (in liquidation) v. The Secretary of State for Environment, Food and Rural Affairs (No. 2)* [2007] EWHC (TCC) 2870 (Eng. & Wales).

⁶ Civil Procedure (Amendment) Rules 2011 (Eng. & Wales).

⁷ *Ferster v. Ferster* [2016] EWCA (Civ) 717 (Eng. & Wales).

⁸ *Id.* at para. 4 (Lord Justice Floyd).

⁹ *Cassel v. Superior Court*, 119 Cal. Rptr. 3d 437 (2009).

(Kausch)¹⁰ and, albeit reluctantly, made this remarkable statement: “when clients, such as [the malpractice plaintiff in that case], participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel.”

With Chin, J. observing:

But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney’s statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so. This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature’s purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point.

These opinions suggest that if the Singapore Convention is adopted by the U.S., California (in the U.S.) will need to revise the Evidence Code. An attempt to introduce a change to remove the privilege of client/attorney mediation communication in an action for malpractice, breach of fiduciary duty, or State Bar disciplinary action was talked out.¹¹

¹⁰ *Wimsatt v. Superior Court (Kausch)*, 152 Cal. App. 4th 395 (2007).

¹¹ Assembly Bill No. 2025 was introduced by Assembly Member Wagner on February 23, 2012.

In Canada, the Supreme Court in *Union Carbide Canada Inc. and Dow Chemical v. Bombardier Inc. et al.*¹² adopted the same approach as the English Court of Appeal in *Unilever PLC v. Procter & Gamble* towards mediation privilege. Although that case was concerned with a dispute involving an oral agreement reached in mediation, it is probable that the Canadian courts would also have no qualms about waiving mediation privilege when dealing with applications for relief under Article 5.1(e) and (f). Other common law jurisdictions have adopted a similar judicial approach, and therefore is unlikely to have any difficulty waiving privilege.

On the face of it there is a potential difficulty for Europe in that the provisions of Article 6 of the ADR Directive, which provide for the confidentiality of mediation, will need to be reconciled with Article 5.1(e) and (f) of the Convention.

Due to these varying approaches to privilege/confidentiality, the ability to prove claims not only under Article 5.1(e) and (f) but the entire Article 5 will vary across jurisdictions.

VI. CONCLUSION

While the terms of Article 5.1(e) and (f) at first blush might produce in the minds of international commercial mediators a similar alarming reaction as the ICC panellist expressed, a considered understanding of the hurdles over which any applicant has to jump should calm the nerves. After fully understanding the two sections and the privilege/confidentiality obstacles, mediators ought to realise that the sections provide adequate safeguards against abuse by parties and as long as mediators perform professionally—independently, fairly, courteously, and neutrally with all parties—they have little to fear!

¹² *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800 (Can.).

THE SINGAPORE CONVENTION AND THE METAMORPHOSIS OF CONTRACTUAL LITIGATION

*Jean-Christophe Boulet**

This article addresses the grounds provided for in Article 5 of the Singapore Convention for the refusal of enforcement of a settlement agreement or for the refusal of a settlement agreement as evidence that the dispute has been resolved.¹ It is divided into three sections. The first section briefly places these grounds in the context of the Singapore Convention as a whole as well as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The second section is devoted to a more detailed examination of the various grounds listed in Article 5 of the Convention, except for 5.1(e) and (f) that are linked to the mediation process. On the basis of the findings in the first two sections, the third and last section tries to assess to what extent the Convention improves the situation of the party who wants to enforce a settlement agreement.

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¹ The notion of “recognition” of settlement agreements was challenged by some delegations in the Working Group of UNCITRAL which was in charge of the project and, instead of using that word, it was eventually decided that the concrete legal effect which was sought through the “recognition” of a settlement agreement would be stated, namely the possibility to invoke the settlement agreement as a defence in court proceedings on the merits. *See* U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session (25 June–13 July 2018), U.N. Doc. A/73/17 (2018) at Annex I [hereinafter Singapore Convention]; Singapore Convention art. 3, para. 2. That effect appears to be similar to the one that may be understood under the “recognition” of the arbitral awards under the New York Convention. *See* UNCITRAL, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) 10 (2016) [hereinafter UNCITRAL SECRETARIAT GUIDE]. It also appears to be comparable with that of the “recognition” of the arbitration agreement under Article II of the same Convention. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. For the sake of convenience, the word “recognition” will be most often used in the rest of this article.

I. ARTICLE 5 OF THE SINGAPORE CONVENTION IN CONTEXT

The grounds provided for in Article 5 of the Singapore Convention are closely linked to some other aspects of the Convention. So it seems useful to first identify some of these links in order to grasp the exact ambit of these grounds.

It seems also useful to put Article 5 of the Singapore Convention in the context of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indeed, the New York Convention was seen by UNCITRAL, from the beginning, as the model to be followed in order to encourage mediation in the same way that the New York Convention has fostered the growth of arbitration by facilitating compliance with arbitral awards.²

Let's first recall that the UNCITRAL Model Law on International Commercial Conciliation (2002)—which was amended during the drafting process and renamed the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018—had enshrined since 2002 the fundamental principle that a settlement agreement “*is binding and enforceable*” (Article 14). It did so without specifying the method by which any enforcement would take place. This open question is answered by the Singapore Convention and the amendments to the Model Law.

These preliminary points highlight some parameters that circumscribe the defences to enforcement or recognition.

A. *Nature of the Defences*

One of the very first notes issued by the UNCITRAL Secretariat on this project pointed out that:

The grounds for refusing enforcement of a settlement agreement vary depending on the means chosen for enforcement. They would be similar to grounds for refusing enforcement of court decisions when the settlement agreement is given the status of a judgment, and would include, for example, public policy, a jurisdictional test and lack of due process. When contract law principles apply, the grounds for challenging the validity of a settlement

² See, e.g., Note by the Secretariat, *Proposal by the Government of the United States of America: Future Work for Working Group II*, at 3, U.N. Doc. A/CN.9/822 (June 2, 2014).

*agreement would include, for example, consideration of the capacity of the parties, and whether the agreement was procured by misrepresentation, duress or undue influence.*³

Indeed, the nature of the grounds mirror the nature of the instrument.

The Singapore Convention, which excludes in Article 1.3 settlement agreements that are enforceable as judgments or as arbitral awards, deals with *contracts*, and more specifically with a particular kind of contract, the settlement agreement, which it defines as “an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute.” (See Article 1.1).

As the Convention deals with a contract “resulting from mediation,” a question had to be considered: Could the grounds relate to the process of mediation and its possible flaws or should they focus on the contractual outcome of this process, namely the settlement agreement itself?

The answer is clear: The choice was made to focus exclusively on the settlement agreement. Although two grounds concerning the mediation process itself were initially considered by the Working Group, they were retained to the extent that any breach of the grounds leads a party to enter into an agreement (See Art. 5.1(e) and (f)). These two mediation-related defences are examined in another chapter in this book by Michel Kallipetis.

Thus, the subject-matter of the Convention is a contract and all the grounds relate to the contractual nature of a settlement agreement. This is why, as we will see under Section II, only the defences of the New York Convention that are applicable in contractual matters, foremost those related to an arbitration agreement,⁴ have been included in the Singapore Convention.

B. *Definition of “Settlement Agreements”*

As mentioned above, the Singapore Convention set forth its own definition of the contract it covers, namely the settlement agreement, as being “an agreement resulting from mediation and

³ See UNCITRAL, Note by the Secretariat, *Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, para. 28 (Nov. 27, 2014).

⁴ New York Convention, *supra* note 1, art. II, para. 3, & art. V, para. 1, subparagraph a.

concluded in writing by parties to resolve a commercial dispute” (Art. 1.1).

This definition appears to be independent of the definition that national laws may give to “settlements.” A number of national laws include in their definition of a “settlement” the requirement of mutual concession between the parties,⁵ which is not the case in Article 1.1 of the Convention. Therefore, it seems that this requirement would not qualify as a basis for invalidity of the settlement agreement.⁶

Another difference with “national” settlements lies in the fact that the settlement agreement under the Convention is defined as an agreement “concluded in writing.” There is no settlement agreement without a written one. This requirement appears once again to differentiate a Singapore settlement from a “national” one.

Of course, a last difference lies in the definition of the settlement agreement under the Singapore Convention as a settlement agreement resulting from mediation. This feature is expanded in Article 4.1(b) which specifies the means to prove that a settlement agreement results from mediation, the first of those means being the mediator’s signature on the settlement agreement.⁷ Unlike a “national” settlement, a settlement agreement covered by the Singapore Convention cannot be an agreement concluded by the parties outside a mediation process.⁸

⁵ See WILLIAM DROSS & BLANDINE MALLET-BRICOUT, *LA TRANSACTION, PROPOSITIONS EN VUE DE LA RÉFORME DU TITRE XV—LIVRE TROISIÈME DU CODE CIVIL “DES TRANSACTIONS”* 295–416 (2014) (Fr.).

⁶ See Singapore Convention, *supra* note 1, art. 5.1(b)(i) (defence). This result does not exclude that the lack of mutual concession could lead to the invalidity of the settlement agreement on the basis of requirements of the applicable law as to the validity of any contract in general, since such requirements would not be specific to another contract than the one covered by the Convention.

⁷ For further discussion, see SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 *CARDOZO J. CONFLICT RESOL.* 1173 (2019).

⁸ A proposal to replace the words “resulting from mediation” with the words “after they have engaged in mediation” in order to avoid a strict causality between the mediation process and the resulting agreement was rejected by the Working Group. See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, September 12–23, 2016), U.N. Doc. A/CN.9/896, para. 37 (Sept. 30, 2016).

C. *No Review Mechanism in the State of Origin*

One last comment on an element omitted from the Convention. It relates to a question initially considered by the Working Group, namely whether to include as a precondition to enforcement a process for reviewing a settlement agreement in the State where it originated.

One opinion was that such review mechanism would allow courts at the originating State to ascertain matters such as the validity of the settlement agreement so that grounds for refusing enforcement in other jurisdictions would be limited.⁹ However, that review mechanism was seen as tantamount to double exequatur and was not retained.

Thereafter, possible defences were considered based on the assumption that a party to a settlement agreement would be able to seek enforcement directly at the place of enforcement.¹⁰ This approach is similar to that adopted by the New York Convention with one significant exception. The UNCITRAL Working Group did not adopt a proposal to incorporate a ground inspired by Article V(1)(e) of the New York Convention,¹¹ namely the setting aside (or suspension) of the award by a competent authority of the country in which, or under the law of which, that award was made.

II. EXAMINATION OF ARTICLE 5

Article 5 of the Singapore Convention follows the structure of Article V of the New York Convention: the first paragraph is devoted to the various grounds that can only be considered at the request of the opposing party, and the second paragraph is devoted to two grounds that the competent authority, in principle a court, can raise on its own motion (“*ex officio*”).

Likewise, the introductory sentences of the two paragraphs of Article 5 reproduce the wording of Article V of the New York Convention. The wording implies that the grounds for refusal are

⁹ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, September 7–11, 2015), U.N. Doc. A/CN.9/861, para. 83 (Sept. 17, 2015).

¹⁰ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016), U.N. Doc. A/CN.9/867, para. 147 (Feb. 10, 2016).

¹¹ U.N. Doc. A/CN.9/861, *supra* note 9, para. 84.

exhaustive, that the party opposing recognition or enforcement bears the burden of proving such grounds, and that national courts can refuse enforcement of an award on those grounds but are not obliged to do so.¹²

With regard to the wording of the grounds themselves, the second paragraph of Article 5 (Article 5.2) almost replicates the wording of Article V(2) of the New York Convention and was the subject of a broad consensus in the Working Group. In contrast, the first paragraph of Article 5 (Article 5.1) diverges quite broadly from Article V(1) of the New York Convention and was, for the most part, the subject of intense discussion in the Working Group.

Although a consensus finally emerged on the substance of the first paragraph, the Working Group, while agreeing on the necessity of regrouping certain defences set out in the paragraph, was unable to agree on the regroupings. In particular, unsuccessful attempts were made to clarify that the ground provided for in subparagraph 5.1(b)(i) (“null and void, inoperative or incapable of being performed . . .”) was of a generic nature and that the following grounds under subparagraphs 5.1(b)(ii), (b)(iii), (c), and (d) were illustrative of that first ground.¹³ The Working Group could only express “a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds.”¹⁴

We will examine successively the different grounds set out in Article 5. This examination will provide us an opportunity to observe overlap between some of the grounds. However, as mentioned earlier, the grounds mentioned under subparagraphs Article 5.1(e) and (f), which are linked to the mediation process, will be dealt with in another chapter and therefore will not be considered here.

¹² UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 125–29.

¹³ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, para. 62 (Feb. 19, 2018); U.N. Comm’n on Int’l Trade Law, Report of the U.N. Comm’n on Int’l Trade Law, Fifty-first session (25 June–13 July 2018), U.N. Doc. A/73/17, para. 31 (2018).

¹⁴ U.N. Doc. A/CN.9/934, *supra* note 13, para. 65; U.N. Doc. A/73/17, *supra* note 13, para. 31.

A. *Article 5, Paragraph 1*

1. Paragraph 1, Subparagraph (a): “A party to the settlement agreement was under some incapacity”

This subparagraph is the only one under paragraph 1 that did not spark discussion. This ground, along with subparagraph (b)(i) on null and void, are the only two grounds under paragraph 1 which are inspired by the New York Convention. They reflect the two grounds under the New York Convention for challenging an arbitration agreement.

This subparagraph is inspired by the ground set forth in the first part of Article V(1)(a) of the New York Convention, except that it does not include the reference to the applicable law.

The Working Group recalled that this reference to the applicable law was omitted from the Model Law on International Commercial Arbitration (1985) “because it was viewed as providing an incomplete and potentially misleading conflict-of-laws rule.”¹⁵

2. Paragraph 1, Subparagraph (b)

Subparagraph (b) sets forth three grounds related to the settlement agreement:

(b)(i): The settlement agreement “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”

This ground adopts the wording of the second ground under the New York Convention that applies to an arbitration agreement, the one set forth in Article II(3), and supplements it with the reference to the applicable law set forth in Article V(1)(a).¹⁶ This ground consists of three elements:

“Null and void”

On the one hand, it was agreed by the Working Group that this “validity defence” should not allow the competent authority to

¹⁵ U.N. Doc. A/CN.9/896, *supra* note 8, para. 85.

¹⁶ Under the New York Convention, the applicability to Article II (3) of the conflict-of-law rule set out in Article V(1)(a) of that Convention is a controversial issue because of the different timing for the application of these two provisions, which will not be the case under the Singapore Convention.

impose requirements in domestic law and it should not extend to form requirements.¹⁷ On the other hand, it was also agreed that this validity defence was sufficiently broad to encompass various contract law defences like fraud, mistake, misrepresentation, duress, or deceit.¹⁸ The combination of these two elements seems to be reminiscent of the so-called “maximum standard” approach of Article II(3) of the New York Convention, which applies the choice-of-law approach but leaves aside validity defences that are not widely accepted by the international community.¹⁹

It should be added that the defences (that this chapter does not cover) under subparagraphs (e) and (f) constitute additional validity defences which are specific to a settlement agreement as defined under the Singapore Convention.

“Inoperative”

This element was not discussed as such by the Working Group. Under the New York Convention, it refers to cases where the arbitration agreement is valid but has ceased to have effect for the future by the time the competent authority is requested to refer the parties to arbitration.²⁰ This ground permits defences based on termination, waiver, and repudiation of the arbitration agreement, changed circumstances, as well as novation or modification of the arbitration agreement.²¹

¹⁷ U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of Commercial Disputes, International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation*, U.N. Doc. A/CN.9/WG.II/WP.202, para. 43 (July 14, 2017).

¹⁸ U.N. Doc. A/CN.9/896, *supra* note 8, para. 100; U.N. Doc. A/CN.9/934, *supra* note 13, para. 43. Other examples of this defence under the New York Convention include unconscionability or illegality, but also lack of capacity (which is dealt with here separately under subparagraph (a) as we have seen). See GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 117 (2012).

¹⁹ See R. Doak Bishop, Wade M. Coriell & Marcelo Medina Campos, *The “Null and Void” Provision of the New York Convention*, in *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE* 275, 290–91 (Emmanuel Gaillard et al. eds., 2008).

²⁰ Stefan Kröll, *The “Incapable of Being Performed” Exception in Article II(3) of the New York Convention*, in *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE* 323, 328 (Emmanuel Gaillard et al. eds., 2008).

²¹ BORN, *supra* note 18, at 117; M. Ipek, *Interpretation of Article II(3) of the New York Convention*, 23 *MARMARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ HUKUK ARAŞTIRMALARI DERGİSİ* 711–12 (2017) (Turk.).

“Incapable of being performed”

Like the previous one, this defence was not discussed as such by the Working Group. Under the New York Convention, it refers to cases where the arbitration cannot be set into motion²² but no party has the right to terminate the contract (the exercise of such a right would render the arbitration agreement “inoperative”²³).

This ground covers, in particular, problems that do not result from the behaviour of one party, such as “pathological arbitration agreements” where inherent contradictions or vagueness of the wording cannot be resolved by interpretation or other contractual techniques, problems with the constitution of the tribunal stemming, for example, from the non-availability of the preselected arbitrator, or problems setting the arbitration into motion at the agreed place of arbitration.²⁴

(b)(ii): *The settlement agreement “is not binding, or is not final, according to its terms”*

The same words appear in Article V(1)(e) of the New York Convention (“The award has not yet become *binding* on the parties”) and in Article 1(d) of the 1927 Geneva Convention on the execution of foreign arbitral awards (“the award has become *final* in the country in which it has been made”), where the provisions are generally understood as referring to possible means of recourse against the award. Such an understanding is not applicable to the Singapore Convention, which relates to a contract.

This ground, as well as that set out in subparagraph (b)(iii) on “subsequently modified,” were originally conceived as parts of the same category of defences pertaining to “the readiness or validity of the settlement agreement to be enforced.”²⁵ The example of a draft agreement was given to illustrate a non-final settlement agreement.²⁶

It was pointed out that the “final” nature of a settlement agreement was addressed by the requirement under paragraph

²² Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 39, 39–68 (Emmanuel Gaillard et al. eds., 2008).

²³ Kröll, *supra* note 20, at 329.

²⁴ *Id.* at 330–43.

²⁵ U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements*, U.N. Doc. A/CN.9/WG.II/WP.195, para. 52 (Dec. 2, 2015).

²⁶ U.N. Doc. A/CN.9/896, *supra* note 8, para. 88.

1(b)(iii) that the settlement agreement has not been “subsequently modified” and also by the requirement under Article 4.1(a) to supply “the settlement signed by the parties.”²⁷

So it was clear that there was a risk of overlap with subparagraph (b)(iii) and more generally with the definition of the settlement agreement which ensures the binding nature of the settlement agreement.

