The United Nations Convention on International Settlement Agreements Resulting from Mediation: Its Genesis, Negotiation and Future

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Introduction

On 7 August 2019, forty-six States signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") in Singapore.[2] More than seventy States sent

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2 United Nations Press Release, "The United Nations 'Singapore Convention on Mediation' opens for signature in Singapore", United Nations Information Service, UNIS/L/278 (7 August 2019) (http://www.unis.unvienna.org/unis/en/pressrels/2019/unisl278.html). The forty-six countries that signed the Convention on 7 August 2019 are: Afghanistan, Belarus, Benin, Brunei Darussalam, Chile, China, Colombia, Republic of the Congo, Democratic Republic of the Congo, Kingdom of Eswatini, Fiji, Georgia, Grenada, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, South Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor-Leste, Turkey, Uganda, Ukraine, United States, Uruguay, and Venezuela. *See also* UNCITRAL, "Status: United Nations Convention on International Settlement Agreements Resulting from Mediation (https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status). Belarus and Iran signed with reservations.

delegations to the signing ceremony.[3] In September, five additional States signed the Singapore Convention.[4] The Singapore Convention will come into force six months after ratification by three signatory States.[5]

Along with the corresponding amendments to the 2002 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation,[6] the Singapore Convention represents an attempt to bring to mediated[7] settlement agreements the same efficient and effective enforcement mechanisms that exist for international arbitration awards via the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which was adopted in 1958.

In announcing the opening of the treaty for signing, the United Nations described it as "a landmark instrument", that should "enhance the use of mediation" and "foster access to justice" by "providing for the first time

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3 United Nations Press Release, "The United Nations 'Singapore Convention on Mediation' opens for signature in Singapore", United Nations Information Service, UNIS/L/278 (7 August 2019).

4 United Nations Press Release, "Treaty event produces new signatories for the United Nations 'Singapore Convention on Mediation'", United Nations Information Service, UNIS/L/282 (30 September 2019) (http://www.unis.unvienna.org/unis/en/pressrels/2019/unisl282.html). The five States were Armenia, Chad, Ecuador, Gabon, and Guinea-Bissau.

5 *United Nations Convention on International Settlement Agreements Resulting from Mediation* (2018), Article 14(1) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf) (hereinafter "Singapore Convention").

6 *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) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf) (hereinafter cited as "Mediation Model Law"). The change in terminology in the Model Law, from "Commercial Conciliation" to "Commercial Mediation", occurred because "mediation" was viewed as a more widely used term and "to adapt to the actual and practical use of the terms and with the expectation that this change w[ould] facilitate the promotion and heighten the visibility of the [Mediation] Model Law". Previously, UNCITRAL used "mediation" and "conciliation" interchangeably. However, the change to "mediation" is not intended to have any substantive effect. Mediation Model Law, §1, Article 1, Number 2. *See* UNCITRAL, Report of Working Group II, 67th Session, UN Doc. A/CN.9/929, 104 (2017). This paper similarly uses "mediation" and "conciliation" interchangeably.

7 As defined in the Meditation Model Law, "mediation" is a process, whether referred to by the expression mediation, conciliation, or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute. Mediation Model Law, §1, Articles 1 and 3.

a cross-border enforcement mechanism for settlement agreements that result from mediation". The Singapore Convention "brings certainty and stability to the international framework on mediation, thereby promoting more prosperous, stable and sustainable international trade relationships among States and regions".[8] Thus, expectations regarding the future success of, and the benefits from, the Singapore Convention, are quite high.

Initially proposed by the UNCITRAL Commission in mid-2014, the Singapore Convention represents the culmination of three years of work by UNCITRAL's Working Group II.[9] Working Group II met twice each year, beginning in February 2015 and concluding in February 2018, to discuss and develop what now will be known as the "Singapore Convention on Mediation".[10] During those discussions, many issues were debated and compromises reached to achieve the final convention and parallel amendments to the Model Law on Conciliation.[11]

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8 United Nations Press Release, "The United Nations 'Singapore Convention on Mediation' opens for signature in Singapore", United Nations Information Service, UNIS/L/278 (7 August 2019).

9 Until the beginning of 2016, UNCITRAL's Working Group II was named "Arbitration and Conciliation". Since late 2016, the name has been changed to "Dispute Settlement".

10 The shortened title comes from the location of the signing ceremony. *See* Singapore Convention, Article 11(1). However, this designation also reflects the excellent work done by the chair of Working Group II during its deliberations, Natalie Morris-Sharma of Singapore, and the delegates' appreciation of her labors.

11 The Singapore Convention already has generated considerable commentary in the academic and professional literature. *See,* e.g., Chua, "The Singapore Convention on Mediation — A Brighter Future for Asian Dispute Resolution", 9 *Asian J. Int'l Law*, at pp. 195–205 (2019); Alexander and Chong, "An Introduction to the Singapore Convention on Mediation — Perspectives from Singapore", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 37–56 (2018); Knieper and Montineri, "UNCITRAL and a New International Legislative Framework on Mediation", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflict-management*, at pp. 23–29 (2018); Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflict-management*, at pp. 30–36 (2018); Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J*., at pp. 1–60 (2019); Schnabel, "Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties", *Am. Rev. Int'l Arb*. (2019) (forthcoming) (available at https://ssrn.com/abstract=3320823); Sussman, "The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements", ICC *Dispute Resolution Bulletin*, at pp. 42–54 (Number 3, 2018); Verbist, "UNCITRAL Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 6–16 (2018).

This article will explore the development of the Singapore Convention in Working Group II and will discuss some of the issues that remain for future interpretation and application. The paper will first briefly describe initiatives by UNCITRAL in the areas of arbitration and mediation that existed prior to Working Group II commencing its deliberations, in order to provide the context and framework within which the Singapore Convention developed and now exists.

Next, this article will examine the reasons that led to Working Group II undertaking the development of the Singapore Convention and will then briefly review the deliberations during its three years of negotiations and the important compromises that occurred. It will highlight the deliberations that led to the final outcome.

