THROUGH THE LOOKING GLASS: AN INSIDER'S PERSPECTIVE INTO THE MAKING OF THE SINGAPORE CONVENTION ON MEDIATION

A new multilateral convention, which provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements, was concluded under the auspices of the United Nations organisation last year and will be opened for signature on 7 August 2019 in Singapore. The United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation", and its complementary Model Law, were the product of the work of UNCITRAL Working Group II (Dispute Settlement) after just six sessions. This article provides an insider's perspective into how this became possible. It surveys the context within which the Working Group undertook its mandate, examines the specific approach of the Working Group in carrying out its subject mandate, and traces the evolution of the instruments from context to content. The article concludes with a study of the five issues which formed the compromise, a linchpin of the making of the Singapore Convention on Mediation.

Khory **MCCORMICK**
D Univ (Griffith University), BA (Queensland), LLM (Queensland); FCIArb, FACICA; Professor (Strategic Law), Griffith University.

Sharon S M **ONG***
LLB (Hons) (National University of Singapore), LLM (Public International Law) (University College London, University of London); Director, Policy Advisory Division, Ministry of Law.

I. Introduction

> UNCITRAL finalized the draft UN Convention on International Settlement Agreements Resulting from Mediation. … the Government of Singapore offered to organize a ceremony for the signing of the convention, once adopted. The Commission gratefully acknowledged this offer and adopted the suggestion that the convention be referred

* This article is written in the co-author's personal capacity.

> to as the 'Singapore Convention on Mediation' by unanimous support. …
>
> In addition, UNCITRAL adopted the Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation, which amends the UNCITRAL Model Law on International Commercial Conciliation of 2002. …
>
> It is expected that both instruments – the Convention as well as the Model Law – will foster the use of international mediation for solving cross-border disputes in a cost effective and efficient manner.[1]

1 This article seeks to give the reader a particular perspective on the origin and primary characteristics of the United Nations ("UN") Convention on International Settlement Agreements Resulting from Mediation,[2] also known as the Singapore Convention on Mediation ("the Convention") and the United Nations Commission on International Trade Law ("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)[3] ("the Model Law").

2 That perspective is of two delegates[4] participating in the sessions of the UNCITRAL Working Group II ("Working Group II" or "the Working Group") that produced the drafts of each of those texts, which were respectively adopted by the General Assembly of the United Nations on 20 December 2018[5] and by the UNCITRAL on 25 June 2018.[6] This article does not purport to exhaustively analyse its nominated topics, or the full texts. Rather, notwithstanding its stated limitations, this article seeks to ensure that from the outset, any consideration of the official texts can be undertaken with an applied appreciation of why the Working Group was able to achieve the ground-breaking feat of simultaneously bringing the two texts into existence,

---

1 Beate Czerwenka, Chairperson of the 51st session of the United Nations Commission on International Trade Law (hereinafter "UNCITRAL"), address to the Sixth Committee of the General Assembly (15 October 2018) at p 2.

2 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

3 GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

4 The authors of this article were delegates of Australia and Singapore respectively at the United Nations Commission on International Trade Law ("UNCITRAL") Working Group II.

5 United Nations General Assembly, *Resolution Adopted by the General Assembly on 20 December 2018: Seventy-third Session* (A/RES/73/198) (11 January 2019).

6 *Report of the United Nations Commission on International Trade Law: Fifty-first session* (25 June–13 July 2018) (A/73/17) (2018) at para 68. See also United Nations General Assembly, *Resolution Adopted by the General Assembly on 20 December 2018: Seventy-third Session* (A/RES/73/199) (3 January 2019).

and the Singapore Convention (and to an appropriate extent the Model Law) should be seen as a complementary modalities for the resolution of cross-border disputes to the longer established United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[7] known as the New York Convention on Arbitration ("New York Convention").