The current version of the provision emerged at the penultimate session of the Working Group in the midst of an avalanche of diverse proposals. In an attempt to reduce the overlap and confusion risks, the Working Group agreed to add the words “according to its terms” to this subparagraph in order to restrict the scope of this ground solely to the express statements in the settlement agreement.²⁸

(b)(iii): The settlement agreement “has been subsequently modified”

As just explained, this provision is not clearly differentiated from subparagraph (b)(ii). At the penultimate session of the Working Group, it was recalled that “the purpose of the clause was to ensure that only the latest version of the settlement agreement ‘concluded by the parties’ should be enforced,”²⁹ which seems to express the finality requirement under (b)(ii).

At its last session, the Working Group rejected a proposal “to add the word “substantially” after the word “subsequently” to clarify that minor modifications should not be a ground for refusing enforcement of the modified settlement agreement.” The Group found that “the word “substantially” would introduce a discretionary or subjective assessment by the competent authority and was therefore not desirable.”³⁰ This rejected proposal seemed to be in line with a previously expressed opinion that the provision “should be clarified in order to avoid situations where enforcement of a settlement agreement would be denied because the parties subsequently modified certain terms of that agreement.”³¹

²⁷ See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, October 2–6, 2017), U.N. Doc. A/CN.9/929, para. 77 (Oct. 11, 2017).

²⁸ U.N. Doc. A/CN.9/929, *supra* note 27, paras. 82–93.

²⁹ U.N. Doc. A/CN.9/929, *supra* note 27, para. 86.

³⁰ U.N. Doc. A/CN.9/934, *supra* note 13, para. 45.

³¹ U.N. Doc. A/CN.9/929, *supra* note 27, para. 94.

Indeed, the addition of the word “substantially” would have given subparagraph (b)(iii) a different scope by potentially allowing the recognition and enforcement of a new agreement concluded by the parties after and outside the mediation process. As already noted under Section I of this chapter, this would have been contrary to the definition of the settlement agreement as “resulting from the mediation” and, even more so, with the means in Article 4.1(b) to prove that the settlement agreement results from mediation, the first of those means being the mediator’s signature on the settlement agreement.

In this respect, it should be mentioned that a proposal to include in the scope of the Convention all settlement agreements irrespective of whether they resulted from mediation was repeatedly rejected. The Working Group reiterated its understanding that the Convention should apply to settlement agreements that only resulted from mediation.³²

That being said, agreements could be concluded not only after the termination of the mediation proceedings but also in other similar contexts, for example after an arbitral award was made.

It should be noted that when the Convention was adopted, UNCITRAL clarified the States’ obligation to enforce settlement agreements under the Convention. It covers not only the process of issuing an enforceable title (a process to transform a private document into an enforceable instrument) but also the actual enforcement of that title once issued, although this last aspect is not regulated by the Convention.³³ A settlement concluded by the parties after the mediation could be taken into account by the judge in the context of the enforcement process of a settlement agreement that has become an enforceable title (see next point).

3. Paragraph 1, Subparagraph (c)

Subparagraph (c) sets forth two grounds related to the obligations in the settlement agreement:

(c)(i) the obligations “have been performed”

This ground, which was present from the first draft text, was never disputed by the Working Group. Here again, it might be observed that this situation is not specific to mediation agreements. This defence could similarly arise when enforcing an arbitral award

³² See, e.g., U.N. Doc. A/CN.9/867, *supra* note 10, para. 115.

³³ U.N. Doc. A/73/17, *supra* note 13, para. 26.

that has already been performed. However, the New York Convention does not provide for this defence.

Indeed, from a technical point of view, a defence linked to that situation seems to fall under the rules governing the material enforcement of an enforceable title rather than under the rules governing the issuance of an enforceable title. Those last rules are the only rules harmonized by the Singapore Convention as well as the New York Convention, and they deal with the transformation (through the *exequatur* process) of the settlement agreement or the arbitral award into a title capable of being enforced.

The dissociation between these two different legal processes does not prevent defences technically linked to the material enforcement process from being raised during the process of issuing an enforceable title. On the contrary, it seems logical that the defendant raises those defences as early as possible. However, the fact remains that those last defences are legally distinct, and that they are not supposed to be harmonized by these two Conventions.

In this respect, it should be noted that the performance of obligations that are enshrined in an enforceable title is only one ground among others that can extinguish the effectiveness of an enforceable title under the law of the State where enforcement takes place. Other such grounds could include for instance a setoff, or a settlement between the parties, as mentioned under the previous point, or the expiry of limitation periods relating to the enforceable title as such. Once again, those grounds are supposed to be regulated by national laws.

(c)(ii) the obligations “are not clear or comprehensible”

This ground came in the wake of two successive proposals which were inspired by the need to ensure clarity of the settlement terms so that the terms can be properly enforced by the competent authority.

A first proposal required that the settlement agreement be in a “single document” as distinct from a mere exchange of communication between the parties.³⁴ This proposal was not adopted.³⁵

³⁴ U.N. Doc. A/CN.9/867, *supra* note 10, para. 134.

³⁵ U.N. Doc. A/CN.9/896, *supra* note 8, paras. 177–85. Article 2(2) of the Convention even seems to go quite in the opposite direction when it states that a settlement agreement is “in writing” if “*its content is recorded in any form.*” Those words echo, at least in part, those of Article 7(3) of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, which were designed to include agreements “*entered into in any form (e.g., including orally) as long as the content of the agreement is recorded*” (Explanatory note by the

A second proposal intended to supplement the requirement under Article 4.1(a) for a settlement agreement signed by the parties, with a complementary requirement that “the settlement agreement should set out in a clear and comprehensible manner its enforceable content.”³⁶ Instead, it was decided to move this requirement to Article 5 as an additional defence.

In order to circumscribe the scope of the provision to what is necessary for the enforcement of a settlement agreement, it also was decided to focus the requirement of clarity and comprehensibility on the obligations stemming from the settlement agreement rather than on the settlement agreement as a whole.³⁷

Thus, this ground reinforces the requirement that the settlement agreement be “in writing” (Article 1.1) by requiring that this writing be clear and comprehensible. However, this additional requirement applies only insofar as it is necessary for the proper enforcement (or recognition) of the obligations in the settlement agreement.

Since this ground is closely related to the “in writing” requirement, one could wonder if it does not overlap, at least in part, with the defence that the settlement agreement is “incapable of being performed” under Article 5.1(b)(i), especially in the case of the so-called “pathological agreements” (see above).

Finally, and once again, it can be noted that interpretation problems are not specific to settlement agreements. Difficulties can arise with the interpretation of arbitral awards, too.

4. Paragraph 1, Subparagraph (d): “Granting relief would be contrary to the terms of the settlement agreement”

When it adopted this provision, the Working Group confirmed that “such wording was broad enough to encompass situations in which the obligations in a settlement agreement would be conditional or reciprocal, and their non-performance could be justified for a variety of reasons,” and that “many different circumstances

UNCITRAL Secretariat). See UNCITRAL, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006*, para. 19 (2008).

However, this broad understanding of the “in writing” requirement seems to be contradicted by the requirement under Article 4(1)(a) of the Convention that “*the settlement agreement*” be “*signed by the parties*.”

It could also be noticed that even the idea of an exchange of communications seems, on the other hand, difficult to reconcile with the requirement under Article 4(1)(b)(i) of the Convention that the settlement agreement be signed by the mediator.

³⁶ U.N. Doc. A/CN.9/929, *supra* note 27, para. 51.

³⁷ U.N. Doc. A/CN.9/934, *supra* note 13, para. 52.

could affect the enforceability of obligations in settlement agreements, in particular in complex contractual arrangements, and that (this provision) should be broadly interpreted as covering a variety of factual situations.”³⁸

Examples of the defence that were cited included obligations in a settlement agreement that cannot be relied upon independent of other parts of the agreement, that have not yet arisen, and that are conditional in that the obligations of the party against whom relief is sought have not yet arisen.³⁹

The wording and illustrations suggest that this defence is capable of covering a variety of cases where non-performance of the settlement agreement by the party against whom enforcement or recognition is sought can be justified on a contractual basis, especially in cases of conditional or reciprocal obligations.

Another cited illustration of the defence involved a settlement agreement opting out of the Convention when the Contracting State has not made a reservation under Article 8.1(b) to opt-out (in case of such a reservation, the Convention would be applied only to the extent that the parties to the settlement agreement have agreed to apply the Convention (parties opted-in)).⁴⁰

Finally, the reference to “the terms” of the settlement agreement should have the same restrictive effect as in the case of subparagraph Article 5.1(b)(ii) on the defence of not binding or final on its terms.

B. *Article 5, Paragraph 2*

Paragraph 2 of Article 5 sets forth two grounds that allow the competent authority of the State where relief is sought to refuse enforcement or recognition of the settlement agreement of its own motion when:

1. Subparagraph (a): It “would be contrary to the public policy of that Party”

In the context of the New York Convention, it is generally accepted that a court seized with an application for recognition and enforcement may not review the merits of the arbitral tribunal’s

³⁸ U.N. Doc. A/CN.9/934, *supra* note 13, para. 57.

³⁹ *Id.*

⁴⁰ U.N. Doc. A/73/17, *supra* note 13, paras. 38–39.

decision, since the grounds for refusal under Article V are exhaustive.⁴¹ It is also an accepted exception that the public policy ground under Article V(2)(b) allows a court to consider the merits of the award,⁴² within the strict limits of this ground.

The situation appears different in the context of the Singapore Convention since, as we have seen, the grounds set out in its Article 5, paragraph 1, and in particular the ground under Article 5.1(b)(i), broadly allows a court to examine the validity of a settlement agreement.

In the context of the Singapore Convention, what differentiates the public policy ground from the grounds set out in Article 5, paragraph 1 is not so much the nature of the court's examination as the law under which it will occur: the public policy ground will be applied under the law of the State of the court while the ground under paragraph 5.1(b)(i) will be applied under the applicable law as determined by that provision.

Otherwise, this defence, that was literally taken from the New York Convention, is capable of receiving the same interpretation as under that Convention. For example, just as it is accepted that public policy under the New York Convention extends both to substantive public policy and procedural public policy, the same is true for the Singapore Convention. The Working Group confirmed that "public policy covered both substantive and procedural aspects."⁴³

However, this does not preclude some differences due to the difference in nature between a mediation process and an arbitration procedure. The Working Group noted that, because "the flexible nature of conciliation could be easily used by parties to resist enforcement using the procedural public policy defence," "the enforcing authority would duly take into account the characteristics of conciliation in assessing such defence."⁴⁴

Likewise, as to the assessment of the international or domestic character of public policy under the New York Convention, it is widely accepted that "a mere violation of domestic law is unlikely to amount to a ground to refuse recognition or enforcement on the basis of public policy."⁴⁵ The Working Group recognized that there is an established trend in case law that interprets "public pol-

⁴¹ UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 126–27.

⁴² *Id.* at 247.

⁴³ U.N. Doc. A/CN.9/896, *supra* note 8, para. 42.

⁴⁴ U.N. Doc. A/CN.9/867, *supra* note 10, para. 156.

⁴⁵ UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 243.

icy” more narrowly when there is an element of extraneity.⁴⁶ It was, however, underlined that “it would be up to each Contracting State to determine what constituted public policy” and that, for instance, public policy could include issues relating to national security or national interest.⁴⁷

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

Like Subparagraph (a), this defence also has been copied from the New York Convention, and therefore, it should receive the same restrictive interpretation as under that Convention.⁴⁸

Likewise, under the Singapore Convention, whether the subject matter of the dispute is “not capable of settlement by mediation” could already have been considered under the broad Article 5.1(b)(i) defence and the law selected by the parties or otherwise applicable. But, under Article 5.2(b), this issue will be looked at under the law of the State of the court.⁴⁹

This ground was barely discussed within the Working Group.

III. “IS THE CONVENTION AN IMPROVEMENT OVER THE STATUS QUO?”⁵⁰

From the examination under the previous section on the defences for refusing enforcement or recognition of a settlement agreement, it has become apparent that these grounds cover a broad scope. Indeed, we have seen that these grounds concern all stages of the life of the settlement agreement as a contract, from the time of its conclusion and the defects that may affect its validity up to the time it ceases to have effect based on the various legal grounds that can lead to the end of the contract. Between these two times, various defences to enforcement can arise, including

⁴⁶ U.N. Doc. A/CN.9/867, *supra* note 10, para. 157.

⁴⁷ U.N. Doc. A/CN.9/934, *supra* note 13, para. 67.

⁴⁸ See UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 230.

⁴⁹ In this respect, it can be noted that, under the New York Convention, the ground based on the matter being not capable of settlement by arbitration may sometimes coincide with that based on public policy. See UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 229.

⁵⁰ This was the title of Panel 5 of the Symposium on “The Singapore Convention: Compliance with Cross-Border Mediated Settlement Agreements” which was held on March 18, 2019 at Cardozo School of Law and which was jointly organized by the *Cardozo Journal of Conflict Resolution* at the Benjamin N. Cardozo School of Law and the Touro Law Center.

where non-performance of the settlement agreement can be justified on a contractual basis; for example, in case of conditional or reciprocal obligations or due to modification of the contract, or interpretation problems.

Faced with such broad defences against enforcement or recognition, one might legitimately wonder whether the Singapore Convention improves the current situation for a party seeking to enforce a settlement agreement. This is the question that will be addressed in this last section, and it will lead us to reconsider Article 5 defences in light of Article 3 general principles that are also examined in-depth in the chapter on Article 3 by Tim Schnabel.⁵¹

Before attempting to answer the question, it should be noted that this question is especially relevant to the enforcement of a settlement agreement. Indeed, as will be explained, the possibility of invoking the settlement agreement as a defence in court proceedings on the merits is already widely recognized. The Convention does not bring significant changes in this area. The situation is quite different with regard to enforcement and therefore, the following comments will be primarily devoted to the enforcement of the settlement agreements.

A. *What is the “Status Quo?”*

The first step in answering the question is to establish a benchmark: What is the present situation, the “status quo,” for a party wanting to enforce a settlement agreement? Before the start of this project, UNCITRAL Secretariat suggested a benchmark when in November 2014 it identified the legislative trends on enforcement of international settlement agreements resulting from mediation.⁵²

That document found that legislative solutions regarding the enforcement of settlements reached in mediation proceedings differ widely:

- “Some States have *no special provisions on the enforceability of such settlements, with the result that general contract law applies.*” (para. 21);

⁵¹ SING. REF. BK., Timothy Schnabel, *Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1181 (2019).

⁵² UNCITRAL, Note by Secretariat, *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, paras. 20–30 (Nov. 27, 2014).

- “Other States provide for enforcement of settlement agreements *as court judgments*, where a settlement agreement *approved by a court* is deemed an order of the relevant court and may be enforced accordingly.” (para. 22);
- “The practice of requesting a notary public *to notarize the settlement agreement* is adopted by a number of jurisdictions as a means of enforcement.” (para. 24);
- “The law in certain jurisdictions empowers parties [. . .] to *transform their settlement agreement into an arbitral award* for enforcement purposes.” (para. 26).

In short, two situations currently exist:

- either the settlement agreement must be enforced as a contract, which implies the need for *prior* contractual litigation on the merits;
- or the settlement agreement can be enforced as a judgment, as a notarial act or as an arbitral award, which implies the need for *prior* transformation of the settlement into one of these instruments.

B. *Article 3: A Radical Change!*

In view of the current situation, Article 3, and in particular its paragraph 1, introduces a fundamental change. This provision reads as follows: “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.”

Under this provision, each State that becomes Party to the Singapore Convention will allow the *enforcement* of settlement agreements under the terms of the Convention, which means that:

- contractual litigation on the merits will no longer be required before enforcement;
- transformation of the settlement agreement into a judgment, a notarial act or an arbitral award will no longer be required before enforcement.

In other words, instead of treating the settlement agreement as an ordinary contract that must be enforced through normal litigation under contract law—with all the difficulties, risks, and considerable time that accompanies litigation, the Singapore Convention skips this step. Instead, it moves any relevant issues to the enforcement court.

As we will see, this is a radical change, the significance of which cannot be overestimated.

C. *The Resistance Against Article 3 Logically Failed to Defeat that Article*

As one can imagine, such a radical change did not occur without hesitation and did only after much discussion. There was strong resistance within the UNCITRAL Working Group against Article 3 and, through that article, against the Convention itself, given the centrality of Article 3. However, that resistance failed to defeat Article 3.

This failure and the adoption of Article 3 appear logical. The arguments against Article 3 were not convincing. Those arguments can be summarized as follows: “Settlement agreements are mere contracts without any *res judicata*. Therefore, they should not be ‘recognized’ or ‘enforced.’”⁵³

Here are two replies to this argument:

a. First, as to the recognition of the settlement agreement, it is correct that various international instruments refrain from enshrining the “recognition” of court settlements (or “judicial transactions”) while still enshrining their enforcement.⁵⁴ This differentiation is generally explained by stating that “in some jurisdictions, judicial settlements do not have the force of *res judicata* and therefore they cannot be recognised in another State.”⁵⁵

A distinction is then made between the treatment of a judicial settlement as a procedural defence to a new claim, which would

⁵³ It must be pointed out here that this resistance against Article 3 focused mainly on its paragraph 2. As explained in footnote 1, this resistance against paragraph 2 led to the withdrawal of the concept of “recognition” of the settlement agreement and its replacement by the statement of its concrete meaning, namely the possibility to invoke the settlement agreement as a defence (“a shield”) against court proceedings on the merits by which the dispute resolved by the agreement would be re-litigated.

⁵⁴ This is the case in the Hague Convention of 30 June 2005 on Choice of Court Agreements, the EU regulation n° 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the newly adopted Hague Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters.

⁵⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, JUDGMENTS CONVENTION: REVISED DRAFT EXPLANATORY REPORT, TWENTY-SECOND SESSION RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS—18 JUNE–2 JULY 2019, THE HAGUE, DOC. NO 1 OF DECEMBER 2018, 344 (2018); similarly, see TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON THE 2005 HAGUE CHOICE OF COURT CONVENTION, 209 (2013).

not be allowed under these instruments, and the treatment of a judicial settlement as a contractual defence to the claim on the merits, which would not be precluded by these instruments.⁵⁶

However, asserting a settlement agreement as a defence (“a shield”) in regard to matters already resolved in a settlement agreement is commonly accepted in many jurisdictions.⁵⁷ Acceptance of this defence is a prerequisite for supporting the use of mediation. It would be pointless to resort to mediation if the resulting settlement agreement was not recognized as a defence against court proceedings on the merits. Otherwise, the dispute resolved by the settlement agreement would be re-litigated. Acceptance of a settlement agreement as a defence, whether a “procedural defence” or a “contractual defence,” is indeed wide, if not universal.