Finally, this article will identify some issues and areas for further development as the Singapore Convention comes into effect. This paper thus will provide guidance for the future application, interpretation, and possible later amendment of this important new international convention and amended model law.[12]

UNCITRAL's Previous Work

For more than five decades, UNCITRAL has been actively working, through the development of conventions, model laws, and accompanying rules and recommendations, to encourage and enhance the efficient, effective, and peaceful resolution of transnational disputes.[13]

By far the best-known and most-successful convention developed by UNCITRAL is the New York Convention.[14] Adopted in 1958, 160 States

12 UNCITRAL does not prepare commentary or explanatory materials to accompany the text of proposed conventions. However, it does maintain a list of *travaux préparatoires* relating to the deliberations that led to the Singapore Convention. *See* UNCITRAL, Singapore Convention on Mediation, *Travaux Préparatoires* (https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/travaux).

13 *See generally* Knieper and Montineri, "UNCITRAL and a New International Legislative Framework on Mediation", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 24–26 (2018); Verbist, "UNCITRAL Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 6–8 (2018).

14 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf) (hereinafter cited as "New York Convention").

have meanwhile acceded to the New York Convention.[15] It provides common legislative standards for the recognition of international arbitration awards and court recognition and enforcement of such awards.[16] The New York Convention has been described as:

> ". . . the most successful, multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonized fashion."[17]

In 1976, UNCITRAL initiated a review of the procedural aspects of international commercial arbitration and issued the UNCITRAL Arbitration Rules.[18] These Rules subsequently were amended in 2010.[19] The Rules "cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award".[20]

The UNCITRAL Arbitration Rules are used frequently in *ad hoc* arbitrations in addition to proceedings administered by arbitral institutions. The rules of more than twenty-five arbitration centers are based in whole or in part on the UNCITRAL Arbitration Rules.[21] In 1976 and again in 2010, UNCITRAL published recommendations to assist arbitral

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15 *See* UNCITRAL, "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

16 UNCITRAL, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards).

17 Pieter Sanders, "Foreword", in International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* v (2011).

18 UNCITRAL, *UNCITRAL Arbitration Rules* (1976) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf).

19 UNCITRAL, *UNCITRAL Arbitration Rules* (2010) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf).

20 UNCITRAL, "Arbitration Rules" (1976) (https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration).

21 UNCITRAL, "Arbitration Centres" (https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres).

institutions and interested groups regarding arbitration under the UNCITRAL Arbitration Rules.[22]

UNCITRAL adopted the Model Law on International Commercial Arbitration in 1985 to assist States in modernizing and harmonizing their arbitration laws.[23] This Model Law was the result of an international consensus on main elements of practice and procedure of international arbitration, and was amended in 2006.[24] At least 110 jurisdictions, which include eighty States, have enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.[25]

Similar to its Arbitration Rules, in 1996 and 2016, UNCITRAL issued Notes on Organizing Arbitral Proceedings. These Notes provide a list of matters on which an arbitral tribunal may make decisions, if the parties agree, such as the place and language of the arbitration, and the conduct of the proceedings.[26]

With the adoption of the UNCITRAL Conciliation Rules in 1980, UNCITRAL moved from the area of dispute resolution in which an outcome is imposed on the parties by one or more arbitration tribunals into the realm of dispute resolution via a negotiated and agreed conclusion to a dispute.[27] The Conciliation Rules provide a comprehensive set of procedural rules that cover many aspects of the conciliation process.[28]

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22 *See* UNCITRAL, "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission" (1976) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-recommendation-e.pdf); UNCITRAL, "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules" (2010) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/13-80327-recommendations-arbitral-institutions-e.pdf).

23 *UNCITRAL Model Law on International Commercial Arbitration* (1985) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf).

24 *See* UNCITRAL, "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration).

25 *See* UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status).

26 *See* UNCITRAL, "UNCITRAL Notes on Organizing Arbitral Proceedings" (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf).

27 UNCITRAL, *UNCITRAL Conciliation Rules* (1980) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf).

28 The UNCITRAL Secretariat has prepared revised Mediation Rules (https://undocs.org/en/A/CN.9/986) and draft Notes on Mediation (https://undocs.org/en/A/CN.9/987). They have been submitted for approval by the UNCITRAL Commission in July 2020. *See* UNCITRAL Commission Report, UN Doc. A/74/17 (2019), 123.

To encourage the use of conciliation, UNCITRAL adopted the Model Law on International Commercial Conciliation in 2002, which provides uniform conciliation rules.[29] Thirty-one States and fourteen subsidiary jurisdictions have adopted the Model Law on Conciliation.[30]

Finally, in 2014, UNCITRAL adopted a convention and Rules on Transparency in Treaty-based Investor-State Arbitration.[31] The convention is known as the "Mauritius Convention on Transparency" and has been ratified by five states.[32] The Rules on Transparency apply to disputes arising out of investment treaties concluded prior to 1 April 2014, when parties to the relevant treaty, or disputing parties, agree to their application; and to disputes arising out of treaties concluded on or after 1 April 2014, when Investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree.

The Rules on Transparency may apply in Investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules and in ad hoc proceedings.[33] At the same time that it approved the Mauritius Convention, UNCITRAL added a new paragraph to its Arbitration Rules to incorporate the Rules on Transparency for Investor-State arbitrations commenced pursuant to an investment treaty signed on or after 1 April 2014.[34] To date, the Rules on Transparency have been incorporated into more than sixty-one Bilateral Investment Treaties.[35]

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29 UNCITRAL, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use* 2002 (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf) (hereinafter "UNCITRAL Model Law Conciliation").

30 *See* UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Conciliation (2002)" (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status).

31 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf).

32 *See* UNCITRAL, "Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)" (https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status).

33 UNCITRAL, "United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the 'Mauritius Convention on Transparency')" (https://uncitral.un.org/en/texts/arbitration/conventions/transparency).

34 *See* UNCITRAL, *UNCITRAL Arbitration Rules* (https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration).

35 *See* UNCITRAL, "Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)" (https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status).

Genesis: The Need for a Rational Enforcement Means After a Mediated Settlement

The question of how a settlement agreement reached through mediation can be enforced if one party fails to comply with the terms of the settlement has existed for decades, especially as the popularity of mediation as an alternative to expensive and time-consuming litigation (or even arbitration) has grown.[36] Indeed, in some jurisdictions — primarily common law systems — mediation has become virtually a requirement before a dispute goes to trial.[37] In the United States, for example, the majority of disputes filed in court are resolved through mediation prior to trial.[38]

Enforcement of a mediated settlement agreement presents several different avenues for enforcement. Each has deficiencies and issues that result in uncertainty and often increased expense and time, thereby lessening the value of a mediated dispute resolution. Mediated settlement agreements are contracts between the parties, and thus a failure to comply with the terms of the settlement — a breach of the settlement agreement — may be enforced as a breach of contract. However, a breach of contract action brings with it the disadvantages of having to begin a new judicial proceeding and facing the typical breach of contract defences.[39] Usually, in reaching a mediated settlement, the parties desired to avoid further or future litigation relating to the issues settled.