3 The article is divided into two parts. Part I[8] surveys the context within which Working Group II undertook its mandate that generated the Convention and the Model Law. Part II[9] considers a particular aspect of what occurred within the sessions of the Working Group, namely the delegations agreeing what became known as "the compromise", and the significance of that agreement both for the form of the texts and the ultimate successful fulfilment of the Working Group's mandate.

II. Part I: The context

A. The mandate

4 In the Report of Working Group II (Arbitration and Conciliation) on the work of its 62nd session,[10] the Working Group noted that the Commission, at its 47th session, agreed that the Working Group should consider the issue of enforcement of international settlements resulting from conciliation/mediation, and should report to the Commission at its 48th session, in 2015, on "the feasibility and possible form of work in that area"[11] ("the Mandate").

5 It should be noted that by this time, the terms "conciliation" and "mediation" were stated to be used interchangeably as broad notions referring to proceedings in which a person or a panel assists the parties in their attempt to reach an amicable settlement of their dispute.[12]

---

7 10 June 1958; entry into force 7 June 1959.

8 See paras 4–33 below.

9 See paras 34–65 below.

10 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at para 13.

11 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at para 2. A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its 47th session is contained in UNCITRAL, *Planned and Possible Future Work – Part III: Forty-seventh Session* (A/CN.9/822) (2 June 2014).

12 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at p 5, fn 11.

Clarity around the nature of the neutral facilitated process which the official texts would cover understandably was to be achieved later in the work of the Working Group. This clarity was present in a time interval which saw the Working Group change its name from "Arbitration and Conciliation" to "Dispute Settlement" to reflect both the dynamic nature of the issues with which the Working Group was dealing and the very real desire of the Working Group to ensure the contemporary relevance of its work product. That time interval also saw the final draft Convention and Model Law abandon the term "conciliation" in favour of what was considered to be the less ambiguous and increasingly more commonly utilised term "mediation".

6 "Mediation" is therefore, for the purposes of the Convention, known to mean:[13]

> … 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.

7 Suggestions that mediation might be defined by reference to a structured process were rejected out of recognition that it was the flexible and unstructured character of a facilitative process, as well as the differing manner in which mediations were conducted in jurisdictions, that were the very core of the nature of the mediation process. This rejection further reflected a commitment to adopt a contemporary approach to implementing the Mandate based on a working knowledge of what occurred in relation to the Mandate subject matter in practice.

---

13 United Nations Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "Singapore Convention on Mediation") Art 2(3). A similar provision is found in Art 1(3) of the UNCITRAL Model Law on International Commercial and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018), which states:

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

8 In its report of its 62nd session,[14] it was noted the Commission considered that the work might be based on a proposal to prepare a convention modelled on the New York Convention. It was further noted that UNCITRAL had already developed two instruments aimed at harmonising international commercial conciliation, namely, the Conciliation Rules (1980)[15] and the Model Law on International Commercial Conciliation (2002)[16] ("the 2002 Model Law"), which it considered "formed the basis of an international framework for conciliation".[17] In the 2002 Model Law, consideration of the enforceability of settlement agreements had resulted in the insertion of Art 14:

> 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*].

9 Article 14 of the 2002 Model Law, while acknowledging the possibility of enforcement of international settlement agreements, did little to advance the development of an internationally accepted cross-border international settlement enforcement regime for such agreements. It is hardly surprising that at the end of its deliberations as to the legal and practical aspects of a possible enforcement convention, Working Group II 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 text. The Working Group rather perceptively recorded:[18]

> 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.

10 At its 48th session, the Commission confirmed a mandate for Working Group II in the terms conforming to what that Working

---

14 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at para 13.

15 GA Res 35/52, adopted at the United Nations General Assembly, 35th Session (23 July 1980).

16 GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002).

17 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at para 14.

18 UNICTRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-second Session* (New York, 2–6 February 2015) (A/CN.9/832) (11 February 2015) at para 59.