Therefore, there was no valid reason to deny this reality. This is why paragraph 2 of Article 3, “in accordance with the rules of procedure of the States”⁵⁸ and leaving aside the possible theoretical debates on the “recognition” of settlement agreements, enshrines this concrete legal effect of using the settlement agreement to prove the matter has been resolved.

b. Second, as to the enforcement of the settlement agreement, there is no necessary link between *res judicata* and enforcement. For example, notarial acts have no *res judicata* effect and yet they are enforceable. In the same way, international instruments allow the enforcement of court settlements which have no *res judicata* effect. Therefore, the lack of *res judicata* of settlement agreements is no reason to refuse in principle their enforcement.

Indeed, just as judgments (or arbitral awards), settlement agreements put an end to a dispute. While this similarity between judgments (or arbitral awards) and settlement agreements is largely recognized as to the defence (“shield”) effect, it is currently not recognized as to the enforcement (“sword”) effect, as we saw above (see point A, “What is the Status Quo”). Yet, the dissociation between these two effects is not logical because they are both sides of the same coin. By enshrining the enforcement of the settlement agreements, the Singapore Convention puts an end to this illogicality.

⁵⁶ *Id.*

⁵⁷ See, e.g., DROSS & MALLET-BRICOUT, *supra* note 5, at 295–416.

⁵⁸ As pointed out above, the modalities for invoking this effect may vary across legal systems and Article 3.2 of the Convention recognizes these possible differences by stating that a Party to the Convention shall allow the party to invoke the settlement agreement “*in accordance with its rules of procedure.*”

D. *The Resistance Against Article 3 Logically Succeeded in Expanding Defences Under Article 5*

As we just saw, the resistance against Article 3 failed to defeat that article. But the resistance against Article 3 was not only focused on that article. It also took another path, namely arguments to expand the defences under Article 5. This article offered another way to resist Article 3, by containing the deployment of its benefits. As we saw under section II, that resistance effort against Article 3 was successful, since Article 5 covers a broad scope of defences against recognition or enforcement of settlement agreements. This success also appears logical.

Here are a few comments to further explain this logic:

a. While the lack of *res judicata*⁵⁹ of the settlement agreement is not a valid reason to refuse its enforcement in principle or its use as a defence against re-litigation of the settled dispute (see the previous point), the lack of *res judicata* appears to be a valid reason to entitle the opposing party to raise a broad scope of contractual defences against enforcement.

It should be recalled that Article 3 of the Convention radically changes the current situation by authorizing the direct enforcement of a settlement agreement without any prior proceedings on the merits. Empowering the enforcement judge to look sufficiently at the contractual defences raised by the party opposing the enforcement appears to be a logical consequence.

b. This power for the enforcement judge is all the more necessary since Article 5 of the Convention does not contain a defence in connection with a decision on the merits by another court related to the settlement agreement.

Indeed, after having considered a possible defence in relation to a settlement agreement contrary to a decision of another court, which partially echoed Article V(1)(e) of the New York Convention and which was capable of covering, for instance, decisions on the validity or the performance of the settlement agreement,⁶⁰ the UNCITRAL Working Group abandoned that defence. It felt that such a ground “would inadvertently complicate the enforcement

⁵⁹ In this respect, it should be noted that the “binding” nature of the settlement agreement (UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, art. 15) is legally distinct from the “binding” nature of an arbitral award (New York Convention art. III) as having *res judicata* effect (UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 80–81), which cannot be the case of a contract.

⁶⁰ U.N. Doc. A/CN.9/867, *supra* note 10, para. 164.

procedure, invite forum shopping by parties, and would generally be covered through the defences already provided” in Article 5.1(b)(i) and Article 5.2(a).⁶¹

That decision was taken after the Working Group adopted a mechanism of direct enforcement, that is to say without a preliminary review of the settlement agreement in the State where it was originating from (see above, section I). The decision is quite significant as it leads to an almost total disconnection⁶² of the enforcement proceedings from the proceedings on the merits, contrary to what is the case under the New York Convention. Indeed, that decision reveals the deliberate will of the Working Group to entrust the enforcement judge, in place of the judge on the merits, with the examination of the defences relating to the contract.

In these circumstances, it appears that the broad scope of contractual defences set forth in Article 5 is only a natural consequence of this strategic choice. Of course, it remains that any examination of the contractual defences by the enforcement judge is ultimately focused on the enforcement issue, not on the substance.

c. In recent rulings,⁶³ the Court of Justice of the European Union promoted a fairly similar approach in the enforcement of notarial acts, even though these acts already were enforceable titles. The cases concerned the recovery of unpaid debts against consumers arising from mortgage loan agreements. The Court was faced with a disconnection under Spanish law between the proceedings on the merits and the enforcement proceedings. The court on the merits was not allowed to suspend enforcement proceedings based on an illegal notarial act, and the enforcement court

⁶¹ U.N. Doc. A/CN.9/896, *supra* note 8, para. 118.

⁶² The last possible connection with the proceedings on the merits lies in Article 6 of the Singapore Convention which is inspired by Article VI of the New York Convention.

However, Article VI has a clear link with Article V as it “may be regarded as “*a corollary*” to Article V(1)(e) and as closing a “*temporal gap*” that exists when an action to set aside the award is pending before a competent authority.” See UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 265.

On the contrary, Article 6 has no link with Article 5 and, in those circumstances, this last possible connection of the enforcement proceedings with the proceedings on the merits seems to be very weak, not to say non-existent.

⁶³ Joined Cases C-537/12, Banco Popular Español SA v. M.T. Rivas Quichimboand, & C-116/13, Banco de Valencia SA v. J. Valldeperas Tortosa, 14 November 2013, ECLI:EU:C:2013:759 [hereinafter Joined Cases C-537/12 & C-116/13]; Case C-169/14, J. C. Sánchez Morcillo v. Banco Bilbao Vizcaya Argentaria SA, 17 July 2014, ECLI:EU:C:2014:2099; Case C-415/11, M. Aziz v. Caixa d’Estativ de Catalunya, Tarragona i Manresa (Catalunyacaixa), 14 March 2013, ECLI:EU:C:2013:164.

was not allowed to assess the validity of that act or to grant interim relief capable of staying or terminating the enforcement proceedings.

The court decided that one of these two courts, and if necessary, the court responsible for enforcement, must be able to assess the validity of the contract recorded in the notarial act which constitutes the basis for enforcement and to refuse enforcement on the basis of this assessment, or grant interim relief capable of staying or terminating the enforcement proceedings.⁶⁴

We find here, like in the Singapore Convention, the same idea of empowering the enforcement court to look to a certain extent at the merits of the case. In the rulings of the EU Court of Justice, this idea is implemented in the context of a notarial act which, being an enforceable title, entitles the creditor to immediately initiate enforcement proceedings without any preliminary assessment on the merits. In the Singapore Convention, this idea is implemented in the context of provisions that allow the direct enforcement of a settlement agreement without any preliminary proceedings on the merits.

Once again, this idea is stated in the EU cases in spite of the fact that notarial acts already are enforceable titles. Settlement agreements are not enforceable titles. Therefore, the idea of empowering the enforcement judge to look at the merits of the case seems all the more justified in the context of settlement agreements.

E. Article 5 Provides Safeguards with Respect to its Broad Defences

As explained under the previous point, the broad defences offered by Article 5 to the party opposing enforcement of the settlement agreement compensate for the direct enforcement procedure put in place by Article 3. But Article 5 is not intended exclusively to protect the party opposing enforcement. Article 5 also provides safeguards to protect the interests of the party seeking enforcement of the settlement agreement.

We have already encountered these safeguards under section II, and they will be briefly recalled here. There are mainly two kinds.

⁶⁴ Joined Cases C-537/12 & C-116/13, *supra* note 63, at n° 55.

a. Each of the defences set forth in Article 5 includes its own limits. These limits are found in the wording of the defences. For example, we have seen that the words not binding or final “according to its terms” in Article 5.1(1)(b)(ii) are designed to restrict the scope of this defence to the express statements of the settlement agreement.

These limits can also flow from the interpretations given to the same defences under the New York Convention. For example, we have seen that under the New York Convention, the public policy defence is not satisfied by a mere violation of domestic law. That interpretation should be true for the same defence under the Singapore Convention.

b. We also can infer limitations based on Article 5’s introductory sentences that reproduce the language of the New York Convention, Article V. That language implies:

- the grounds for refusal are exhaustive;
- the party opposing recognition or enforcement bears the burden of proving such grounds;
- national courts have the possibility to refuse enforcement on those grounds but are not obliged to do so.

Thus, the requesting party should enjoy the same privileged status as under the New York Convention. After a party supplies the documents under Article 4 to demonstrate a settlement agreement that resulted from mediation, there will be a presumption of enforceability of the settlement agreement, and the opposing party will bear the burden of proving that the conditions of one of the grounds for refusal under Article 5 are met.⁶⁵

IV. CONCLUSION

Article 5 of the Singapore Convention provides for broad defences against the enforcement of a settlement agreement or its use as evidence that the dispute has already been resolved. These defences are a direct consequence of a radical change resulting from adopting Article 3 of the Convention on enforcing settlement agreements. Article 3 provides for direct enforcement of a settlement agreement without any need for prior contractual litigation on the merits or prior transformation of the settlement agreement into a judgment, a notarial act or an arbitral award.

⁶⁵ UNCITRAL SECRETARIAT GUIDE, *supra* note 1, at 99.

Due to these two articles, the current default procedure of contract litigation for enforcing a settlement agreement will metamorphose into a fast-track procedure for enforcement that ensures appropriate observance of the defendant's rights.

In doing so, the Singapore Convention gives mediation the enforcement status that it deserves as an alternative to judicial proceedings or arbitration to settle a dispute. A settlement agreement is not a contract like any other. It is a contract that terminates a dispute, like a judgment or an arbitral award. This special subject matter of the settlement agreement justifies that it benefits from an appropriate status for its enforcement. This is precisely the change brought by the Singapore Convention. This change could be decisive for fostering the use of mediation globally as a useful alternative to judicial proceedings or arbitration. It is hoped that States will seize this opportunity.

FOUNDATIONS TO REFUSE THE ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER THE SINGAPORE CONVENTION ON MEDIATION: PURPOSE, SCOPE, AND THEIR IMPORTANCE FOR THE SUCCESS OF THE CONVENTION

*Héctor Flores Sentíes**

I. INTRODUCTION

In February 2019, during its sixty-eighth session, Working Group II (“the Working Group”) of the United Nations Commission on International Trade Law (“UNCITRAL”) approved two instruments focused on the enforcement of settlement agreements reached through mediation: (i) the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)¹; and (ii) a Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (“Model Law”).²

The most important result of the Singapore Convention is embedded in Article 3.1 and 3.2: a court from a State party must enforce a settlement agreement that fulfills the requirements of Article 1. It is also obligated to allow a party to invoke the settlement agreement when a dispute arises concerning a matter that the party alleges was resolved by the agreement (Article 3.2).

Thus, after a party furnishes proof that a settlement agreement is signed by the parties and resulted from mediation (Article 4), there are two ways to seek relief under the Singapore Convention: a party can seek enforcement of the settlement agreement (sword) or use the settlement agreement as a defense (shield) against a claim related to the settled dispute. These two modalities are jointly referred to throughout the Singapore Convention as “reliance on settlement agreements.”

The court’s obligation to grant relief is not an absolute one; it is subject to exceptions. These exceptions have been identified in

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¹ Also referred to as the “Singapore Convention on Mediation.”

² An amendment to the UNCITRAL Model Law on International Commercial Conciliation of 2002.

Article 5 of the Singapore Convention as “grounds for refusing relief,” and refer to the reasons that may be brought up by the party resisting the relief sought under the settlement agreement (enforcement or reliance on the settlement agreement as a defense).

This article focuses on these exceptions.³ We will attempt to: (i) explain the purpose behind the drafting of the grounds to refuse enforcement; (ii) describe the scope of these defenses, based on the deliberations of the Working Group that drafted the Singapore Convention; and finally, (iii) briefly comment on the relationship between the scope of the defenses and the likelihood of the success of the Singapore Convention.

II. THE PURPOSES BEHIND THE DRAFTING

In drafting the defenses regime of the Singapore Convention, the Working Group attempted to achieve at least these purposes: (i) replicate, when appropriate, the approach taken by the New York Convention with respect to arbitral awards; (ii) be sensitive towards the particular issues that arise when attempting to enforce a contract, as opposed to an arbitral award; (iii) be as restrictive and narrow as possible to avoid unwarranted litigation and undue interference by courts, while providing essential defenses to parties subject to enforcement; and (iv) avoid the use of local requirements as a defense against the enforcement of the settlement agreement and instead to rely on international elements shared by most, if not all, jurisdictions.

A. *The New York Convention as an Inspiration*

At the outset of their task, the approach undertaken by the Working Group was guided by the Notes prepared by the Secretariat of UNCITRAL and distributed on July 13, 2015.⁴ These Notes were based on the deliberations and decisions taken by the Com-

³ The purpose of this article is not to provide a thorough commentary on all the issues arising from Article 5 of the Singapore Convention. Only the most representative features of this provision shall be emphasized.

⁴ UNCITRAL, Note by the Secretariat, *Settlement of Commercial Disputes, International Commercial Conciliation: Enforceability of Settlement Agreements*, U.N. Doc. A/CN.9/WG.II/WP.190 (July 13, 2015).

mission at its forty-eighth session, as a response to a proposal presented by the United States.

The United States originally proposed developing a multinational convention on the enforceability of international commercial settlement agreements reached through mediation. Albeit not stated explicitly, the proposal was largely based on some studies that purportedly showed that the lack of a uniform regime to enforce settlement agreements at an international level was one of the main reasons why mediation was not used as much as it otherwise would have been. The explicit goal, as framed in their proposal, was to encourage the use of mediation in the same manner in which the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) had served as an engine to increase the use of arbitration.⁵

The UNCITRAL Secretariat pointed out that the grounds for refusing enforcement were necessarily linked to the means chosen for enforcement. For instance, in those jurisdictions in which settlement agreements were given the status of a judgment, grounds to refuse typically include public policy, a jurisdictional test, and lack of due process.⁶

Drawn from the fact that some jurisdictions provided for the enforcement of “conciliated settlement agreements” as if they were arbitral awards, the United States’ proposal attempted to mirror several concepts of the New York Convention. For example, the “exceptions” upon which a defendant would be able to resist enforcement of a settlement agreement were similar to the system created by Article V of the New York Convention. It must be emphasized, however, that this same proposal recognized that some defenses under the New York Convention could not be imported into the regime of settlement agreements; and conversely, there was also a need to provide for additional defenses that would be inappropriate for arbitral awards.⁷

In the early discussions, it became clear that several of the defenses that the delegations wanted to consider were related to the validity and efficacy of the settlement agreement. Therefore, it was deemed convenient and appropriate to use and adapt Article II.3

⁵ UNCITRAL, Note by the Secretariat, *Planned and possible future work—Part III, Proposal by the Government of the United States of America: future work for Working Group II*, U.N. Doc. A/CN.9/822, at 3 (June 2, 2014).

⁶ UNCITRAL, Note by the Secretariat, *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, at para. 28 (Nov. 27, 2014).

⁷ U.N. Doc. A/CN.9/822, *supra* note 5, at 4.

of the New York Convention, pursuant to which an arbitral agreement would not be enforced if it is “null and void, inoperative or incapable of being performed.”⁸

B. *Distinctions Between Settlement Agreements and Arbitral Awards*

The differences between an arbitral award and a settlement agreement are significant. Although it may sound obvious, the distinctions had to be noted during the Working Group’s deliberations when conceiving and drafting the grounds to refuse enforcement of a settlement agreement.⁹ Two examples will illustrate this point: 1) the manner in which the dispute is settled, and 2) who resolves the dispute?

In spite of its private nature, an arbitral award closely resembles a judicial judgment in the way it resolves a dispute: Based on a reconstruction of past events, a third party objectively decides who prevails in light of the evidence, the law, and principles agreed upon by the parties. From this perspective, the solution is not dependent on the possible outcomes and future scenarios; it adjudicates and assigns rights and obligations based on something that has already happened. In contrast, a settlement agreement may not necessarily refer to the past events. At least in some jurisdictions, the settlement agreement may not only resolve an existing dispute, but also prevent disputes that have not yet come to pass. Furthermore, a settlement agreement may solve the dispute through the creation of new, complex, conditional, interrelated, or long-term obligations between the parties, which means that the solution to the dispute depends on future performance of the parties in light of a new contract.

Who resolves the dispute? Whereas an arbitration is ended upon the decision of an independent third party, a settlement agreement is freely executed by the parties themselves. Moreover,

⁸ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, September 7–11, 2015), U.N. Doc. A/CN.9/861, para. 92 (Sept. 17, 2015).

⁹ Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), U.N. Doc. A/CN.9/832, paras. 29, 35 (Feb. 22, 2015); U.N. Doc. A/CN.9/861, *supra* note 8, para. 96; UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016), U.N. Doc. A/CN.9/867, para. 149 (Feb. 10, 2016).

we cannot classify the result as a settlement agreement if a third party imposes the solution on the parties.

These distinctions demanded a substantive departure from the arbitration regime when it came to the grounds for refusing enforcement. The first distinction underscores the need to address situations in which the enforcement cannot proceed because, for instance, certain obligations were not met by the party seeking relief, the obligations allegedly breached were not yet due, the parties limited the enforcement of the settlement agreement to certain jurisdictions, consideration of arbitral and forum clauses within the settlement agreement, etc.¹⁰ From this perspective, the grounds for refusal will inevitably be more complex than those we find in arbitration, especially if one takes into consideration that the enforcement of a settlement agreement may result in non-monetary relief.¹¹

The second distinction shows that the grounds to refuse enforcement of an award that are based on the arbitrator's duties to follow a certain procedure¹² and respect due process requirements¹³ cannot be entertained to the same extent when what is being enforced is the will of the parties, expressed through a contract freely executed by them, regardless of the characteristics of the process that led them to it. In other words, what is being executed is the parties' own choices, instead of a decision imposed by an arbitrator who is required to follow the agreed arbitration procedure.¹⁴

In furtherance of the contractual nature of the settlement agreement, the Working Group was asked, from the very beginning,¹⁵ to consider issues relating to the consent of the parties,¹⁶ as well as matters that are particularly applicable to contracts, such as purpose, cause, validity, and formalities. This forced the Working Group to discuss the law under which these issues would be decided and the extent of judicial review of settlement agreements. Should the courts, for instance, be allowed to review the merits of

¹⁰ U.N. Doc. A/CN.9/832, *supra* note 9, para. 34.