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36 Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine* 10 (Summer 2009). *See also* Sussman, "Final Step: Issues in Enforcing the Mediation Settlement Agreement", in *Contemporary Issues in International Arbitration and Mediation*, Rovine, ed., at p. 343 (2009).

37 *See* Deason, "Procedural Rules for Complementary Systems of Litigation and Mediation — Worldwide", 80 *Notre Dame L. Rev.*, at pp. 553–592 (2005); Stipanowich, "The International Evolution of Mediation: A Call for Dialogue and Deliberation", 46 *Victoria U. of Wellington L. Rev.*, at pp. 1191–1243 (2015).

38 *See* Eisenberg and Lanvers, "What is the Settlement Rate and Why Should We Care?" 6 *J. Empirical Legal Studies*, at pp. 111–146 (2009); de Gramont, Igyarto, and Sainti, "Divergent Paths: Settlement in US Litigation and International Arbitration", 40 *Fordham Int'l L.J.*, at pp. 953–972 (2017).

39 *See*, e.g., Sussman, "A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony", 2 *International Bar Association Mediation Committee Newsletter*, at pp. 32–40 (2006) (summarizing various defences and issues with enforcement of mediated settlement agreements in the United States). *See also* Sussman, "Final Step: Issues in Enforcing the Mediation Settlement Agreement", in *Contemporary Issues in International Arbitration and Mediation*, Rovine, ed., at pp. 343–359 (2019).

If an action is pending in court, then a settlement agreement may be entered as a judgment and enforced as such. In such instances, the terms of the agreement may be entered by the court as a consent judgment, and the court may retain jurisdiction to enforce the judgment against a recalcitrant party.[40] Indeed, the European Union's ("EU") Mediation Directive anticipates that a settlement agreement may be enforced by entry of a judgment if permissible under the law of the member state in which the request is made.[41] However, if no action is pending, then this method to obtain a readily enforceable settlement is not available.[42]

If the settlement agreement arises out of a trans-national dispute, it may be entered as an agreed arbitral award and thus may, and usually will, be enforceable under the New York Convention. However, this route is not without dangers. The rules of many arbitral institutions provide for entry of an agreed arbitral award if the dispute is resolved while the matter is pending.[43] But the arbitration laws of some jurisdictions effectively require the existence of a "live" dispute prior to entry of an arbitral award.[44]

If an arbitration is not then-pending, the enforceability under the New York Convention of an arbitral award entered after an arbitrator is appointed (for the purpose of entering an agreed award) is uncertain. Commentators have reached differing views.[45] However, the alleged uncertainty may not have a basis in the text of the New York Convention, which merely provides that it applies to the recognition and enforcement

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40 Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine*, at pp. 10–11 (Summer 2009).

41 European Union, Directive 2008/52/EC, Article 6 (2008).

42 But *see Colorado Rev. Stat*. §§ 13-22-308, 13-22-505 (2016) (providing that a settlement agreement, including those relating to international disputes, if reduced to writing and signed by the parties, may be presented to any court as a stipulation and entered as a judgment).

43 *See,* e.g., *UNCITRAL Model Law on International Commercial Arbitration* (2006), Article 30(1); London Court of International Arbitration, Arbitration Rules, Article 26.9 (2014); Stockholm Chamber of Commerce, Arbitration Rules, Article 45 (2017).

44 *See,* e.g., United Kingdom, "Arbitration Act 1996", Article 6(1) (1996) (defining "arbitration agreement" as relating to "present or future disputes" — not past disputes); *New York Civ. Prac. L. & Rules*, §7501 (defining "arbitration agreement" as relating to "any controversy thereafter arising or any existing controversy").

45 *See*, e.g., Abramson, "Mining Mediation Rules for Representation Opportunities and Obstacles", 15 *Am. Rev. Int'l Arb*., at pp. 103–109 (2004) (concluding such awards are enforceable); Deason, "Procedural Rules for Complimentary Systems of Litigation and Mediation — Worldwide", 80 *Notre Dame L. Rev*., at pp. 553–592 (2005) (concluding enforceability of such awards is unclear); Newmark and Hill, "Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?", 16 *Arb. Int'l*, at pp. 81–88 (2000) (concluding such awards are not enforceable). *See generally*, Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine*, at pp. 11–12 (Summer 2009).

of arbitral awards "arising out of differences between persons", without any temporal limitations.[46]

The desirability of a means to readily enforce mediated settlement agreements is clear. Indeed, during the discussions leading to the creation of the Model Law on Conciliation in 2002, an attempt was made "to develop a uniform enforcement mechanism".[47] During the deliberations:

> "Many practitioners … put forward the view that the attractiveness of conciliation would be increased if a settlement reached during conciliation would, for the purposes of enforcement, be treated as or similarly to an arbitral award. Reasons given for introducing expedited enforcement usually aim to foster the use of conciliation and to avoid situations where a court action to enforce a settlement might take months or years to reach judgement."[48]

However, this effort fell short, and the text of the Model Law merely recognized that agreements reached through mediation were enforceable, while leaving the method for enforcing such agreements up to the enacting State.[49]

Support for an efficient enforcement means continued. In November 2007, the International Bar Association's Mediation Committee published the results of a survey that found "enforceability of a settlement agreement is generally of the utmost importance".[50] Leading practitioners and scholars joined the chorus, and by 2014, a consensus on the need for a uniform, transnational mechanism to enforce mediated settlement agreements existed.[51]

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46 New York Convention, Article 1(1).

47 Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine*, at p. 10 (Summer 2009).

48 UNCITRAL, "Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation", UN Doc. A/CN.9/514, 77 (2002).

49 UNCITRAL Model Law Conciliation, Article 14. *See also* Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 30–36 (2018).

50 International Bar Ass'n, Mediation Committee, Subcommittee on UNCITRAL, "Model Law on International Commercial Conciliation", Singapore (October 2007), quoted in Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine*, at p. 10, Number 4 (Summer 2009).

51 Boulle, "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework", 7 *Contemp. Asia Arb. J.*, at pp. 35–65 (2014); Strong, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", 45 *Wash. U. J. L. & Pol'y* , at pp. 11–39 (2014); Sussman, "The New York Convention Through a Mediation Prism", 15 *Dispute Resolution Magazine*, at p. 13 (Summer 2009); Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Work", 7 *Contemp. Asia Arb. J.*, at pp. 87–117 (2014).