Group II had recommended.[19] That this position should be arrived at is not surprising. If the records of the deliberations of both the Commission and Working Group II prior to the 48th session of the Commission are perused, it is clear that in the years since 2002, member states as well as the Commission had arrived at the view that conciliation was achieving increasing acceptance as a cross-border dispute resolution modality. The appropriateness of this view was reinforced by the results of delegation responses to an invitation to provide information to the Secretariat on the issue under deliberation.[20]

11 Reference to the various delegation commentaries, although evidencing differing national stages of maturity in terms of national adoption and acceptance of neutral facilitated settlement processes as part of any given national overall legal framework, confirms a universal acceptance, however qualified, of the legitimacy of such processes. The increasing acceptance of organisations such as the International Mediation Institute and the increasing focus on neutral accreditation standards also reflected this developing reality.

12 If further confirmation of the timeliness of the subject mandate was required beyond that provided by the volume and diversity of the "Observers" attending subsequent Working Group sessions, it was irrefutably provided by an unexpected source, albeit in the later period of work, on the Mandate. That source was the Queen Mary University of London 2018 International Arbitration Survey: The Evolution of International Arbitration[21] ("the 2018 Survey").

13 The Survey has for some time been considered a very good gauge of the state of the international commercial arbitration services market. However, from at least 2015, if not before, the Survey had, to a limited extent, begun to elicit from its survey population views about trends that were manifesting in the facilitative as well as evaluative disputes resolution market. In the 2018 Survey, a major inflection point was identified in the very first chart in the Survey (Chart 1). Of those surveyed, 49%, when asked, "What is your preferred method of

19 UNCITRAL, *Report of UNCITRAL Commission on Its Forty-eighth Session* (29 June–16 July 2015) (A/70/17) at para 142.

20 UNCITRAL, *Settlement of Commercial Disputes: Compilation of Comments by Governments: Forty-eighth Session* (A/CN.9/846) (27 March 2015) and Addendums: A/CN.9/846/Add.1 (15 April 2015); A/CN.9/846/Add.2 (22 April 2015); A/CN.9/846/Add.3 (4 June 2015); A/CN.9/846/Add.4 (12 June 2015); A/CN.9/846/Add.5 (30 June 2015).

21 This is the eighth major empirical international arbitration survey conducted by the School of International Arbitration at Queen Mary University of London. See also Stacie I Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73(4) Wash & Lee L Rev 1973.

resolving cross-border disputes?" answered, "International arbitration together with ADR." Standalone international arbitration scored a 48% response. When it is noted that of the survey population, non-service providers ("Other") only accounted for 21% ("In-house counsel" accounted for 10%) (Chart 41) and that, when the responses to the quoted survey question are broken down by respondent profile, in-house counsel favour international arbitration together with alternative dispute resolution ("ADR") as compared with standalone international arbitration at a ratio of 60% to 32%, the reality of market trends is exposed (Chart 2). The market, that is to say, those who of necessity must pay for dispute resolution services, wants a range of ADR service offerings to be available to it and increasingly wants non-adjudicative dispute resolution service offerings.

14 When Working Group II engaged with a deliberately broadly expressed and somewhat open-ended mandate, it did so at a time and in a context when there was (and is) a market appetite for the anticipated output of the Working Group, and where the Commission and member states were fully apprised of the timeliness of the initiative in which Working Group II was about to engage. This paradigm had an impact on the approach of delegations to the fulfilment of the Mandate.

B. The approach of the Working Group sessions

15 The comments which follow are specific to Working Group II in relation to its subject mandate and are in no way intended to draw comparisons with or to denigrate the performance of any other working group.

16 Working Group II, either in consequence of the constitution of its delegation representatives or a series of deliberative choices, adopted a number of shared tenets which directly affected the conduct of its sessional deliberations after February 2015.