¹¹ U.N. Doc. A/CN.9/832, *supra* note 9, paras. 40–41.

¹² New York Convention art. V(1)(d).

¹³ New York Convention art. V(1)(b).

¹⁴ U.N. Doc. A/CN.9/861, *supra* note 8, para. 90.

¹⁵ U.N. Doc. A/CN.9/WG.II/WP.190, *supra* note 4, at 11.

¹⁶ Including questions of duress, unconscionability, undue influence, misrepresentation, mistake, and fraud. We have included all these concepts into the notion of “consent,” to the extent that their presence makes it difficult to conclude that a party has in fact agreed to be bound by the terms of the agreement.

the agreements, or be limited to reviewing the legality of the agreements?

The sole exceptions that received unequivocal support to be included as defenses were fraud, violation of public policy, and whether the dispute was not susceptible of being resolved through mediation. The rest of the issues were hard to tackle due to diverging views within the Working Group.¹⁷

Attention was also drawn to the strictly contractual nature of the settlement agreement. In so doing, the Working Group recognized it needed to fashion defenses that took account for a party that had already complied with its obligations, that the settlement agreement was not a final resolution of a dispute, or that the agreement had been subsequently modified by the parties.

C. Restrictive and Uniform Approach to Avoid Unwarranted Litigation

To a great degree, the New York Convention owes its success to the narrowness and “drafting cleanness” of its Article V and that the grounds to reject enforcement of an arbitral award are exhaustive. That combination has, with exceptions, led to court decisions that do not intrude on the merits of the dispute and the arbitrator’s discretionary powers, and that favor enforcement as the general rule.

The drafting of the New York Convention occurred with a clear self-awareness of how parochial or local criteria could hinder the success of the enforcement regime for arbitral awards at an international level. That goal would not have been achieved had the treaty resorted to complicated or vague expressions, instead of using simple, descriptive, and uniform language.

The Working Group set the same goal with respect to the grounds to refuse enforcement of a settlement agreement under the Singapore Convention: exhaustiveness, narrowness, clarity, simplicity, and efficiency.¹⁸ Notwithstanding the common goals, this proved to be a significant challenge for the Singapore Conven-

¹⁷ U.N. Doc. A/CN.9/861, *supra* note 8, para. 88.

¹⁸ U.N. Doc. A/CN.9/861, *supra* note 8, para. 93; U.N. Doc. A/CN.9/867, *supra* note 9, para. 147.

tion considering the divergent agendas and positions of the delegations that worked on the text.¹⁹

At some point in the Working Group's discussions,²⁰ it became clear that there were two colliding forces: On one hand, (i) the need to reflect the perspectives and needs of practitioners, which usually translated into avoiding detailed and ambiguous provisions that could lead the courts to question several issues at the enforcement stage, unduly providing numerous tools for a party seeking to circumvent an agreement; and, on the other hand, (ii) the need to reflect the concerns of the states aiming at becoming a party to this instrument.²¹ Therefore, emphasis was placed on the need to find a balance between both.

The success or failure of the Working Group to achieve this balance will ultimately be determined by the State courts, based on their interpretations of Article 5 of the Singapore Convention. This realization was present throughout the discussions of the Working Group.

Below are some examples of the efforts to simplify and limit the scope of the defenses against enforcement under the Singapore Convention. We will focus on the early discussions, for it was then when the original purpose behind the provisions were outlined, whereas in later discussions, the exercise became more centered on "cleaning up" the language.

- Some delegations were interested in creating defenses that related to the principles governing mediation, as well as formal requirements (such as a homologation process) that needed to be met by the settlement agreement in order to be enforced. These proposals were rejected, for it was shown that the inclusion of these types of distinctions would run contrary to the purpose of creating a truly international and uniform enforcement regime.²²

¹⁹ For examples of proposals that constituted "push backs" in this respect, see U.N. Doc. A/CN.9/861, *supra* note 8, para. 95.

²⁰ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, October 2–6, 2017), U.N. Doc. A/CN.9/929, para. 81 (Oct. 11, 2017).

²¹ For instance, some States were weary of creating an efficient enforcement regime for settlements reached through "informal" or "non-structured" mediation, let alone non-mediated settlement agreements. Concerns were also expressed about applying this instrument in States that were not sufficiently familiarized with the use of mediation. Some States even quoted "policy" reasons to approve or reject suggestions, without actually explicating those reasons.

²² U.N. Doc. A/CN.9/861, *supra* note 8, para. 89.

- There were proposals to incorporate provisions that would require a preliminary review of the settlement agreement in the state of origin, which would allow for a better understanding of the mediation process. These proposals were rejected based on the difficulties to assess the origin of the settlement agreement.²³ On that note, settlement agreements lack the clarity that is given by the arbitration laws to the origin of arbitral awards, as soon as the seat of arbitration is determined.²⁴
- Further complications were brought up due to the difficulty in determining the place of mediation and the origin of the settlement agreement, as well as the distinctions between the law applicable to the dispute that was settled, and the law applicable to the settlement agreement *per se*. These complications led the Working Group to ultimately ignore the issues of applicable law to assess the scope of the defenses. It was noted that in absence of a given applicable law, the enforcing court would generally apply conflict of law rules in the place of enforcement, which would also allow that court to take into account the law chosen by the parties in the settlement agreement.²⁵ The sole reference to the applicable law is limited to determining whether the settlement agreement is null and void, inoperative, or incapable of being performed. This provision allows the court to determine the applicable law failing any indication thereon by the parties (Article 5.1(b)(i)).²⁶
- At one point, language was proposed to add the “invalidity of the agreement” to the notion of “null and void, inoperative or incapable of being performed.”²⁷ Here it was noted that “invalidity” of the settlement agreement as a defense would dangerously open the door for domestic legislation requirements that could be too broad and include formal requirements that could lead to uncertainty. The Working Group responded by eliminating the term “not valid” from the defenses.²⁸ It also moved forward with the understanding that consideration of validity

²³ U.N. Doc. A/CN.9/861, *supra* note 8, para. 98.

²⁴ See New York Convention art. V(1)(a) *in fine*, and particularly, UNCITRAL Model Law on International Commercial Arbitration art. 31.3.

²⁵ U.N. Doc. A/CN.9/861, *supra* note 8, para. 102.

²⁶ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, September 12–23, 2016), U.N. Doc. A/CN.9/896, para. 101 (Sept. 30, 2016).

²⁷ U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements*, U.N. Doc. A/CN.9/WG.II/WP.195, para. 56 (Dec. 2, 2015).

²⁸ U.N. Doc. A/CN.9/867, *supra* note 9, para. 161.

would not extend to form requirements, to the extent that these form requirements were already addressed elsewhere in the Singapore Convention.²⁹

- Albeit no one really questioned the need to include coercion and fraud as defenses, it was pointed out that these and other similar issues would already be covered by the more general provision that referred to the nullity of the agreement.³⁰ Ultimately, fraud and coercion bar a party from truly “agreeing” to something, thus disallowing a court to conclude that a party consented to the settlement agreement.
- Also, in connection with Article 5.1(b)(i), some delegations proposed to add the word “voidable” to the provision referring to the “null” settlement agreement in order to put it beyond doubt that this general provision covered fraud, mistake, misrepresentation, duress, and deceit. However, the Working Group insisted and finally determined that Article 5.1(b)(i) was sufficiently broad and clear in this respect.³¹
- Early drafts of the Singapore Convention provided that relief could be denied if the settlement agreement contained obligations that were “conditional or reciprocal.”³² This language was problematic. The Working Group pointed out that these terms have substantive legal connotations and were susceptible of diverging interpretations.³³ Therefore, the Working Group attempted to find descriptive, unambiguous language that would capture the idea behind the early drafts: Enforcement should be denied if the conditions stipulated in the agreement had not been met or the obligations provided therein had not been performed.
- Some delegations proposed, in connection with the defense provided in Article 5.1(b)(iii) (modification of the agreement), that a party prove that the settlement agreement had been “substantially” modified. The Working Group rejected this change because the term “substantial” would introduce a sub-

²⁹ U.N. Doc. A/CN.9/867, *supra* note 9, para. 160.

³⁰ U.N. Doc. A/CN.9/867, *supra* note 9, paras. 153, 159.

³¹ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, para. 43 (Feb. 19, 2018).

³² *See, e.g.*, U.N. Comm’n on Int’l Trade Law, Note by the Secretariat, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, U.N. Doc. A/CN.9/WG.II/WP.198, para. 35 (June 30, 2016).

³³ U.N. Doc. A/CN.9/896, *supra* note 26, para. 91.

jective standard that could provide the basis for unwarranted litigation and undue court's discretion.³⁴

III. BRIEF COMMENTARY ON ARTICLE 5 OF THE SINGAPORE CONVENTION

A. *The Approved, Definitive Text*

Article 5 of the Singapore Convention is transcribed below:

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:

³⁴ U.N. Doc. A/CN.9/934, *supra* note 31, para. 45.

- (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 5 has two main sections that comprise eleven defenses. Like the New York Convention, Section 1 of the new Convention includes the defenses that must be alleged by the party challenging the enforcement, while Section 2 provides for the grounds that can also be invoked by the courts *ex officio*.

Article 5.1 includes five topics comprising of nine defenses:

- Incapacity of the parties to execute the settlement agreement.
- Three defenses that “qualify” the settlement agreement: (i) nullity, inoperativeness, and incapability of being performed; (ii) absence of binding force and finality of the settlement agreement; and (iii) modification of the agreement.
- Two of the defenses refer to obligations contained in the settlement agreement: (i) party against whom enforcement is sought has already complied with its obligations; and (ii) the obligations cannot be enforced because they are incomprehensible.
- Generic defense that refers to the incompatibility between the relief sought under the Singapore Convention and the terms of the settlement agreement.
- Two defenses relate to the conduct of the mediator and the mediation process.³⁵

Article 5.2 includes the two remaining defenses that pertain to public policy and whether the dispute is capable of settlement.

B. *Incapacity of the Parties*

The defense under Article 5.1(a) had been considered early by the Working Group. It was drawn from Article V.1(a) of the New York Convention; there was no intent whatsoever to modify the consequences of its drafting. The incapacity of the parties pertains to the parties’ execution of the settlement agreement, not to the mediation process.

³⁵ The analysis of the grounds to refuse enforcement based on the conduct of the mediation and the mediator are covered by the chapter written by Michel Kallipetis. See SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based on Mediator’s Misconduct: Articles 5.1(e) & (f)*, 20 CARDOZO J. CONFLICT RESOL. 1197 (2019).

C. *Null, Inoperative, or Incapable of Being Performed*

The defense under Article 5.1(b)(i) is aimed at the validity and efficacy of the settlement agreement. Building upon its contractual nature, the Working Group mirrored the requirements in the New York Convention for enforcing an arbitration agreement. Therefore, the meaning ascribed to the key words “null,” “inoperative,” and “incapable of being performed” is not different to what multiple courts have interpreted over the years under Article III.3 of the New York Convention.

As stated above, there are a number of issues conceived as defenses from the outset, but that are not expressly reflected in the text of the Singapore Convention. The broadness of Article 5.1(b)(i) clearly encompasses them: duress, unconscionability, undue influence, misrepresentation, mistake, deceit, and fraud. The presence of one of these claims may directly affect the consent of a party to the settlement agreement and result in the agreement’s nullity.

D. *Binding and Final Settlement Agreement*

The defense under Article 5.1(b)(ii) refers to the binding nature of the settlement agreement and that it finally settled a dispute. These two requirements typically apply to arbitral awards, and the “binding” requirement is also present in the New York Convention (Article V.1.e).³⁶

The proposal to include a “final” and “binding” settlement agreement was present since the early discussions and, at the beginning, was somehow intertwined with the validity of the settlement agreement.³⁷ Later, it was associated with “reciprocal or conditional obligations” that were not yet due or had been breached.³⁸

³⁶ It should be reminded that the Geneva Convention on the enforcement of arbitral awards included the claimant’s need to show that the award was final, which in practice meant there was no recourse that could be filed against the award. Since under the Geneva Convention the burden of proof was the claimant’s, this led to the well-known and now extinct *double-exequatur*. After substantive deliberations, the New York Convention got rid of the “final” requirement, and substituted in the term “binding” to qualify the award.

³⁷ U.N. Doc. A/CN.9/861, *supra* note 8, para. 97.

³⁸ U.N. Doc. A/CN.9/867, *supra* note 9, para. 88.

This defense was initially proposed in light of questions raised by some delegates concerning scenarios in which the dispute had not been finally settled or, unusual as it may sound, if a party submitted a draft instead of an executed agreement.³⁹ One delegation used these concerns as a basis for proposing to address these two requirements as a defense against enforcement. Underscoring (perhaps inadvertently) the redundancy in this defense, another delegation believed that these requirements could be included as part of the definition of settlement agreements that fall within the scope of the Singapore Convention.⁴⁰

Despite that these requirements are present in the final text, it should be noted that some delegations pointed out⁴¹ that this defense was superfluous (redundant), as it was already covered by other articles of the Singapore Convention. Furthermore, if a court entertains a claim to have a settlement agreement enforced, it necessarily means that the threshold provided by Article 1 (scope of application) and Article 4 (requirements for reliance on settlement agreements) have been met. In other words, a court would not grant relief upon a settlement agreement that has been modified, nullified, or for whatever reason did not definitively settle a dispute. We believe this is not something that needed to be said.

In interpreting this provision, the courts should bear in mind the intent behind the wording. The Working Group's intention was solely to establish a defense to cover scenarios in which what is being requested to be enforced, for whatever reason, is not the definitive resolution of the dispute.

E. *The Agreement was Modified*

The defense provided in Article 5.1(b)(iii) is clear and straightforward. Its aim is an obvious one: the settlement agreement sought to be enforced must be filed in its latest form. If an original settlement agreement was subject to subsequent modification by the parties, the court should obviously take into consideration those modifications, and refuse to grant relief based on a version that has been superseded. It should also be noted that the defense would only prevail to the extent that the modifications touch upon the relief sought.

³⁹ U.N. Doc. A/CN.9/896, *supra* note 26, para. 162.

⁴⁰ U.N. Doc. A/CN.9/861, *supra* note 8, para. 91.

⁴¹ U.N. Doc. A/CN.9/929, *supra* note 20, para. 77.

F. *The Obligations Have Already Been Performed*

The defense provided in Article 5.1(c)(i) is also clear and straightforward. If the defendant shows that it already performed or paid that which is being demanded before the court, the request for relief should not be granted.

G. *Not Clear or Comprehensible*

At a relatively late stage in the discussions, one delegation proposed to include the lack of clarity and comprehensibility of the settlement agreement as a defense. The proposal was framed as an example of the incapability of enforcing a settlement agreement.⁴² The purpose behind this was to ensure that the settlement agreements covered by the Singapore Convention are limited to those containing enforceable obligations that are clearly set out.⁴³

Some delegations objected to the inclusion of this ground. The reasons for their objections were twofold: (i) the terms “clear” and “comprehensible” introduce ambiguity and gave substantive discretionary power to the courts; and (ii) the defense is redundant, for if a settlement agreement overly confuses and is incomprehensible, it goes without saying that it will be impossible to enforce.⁴⁴

The objections were followed by several efforts to improve the language and narrow the scope of the defense, but since none of the proposals provided sufficient guidance, they were rejected.⁴⁵ The sole adjustment to the proposal adopted was to refer to the adjectives qualifying the obligations contained in the settlement agreement, instead of the agreement in general.

From the discussions, it seems that although the intent behind the provision was obvious and narrow, the Working Group recognized that Article 5.1(c)(ii) included ambiguous and subjective standards. However, those states that proposed and supported them insisted in their inclusion, framing it as a policy issue. The potential negative effects of this outcome can only be limited by the courts following the intention behind this provision, while re-

⁴² Furthermore, the original drafting proposal was “the settlement agreement is not clear or comprehensible rendering it not capable of being enforced,” or alternatively, “the settlement agreement is not capable of being enforced.” See U.N. Doc. A/CN.9/929, *supra* note 20, para. 88.

⁴³ U.N. Doc. A/CN.9/929, *supra* note 20, para. 51.

⁴⁴ U.N. Doc. A/CN.9/929, *supra* note 20, para. 88.

⁴⁵ U.N. Doc. A/CN.9/934, *supra* note 31, para. 47.

jecting unwarranted arguments by respondents who seek to circumvent their obligations.

H. *Granting Relief Would be Contrary to the Terms of the Settlement Agreement*

The defense provided in Article 5.1(d) was proposed at the early stages of the discussions by the United States⁴⁶ and was never really questioned or substantively commented on until the 65th session. The idea behind this provision, as explained by its proponent, was to give priority to party autonomy, which would require a court to deny enforcement if granting relief would run contrary to a condition set forth by the parties in the settlement agreement, including a dispute resolution clause.⁴⁷

However, some delegations objected to an enforcement court deferring to a dispute resolution clause in the settlement agreement, considering that the object of such a clause would be to address matters pertaining to the performance of obligations in the settlement agreement, not its enforcement.⁴⁸

This criticism to the proposal is, in our view, unfounded. In the end, in light of the scope of the defenses provided in Article 5, it seems to us that the enforcing court could be inevitably faced with the need of determining, for instance, if an obligation had been met, or if the relief sought is still subject to some unfulfilled condition. In that scenario, the court's decision to grant or refuse enforcement would have had to deal with matters pertaining to the performance of obligations, which, as pointed out by some delegates, would be the object of a dispute resolution clause within the settlement agreement.

Therefore, courts should interpret this provision to include dispute resolution clauses and arbitration agreements as part of the "terms of the settlement agreement" that may condition the relief sought upon the agreement. For instance, if the settlement agreement contains an arbitration clause, the defendant would be able to

⁴⁶ U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, *Settlement of commercial disputes: Enforceability of settlement agreements (Comments by Israel and the United States of America)*, U.N. Doc. A/CN.9/WG.II/WP.192, para. 17 (Aug. 3, 2015). The first attempt to draft this defense is found in U.N. Doc. A/CN.9/WG.II/WP.195, *supra* note 27, para. 56.

⁴⁷ U.N. Doc. A/CN.9/896, *supra* note 26, para. 92.

⁴⁸ U.N. Doc. A/CN.9/896, *supra* note 26, paras. 94, 95.

invoke Article 5.1(d)⁴⁹ and request the enforcement court to refer the parties to arbitration. This defense would also be upheld if the settlement agreement limits or bars the application of the Singapore Convention, or if the parties agreed that enforcement thereunder could be carried out in only one or a few defined jurisdictions.