Thus, in the summer of 2014, the United States proposed to the UNCITRAL Commission that Working Group II take up the issue as its next topic.[52] The UNCITRAL Commission agreed, and directed Working Group II to consider the issue of enforcement of international settlement agreements resulting from conciliation (mediation) proceedings.[53] The stage was set for an international effort to reach agreement on the long-sought enforcement means.

The Deliberations of Working Group II: From a Rocky Start to Final Adoption

When Working Group II began its deliberations in February 2015, the proposal for an international agreement for the enforcement of mediated settlement agreements "did not get off to an auspicious start".[54] Indeed, after the first day of discussions, the then-chair of the Working Group concluded that the project did not have a great chance of success.[55]

The interventions of various delegations painted a bleak picture, including predictions that development of any convention would take years and that such a convention would not be any more successful than the Model Law on Conciliation.[56] At the end of the first week of discussions, Working Group II requested a mandate from the Commission to work on the subject, but without specifying any particular form for the final product.[57]

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52 Proposal by the Government of the United States: Future Work for Working Group II, UN Doc. A/CN.9/822, at p. 3 (2 June 2014). *See also* Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 31–32 (2018); Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 2–4 (2019).

53 UNCITRAL Commission Report, UN Doc. A/69/17 (2014), 123.

54 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at p. 5 (2019).

55 Intervention of the Chair, UNCITRAL Audio Recordings, Working Group II, 62nd Session (5 February 2015), at 10:00–13:00 (https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f7f8fc60-434c-4965-9b2d-79dee3f85403) (the chair for the first session was Mr. Michael Schneider of Switzerland).

56 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at p. 5 (2019).

57 *See* UNCITRAL, Report of Working Group II, 62nd Session, UN Doc. A/CN.9/832, 59 (2015).

At the Commission meeting in the summer of 2015, support for the project increased, with many states expressing favorable positions.[58] Only the EU and some of its Member States expressed strong opposition. The EU saw no need to undertake the topic and asserted that agreement on a uniform mechanism for enforcement was unlikely.[59] Nevertheless, the Commission decided that Working Group II should commence work on the possible preparation of a convention, model provisions, or "guidance texts" on the topic.[60]

At its 63rd Session in September 2015, Working Group II reached a consensus that the scope of the instrument should be limited to the enforcement of "commercial" settlement agreements.[61] As a consequence, the Singapore Convention excludes personal, family, inheritance, and employment matters from its scope, as well as settlement agreements that would otherwise be enforceable as a judgment or as an arbitral award.[62]

Working Group II also reached agreement that settlement agreements involving government entities should not be excluded, because some of these entities engage in commercial activities and might seek to use mediation to resolve disputes in the context of those activities.[63] At its session in September 2016, Working Group II confirmed that settlement agreements involving States and other public entities should not be automatically excluded from the scope of the instrument.[64]

Discussion also arose in September 2015 whether a review mechanism should exist at the place where the mediation took place. However, because it is not always possible to determine "a place of the mediation" in international mediation and there was a risk of a "double exequatur" requirement if this idea were followed, Working Group II agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek direct enforcement at the place of

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58 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", *19 Pepperdine Disp. Resol. J.*, at pp. 5–6 (2019).

59 Intervention of the European Union, UNCITRAL Audio Recordings, 48th Session (2 July 2015), at 9:30–12:30 (https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f3e4531b-7187-411c-a063-27bb8e1bc546).

60 UNCITRAL Commission Report, 48th Session, UN Doc. A/70/17, Paragraph 142 (2015).

61 UNCITRAL, Report of Working Group II, 63rd Session, UN Doc. A/CN.9/861, Paragraph 40 (2015).

62 Singapore Convention, Article 1.

63 UNCITRAL, Report of Working Group II, 63rd Session, UN Doc. A/CN.9/861, Paragraph 46 (2015).

64 UNCITRAL, Report of Working Group II, 65th Session, UN Doc. A/CN.9/896, Paragraph 62 (2016). *See* Singapore Convention, Article 8(1)(a).

enforcement without imposing a requirement for a review of the settlement agreement at the originating state.[65]

The 66th Session in February 2017 was a break-through in the discussions. At an informal consultation organized over the lunch break on 7 February, key delegations reached a number of compromises. The "package" deal addressed five critical issues. These issues, which had been extensively debated, were:

(1) Would the instrument cover only private settlement agreements or would judicial settlements and arbitral consent awards be included?
(2) Would recognition of settlement agreements be included, or only their enforcement?
(3) Would the instrument include an opt-in/opt-out mechanism?
(4) Would the lack of impartiality and independence of the mediator be a ground for refusing enforcement?
(5) Would the instrument be a convention or a model law?[66]

The consensus reached was that the instrument would only cover private settlement agreements; only enforcement would be addressed in the instrument, although defenses would be described as well; States would be permitted to adopt an opt-in mechanism; the lack of impartiality and independence by the mediator, properly defined and limited, would be grounds to refuse enforcement; and both a convention and amendments to the Model Law on Conciliation would be drafted.[67]

With this breakthrough, the deliberations of Working Group II proceeded apace and were completed in two additional sessions. At its 67th Session, Working Group II debated the grounds for refusing to enforce a settlement agreement, as well as the evidence necessary to establish that

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65 UNCITRAL, Report of Working Group II, 63rd Session, UN Doc. A/CN.9/861, Paragraph 84 (2015).

66 Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at p. 34 (2018); Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 6–7 (2019).