Despite the issues raised during the discussions, this language was considered generally acceptable to the Working Group. Nevertheless, the group insisted on being clear and emphatic on the meaning of this provision to avoid inadvertent introductions of unwanted defenses.⁵⁰

I. *Incapability of Being Settled and Public Policy*

The defenses in Article 5.1(2) are the functional equivalent of Article V(2) of the New York Convention,⁵¹ including the possibility of these issues being raised by the court *ex officio*.⁵² This proposal was made at the very beginning,⁵³ and was never really questioned or objected by the Working Group. It was almost a given that the Singapore Convention would provide that a settlement agreement would not be enforced if the matter of the settlement agreement was not capable of settlement, or if it violated public policy in the enforcement state.

Based on court experiences with the interpretation of Article V(2)(2) of the New York Convention, some delegations proposed to narrow this defense by expressly referring to “international” public policy, with the understanding that “international public policy” was more restrictive language than the “public policy of each country.” Notwithstanding, the Working Group decided to not include the term “international” in Article 5.2(a) for three main reasons:

- By preserving the same language of the New York Convention, the relatively consistent case law developed by multiple courts would support a notion of “public policy” that is more narrowly interpreted when a foreign element was present.⁵⁴

⁴⁹ And naturally, article II of the New York Convention or its equivalent is relevant.

⁵⁰ U.N. Doc. A/CN.9/896, *supra* note 26, para. 98, *in fine*.

⁵¹ U.N. Doc. A/CN.9/WG.II/WP.192, *supra* note 46, para. 17.

⁵² U.N. Doc. A/CN.9/867, *supra* note 9, paras. 154, 155.

⁵³ U.N. Doc. A/CN.9/832, *supra* note 9, paras. 23, 31.

⁵⁴ U.N. Doc. A/CN.9/867, *supra* note 9, para. 157.

- Since international public policy could be interpreted as a notion of fundamental justice shared by many states, the resulting threshold would make it more difficult for states to adopt the Singapore Convention.⁵⁵
- Some delegations explicitly stated that they preferred local courts to determine what constituted public policy in their respective countries.⁵⁶

With the purpose of narrowing the notion of public policy further, a proposal was made to add the requirement that the enforcement settlement agreement had to be “manifestly” contrary to the public policy in order for the defense to proceed. Similar reasons were provided by the Working Group to reject this suggestion. Namely, that a departure from a uniform and internationally recognized language (Article V.1.2 of the New York Convention) would raise further confusion before the courts.⁵⁷

Little was said with respect to the subject matter’s “incapability of being settled” (Article V.2(b)). Some delegations proposed to discuss whether the Working Group should consider changing the law according to which this defense was to be interpreted. Those delegations alleged that it was more proper for the court to consider the law chosen by the parties and not the law of its forum. However, that proposal did not receive meaningful support, and the Working Group decided to mirror the same approach taken by the New York Convention: both public policy and the subject matter’s capability of being settled are to be determined pursuant to the law of the country in which enforcement is sought.⁵⁸

J. *The Overlap Between Defenses*

At the end of the drafting efforts, there were two realizations broadly shared within the Working Group: (i) no delegation was completely satisfied with the way in which Article 5 had been definitively structured and drafted; and (ii) the defenses foreseen in Article 5 were somewhat redundant. This “unsatisfaction” led to further efforts to redraft, restructure, and revise Article 5. In doing so, the Working Group had to face the fact that Article 5 had been

⁵⁵ *Id.*

⁵⁶ U.N. Doc. A/CN.9/934, *supra* note 31, para. 67.

⁵⁷ U.N. Doc. A/CN.9/867, *supra* note 9, para. 157.

⁵⁸ U.N. Doc. A/CN.9/929, *supra* note 20, para. 100.

the result of a long, complex, and enormous effort to accommodate widely divergent views.⁵⁹

In the end, the Working Group was aware that Article 5.1(b)(i) was broad and that the other grounds in Article 5.1(b), Article 5.1(c), and even 5.1(d) and 5.1(e)⁶⁰ were really illustrative of the more generic provision.⁶¹ Unfortunately, the Working Group failed in its efforts to the language, but at least it got sufficiently far along to recognize the need to be explicit about this redundancy in the *travaux préparatoires*.⁶²

In this respect, one of the proposals put forth during the discussion is worth reproducing:⁶³

The competent authority, in interpreting and applying the various grounds for refusing requested relief under paragraph 1, may take into account that the grounds for such refusal identified under paragraph 1(b) may overlap with other grounds for refusal in paragraph 1.

We think this proposal is worth quoting because not only does it underscore the overlap between the defenses, but it also gives practical guidance on how a court should interpret Article 5.1 on defenses.

IV. RELATIONSHIP BETWEEN THE DEFENSES AGAINST ENFORCEMENT, AND THE SUCCESS (OR FAILURE) OF THE SINGAPORE CONVENTION

To conclude these commentaries on Article 5 of the Singapore Convention, we will briefly reflect on how the regime of defenses against the enforcement of settlement agreements may influence the success of the treaty.

⁵⁹ U.N. Doc. A/CN.9/934, *supra* note 31, para. 62.

⁶⁰ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, February 6–10, 2017), U.N. Doc. A/CN.9/901, para. 82 (Feb. 16, 2017).

⁶¹ U.N. Doc. A/CN.9/934, *supra* note 31, para. 62.

⁶² U.N. Doc. A/CN.9/934, *supra* note 31, para. 65.

⁶³ U.N. Doc. A/CN.9/934, *supra* note 31, para. 63.

A. *The Meaning of Success for the Singapore Convention*

How will we know if the Singapore Convention was a success? The answer must necessarily consider its purpose. The Resolution adopted by the General Assembly⁶⁴ stated the following:

. . . 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, . . .

In our view, as drafted, success for the Singapore Convention means that the enforcement of international mediated settlement agreements will be subject to a uniform, clear, and efficient regime, in a fashion that is similar to how the New York Convention regulates the enforcement of arbitral awards. We may also add that the existence of this regime will foster the use of mediation, to the extent that the Singapore Convention will become a well-known instrument that gives parties greater confidence in the execution of settlement agreements.

If any of these do not come to pass, we believe the treaty has failed in its primary purposes.

B. *The Success of the Singapore Convention Cannot be Borne by Article 5 as a Stand-alone Provision*

To state the obvious, the extent to which a respondent may unduly avoid the enforcement of a settlement agreement is a useful parameter against which to assess the success of the Singapore Convention. However, it is practically impossible to isolate the defenses regime of Article 5 as an independent basis for assessing the treaty's potential success or failure. There are several other features of the Singapore Convention, apart from Article 5, that will play important roles in its future.

Albeit not drafted nor originally thought of as “defenses” *per se*, a defendant may invoke provisions outside of Article 5 to suc-

⁶⁴ U.N. Doc. A/RES/73/198 (Jan. 11, 2019).

cessfully challenge enforcement under the Singapore Convention. Ironically, the existence of these “hidden defenses” was explicitly recognized by the Working Group during the discussions.⁶⁵

A court may refuse to grant relief under the Singapore Convention, for instance, if the thresholds created by Articles 1 and 4 (principally, but not exclusively) are not met. In our view, this is a clear indication that the more conditions set by the Working Group, the narrower the scope of the Singapore Convention is, and, perhaps unfortunately, more “defenses” against the enforcement have been created.

To illustrate this “hidden defenses” regime, we noted how the Working Group decided to limit the scope of the Singapore Convention to settlement agreements that had been achieved through a mediation process. This inevitably forced the Working Group to embark on complex and burdensome discussions that naturally resulted in several provisions that would have otherwise been unnecessary. For instance:

- It became more complex to define the “international” component of the settlement agreement, for the Working Group had to deal with scenarios in which an international mediation could have given birth to a national settlement agreement, and vice versa (Article 1).
- The threshold became more difficult for claimants, for they have the burden of proving that a mediation actually took place. Discharging such a burden may sometimes prove to be a troublesome requisite. For instance, the Singapore Convention establishes the mediator’s signature or an attestation by the administering institution as the preferred means to discharge the burden of proof. This raises two inconveniences. The mediator’s signature is not only uncommon but may be seen as inadequate in some jurisdictions. Moreover, a mediator’s signature does not prove, by itself, that a mediation actually occurred, and may even be used to defraud the convention’s purpose of limiting its scope to mediated settlement agreements (Article 4.1(b)).⁶⁶

⁶⁵ U.N. Doc. A/CN.9/896, *supra* note 26, paras. 113–14.

⁶⁶ For a more detailed analysis of this provision, see SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 *CARDOZO J. CONFLICT RESOL.* 1173 (2019).

- Respondents may invoke new defenses that, in principle, are independent from the settlement agreement:⁶⁷ (i) failure to meet standards applicable to the mediator or mediation (Article 5.1(e)); and (ii) failure to disclose circumstances that give rise to justifiable doubts as to the mediator’s impartiality and independence (Article 5.1(f)).⁶⁸

Even though the Working Group decided to limit the scope of the Singapore Convention to “international” mediated settlement agreements, we believe it would have been more useful to deal with cross-border enforcement of settlement agreements, regardless of whether they are domestic or international. However, by choosing to build the scope around the concept of “internationality,” there are at least two inconveniences to face, and that were raised during the discussions⁶⁹: (i) there is an inevitable detrimental effect for countries to have different regimes to deal with settlement agreements, depending on whether they are international or domestic; and (ii) it provides respondents with an additional ground to resist or hinder the enforcement, that is, to argue before the competent court that the settlement agreement does not meet the criteria of Article 1. These foregoing points may be seen in other examples of “hidden defenses” against enforcement under the Singapore Convention.

C. *States Not Being Expected to Adopt the Singapore Convention*

It was hard to assess the real willingness of all the states to adopt an instrument that was being drafted as a convention during the discussions within the Working Group. The desire of (probably) the majority of delegations to develop and finalize a convention made it necessary to adopt a peculiar approach in order to advance in the discussions and fulfill the Commission’s mandate.

The “peculiar approach” consisted in adopting the following resolution upon the publication of the Singapore Convention:

⁶⁷ The Working Group managed to provide that the party resisting enforcement has to prove that it would not have entered into the settlement agreement but for the breach committed by the mediator.

⁶⁸ For a more detailed analysis of this provision, see SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based on Mediator’s Misconduct: Articles 5.1(e) & (f)*, 20 CARDOZO J. CONFLICT RESOL. 1197 (2019).

⁶⁹ U.N. Doc. A/CN.9/832, *supra* note 9, para. 29.

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.

This resolution did serve as a compromise that enabled several sceptic states to move forward in the discussions in a positive way. We fully understood the need for this approach in order to gain a consensus. However, we fear it could also mean that the signature and adoption of the Singapore Convention will be harder.

D. *A Regret*

One can judge the success of the Singapore Convention from a different perspective. Despite the almost isolated but continuous protests of the Mexican delegation throughout the discussions,⁷⁰ the Working Group decided to limit the scope of the treaty to settlement agreements that had been achieved through a mediation process. No clear, legal reason was provided to justify leaving out negotiated settlement agreements, regardless of their quality and sophistication. No evidence was provided to demonstrate that a mediated settlement agreement guarantees a better product. It is difficult to deny that mediation enjoyed a somewhat directed support, in detriment to other methods of alternative dispute resolution, and in particular, over direct negotiations. Furthermore, even though negotiations may currently enjoy broader use than mediation and is undeniably cheaper, negotiated settlement agreements were not covered by the Singapore Convention. We do note, however, that while revising the Model Law in parallel to the drafting of the Singapore Convention, the Working Group explicitly acknowledged the possibility of allowing the same enforcement regime for negotiated settlements.

⁷⁰ U.N. Doc. A/CN.9/832, *supra* note 9, para. 42.

V. CONCLUSION

The Singapore Convention creates a regime by which settlement agreements are enforced for what they are, without the need to have them notarized, recognized before a court, or otherwise formalized. Relief may be sought directly from the settlement agreement (Article 3). That may be seen as the paramount feature of this instrument that is currently lacking at the international level.

We do have regrets, for the instrument could have been much simpler and akin to the mediation practice at the international commercial arena. Indeed, in our view, UNCITRAL missed an opportunity to refer to commercial settlement agreements in general when it limited the scope to mediated solutions and unduly “discriminated” against negotiated settlements. The scope was also narrowed by deciding to deal with settlement agreements that are “international” and by excluding some types of mediated settlement agreements (non-commercial ones and those which are also enforceable as a judgment or an award). We point to these examples as additional “hidden” grounds that may potentially be raised by respondents (along with Article 5) to resist enforcement. Ironically, the narrowness of the instrument’s scope (as defined by Articles 1 and 4) offers indirectly broad defenses to respondents under the Singapore Convention.

Having stated the above, we find that the Singapore Convention has a great potential to foster the use of mediation, which in itself is an aspiration we all share. Moreover, despite the inconveniences described above, we do believe that the Singapore Convention provides mediation practitioners with an instrument with the potential of creating a uniform regime for the enforcement of international settlement agreements.

We could undertake a comparative law analysis and point out how each jurisdiction decides to address the issue of enforcement of settlement agreements. By doing so, we may compare and decide what the best solution is, and even compare these regimes with the one created by the Singapore Convention. In so doing, we may further conclude that this treaty has failed to create an efficient regime, when comparing it to “x” jurisdiction. But we may very well conclude precisely the opposite if the comparative background changes. In this respect, it may be useful to have Article 7 of the Singapore Convention, which allows a party to resort to an

alternative regime if available (and possibly a better, more efficient one) to the Convention.

What we don't have yet is a universal, uniform approach to enforcement. That is a gap we don't find in arbitration (which is due, to a great extent, to the New York Convention). The Singapore Convention aims at filling in that gap for mediated settlement agreements.

If it gains reasonable support by States, the Singapore Convention will become a universal reference for parties and practitioners, who will perhaps find it easier and will have more confidence in using mediation, knowing that the protections afforded by this treaty exist. If this becomes a reality, the mediation world will have achieved something that is currently lacking in many jurisdictions. That, in itself, at least from a long-term perspective, provides enough reasons to support this instrument.

THE SINGAPORE CONVENTION: REFLECTIONS ON ARTICLES 1.3 ON SCOPE, 8.1(b) ON RESERVATIONS, AND 12 ON REGIONAL ECONOMIC INTEGRATION ORGANIZATIONS

*Norel Rosner**

I. INTRODUCTION

The General Assembly of the United Nations adopted on 20 December 2018 the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Convention”).¹ The Convention opened for signature in Singapore in August 2019. The UN adoption marks the culmination of a process that started in 2014 at the United Nations Commission on International Trade Law (“UNCITRAL”), first with discussions on the proposal to take up this project and then, as of September 2015, on the actual principles, form, and text of the instruments to be drafted. The Convention was drafted in conjunction with a Model Law that contains parallel provisions.

In this intervention, I intent to shed some light on three provisions of the Convention: Articles 1.3, 8.1(b), and 12. Article 1.3 limits the scope of the Convention. Article 8(1)(b) contains a declaration mechanism in which a Party (state) can declare that it will apply the Convention only to the extent that the parties to the settlement agreement have agreed to its application. Finally, Article 12 deals with the specific arrangements needed in case of accession to the Convention by a regional economic integration organisation.

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¹ G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018).

II. ARTICLE 1.3 ON SCOPE

This provision generated intense discussions. The main question in the Working Group was whether the future instrument should also apply to judicial settlements and arbitral consent awards, or only to purely private settlement agreements.

Those who argued for a broad scope of application cited the utility of the future instrument as well as the argument that parties should have a choice between several international instruments when enforcing a settlement agreement. On the other hand, those who wanted a more restrictive scope of application cited the fact that judicial settlements are covered by other international instruments such as the Convention on Choice of Court Agreements (2005) (the “Choice of Court Convention”) or will likely be covered by the convention under preparation at the Hague Conference on Private International Law (the “Hague Judgments Convention”). The different nature of judicial settlements was also cited as an argument justifying a different treatment. Furthermore, arbitral consent awards are covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”).

After discussion, the Working Group chose to exclude judicial settlements and arbitral consent awards from the scope of application of the Convention. The main objective behind this policy choice was to avoid possible overlaps or gaps with existing and future conventions.²

Article 1.3 reads as follows:

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.

² UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, February 6–10, 2017), U.N. Doc. A/CN.9/901, para. 26 (Feb. 16, 2017).

A. *The Exclusion of Judicial Settlements*

Article 1.3 of the Convention is fully aligned with the text of the Choice of Court Convention³ and with the Hague Judgments Convention.⁴ This means that, in principle, no overlap or gap is possible between these instruments, so that parties seeking to enforce a judicial settlement in another country will have open only the path made available by the latter instruments. This is consistent with the view expressed during the discussions that the Convention should not open the door to the possibility of using two enforcement paths and thereby create an opportunity for abuse by the parties.⁵ Such a situation could have arisen, for instance, if judicial settlements would have been included under the scope of the Convention and a party seeking to enforce a settlement agreement could then have had “two bites of the cherry.” This would have meant that, under the Convention, if unsuccessful in its attempt to enforce the private settlement agreement, a party would have had the option of trying to enforce the agreement as a judicial settlement. This exclusion prevents such duplicative strategy.

In practice, the competent authority before which a settlement agreement is brought for enforcement or raised as a defence would have to assess either *ex officio* or at the request of one of the parties (in this case most probably the party resisting enforcement) whether that settlement agreement falls under the scope of the Convention. When it comes to assessing whether the settlement agreement is a judicial settlement and falls outside the scope, the competent authority would have to look at whether it has been approved by a foreign court or concluded in the course of proceedings before such a foreign court. If so, then the competent author-

³ Choice of Court Convention art. 12 reads as follows:

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

⁴ 2019 Hague Judgments Convention art. 11 reads as follows:

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

⁵ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016), U.N. Doc. A/CN.9/867, para. 123 (Feb. 10, 2016).

ity would have to look at a second cumulative condition, namely that the settlement agreement in question is enforceable as a judgment in the State where that court sits. Admittedly, it would not be easy for the competent authority to assess this latter condition, as this requires an expert look at the procedural law of the State of the foreign court. The competent authority could base its assessment for instance on expert evidence submitted before it, either at its request or by the party resisting enforcement, or could simply ask the parties to provide documentation/proof, as to the enforceability of the settlement agreement as a judgment in that State. Article 4.4 of the Convention allows the competent authority to ask for “any necessary documents” it may need in this process to help the court determine whether the requirements of the Convention have been complied with.

B. *The Exclusion of Arbitral Consent Awards*

In this situation too, the Working Group decided that the best way to achieve the objective of avoiding overlap with the New York Convention, a widely ratified international instrument,⁶ was to exclude arbitral consent awards from the new convention.

In order to be excluded, the settlement agreement needs to be recorded as an arbitral award and be enforceable. Unlike judicial settlements, the text does not specify where the award should be enforceable. After discussions⁷ on the best criteria to be used when assessing the enforceability of an arbitral consent award, the Working Group was of the opinion that this matter should be left to be decided by the competent authority before which a settlement agreement is brought for enforcement.