67 Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at pp. 34–35 (2018); Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 7–8 (2019). *See generally* UNCITRAL, Report of Working Group II, 66th Session, UN Doc. A/CN.9/901 (2017).

the settlement resulted from mediation.[68] At its final session, Working Group II discussed a number of issues regarding the scope and exclusions of the draft instruments, as well as definitions. In general, no substantive alterations or changes were made.[69]

With respect to whether the draft instruments should set forth how a competent authority would ascertain whether a settlement agreement fell within the scope of the exclusions, it was noted that such a procedure would largely depend on the domestic rules of procedure. Therefore, it was not necessary for the draft instruments to prescribe any particular procedure for that purpose.[70]

However, this decision is not helpful in some jurisdictions, such as England and Wales, where there presently are not any standard rules for mediation procedure. In other countries, such as Belgium, the applicable law contains rules of procedure regarding mediation and provides grounds that may cause a court to refuse to recognize a mediation settlement agreement.[71]

In addition, Working Group II agreed that the "illustrative and non-hierarchical list of means to evidence that a settlement agreement resulted from mediation" was indeed non-exhaustive and that a party requesting enforcement could submit any other evidence to prove that a settlement agreement resulted from mediation if it could not produce the evidence mentioned in the draft instruments.[72]

Working Group II then turned to a final consideration of defences. It confirmed that the grounds listed for refusing to grant relief applied both to requests for enforcement and to situations where a party invokes a settlement agreement as a defence against a claim.[73] After considerable further discussion, Working Group II agreed on amended language for the draft convention.[74] It also expressed an approved understanding that overlap might exist among the grounds for refusing enforcement, and that competent authorities should take that aspect into account when

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68 UNCITRAL, Report of Working Group II, 67th Session, UN Doc. A/CN.9/929, Paragraphs 74–101 (2017).

69 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraphs 17–32 (2018).

70 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraph 24 (2018).

71 Belgian Judicial Code, Book 7, Articles 1733, 1736.

72 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraph 38 (2018).

73 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraph 41 (2018).

74 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraphs 42–67 (2018).

interpreting the various grounds.[75] Further, it was accepted that it would be up to each contracting state to decide what constituted "public policy" as stated in section 2(a), and that "public policy could include, in certain cases, issues relating to national security or national interest".[76]

One final important clarification was to what is now Article 12 of the Singapore Convention, which relates to regional economic integration organizations. This provision was amended to make it clear that a party seeking enforcement of a mediated settlement agreement may only seek relief from a single member State in the regional economic integration organization, and could not re-apply to courts of other member States following a decision in a single member State.[77]

At its session in New York on 25 June 2018, the UNCITRAL Commission approved the draft Convention and proposed amendments to the Model Law on Conciliation with two minor modifications.[78] The draft Convention and draft amended Model Law were submitted to the General Assembly of the United Nations at its session that opened on 18 September 2018. Introducing the texts, the chair of the UNCITRAL Commission stated that the instruments "would allow parties to rely on a mediated settlement agreement and enforce it in a cross-border context according to simplified procedures".[79]

On 20 December 2018, the General Assembly adopted the Convention, noted with satisfaction the amended Model Law, and recommended that all States give favorable consideration to the amended Model Law when revising or adopting legislation relevant to mediation.[80] In announcing the adoption of the Convention by the General Assembly, the UNCITRAL Commission stated:

> "Until the adoption of the Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonized

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75 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraph 65 (2018).

76 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraph 67 (2018).

77 UNCITRAL, Report of Working Group II, 68th Session, UN Doc. A/CN.9/934, Paragraphs 96–97 (2018).

78 *See generally* UNCITRAL Commission Report, 51st Session, UN Doc. A/73/17, Paragraphs 18–49 (2018). *See also* Verbist, "The Amended UNCITRAL Model Law on International Commercial Mediation 2018", *Liber Amicorum CEPANI, 50 years of solutions — 50 ans de solutions — 50 jaar oplossingen — 1969–2019*, at pp. 457–482 (2019).

79 United Nations Meetings Coverage and Press Releases, GA/L/3575 (16 October 2018) (https://www.un.org/press/en/2018/gal3575.doc.htm).

80 UNCITRAL, "General Assembly Adopts United Nations Convention on International Settlements Resulting from Mediation", 21 December 2018 (https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting).

framework for cross-border enforcement of settlement agreements resulting from mediation. In response to this need, the Convention has been developed and adopted by the General Assembly.

The Convention ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure. The Convention provides a uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign 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 also contributes to strengthening access to justice, and to the rule of law."[81]

Issues and Prospects for the Future

The Singapore Convention's *raison d'être* was to address the lack of an efficient and harmonized framework for the enforcement of settlement agreements arising from cross-border disputes that had been settled by mediation. However, many provisions in the Singapore Convention resulted from compromises during Working Group II's deliberations. Some States and organizations expressed concerns throughout the duration of the project.

Now that the Singapore Convention has been signed, what are its prospects for the future? Issues may arise as the Singapore Convention comes into effect and is interpreted and applied. This section considers several of those likely future issues as well as prospects for the future.[82] Given the importance of deciding whether or not a mediated settlement

81 UNCITRAL, "General Assembly Adopts United Nations Convention on International Settlements Resulting from Mediation", 21 December 2018 (https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting).

82 For an exhaustive discussion of the provisions, limitations, and areas for possible disagreement, *see* Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 14–55 (2019).

agreement should be enforced, this section first discusses issues that may arise out of Article 5 — the grounds for refusing to enforce a mediated settlement agreement.

Next, issues relating to reservations that States may make are addressed and their implications for the future. The EU's views are then reviewed and analyzed, given its positions taken during the deliberations and the importance of the EU Member States in adopting and applying the Singapore Convention.

Finally, the recently proposed mediation rules under ICSID are briefly discussed, as an example of how use of the Singapore Convention may expand in the future.

Grounds for Refusing Enforcement under Article 5

The Singapore Convention has been touted as increasing the recognition of mediation as an accepted method of dispute settlement in addition to arbitration and the judicial process. Considerable reliance was placed on the New York Convention when drafting the grounds for refusing relief to a settlement agreement reached by the mediation process. Courts have been supportive of the arbitration process and generally have been unwilling to refuse enforcement of an arbitral award under the New York Convention. Under the Singapore Convention, will mediated settlement agreements receive similar treatment?

Courts asked to enforce a settlement agreement reached as a result of mediation may not treat such an agreement with the same respect as an award reached through a formal arbitration process. Emphasis should be placed on the use of the word "formal". Arbitration generally follows procedures that are similar throughout the world. However, much variation exists in the acceptance of the concept of mediation. Mediators may take vastly different approaches to the conduct of the mediation. This lack of similar procedures may cause differences to the weight given to the enforceability of mediated settlement agreements by reviewing courts.

The grounds listed in Article 5 of the Singapore Convention for refusing recognition are exclusive. Article 5 of the Singapore Convention provides:

> "1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:
>
> (a) A party to the settlement agreement was under some incapacity;

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

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

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

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

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

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

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

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

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

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State."[83]

Article 5 distinguishes between grounds that a party opposing enforcement must prove (Article 5(1)) and grounds that the competent authority

83 Singapore Convention, Article 5.

where relief is sought may raise *ex officio* (Article 5(2)). The grounds are stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation.[84] All of the bases for refusal are permissive rather than mandatory. A court therefore may refuse to provide relief even if a particular exception applies and, if a State implements the Convention through legislation, i.e., as a model law, it has no obligation to permit courts to use all of the grounds for refusal.[85]

Each of the specific grounds for refusing enforcement could have been drafted with greater clarity, as a few examples will show. Article 5(1)(a) does not define or describe "incapacity" or the degree to which it must exist. It also does not address the question of under what law "incapacity" should be determined.[86] While Article 5(1)(b)(i) refers to the law selected by the parties to apply to the settlement agreement for purposes of whether or not the agreement is void, inoperative, or incapable of being performed,[87] no such reference exists in Article 5(1)(a). Enforcing authorities will have to decide the extent, nature, and applicable law for this provision.

Article 5(1)(c)(ii) permits enforcement to be refused if the obligations in the agreement are not clear or comprehensible.[88] It is unlikely that the agreement itself will fall into this category. Enacting States may wish to consider revising this exclusion to make clear that it will only apply if a key term is not clear or comprehensible. Also, to rely upon some obligation as unclear or incomprehensible when that term itself contributed to the construction of the agreement may be seen as inequitable.

Article 5(1)(d) permits a party to resist enforcement where enforcement would be contrary to the terms of the settlement agreement.[89] When the parties agreed to the settlement, they surely considered that the agreement reasonably and fairly represented the terms agreed. At best, reviewing authorities should consider this provision an overriding ground to refuse enforcement and not some additional, specific basis.

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84 UNCITRAL, Report of Working Group II, 63rd Session, UN Doc. A/CN.9/861, Paragraph 93 (2015).

85 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at p. 42 (2019). *See also* Sussman, "A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony", 2 *International Bar Association Mediation Committee Newsletter*, at pp. 34–35 (2006).

86 Singapore Convention, Article 5(1)(a).

87 Singapore Convention, Article 5(1)(b)(i).

88 Singapore Convention, Article 5(1)(c)(ii).

89 Singapore Convention, Article 5(1)(d).

Articles 5(1)(e) and (f) are troubling provisions. They provide defences to enforcement based on the conduct of the mediator, or the failure of the mediator to disclose a conflict of interest or circumstances that may raise a justifiable doubt regarding the mediator's impartiality or independence where such failure to disclose had a material impact or undue influence on a party. In both situations, the party opposing enforcement must show that absent the specified conduct or non-disclosure by the mediator, the party would not have entered into the settlement agreement.[90]

Working Group II debated these provisions extensively. Some delegations, such as the EU, sought more extensive bases to refuse enforcement based on alleged mediator misconduct.[91] Other participants desired to exclude any such grounds.[92] These particular provisions arose as part of the "grand compromise" achieved at the February 2017 session of Working Group II and are narrow.[93] The "but for" requirement in each provision must be established by the opposing party. The "but for" requirement is an objective standard; what the opposing party says after the fact of the mediation is not sufficient.[94]

Articles 5(1)(e) and (f) essentially ignore the fact that mediation is a consensual process; no party is required or forced to reach an agreement. Any party can quit the mediation if it believes it is being treated unfairly or subjected to excessive (or indeed any) coercion. Some mediators tend to assist parties to arrive at a settlement agreement more assertively than others, which practice is notionally most beneficial to all parties. In some jurisdictions such behaviour may be deemed inappropriate; the preferred conduct is for the mediator to not undertake any positive or direct role. Are mediators, in light of these provisions, limited to assuming such a non-active role lest their work run afoul of Article 5(1)(e)?

Article 5(1)(e) refers to applicable standards. Presumably, this refers to the various codes of conduct for mediators that have been promulgated

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90 Singapore Convention, Article 5(1)(e) and (f).

91 *See* Intervention of the European Union, UNCITRAL Audio Recordings, Working Group II, 65th Session (16 September 2016) at 9:30-12:30 (https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/e6cda078-71e2-4108-abad-66df99f84fda).

92 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 49–50 (2019).

93 Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement*, at pp. 34–35 (2018).

94 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 50–54 (2019).

by various organizations and entities.[95] But which standards should apply? In many jurisdictions, for example, England and Wales, no overriding regulatory authority for mediation exists. What if the mediator is not a member of any standard-issuing entity? Article 5(1)(f) does not refer to any particular standard or code of conduct. It apparently creates an "autonomous standard that can be relied upon regardless of whether any 'applicable' standards required disclosure".[96]

Other than the requirements of fairness and confidentiality by the mediator, what might be such a serious breach? Purported concerns regarding the management of the mediation process could allow a party wishing to resist enforcement to persuade the court that the mediation process was in breach of the public policy or the contractual agreement between the parties. If the breaches are limited to fairness and confidentiality, then the exclusion should state that explicitly. If other breaches are possible, then it would have been helpful to provide guidance to the parties. Instead, the provision creates an ambiguous, autonomous standard untethered from any of the existing codes of conduct for mediators.

Given the high standard for refusing enforcement under Articles 5(1)(e) and (f), issues may arise regarding the over-arching requirement of confidentiality in the conduct of a mediation. Are the notes taken by the party challenging the enforcement deemed to be admissible in evidence? Further, if the mediator has taken notes, may a party wishing to challenge enforcement demand that the mediator disclose those notes? Surely not. If the process is considered confidential, then an enforcing court should be unwilling to consider any materials created during the confidential process.

Finally, Article 5(2) provides the grounds that the competent authority of the State where relief is sought may raise *ex officio*.[97] Based on Article 5(2)(a), the competent authority may refuse to grant enforcement if this would be contrary to public policy of that state. Public policy is a nebulous concept. Parties must try to ascertain when public policy concerns might interfere with a genuinely mediated settlement agreement.

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95 *See*, e.g., International Mediation Institute, "Code of Professional Conduct" (https://www.imimediation.org/practitioners/code-professional-conduct/); *European Code of Conduct for Mediators* (https://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf). *See also* Noone & Ojelabi, "Ethical Challenges for Mediators around the Globe: An Australian Perspective", 45 *Wash. U.J.L & Pol'y*, at pp. 145–193 (2014); Shapira, "A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform", 100 *Marq. L. Rev*., at pp. 81–136 (2016).

96 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J*., at p. 53 (2019).