In practice, the competent authority would have to assess whether the settlement agreement falls under the scope of the Convention either *ex officio* or at the request of one of the parties (in this case too most probably the party resisting enforcement). If the settlement agreement is recorded as an arbitral award, then the competent authority would assess whether it could be enforceable in that State, for instance based on the New York Convention. If

⁶ Ratified by 159 States. See UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (consulted on Mar. 4, 2019).

⁷ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, October 2–6, 2017), U.N. Doc. A/CN.9/929, paras. 25–26 (Oct. 11, 2017).

so, then that settlement agreement would be excluded from the scope of application of this Convention. However, if it is not enforceable via another path, then the Convention would apply.

III. ARTICLE 8(1)(b)—THE OPT-IN MECHANISM UNDER RESERVATIONS

The possible optional character of the future instrument was also the subject of intense discussions. This translated into a proposed opt-in/opt-out mechanism whereby the parties to the settlement agreement would have to expressly choose the future instrument to apply to their settlement agreement (opt-in) or to exclude its application (opt-out). Those who supported such a mechanism argued that since party autonomy is paramount to mediation and to agreeing to a settlement agreement, parties should therefore also have the choice of whether this instrument would apply in their case. Those who argued against considered that it is unusual for an international instrument to contain such a possibility which might affect its effectiveness in practice.

After discussions, the Working Group agreed that a Party that so wishes may enter a declaration that it shall apply the Convention only where the parties to the settlement agreement agreed to its application.

Article 8(1)(b) reads as follows:

1. A Party to the Convention may declare that:

(. . .)

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

In practice, a Party to the Convention may enter a declaration at any time, specifying that it shall enforce settlement agreements or allow parties to raise a settlement agreement as a defence only where the parties to the settlement agreement have expressly agreed to the application of the Convention. When a State Party enters such a reservation, failure by the parties to a settlement agreement to agree to the application of the Convention means that a competent authority in that State Party will not apply the Convention to the settlement agreement.

Contrary to an opt-out mechanism, the adopted opt-in mechanism under Reservations requires an action from the parties to the settlement agreement in order for the Convention to apply.

Whereas for an opt-out, the silence of the parties would have meant that the Convention applies; in the opt-in scenario, the silence of the parties means that the Convention does *not* apply.

Even though the text of the Convention omits a provision on how to opt-in, it is safe to conclude that the agreement of the parties would need to comply with the same formal requirements as the settlement agreement, namely that it should be in writing and signed by the parties.

Finally, separate from the opt-in mechanism, it should be noted that the Working Group shared the understanding⁸ that even without an express provision, the parties to a settlement agreement can always exclude the application of the Convention. In that case, a competent authority should refuse to grant relief under the Convention as the settlement agreement would not comply with Article 5(1)(d) (“Granting relief would be contrary to the terms of the settlement agreement”).

IV. ARTICLE 12—REGIONAL ECONOMIC INTEGRATION ORGANISATIONS

Article 12 regulates the situation where regional economic integration organisations⁹ (“REIO”) would become Parties to the Convention. This is a standard provision to be found in different UN conventions¹⁰ which aims to facilitate accession in situations where a REIO has competence over matters governed by the Convention.

Article 12 reads as follows:

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

⁸ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, para. 78 (Feb. 19, 2018); U.N. Comm. on Int’l Trade Law, Report of the U.N. Comm. on Int’l Trade Law, Fifty-first session, U.N. Doc. A/73/17, paras. 38–39 (2018).

⁹ A good example of such an organisation is the European Union.

¹⁰ See, e.g., UN Convention on the Rights of Persons with Disabilities art. 44.

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.

The first two paragraphs of this provision contain a so-called accession clause, regulating different aspects of an accession by a REIO, from the method of counting the Parties to the Convention (for instance, for the purpose of entry into force based on Article 14.1) to the declarations to be made on the competence of the REIO in the matters covered by the Convention.

Paragraph 3 defines terms relevant to this article, namely that references to Party/Parties and State/States should be interpreted as a reference to REIOs.

Finally, paragraph 4 contains a so-called disconnection clause. This provision regulates the interface between the Convention, on one hand, and the internal rules of the REIOs, on the other hand. Accordingly, in a situation of conflict between the Convention and the internal rules of a REIO, whether already in force or which will be adopted in the future, the latter will prevail in two distinct situations:

- Where the competent authority is in a member State of a REIO and all the States relevant for the purpose of Article 1.1 are member States of a REIO; or
- Where the conflict concerns the recognition or enforcement of judgments within the REIO.

The first situation above is rather factual and needs little explanation. Where elements such as the place of business of the parties to the settlement agreement are found on the territory of the REIO then the conflicting internal rules will prevail. The latter one is, however, more complicated but can be exemplified with the following situation: If party A wants to enforce a settlement agreement under the Convention in State X (a member State of a REIO) but fails, if the REIO has internal rules on the recognition and enforcement of judgments, like the European Union, then under paragraph 4 of Article 12 a judgment from State X refusing to enforce a settlement agreement will be recognised throughout the REIO and party A is bound to fail to enforce the same settlement agreement under the Convention elsewhere in the REIO.¹¹ Indeed, as far as the European Union is concerned, for the purposes of recognition and enforcement of intra-EU judgments, it can be considered as one territory, so parties wanting to enforce a settlement agreement in the EU would have to carefully choose their port of entry.

V. REFLECTIONS

This chapter was designed to shed some light on the history and purposes of three unrelated and significant sections: Articles 1.3 on Scope, 8.1(b) on Reservations, and 12 on Regional Economic Integration Organizations.

¹¹ UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018), U.N. Doc. A/CN.9/934, para. 97 (Feb. 19, 2018).

RESERVATIONS IN THE SINGAPORE CONVENTION—HELPING TO MAKE THE “NEW YORK DREAM” COME TRUE

Itai Apter & Coral Henig Muchnik***

I. INTRODUCTION

On a wintery day in New York City, in the conference room of the United Nations General Assembly, history was made with the unanimous adoption of the text of the Convention on International Settlement Agreements Resulting from Mediation, also known as the “Singapore Convention.”¹ A few months earlier, and a few blocks up the road in an event held in the offices of a prominent New York law firm, one of the members of the Canadian delegation to the negotiations expressed his dream that the Convention would do for international mediation what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)² (the “New York Convention”) did for international arbitration.³

The reservation mechanisms included in Article 8 of the Singapore Convention, and discussed in this article, were designed to

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¹ G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3. As of today, the Convention was adopted by 159 State Members.

³ Allan J. Stitt, Remarks at NYIAC Talks: A Look into the Singapore Convention on Mediation and UNCITRAL’s Working Group II—Where do we go from here? (Feb. 6, 2019) [hereinafter NYIAC] (an event sponsored by Davis Polk in New York City). A similar sentiment was expressed by one of the authors, noting his hope that at least half of the number of state parties to the New York Convention join the Singapore Convention in 60 years’ time, in the context of the special event held to commemorate the 60th anniversary of the New York Convention during the 2018 UNCITRAL Commission meeting held on June 28, 2018.

help make the Canadian delegate's dream come true. These reservations will become crucial to enabling a broad adoption of the Convention.⁴ A first sign of this could be evident by the fact that at the very first opportunity, 46 States signed the Singapore Convention with two of them including reservations.⁵

Following a brief introduction of the Singapore Convention, this article discusses the concept of reservations in international law and the importance of such mechanisms for facilitating adherence to multilateral treaties. It then focuses on two elements of the reservation mechanism including their drafting history, purposes, and consequences. In the final section of the article, we explain how these reservations will likely constitute a key component to the success of the Singapore Convention.

⁴ United Nations Convention on International Settlement Agreements Resulting from Mediation [hereinafter Singapore Convention], art. 8, *available at* UNCITRAL Report for its 51st Sess. (25 June–13 July 2018), U.N. Doc. A/73/17 (2018); U.N. GAOR, 73rd Sess., No. 17, Annex I, at 50 (2018):

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.

⁵ The signatory states include, *inter alia*, Israel, China, and the U.S. While only Belarus and Iran included reservations at this stage, it is arguably the case that the flexibility in allowing for reservations (at any time) provided a comfort level for states allowing such a large number of initial signatories. See UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=en (last visited Sept. 7, 2019).

II. THE SINGAPORE CONVENTION IN BRIEF

The origins of the Singapore Convention can be traced to a 2014 U.S. proposal to UNCITRAL (the United Nations Commission on International Trade Law) to establish a new instrument, modelled on the New York Convention,⁶ to promote the use of mediation to resolve cross-border disputes.⁷ The proposal was accepted and negotiations took place in the framework of UNCITRAL Working Group II until June 2018 when the text of the Convention was finalized at the UNCITRAL's annual Commission meeting.⁸

Mainly, the Singapore Convention aims to elevate the status of a settlement agreement, from that of a contract between parties which can only be enforced according to the traditional rules of private international law,⁹ to that of an enforceable instrument. Under the Convention, a settlement agreement can also be given effect as a part of defense.¹⁰

The Singapore Convention obliges states to recognize and enforce mediated settlement agreements that were concluded in writing between parties to a dispute when such parties have their places of businesses in different States.¹¹ The Convention solely applies to commercial disputes, explicitly excluding any family, employment, or related matters,¹² while at the same time making clear that it does not apply to settlement agreements which obtained the status of a judgment or an arbitral award.¹³ The obligation to rec-

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

⁷ Proposal by the Government of the United States of America: Future Work for Working Group II (7–18 July 2014), at 2–3, U.N. Doc. A/CN.9/822 (June 2, 2014).

⁸ U.N. Doc. A/73/17, *supra* note 4.

⁹ Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC DISP. RESOL. BULL., Nov. 2018, at 42, 46 (2018).

¹⁰ Singapore Convention, *supra* note 4, art. 3(2).

¹¹ Singapore Convention, *supra* note 4, arts. 1, 3.

¹² Singapore Convention, *supra* note 4, arts. 1–2. For an elaborate analysis of the scope of the Convention, see Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, ASIAN J. INT'L L. 1, 2–3 (2019).

¹³ Singapore Convention, *supra* note 4, art. 1(3). For further elaboration on the scope of the Convention, see SING. REF. BK., Ellen E. Deason, *What's in a Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1149 (2019).

ognize and enforce such agreements is subject to a relatively narrow set of exceptions.¹⁴

III. RESERVATIONS UNDER INTERNATIONAL LAW

The term “reservation” is very familiar to those with regular international law experience although may be less familiar to wider audiences and future users of the Singapore Convention. So, it may be helpful to begin the analysis in this section with the definition of a reservation as set forth in the Vienna Convention on the Law of Treaties (1969).¹⁵ Article 2(1)(d) states that:

“Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

Reservations allow states to limit the application of certain obligations in a multilateral treaty, an option that provides states with a degree of flexibility. This mechanism affords states the possibility of joining the international community in adhering to a set of agreed-upon obligations, while excluding particular provisions that it wishes to opt out for one reason or another. Multilateral treaties are the result of multiparty negotiations¹⁶ that can include states from diverse geographical regions, with different cultural sensitivities and legal traditions. Allowing reservations can become a key factor for reaching a consensus.¹⁷ Of course, states cannot make

¹⁴ See SING. REF. BK., Jean-Christophe Boulet, *The Singapore Convention and the Metamorphosis of Contractual Litigation*, 20 *CARDOZO J. CONFLICT RESOL.* 1209 (2019); see also SING. REF. BK., Héctor Flores Sentíes, *Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention*, 20 *CARDOZO J. CONFLICT RESOL.* 1235 (2019).

¹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

¹⁶ This was the case for the Singapore Convention; see, e.g., Hal Abramson, Introductory Panel Remarks at Cardozo School of Law, Symposium on the Singapore Convention (Mar. 18, 2019); see also SING. REF. BK., Hal Abramson, *The New Singapore Mediation Convention: The Process and Key Choices*, 20 *CARDOZO J. CONFLICT RESOL.* 1037 (2019).

¹⁷ The principal of Consensus in treaty-making is one which is especially characteristic of discussions in UNCITRAL as part of what is termed as the “Vienna Spirit” (UNCITRAL conducts its work at U.N. headquarters in Vienna and New York, but the UNCITRAL Secretariat is based in Vienna). The “Vienna Spirit” is celebrated by many in the international community as characteristic of international negotiations. See, e.g., Josephine Teo, Second Minister for Man-

reservations that conflict with the object and purpose of a treaty,¹⁸ as this would negate the very basis for the treaty.¹⁹ Still, reservations, even on seemingly ancillary matters, can remain crucial to the negotiation and broad adoption of a multilateral treaty.

There are no preset rules on the design of reservations in multilateral treaties, as practices range from provisions that completely bar reservations to provisions detailing specific matters that can be the subject of reservations. The Singapore Convention drafters have opted for the latter approach.²⁰ Reservations are submitted to the depositary named in the relevant convention, and in the case where the depositary is the UN Secretary-General,²¹ they are made public.²²

IV. ARTICLE 8.1(a)—OPT-OUT FOR SETTLEMENTS INVOLVING GOVERNMENT ENTITIES

A. *Drafting History*

Article 8.1(a) of the Singapore Convention states:

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; . . .

power and Second Minister for Home Affairs, National Statement of Singapore to the Commission on Narcotic Drugs (March 12, 2018), para. 22, https://www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2018/03/press_20180314.

¹⁸ Vienna Convention, *supra* note 15, art. 18:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed”.

¹⁹ MALCOLM N. SHAW, INTERNATIONAL LAW 821–22 (5th ed. 2003).

²⁰ U.N. Treaty Section of the Office of Legal Affairs, Summary of Practice of the Secretary-General As Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/7/Rev.I, U.N. Sales No. E.94.V.15 (1999) [hereinafter Summary of Practice of the Secretary-General].

²¹ This is the case for the Singapore Convention. See Singapore Convention, *supra* note 4, art. 10.

²² See *Depositary Notifications (CNs) by the Secretary-General*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en (last visited Aug. 3, 2019).

At its 63rd session, UNCITRAL Working Group II (the “Working Group”) considered whether to exclude settlement agreements involving government entities from the application of the Convention. At the time, it was undecided whether the instrument would be drafted as a convention or a model law.²³

Preparing for an eventuality of a convention format,²⁴ two alternatives were considered—a positive formulation: “A Party to this Convention may declare that it shall apply this Convention . . .”, and a negative one: “A Party to this Convention may declare that it shall not apply this Convention”²⁵ After a short deliberation, the latter was favored in order to reinforce the understanding that exclusion of governments (and related actors) would be the exception rather than the rule.²⁶ It is noteworthy that the idea of allowing a government as party exclusion, albeit in a somewhat different setting, was also adopted by the drafters of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the “2019 Hague Judgments Convention”).²⁷

²³ UNCITRAL, Note by the Secretariat, *Settlement of Commercial Disputes International Commercial Conciliation: Enforceability of Settlement Agreements (7–11 Sept. 2015)*, U.N. Doc. A/CN.9/WG.II/WP.190, paras. 48–58 (July 13, 2015).

²⁴ In case of a model law, such declarations would be unnecessary as when adopting the model law states could freely make a choice of whether to exclude the application of the law to settlement agreements involving governments or not.

²⁵ UNCITRAL WG II, Note by the Secretariat, *Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements, Sixty-fourth Sess. (1–5 February 2016)*, U.N. Doc. A/CN.9/WG.II/WP.195, paras. 19–21 (Dec. 2, 2015). See also Draft Convention at UNCITRAL WG II, Note by the Secretariat, *Settlement of commercial disputes International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation, 67th Sess. (2–6 October 2017)*, U.N. Doc. A/CN.9/WG.II/WP.202/Add.1, para. 5 (2017); UNCITRAL WG II, Note by the Secretariat, *Settlement of commercial disputes International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation, 67th Sess. (2–6 October 2017)*, U.N. Doc. A/CN.9/WG.II/WP.202, para. 54 (2017).

²⁶ UNCITRAL Rep. of Working Group II (Dispute Settlement) on the work of its 68th Sess. (New York, 5–9 February 2018), U.N. Doc. A/CN.9/934, para. 77 (Feb. 19, 2018).

²⁷ Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, 1144 U.N.T.S. 249 [hereinafter *Hague Judgments Convention*], art. 19, which reads as follows:

1. A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party—(a) that State, or a natural person acting for that State; or (b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government

B. *Discussion*

Article 8.1(a), as cited earlier, constituted a departure from the drafting of the New York Convention, around which the Singapore Convention was modeled.²⁸ There is no such opportunity for an exclusion in the New York Convention.

The reasons behind this reservation were several. In some jurisdictions, government entities are not authorized to conclude mediated settlements.²⁹ In addition, governments might become involved in disputes in which the subject matter is particularly sensitive (e.g. national security), or with foreign policy implications. These dilemmas are partially addressed by an explicit reference to sovereign immunity in the context of enforcement of awards resulting from investor-state dispute arbitration.³⁰ However, some states felt that greater flexibility was needed for states to exclude these matters entirely from the scope of the Convention. For some

agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2. Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

One of the authors was a member of the Israeli delegation to the negotiations of the Hague Convention. It is noteworthy that the discussions of this provision in the context of judgments proved out to be much more controversial than with respect to mediated settlements, but in the end it too was agreed by consensus (notes on file with authors).

²⁸ There are various instances where the drafters of the Singapore Convention chose to divert from the New York Convention. See, for example, Article 5(1)(e)–(f) to the Singapore Convention that grant refusal for enforcement of a mediation settlement agreement in case there was a serious breach by the mediator or if the mediator failed to disclose circumstances that might raise doubts regarding the mediator’s impartiality or independence. Article 5 to the New York Convention does not include a similar provision regarding the arbitrator’s behavior. Another example is the emphasis given to the parties’ places of business in the application of the Singapore Convention. While the New York Convention limits its application to non-domestic arbitral awards concluded in another State’s territory (Article 1), without considering the parties’ places of origin or places of business, the Singapore Convention considers the parties’ places of business as the key criteria for the international character of the agreement and thus for the Convention application to it.

²⁹ UNCITRAL Rep. of Working Group II (Arbitration and Conciliation) on the work of its 63rd Sess. (7–11 September 2015), 49th Sess., A/CN.9/861, para. 44 (2015).

³⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 54–55 (the ICSID Convention), Oct. 14, 1966, 575 U.N.T.S. 159. See also INT’L BANK FOR RECONSTRUCTION AND DEVELOPMENT, REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 47–48 (1965), <https://icsid.worldbank.org/en/Pages/icsiddocs/REPORT-OF-THE-EXECUTIVE-DIRECTORS-ON-THE-ICSID-CONVENTION.aspx>.

states, this could be an important factor in deciding whether to join the Convention.³¹

Addressing the issue through a reservation appeared to be preferable to a blanket exclusion of government-related mediated settlements. Despite the concerns noted above, some government entities engaged in commercial activities may still wish to utilize the Singapore Convention to enforce mediated settlements in which they are a party.³² Article 8.1 fine-tunes the balance between these competing concerns by encouraging states that want to make a reservation to limit it to subject matters that are strictly necessary.