97 Singapore Convention, Article 5(2).

Further, public policy can change over time and as governments and administrations change and evolve. Nothing can be done to legislate against such variations. The New York Convention provides that the standard of proof for the public policy exception "is a demanding one" and its application should be "exceptional" and "extremely narrow" and applied "sparingly" and with "extreme caution".[98] Reviewing authorities should adopt a similarly restrictive interpretation of Article 5(2)(a).

Convention vs. Model Law and Article 8

Two aspects of the Singapore Convention and the path taken by Working Group II may limit its effectiveness. First, at the "breakthrough" session in February 2017, Working Group II decided to develop both a convention and amendments to the then Model Law on Conciliation in parallel. This approach was unprecedented in UNCITRAL.[99] Although users almost unanimously supported a convention, the dual-track approach compromise allowed Working Group II to proceed.

However, this dual-track approach likely will undercut an essential goal of the project: a uniform and consistent expeditious means to enforce mediated settlement agreements. As various States and users of mediation pointed out during deliberations, a model law will not result in as much certainty or promote mediation as a viable dispute resolution methodology compared with a convention. Some States, including members of the EU, argued that a convention was premature due to the "infancy" of mediation.[100]

Because both a convention and model law were drafted, variations may develop in the interpretation and application of the instruments. A model law almost inevitably will not be interpreted in the same way as a convention. No matter how determined the parties are to take advantage of the ability to enforce mediated settlement agreements, unless the State in which the parties are located is willing to accept the concept of cross-border enforcement of such agreements, the parties' determination is of little worth.

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98 Born, *International Commercial Arbitration* § 26.05[C][9][c] (2d ed. 2014). *See* New York Convention, Article V(2)(b).

99 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at p. 9 (2019).

100 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at pp. 8–9 (2019).

Under Article 8, a State adopting the Singapore Convention may make two reservations:

First, a State may declare that it will not apply the Singapore 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.[101] At the signature ceremony in Singapore on 7 August 2019, Belarus declared it would not apply the 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. Iran made a similar declaration and also stated other reservations.[102] Such declarations reduce the number and type of disputes to which the Singapore Convention (or amended Mediation Model Law) may apply.

Second, a State may declare pursuant to Article 8 that the Singapore Convention will only apply to the extent the parties to the settlement agreement have agreed to its application.[103] Again, users participating in Working Group II urged general application, but this ability to reverse general application of the Singapore Convention was part of the compromises agreed in February 2017.[104] This "opt-in" provision, to the extent States adopt it, also will limit application of the instrument:

> "[A] signatory State can significantly limit the application of the Convention by declaring the second reservation, because mediating parties are unlikely to modify the status quo of non-application by taking the additional step to opt in to a new, untried and untested legal framework."[105]

Thus, the provisions of Article 8, to the extent utilized, will limit the applicability of the Singapore Convention and not encourage resort to mediation, contrary to the goals for Working Group II's project.

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101 Singapore Convention, Article 8(1)(a).

102 UNCITRAL, "Status: United Nations Convention on International Settlement Agreements Resulting from Mediation" (https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status).

103 Singapore Convention, Article 8(1)(b).

104 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", 19 *Pepperdine Disp. Resol. J.*, at p. 56 (2019).

105 Alexander and Chong, "An Introduction to the Singapore Convention on Mediation — Perspectives from Singapore", 22 *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement*, at pp. 50–51 (2018).

The European Union's Views

From the beginning of Working Group II's deliberations, the EU approached the project with scepticism and frequent opposition. Although the EU purported to speak for its Member States, some EU States also expressed their (usually consistent) views during the deliberations. Review of the EU's position sheds light on some of the provisions in the Singapore Convention, and suggests the extent to which the EU will encourage — or discourage — use and application of the Singapore Convention within its area.[106]

An analysis shows that the EU's purported concerns regarding conflicts between the Singapore Convention and other international instruments should not be an impediment to the use and application of the instrument within the very important EU area.

Interestingly, the Council of the European Union issued a mandate to govern the EU during the deliberations in Working Group II. Those directions, dated 15 September 2017, stated in relevant part:

> "It should be ensured that the instruments will not extend to the recognition of international commercial settlement agreements, so as to preserve the right of access to courts of EU companies and citizens. It should be clarified that this would not prevent the parties from using the settlement agreement as defence.
>
> The instruments should apply to settlement agreements resulting only from conciliation. The definition of conciliations should be based on the text of Article 1(3) of the 2002 UNCITRAL Model Law….
>
> It should be ensured that express language is included in the instruments as to the total exclusion from the scope of application of judicial settlement agreements and of those settlement agreements formalised as awards on agreed terms issued by arbitral tribunals."[107]

The Singapore Convention's articles satisfy this mandate of the EU.

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106 Consider, for example, the judgment of the Court of Justice of the European Union in *Slovak Republic* vs. *Achmea B.V.*, Case C-284/16, Judgment (6 March 2018) (declaring arbitration clauses in intra-EU BITs incompatible with EU law).

107 Draft Council Decision, Doc. 12176/17 Add 1 DCL 1, JustCiv 205, at p. 4 (15 September 2017). Dr Verbist, one of the authors of this paper, requested and obtained these directions after they were declassified on 28 February 2019. *See* https://data.consilium.europa.eu/doc/document/ST-12176-2017-ADD-1-DCL-1/en/pdf.

The EU took the position throughout the negotiations that the instruments should not create an overlap with other agreements dealing with the enforcement of settlement agreements, including the European Mediation Directive of 21 May 2008; the Convention on Choice of Court Agreements of 30 June 2005; the Judgments Convention which is elaborated in the context of the Hague Convention on Private International Law; and the 1958 New York Convention.[108] However, these instruments differ in their scope and are not in conflict with the Singapore Convention.[109] Within the EU, they should not be an impediment to application of the Convention or enforcement of mediated settlement agreements.

The European Directive on Mediation[110] does not provide a mechanism for the enforcement of mediated settlement agreements. Rather, it creates an obligation for EU Member States to "ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable".[111] Thus, this Directive only expresses, as of 2008, the need to provide an enforcement mechanism for settlement agreements resulting from mediation. The Singapore Convention addresses this need.

The Hague Convention on Choice of Court Agreements[112] deals with the enforcement of judgments resulting from proceedings based on choice of court agreements. Adopted in 2005, it has been acceded to by the EU and five States worldwide.[113] It covers "judicial settlements", i.e., "an agreement … approved or … concluded before a court". It does not apply

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108 Verbist, "United Nations Convention on International Settlement Agreements Resulting from Mediation", *B-Arbitra (Belgian Rev. of Arbitration)*, at pp. 74–79 (2019). *See generally* Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreement Resulting from Mediation — an Insider's View", 22 *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement*, at pp. 32–36 (2018). Mr Rosner represented the EU throughout the deliberations of Working Group II.