However, the Article 8.1(a) reservation could deter private parties from entering into international mediated settlement agreements with states. This could have a negative impact on the spread of the use of mediation in the international context as states today are integral actors in the global commercial community (in contractual and investment contexts).

At the same time, it is also crucial to acknowledge that unlike in the past, global dispute resolution between foreign commercial actors and states is no longer considered by everyone as the most appropriate tool to promote global growth and development,³³ even if it is clear that states should abide by their commitments.³³ UNCITRAL has been working to reform investor-state dispute settle-

³¹ Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 43 (2019).

³² Additionally, blanket exclusion would have negatively impacted third parties' interests and expectations. See UNCITRAL Rep. of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (7–11 September 2015), U.N. Doc. A/CN.9/861, para. 46 (2015); Chua, *supra* note 12, at 8–9.

³³ Australia has recently deliberated whether to continue to include ISDS provisions in its agreements. AUSTRALIA GOV'T, PRODUCTIVITY COMM'N, TRADE & ASSISTANCE REVIEW 2013–14, PRODUCTIVITY COMMISSION ANNUAL REPORT SERIES 77–81 (2015), <https://www.pc.gov.au/research/ongoing/trade-assistance/2013-14/trade-assistance-review-2013-14.pdf>. In 2015, the Commission recommended not to include such a provision in Australia's bilateral agreements. AUSTRALIA GOV'T, PRODUCTIVITY COMM'N, TRADE & ASSISTANCE REVIEW 2014–15, PRODUCTIVITY COMMISSION ANNUAL REPORT SERIES 49 (2016). Ecuador has denounced the ICSID Convention. See Joshua M. Robbins, *Ecuador withdraws from ICSID Convention*, THOMSON REUTERS PRACTICAL LAW, Aug. 12, 2009, [https://uk.practicallaw.thomsonreuters.com/2-422-1266?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-422-1266?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1). See PLC Arbitration, *Venezuela withdraws from ICSID*, THOMSON REUTERS PRACTICAL LAW, Jan. 31, 2012, <https://uk.practicallaw.thomsonreuters.com/2-517-5244?originationContext=knowHow&transitionType=KnowHowItem&contextData=%28sc.Default%29&comp=pluk>.

ment for the past few years, with the aim of reforming current deficiencies.³⁴

This state of affairs raises the concern that some states will be required to choose between rejecting the Singapore Convention or acceding to it in order to support the use of mediated settlements in international disputes and, as a result, exposing themselves to expedited enforcement procedures. It is admittedly difficult to know what choice states will make, even for states which view the use of mediation as a valuable alternative to courts or international arbitration.

Allowing the reservation in Article 8.1 makes such a choice unnecessary, which might be determinative to the success of the Convention. As there is no reciprocal impact for the reservation on other states (a somewhat unusual practice),³⁵ the Convention applies only to the competent authorities in the state which made the reservation and not to courts for other Parties to the Convention. The absence of a “traditional” reciprocity provision can be explained by the lack of a “state of origin” in the Convention, as it might be difficult to designate the state where the mediation process took place.³⁶ In the absence of an explicit reciprocity provision (which is included, for example, in the parallel provision of the 2019 Hague Judgments Convention³⁷), other state members of the Singapore Convention might not decline applying the Convention to enforcement of settlement agreements in which governments are involved in originating from a declaring state (or such agreements to which the declaring state is party to).

Accordingly, despite its limiting effect, the Article 8.1(a) reservation may be crucial to promoting wider participation of states in the Convention, which in turn will benefit users of the Convention as they seek legal status and enforcement of their international mediated settlements around the globe.

³⁴ Please see the work of Working Group III of UNCITRAL at https://uncitral.un.org/en/working_groups/3/investor-state. See also ICSID SECRETARIAT, PROPOSALS FOR AMENDMENT OF THE ICSID RULES—WORKING PAPER, Vol. 3, 415, 857, 915 (2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf; EUROPEAN UNION, SUBMISSION OF THE EUROPEAN UNION AND ITS MEMBER STATES TO UNCITRAL WORKING GROUP III (2019), http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf.

³⁵ See, e.g., Hague Judgements Convention, *supra* note 27, art. 18(2)(b).

³⁶ Schnabel, *supra* note 31, at 45.

³⁷ Hague Judgments Convention, *supra* note 27.

V. ARTICLE 8.1(b)—RESERVATION ON OPT-IN BY PARTIES TO
THE SETTLEMENT AGREEMENT

A. *Drafting History*

Article 8.1(b) of the Singapore Convention states: “1. A Party to the Convention may declare that: (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.”

Drafting this provision was not an easy task, as it raised fundamental, almost “ideological” differences between delegations as to the core elements of mediation. Drafters expressed various views, ranging from automatic application of the better enforcement process in the Convention as was done with the New York Convention regime, to supporting party autonomy by authorizing private parties to decide whether they want the Convention to apply.³⁸ It was also proposed to allow states to enforce settlement agreements without the parties’ consent, and even in cases where the parties explicitly opted-out.³⁹

The debate on this issue was often heated and intense although always cordial and friendly,⁴⁰ as each of the “camps” waited for others to “see the light.”⁴¹ Finally, as part of the overall “five step” compromise,⁴² it was decided to resolve this discussion in a reservation mechanism.⁴³

³⁸ UNCITRAL Rep. of Working Group II (Dispute Settlement) on the work of its 66th Sess. (6–10 February 2017), U.N. Doc. A/CN.9/90, paras. 36–37 (2017).

³⁹ A/CN.9/WG.II/WP.202, *supra* note 25, at 56; UNCITRAL Working Group II, Note by the Secretariat, *Settlement of commercial disputes, International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation*, U.N. Doc. A/CN.9/WG.II/WP.205, para. 30 (Nov. 23, 2017).

⁴⁰ The cordial atmosphere of the debate was largely due to the skillful and elegant conduct of the deliberations by the chair of the working group, Natalie Morris-Sharma (internal notes on the Singapore Convention negotiations, on file with authors).

⁴¹ The delegation of Israel to the negotiations repeatedly made statements, during the negotiations, expressing its hope that other delegations realize that this is an impasse which can only be overcome with a compromise to accommodate proponents of both approaches (statements on file with authors).

⁴² UNCITRAL Rep. of Working Group II (Dispute Settlement) on the work of its 66th session (6–10 February 2017), U.N. Doc. A/CN.9/90, paras. 39–40, 51–52 (2017).

⁴³ Schnabel, *supra* note 31, at 43–44.

B. *Discussion*

One of the most prominent features of a mediated settlement agreement is that the terms are based on the consent of the parties.⁴⁴ Requiring double consent by parties, to both the settlement terms and the application of the Convention, might seem overly burdensome and unnecessary, considering that the Convention already includes protections for parties in the form of defenses against enforcement.⁴⁵ Also, by agreeing to the settlement terms (to be contrasted with arbitration terms that are imposed), the parties to the dispute might have implicitly agreed to enforcement around the world, wherever they have assets.⁴⁶

These arguments seemingly render the Article 8.1(b) state opt-out reservation with opt-in for disputing parties unnecessary. However, as indicated by the responses of the various states to the UNCITRAL questionnaire distributed prior to the commencement of the negotiations, enforcement of settlement agreements originating in foreign jurisdictions was almost unknown in most states.⁴⁷ While this state of affairs did not deter many states from supporting the Singapore Convention, as evidenced by its adoption by consensus in the United Nations General Assembly, it did raise the potential for disputing parties to be unaware of the possibility of enforcement outside the jurisdiction where the settlement agreement was made. Whether parties are aware of and consent to the consequences of signing a settlement agreement can be important factors when courts are considering enforcement.⁴⁸ Enabling

⁴⁴ See Jacqueline Nolan-Haley, *Consent in Mediation*, 14 DISP. RESOL. MAG., 2007, at 4–5.

⁴⁵ Singapore Convention, *supra* note 4, art. 5. For more information on defenses, see SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based On Mediator's Misconduct: Articles 5.1(e) & (f)*, 20 CARDOZO J. CONFLICT RESOL. 1197 (2019); SING. REF. BK., Jean-Christophe Boulet, *The Singapore Convention and the Metamorphosis of Contractual Litigation*, 20 CARDOZO J. CONFLICT RESOL. 1209 (2019); SING. REF. BK., Héctor Flores Senties, *Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention*, 20 CARDOZO J. CONFLICT RESOL. 1235 (2019); *see also* SING. REF. BK., Timothy Schnabel, *Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1181 (2019).

⁴⁶ Schnabel, *supra* note 31, at 45.

⁴⁷ UNCITRAL, Note by the Secretariat, *Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting From International Commercial Conciliation/Mediation, Compilation of Comments by Governments*, 63rd Sess., U.N. Doc. A/CN.9/846, U.N. Doc. A/CN.9/846.Add.1, U.N. Doc. A/CN.9/846.Add.2, U.N. Doc. A/CN.9/846.Add.3, U.N. Doc. A/CN.9/846.Add.4 and U.N. Doc. A/CN.9/846.Add.5 (29 June–16 July 2015).

⁴⁸ In mediation, party autonomy and flexibility are important elements, but States that see the need to provide detailed frameworks for the conduct of mediation reflect the need to pre-

states to require explicit party consent in order for the Singapore Convention to apply reflects this concern.

Delegates opposing the disputing parties' opt-in requirement expressed concerns that parties could not be expected to include a Convention opt-in provision at the last stage of the mediation process, especially when any discussion of the additional provision could result in further disputes. This is again a serious concern which was shared by mediators and practitioners.

Some observers also contended that the 8.1(b) reservation was not needed if the Working Group thought that the new convention offered an improved enforcement mechanism over the status quo. Without the convention, parties can rely on the default enforcement process in cross-border litigation, and that can occur without making an informed choice to do so. The argument was made that the aim of the exercise was to draft an improved process to replace the default one. It was further noted that if successful in achieving this aim, this reservation is unnecessary because the improved enforcement process should become the default one that automatically applies. If parties do not like the improved process, they can always opt-out.

Considering the innovative nature of the Singapore Convention, and that in the past UNCITRAL has adopted mechanisms for parties to exclude commercial law treaties,⁴⁹ the state opt-out and party opt-in mechanism adopted in the new Convention ultimately embodied an effort to balance the different views.

Further objections to the 8.1(b) reservation mechanisms related to the potential lack of awareness by lawyers and mediators to the fact that the state where enforcement is envisioned (i.e. where assets are located) made a reservation requiring party opt-in consent to the application of the Singapore Convention. The relatively easy answer to this question is that mediators and lawyers representing parties to a settlement agreement should always include an opt-in clause to avoid any potential issues.⁵⁰ In a similar vein, as is the case for other conventions,⁵¹ the UNCITRAL secre-

serve key due process rights in the process. *See, e.g.*, Israeli Courts Regulations (Mediation), 5753-1993 (Isr.) (providing such a framework, including a proposed mediation agreement).

⁴⁹ United Nations Convention on Contracts for the International Sale of Goods, art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3.

⁵⁰ Following the advice of Allan Stitt, made during this presentation at the NYIAC event. *See* NYIAC, *supra* note 3.

⁵¹ *See Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en (last visited Aug. 3, 2019) (which includes publications on reservations and declarations).

tariat will likely indicate reservations on the status page of the Singapore Convention, which will be public and easily accessible. Moreover, states making such a reservation will have an interest in raising awareness of this requirement in order to encourage foreign parties to conclude settlement agreements with their nationals.

In contrast with the Article 8.1(a) reservation, the 8.1(b) reservation was much more controversial as it might impose a requirement on the mediation process which did not exist prior to the adoption of the Singapore Convention. At the same time, including the reservation in the Convention not only paved the way to bypass a difficult obstacle to the successful completion of the negotiations, but also might provide the necessary comfort level for states that view explicit informed consent as key to supporting and ratifying the Convention.

VI. THE OVERALL FRAMEWORK FOR RESERVATIONS UNDER THE SINGAPORE CONVENTION

Both reservations, and in particular the Article 8.1(b) reservation, led commentators to express the view that if states pursue them, it will harm the effectiveness of the Convention, including undermining its main purpose to bring certainty and promote the use of mediation as a dispute settlement mechanism globally.⁵² As is evident from the analysis in the previous sections, this chapter argues that this will not likely be the result.

Alongside the various considerations already presented, mainly that the reservation mechanism will encourage wider ratification of the Convention (without which there would be no point in its adoption), the overall framework for reservations provides for additional safeguards that support the utility of the reservation mechanisms for increased adherence accession.⁵³

First, no other reservations apart from those contained in Article 8.1 are allowed.⁵⁴ This is a provision which is not always in-

⁵² Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 25 AM. REV. INT'L ARB. (forthcoming 2019).

⁵³ See, for example, art. 8(3) to the Convention which allows States to not only reserve, but also to withdraw from reservations at any time.

⁵⁴ Singapore Convention, *supra* note 4, art. 8(2). See also Vienna Convention, *supra* note 15, arts. 19–20 (which stipulates what reservations are permitted under the Vienna Convention).

cluded in treaties,⁵⁵ reflecting the need to limit the flexibility of states to modify their obligations to the Singapore Convention in light of the potential difficulties associated with allowing large carve-outs.⁵⁶

Second, as a relatively unique exception to the international law practice of permitting reservations only at the time of signing, ratification, or accession to a treaty,⁵⁷ the Singapore Convention permits reservations and withdrawals at any time.⁵⁸ This allows for flexibility, as states can also have the option not to decide to include reservations at the point of joining the Convention, but can do so later if a need arises. The option to withdraw reservations serves an opposite and similar function. States can make reservations and subsequently withdraw them, according to practices developed over the years.⁵⁹

Third, the Singapore Convention provides that the reservations submitted after a state joins the Convention will take effect after six months from the date of their deposit,⁶⁰ and that the reservation will apply only to international mediated settlement agreements concluded after the Convention is in force.⁶¹ This mechanism is meant to limit the uncertainty embodied in the reservation mechanism, as well as to prevent abuse by states of the flexible nature of the reservations, particularly in respect of the Article 8.1(a) opt-out reservations relating to settlement agreements in which states are a party. This anti-abuse provision will prevent “strategic” use of this reservation by states to avoid the obligation to enforce a settlement agreement in which they are a party.

This overall framework might not address all the concerns associated with the reservation regime under the Singapore Convention. But the framework could go a long way in providing more leeway for states when debating whether to join the Convention, while at the same time providing more certainty for parties to an international mediated settlement agreement seeking global compliance.

⁵⁵ Sean D. Murphy, Special Rapporteur, *Third Report on Crimes Against Humanity*, Int’l Law Comm’n, U.N. Doc. A/CN.4/704, para. 312 (Jan. 23, 2017). Such a provision is not included, for example, in the 2019 Hague Judgments Convention.

⁵⁶ A/CN.9/934, *supra* note 25, paras. 86–88.

⁵⁷ Vienna Convention, *supra* note 15; Summary of Practice of the Secretary-General, *supra* note 20, at 61; A/CN.9/934, *supra* note 25, paras. 81–85.

⁵⁸ Singapore Convention, *supra* note 4, art. 8(3).

⁵⁹ Chua, *supra* note 12, at 9.

⁶⁰ Singapore Convention, *supra* note 4, arts. 8(3) & (5).

⁶¹ *Id.* art. 9.

VII. CONCLUSION

Only time will tell whether the reservation mechanism in the Singapore Convention will indeed make the “New York dream” for international mediated settlements come true.

As argued throughout this article, the inclusion of this mechanism was one of the reasons for the successful adoption of the Convention in relatively record time for negotiations of international instruments (three years).⁶² Similarly, allowing both reservations could also be the very reason for the Convention’s overall success in promoting the use of mediation for cross-border disputes worldwide. If it is indeed the case that the Convention would rarely be used in practice as parties would comply with the settlement terms in order to avoid the risk of enforcement,⁶³ then even if the reservations did “water down the Convention,”⁶⁴ significant global buy-in to the Convention would be success in itself.

Whatever the case may be, it is imperative that all relevant stakeholders be aware of the reservation mechanism and its impacts. States hesitating to join the Singapore Convention should consider whether exercising the reservation option dispels impediments in domestic law and policy. Parties (and their representatives) should be aware that a reservation might be applicable to their settlement agreement and should plan accordingly. Hopefully, this chapter will facilitate this plea to be aware of the reservation mechanism and the opportunities it holds for flexibility, as the Singapore Convention makes its first steps into the almost exclusive New York Convention territory of cross-border dispute resolution.

⁶² For example, the Convention on the Rights of Persons with Disabilities of 2006 was adopted by the General Assembly on December 2006, five years after the mandate to consider such Convention was given to the Ad Hoc Committee. See G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

⁶³ This was said, for example, by Allan Stitt in the NYIAC event. See NYIAC, *supra* note 3.

⁶⁴ Chua, *supra* note 12, at 9.

AUTHOR BIOGRAPHIES

Professor Hal Abramson

Professor Hal Abramson, Touro Law Center, has been deeply involved in the development and practice of domestic and international dispute resolution for more than twenty-five years. He contributes as a teacher, trainer, author, and participant on professional committees and serves actively as a mediator and facilitator. He also has taught or trained on dispute resolution in nineteen countries on six continents.

For his contributions to the field of dispute resolution, Professor Abramson received the 2013 Peace Builder Award from the New York State Dispute Resolution Association. He has been selected for the International Who's Who of Commercial Mediation since its inaugural year in 2011. Professor Abramson also was selected by UNLV as one of its first two senior ADR scholars and served as the first Scholar-in-Residence for the International Academy of Mediators (IAM). In addition, he is an award-winning author with two of his publications receiving international awards by the CPR Institute for Conflict Resolution and Prevention.

He served as Chair of the ABA Committee of the Section for Dispute Resolution that drafted the mediation representation rules for its national competition and served as a member of the inaugural committee that launched the International Chamber of Commerce's global mediation competition in Paris. For IMI (International Mediation Institute) in The Hague, he chaired the task force that designed the first ever program for certifying intercultural mediators. He also participated in the UN (UNCITRAL) drafting process that produced the Singapore Mediation Convention, including serving as an expert advisor when he designed three mediation education programs for Delegates.

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Itai Apter serves as Director, International Civil Affairs in the Office of the Deputy Attorney-General (International Law) at the Israel Ministry of Justice. His work focuses on issues relating to private and commercial international law, public international law, treaty law, international privileges and immunities, international arbitration, and law of the sea. He is also a frequent member of Israeli delegations to various United Nations and HCCH (Hague Conference on Private International Law) forums and takes part in intergovernmental taskforces responsible for bilateral negotiations with international organizations and foreign states. Mr. Apter was a member of the delegation of Israel to UNCITRAL Working

Group II (Arbitration and Conciliation/Dispute Settlement) during the negotiations of the Singapore Mediation Convention between 2015–2018. Mr. Apter joined the office in 2008. He received an LL.B. from the University of Haifa (*magna cum laude*) in 2006, and an LL.M. (International Legal Studies) from New York University in 2008. He also served as a law clerk at the Office of Legal Adviser, Israel Ministry of Foreign Affairs prior to joining the Ministry of Justice.

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Jean-Christophe Boulet obtained a Master's Degree in Law at the University of Louvain-la-neuve (Belgium). He is Counsellor at the Belgian Federal Public Service of Justice (Ministry of Justice), in the Directorate-General for Legislation and Fundamental Freedoms and Rights, where he has been working for more than 25 years on the development of legislation in the large area of Property and Obligations Law and Civil Procedural Law. Among other responsibilities in international organizations, he has been for 20 years Head of the Belgian delegation to the United Nations Commission on International Trade Law (UNCITRAL) for the negotiation of various instruments in the field of Electronic Commerce, Security Rights, and Arbitration/Mediation, most recently the forthcoming Singapore Convention. At the level of the European Union, he has negotiated for more than 20 years many instruments in the field of Consumer Law, Commercial Law, and Private International Law. Among other things, he has been in charge of the European Contract Law project since the inception of that project (Tampere European Council 1999) and during the 2010 Belgian Presidency of the EU Council, he was Chair of the working party "Friends of the Presidency (Contract law)" and Observer of the EU Council in the Expert Group of the European Commission on a Common Frame of Reference in the area of European contract law.

Lastly, at the Belgian level, he has been responsible for the drafting and follow-up of many bills before the Belgian Parliament, most recently the Draft New Civil Code for which he was, among other responsibilities, a Member of the Commission for the Reform of the Obligations Law.

Professor James R. Coben

James Coben is a professor at Mitchell Hamline School of Law and a senior fellow in the law school's internationally acclaimed Dispute Resolution Institute (DRI), which he directed from 2000–2009. He teaches civil procedure and a wide variety of ADR courses. He is a co-author of the Thomson Reuters trial practice

series treatise *Mediation: Law, Policy & Practice* (2018–2019), a co-editor of the four-volume *Rethinking Negotiation Teaching Series* (DRI Press 2009–2013), and a former editorial board member of the American Bar Association’s *Dispute Resolution Magazine*, for which he co-writes a “Research Insights” featured column. From 2003–2007, Professor Coben served as project director for a European Union/U.S. Department of Education funded project to develop transnational ADR curriculum and promote transatlantic student mobility. During his tenure as DRI director, he helped create and co-directed three ADR study abroad programs—an international commercial arbitration program in London, an international business transactions negotiation program in Rome, and a program in democratic dialogue and mediation in Budapest. He also pioneered a variety of innovative ADR clinical opportunities for law students, including mediation advocacy on behalf of clients in employment and family law cases. Together with law school colleague Professor Peter Thompson, he created the Mediation Case Law project, a multi-media resource devoted to studying “failed” mediations—those unhappy situations where people using mediation to address an existing conflict or court case end up litigating an entirely new dispute about the mediation process itself.

Professor Ellen E. Deason

Ellen E. Deason is the Joanne Wharton Murphy/Classes of 1965 and 1973 Professor in Law at The Ohio State University Moritz College of Law. She served as the faculty director of the Moritz LL.M. program for foreign lawyers from 2006–2010. She teaches courses in the fields of alternative dispute resolution (ADR) and civil procedure and has authored casebooks on both subjects. Deason has also taught ADR subjects in LL.M. programs in Spain and China. She is known for her scholarly work on mediation confidentiality and she participated in drafting the amendments to the Uniform Mediation Act that incorporated the UNCITRAL Model Law on Conciliation. Most recently, her article on appropriate roles for judges in settlement was selected by the Association of American Law Schools Section of Dispute Resolution as the best article in the field of ADR published in 2017. Her current work is focused on the topic of combinations of mediation and arbitration. Deason serves as Reporter for the Uniform Law Commission Committee to Monitor Developments in Civil Litigation and Dispute Resolution, which considered the Singapore Convention at its meeting earlier this month.

Before becoming a legal academic, Deason served as a legal assistant to Arbitrator Howard M. Holtzmann at the Iran-United States Claims Tribunal, was a law clerk for Harry A. Blackmun of

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Michael R. Griffith

Michael Griffith is an associate of Mazie Slater Katz & Freeman, LLC and has been a member of the firm since 2017. He is admitted in New Jersey, the District of New Jersey, New York, and the Southern District of New York. Prior to joining the firm, Mr. Griffith served as law clerk to the Hon. Robert P. Contillo, P.J. Ch. and the Hon. Menelaos W. Toskos, P.J. Ch. of the Superior Court of New Jersey, Chancery Division in Bergen County. Mr. Griffith graduated from Rutgers University School of Law in 2016. During law school, Mr. Griffith served as the Senior Notes Editor of *The Women's Rights Law Reporter*, was a Kinoy-Stavis Public Interest Law Fellow, and an Eagleton Institute Fellow. Mr. Griffith also founded the Rutgers Alternative Dispute Resolution Society, and competed in the ICC Paris Mediation Competition, the CDRC Vienna IBA-VIAC with the New Jersey City University team, and on the Rutgers Law AAA/NYSBA Arbitration Team. Mr. Griffith went on to coach the Rutgers Law-Newark team in the 2016 ABA Mediation Competition, which finished second in the region. Mr. Griffith has co-authored research with Professor David Weiss, which was published by the International Mediation Institute. Mr. Griffith concentrates his practice on product liability, mass tort litigation, multidistrict litigation, and multicounty litigation. Mr. Griffith's research concentrates on international alternative dispute resolution.

Michel Kallipetis

Michel Kallipetis is the former Head of Littleton Chambers, and has 40 years' experience as a practicing barrister in the field of general commercial, professional negligence, and employment work. He is recognized in *The Legal Directories* as an expert in his field in Mediation, Commercial Litigation, and Professional Negligence. He is an Accredited Mediator with CEDR and ADR Chambers, was appointed to the Hong Kong HKIAC Accredited Mediator Panel, and as one of the first CIArb Mediation Fellows in 2008. He was appointed to the Singapore SMIC International Panel of Mediators in 2014. He is a member of The Sports Resolution Panel, a PIM Senior Mediator and a Chartered Arbitrator.

Michel has undertaken a number of mediations of an international nature, a large proportion of which have involved governments, state-owned businesses mediating with individuals and companies from across the globe. He has been appointed through

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Professor Lela P. Love

Lela P. Love is a professor of law at Benjamin N. Cardozo School of Law (NYC) where she leads the Kukin Program for Conflict Resolution. Cardozo's conflict resolution program has been one of the top ten dispute resolution programs in the United States for more than a decade, according to *US News and World Report*.

She founded (in 1985) Cardozo's Mediation Clinic, one of the first in the United States to train law students as mediators. She serves as mediator, arbitrator, and trainer for a variety of case types, including community, employment, family, probate, human rights, and commercial cases.

As Past Chair of the American Bar Association Section of Dispute Resolution, she initiated the first International Mediation Leadership Summit at the Peace Palace in the Hague. She has written widely on the topic of dispute resolution, including three law school textbooks and three books about mediation—*The Middle Voice*, with Joseph Stulberg, *Stories Mediator Tell*, co-edited with Eric Galton, and *Stories Mediators Tell—World Edition*, co-edited with Glen Parker. She has appeared on *Court TV* to demonstrate mediation.

She received a Lifetime Achievement Award from the International Academy of Mediators and a Frontline Champion Award during the celebration of Mediation Week at the Association of the Bar of NYC.

Lela earned her B.A. from Harvard University, a M.Ed. from Virginia Commonwealth University, and a J.D. degree from Georgetown University Law School. She is admitted to the Bar in New York, New Hampshire, and the District of Columbia.

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She is a global expert in alternative dispute resolution and dispute management with over thirty years' experience in promoting the effective use of ADR. She is a published author on ADR issues and frequently speaks on the topic. She is Chair of the NYSBA Dispute Resolution Section and Co-Chair and Board Member of the International Mediation Institute. She is a former Chair of the ABA Section for Dispute Resolution where she was a founding member of Women in Dispute Resolution and co-founder of Minorities in Dispute Resolution. She was a delegate to UNCITRAL's Working Group II that developed the Singapore Convention.

Deborah is a member of the Board of Editors for the Securities Arbitration Commentator and serves on the Board of Advisors for "Arbitrator Intelligence." She is co-author of a Chapter on ADR Providers for *ADR in Employment Law*, and author of a Chapter on Securities Dispute Resolution for the *Dispute Resolution Handbook*. For more information, go to www.debmasucciadr.com.

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Corinne Montineri is a Senior Legal Officer in the International Trade Law Division of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is the core legal body of the United Nations in the field of international trade law.

Her main field of activity relates to dispute settlement, and technical assistance to law reform in the field of arbitration and mediation, which includes advising UN Member States on draft arbitration and mediation laws, and on compatibility of existing laws with UNCITRAL standards. She has been servicing the sessions of the UNCITRAL Working Group II (Arbitration and Conciliation) since October 2003 and has been the Secretary of Working Group II until December 2018. She is currently the Secretary of Working Group III (ISDS Reform).

Natalie Y. Morris-Sharma

Natalie Y. Morris-Sharma is Director of the International Legal Division in Singapore's Ministry of Law, which handles a variety of international law and policy concerns. Previously, Natalie was legal advisor to Singapore's Permanent Mission to the UN, and

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Natalie has participated in several bilateral and multilateral negotiations, including trade and investment agreement negotiations, and at UNCITRAL. At UNCITRAL, her recent roles have included Chairperson of UNCITRAL Working Group II (Dispute Settlement), for its work on a Convention and draft amended model law on mediation; and Vice-Chairperson of the 50th UNCITRAL Commission session, where she chaired the discussions that led to the adoption of UNCITRAL's mandate for ISDS reform.

Natalie has chaired and facilitated other UN meetings, including as Vice-Chairperson of the Sixth Committee Bureau at the 70th Session of the UNGA and as the facilitator for the omnibus UNGA resolution on oceans and the law of the sea. She has also served as head of delegation for Singapore at meetings including the ASEAN Senior Law Officials' Meeting and The Hague Conference General Council meeting.

Natalie has published journal articles and book chapters on topics such as the Singapore Convention on Mediation, investor-State dispute settlement, BBNJ, and the work of the International Law Commission. She is co-author of a book, *From Treaty-Making to Treaty-Breaking: Models for ASEAN External Trade Agreements*.

Natalie read law at Cambridge University, and obtained her LL.M. in International Legal Studies from New York University's School of Law. She is called to the Bar in New York and in Singapore. Natalie is a recipient of the Public Administration Medal (Bronze).

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Norel Rosner was involved in the UNCITRAL project on the enforceability of international commercial settlement agreements as lead negotiator on behalf of the European Union. He currently works at the Directorate-General for Justice and Consumers at the European Commission in Brussels, Belgium, focusing on international negotiations in the area of civil justice. He previously worked at the Court of Justice of the European Union, as well as in the academics (University of Groningen, The Netherlands) and private practice (De Brauw Blackstone Westbroek, The Netherlands). He holds a Ph.D. degree in Law from the University of Groningen and has been a Visiting Researcher at the NYU School of Law.

Timothy Schnabel

Tim Schnabel was an attorney for U.S. State Department from 2008 to 2018. He led U.S. participation in the negotiation of a vari-

ety of multilateral instruments related to mediation, investor-state arbitration, insolvency, secured finance, and financial markets law. In particular, he proposed that UNCITRAL develop the Singapore Convention on Mediation and then served as the lead U.S. negotiator for the treaty. He also led U.S. participation in UNCITRAL's project on reform of investor-state dispute settlement as well as in the development of the U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration and two model laws on cross-border insolvency. Additionally, he represented the United States in a number of legal harmonization projects in UNIDROIT and the Hague Conference, and was the lead U.S. Lawyer for the negotiation of the Food Assistance Convention. Before joining the State Department, he clerked on the U.S. Court of Appeals for the D.C. Circuit and worked as an attorney at WilmerHale. He earned his J.D. from Yale Law School and his B.A. and M.A. from Case Western Reserve University.

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Héctor Flores Senties obtained his Law Degree, *Magna Cum Laude*, at Instituto Tecnológico Autónomo de México (ITAM). He attended programs on public and private international law at the Hague Academy of International Law. Professor of International Arbitration and Alternative Dispute Resolution at ITAM, he frequently speaks and gives lectures before members of Mexican federal courts related to alternative dispute resolution and arbitration. As a Partner in *Abascal, Flores y Segovia*, a boutique law firm based in Mexico City and specializing in international arbitration and business law, he regularly advises and represents clients in arbitration proceedings, and is constantly engaged in all types of matters related to the state court's interventions related to arbitration and alternative dispute resolution. He is a member of the arbitrator's roster of the International Centre for Dispute Resolution, and member of the ICDR Board of Advisors in Mexico. He serves as an external advisor to the Mexican Ministry of Foreign Relations in matters related to International Private Law. Since 2014, he has served as advisor and representative of Mexico before the United Nations Commission for International Trade Law (UNCITRAL); and, as such, he was actively involved in the approval of the Mauritius Convention on Transparency in Investment Arbitration and corresponding amendments to the UNCITRAL Arbitration Rules, amendments to the UNCITRAL Notes on the Organization of Arbitral Proceedings, and more recently, the amendment of the UNCITRAL Model Law on International Commercial Conciliation, and the drafting of the Singapore Convention on Commercial Mediation.

Allan J. Stitt

Allan J. Stitt is the President and CEO of ADR Chambers and the Stitt Feld Handy Group. ADR Chambers is the largest, private alternative dispute resolution service provider in the world and has administered over 55,000 mediations and arbitrations since 2012. The Stitt Feld Handy Group, the ADR training division of ADR Chambers, has trained over 40,000 people world-wide in alternative dispute resolution skills since its inception in 1994. Allan is a Toronto-based mediator, arbitrator, negotiation consultant, facilitator, trainer, author, and ADR systems design specialist. He has mediated two-party and multi-party disputes in a variety of contexts and has arbitrated numerous commercial cases. Allan has designed and taught ADR workshops in North America, South America, Europe, Asia, Australia, and Africa. He earned his Master of Laws at Harvard Law School where he first studied ADR under Professor Roger Fisher. Allan is on the international panel of arbitrators for the International Centre for Dispute Resolution, an arbitrator and mediator for the Sport Dispute Resolution Centre of Canada and the Court of Arbitration for Sport in Lausanne, Switzerland, and an arbitrator on the Canadian Transportation Agency List of Arbitrators.

Allan is a Senior Advisor to the Jerusalem Arbitration Centre, and was a Canadian advisor at the UNCITRAL Working Group on the Singapore Convention for the enforcement of international mediation agreements. He has written *ADR For Organizations* and *Mediating Commercial Disputes*, both business books bestsellers. He also wrote *Mediation: A Practical Guide* and he is the Editor-in-Chief of the LexisNexis *ADR Practice Manual*.

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Professor S.I. Strong is a Manley O. Hudson Professor of Law at the University of Missouri. She specializes in international and comparative law, with a particular emphasis on international commercial arbitration and mediation. She has taught at the Universities of Cambridge and Oxford in the United Kingdom as well as Georgetown Law Center and the University of Missouri in the United States. Professor Strong is an experienced practitioner, having acted as Counsel at Baker & McKenzie after working as a dual-qualified lawyer (U.S. attorney and English solicitor) in the New York and London offices of Weil, Gotshal & Manges. Professor Strong has published over 100 award-winning books and articles in Europe, Asia, and the Americas, including *Arbitration of Trust Disputes: Issues in National and International Law* (2016), *Class, Mass, and Collective Arbitration in National and International Law* (2013), and *Research and Practice in International Com-*

mercial Arbitration: Sources and Strategies (2009), all from Oxford University Press, as well as *International Commercial Arbitration: A Guide for U.S. Judges* (2012) from the Federal Judicial Center, the education and research arm of the U.S. federal judiciary. Professor Strong's scholarly work has also been translated into Spanish, French, Russian, and Chinese, and cited as authority in numerous judicial opinions and international arbitral awards. Professor Strong, who holds a Ph.D. in law from the University of Cambridge, a D.Phil. from the University of Oxford, a J.D. from Duke University, an M.P.W. from the University of Southern California, and a B.A. from the University of California, Davis, sits as an arbitrator and mediator on a variety of complex commercial matters.

Professor David S. Weiss

Dr. David Weiss was a structured finance banker and still holds a license to practice law. Professor David S. Weiss, Esq., is an Assistant Professor in the Management Department at New Jersey City University School of Business where he teaches global business and heads the B.S. in Entrepreneurship. He is also the Founder and Director of the Institute for Dispute Resolution (IDR) and the "Connecting Bridges and Borders Program through Business" also located at New Jersey City University. Dr. Weiss advances self-determination values through concepts of mediation theory and promotes innovation and entrepreneurship to advance Foreign Direct Investment (FDI). He advises on policy through both the IDR institute and the Connecting Bridges and Borders through Business Program to assist cross border stakeholders improve FDI opportunities. Professor Weiss received his Juris Doctor at New York Law School, and post doctorate work at the Sorbonne University le droit and is an IMI Certified Mediator. He held appointments at The United Nations through UNCITRAL, is chair of the International Committee for a major trade and industry group, and lectures internationally throughout Eastern Europe, the Balkans, Caucasus, and the Caribbean basin on law and economics through the prism of mediation, business, innovation, and entrepreneurship.

Professor Weiss has extensive publications in the field of mediation and policy to address risk and conflict through his theory known as Economic Efficiency Mediation (EEM) which is a linkage for ethical code applied for AI (Artificial Intelligence) using Natural Processing Language (NLP). He is the author of several policies and articles including the recent "*New Jersey Arbitration, Conciliation and Mediation Act.*" Currently, he is working on New Jersey policy for data protection to promote more

clarity and confidence within the digital economy, institutional system design for mediation policy within the Commonwealth of Puerto Rico, and value systems for mediation theory and practice within Central Eastern Europe from a thought leadership perspective and standards for consideration within the data destruction industry globally. He is currently in the process of launching an additional economic and feasibility study between Hungary and New Jersey relating to improving chain supply logistics utilizing air cargo between Newark and Budapest for furthering Foreign Direct Investment (FDI) activity.