109 Verbist, "United Nations Convention on International Settlement Agreements Resulting from Mediation", *B-Arbitra (Belgian Rev. of Arbitration*), at p. 75 (2019).

110 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJEU*, 24 May 2018, L 136/3.

111 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJEU*, 24 May 2018, L 136/3.

112 *Convention on Choice of Court Agreements* (2005) (https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf).

113 Hague Conference on Private International Law, "Status: Convention on Choice of Court Agreements (The Hague, 2005)" (https://www.hcch.net/en/instruments/conventions/ status-table/print/?cid=98).

to "out-of-court settlements".[114] Thus, the Choice of Court Agreements Convention applies to agreements approved by a court, while the Singapore Convention does not apply to such agreements.[115] Similarly, Article 11 of the Hague Convention on Enforcement of Foreign Judgments contains virtually the same language as Article 12 of the Hague Convention on Choice of Court Agreements.[116] The Convention on Enforcement of Foreign Judgments applies only to settlement agreements concluded as part of judicial proceedings or settlement agreements subsequently approved or confirmed by a court.[117]

Finally, the 1958 New York Convention applies to the recognition and enforcement of "arbitral awards".[118] It does not apply to mediated settlement agreements that are included in the terms of a final arbitral award, and the Singapore Convention does not apply to settlement agreements that are rendered as final and enforceable arbitral awards.[119] Thus, contrary to the EU's asserted concerns, none of these conventions provide any impediment to application and enforcement of the Singapore Convention within the EU.

ICSID's Proposed Mediation Rules

The recent development of proposed Additional Facility Mediation Rules for Investor-State disputes should promote development and use of the Singapore Convention. The International Centre for Settlement of Investment Disputes ("ICSID") proposed these rules in August 2018 as part of its work to amend its rules that began in 2016.[120] In announcing

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114 Hartley & Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Agreements Convention", in Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements*, at p. 795 (2013).

115 *See Hague Choice of Court Agreements Convention*, Article 12; Singapore Convention, Article 1(3)(a).

116 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, Article 11 (2019) (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137). This convention was finalized and adopted on 2 July 2019. *See* Hague Conference on Private International Law, "It's done: the 2019 HCCH Judgments Convention has been adopted!" (8 July 2019) (https://www.hcch.net/en/news-archive/details/?varevent=687).

117 Garcimartín & Saumier, "Judgments Convention: Revised Draft Explanatory Report", *Preliminary document No 10 of May 2018 Judgements Convention*, at pp. 68–69 (2018).

118 New York Convention, Article 1.

119 Singapore Convention, Article 1(3)(b).

120 ICSID, *Proposals for Amendment of the ICSID Rules — Working Paper*, vol. 3 (August 2018) (https://icsid.worldbank.org/en/Documents/X.Amendments_Vol_3_AFMR.pdf). For the most recent commentary on the proposed mediation rules, *see* ICSID, "Working Paper #3", *Proposals for the Amendment of the ICSID Rules*, at pp. 1, 208–230 (August 2019) (https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf).

the proposed mediation rules, ICSID recognized the widespread discussion of mediation to resolve investment disputes and the recognition of its Member States that mediation was suitable for resolving such disputes, with the inclusion of mediation clauses in bi-lateral and multi-lateral investment treaties.[121] ICSID also took note of the fact that the members of the Energy Charter Conference adopted a "Guide on Investment Mediation" in 2016.[122]

The proposed ICSID mediation rules provide for voluntary Investor-State mediation, and have been described as a "useful step towards improving the ISDS system".[123] The proposed rules do not contain any enforcement mechanism, but refer to the Singapore Convention: "[T]he efficiency of these Mediation Rules depends on the Singapore Convention".[124] Thus, while Article 8 of the Singapore Convention allows a State to declare that it will not apply to agreements to which the State or one of its governmental agencies is a party, ICSID's proposed mediation rules may limit the scope of such declarations. The promotion of mediation by ICSID as a dispute-resolution mechanism in Investor-State disputes, including those arising under the Energy Charter, augers well for the future of the Singapore Convention and should encourage its general acceptance and application.

Conclusion

After three years of effort by UNCITRAL's Working Group II, the Singapore Convention and corresponding amendments to the Model Law on International Commercial Mediation have come to fruition. A clear need and demand existed for such an international means for enforcement, despite opposition by some of the participants in the Working Group. The

121 ICSID, "Proposals for Amendment of the ICSID Rules — Working Paper", vol. 3 (August 2018), at p. 748.

122 ICSID, "Proposals for Amendment of the ICSID Rules — Working Paper", vol. 3 (August 2018), at p. 748. *See* Energy Charter Secretariat, "Decision of the Energy Charter Conference", CCDEC 2016 12INV (19 July 2016) (adopting the "Guide on Investment Mediation") (https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf).

123 Ubilava & Nottage, "ICSID's New Mediation Rules: A Small but Positive Step Forward" (2018), at p. 6 (https://icsid.worldbank.org/en/Documents/Ubilava_Notage_10.17.2018.pdf).

124 Ubilava & Nottage, "ICSID's New Mediation Rules: A Small but Positive Step Forward" (2018), at p. 5 (https://icsid.worldbank.org/en/Documents/Ubilava_Notage_10.17.2018.pdf).

instruments resulting from UNCITRAL's work should promote the expanded use of mediation as a means to resolve international disputes.

The Singapore Convention and corresponding amended Model Mediation Law have created a positive environment for the enforcement of settlement agreements arising from mediation. The Singapore Convention has been compared with the benefits to international arbitration arising from the 1958 New York Convention in 1958. This optimism must be tempered by the fact that the drafters of the New York Convention identified very specific grounds for refusing to enforce an international arbitral award. The majority of those areas applied to breaches of procedure in the process of the arbitration.

The flexibility of mediation and the fact that the Singapore Convention avoids any hard and fast guidance regarding procedure could mitigate against simple and direct enforcement of mediated settlement agreements. However, this slight cautionary note should not detract from the very positive reaction with which the Singapore Convention has been greeted. It is to be welcomed by the international dispute resolution community and its adoption, and use when necessary, encouraged.