17 There was a heightened applied spirit of goodwill within the Working Group. An objective reasonable bystander could not but be impressed by the open-minded and constructive way in which both general sessions and delegation consultations were universally conducted. Reference to the audio recording of proceedings will confirm the validity of this observation, as will the subsequent observations which will be made concerning what the delegations captioned "the compromise".

18 In addition to exhibiting goodwill and open-mindedness, delegations agreed on a settled position on a range of issues, both

procedural and substantive, which impacted positively on the subsequent productivity of the Working Group.

19 Although, as noted, when considering what mandate to confer on Working Group II, the Commission had observed that when drafting any proposed convention, the Working Group might consider modelling it on the New York Convention, the Working Group did not let this observation limit its deliberations. Notwithstanding that the Convention in format mirrors the structure of the New York Convention, that is largely where the substantive similarity ends. This outcome may have been influenced by the fact that the composition of member states delegations changed over time to present a more mediation-biased skill set than an arbitration-biased skill set. That was a material shift which occurred relatively early in the Mandate. This shift contributed to the tendency of delegations to discuss the issues within the Mandate without preconceptions or any limitations, express or implied, arising from imbedded prejudices based on a flawed assumption that the New York Convention was to be treated as a superior instrument, or that concepts related to mediation could be moulded to conform to the meaning or operation of the provisions of the New York Convention, as if they were seamlessly transferable across the two complementary but differing ADR modalities. These cumulative elements were of significance. This fact will be highlighted by reference to several key bespoke components of the Convention and the Model Law which would never have seen the light of day if attempts to conform that output to the constraints of the structure and content of the New York Convention had been allowed to persist.

20 Furthermore, there was agreement to work simultaneously on both a draft Convention and Model Law. The capacity for the Working Group to do so was based on the rich skill-set of the Secretariat and its ability to support such a parallel deliberation approach by constructing a central core document which, with appropriate variation in language and expression, could be used as a core document from which to construct the Convention and the Model Law.[22] The relevant competency of the Secretariat and the workability of this approach needs no greater testimony than the adoption of the Convention and the Model Law.

22 The UNCITRAL Working Group II requested the Secretariat to prepare a document outlining the issues and "setting out possible draft provisions, including those that would be relevant if the instrument were to be a convention": UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 109.

21 The value of the agreement to undertake parallel deliberations was not merely a feat of legal or deliberative mechanics. It was of equal, if not greater, qualitative import. From the outset, it was clear that some member states or Observer delegations were committed to the consideration of the possibility of either a Convention or Model Law, but not the other or both. This was notwithstanding the breadth and open-ended terms of the Mandate.

22 The reasonings behind these various positions were as numerous as the delegations.[23] There were some broad groupings, however, in that some delegations had in place existing legal regimes that regulate recourse to mediation and did not want to complicate or potentially prejudice those arrangements; some delegations felt that that their domestic stakeholders had levels of familiarity with mediation which made one of the proposed instruments attractive but not the other; some delegations saw particular idiosyncratic problems with their domestic jurisprudence easily accommodating the adoption of the Convention at the current time; while those delegations favouring the introduction of a Convention did so for differing reasons.

23 The qualitative impact came from the fact that all delegations wished to see whatever instrument was developed become an initiative which would drive promotion of mediation within their own jurisdiction, although they accepted that positive engagement by their domestic judiciary would be crucial for success in that context. The specific commitment to using the Working Group output to promote mediation was a universally shared aspiration of all delegations. Regardless of their individual delegation bias, they stayed in the sessions and worked towards shared primary goals.

24 This was reflected as much in the Preamble to the Convention by which signatory states will recite their agreement in the following terms:[24]

> **Preamble**
>
> *The Parties to this Convention,*
>
> *Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the

23 The arguments in support of preparing a convention and those in support of preparing model legislative provisions are set out in UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at paras 136–138 and 139–140 respectively.

24 Similar language is found in United Nations General Assembly, *Resolution Adopted by the General Assembly on the 2002 Model Law on 19 November 2002: Fifty-seventh Session* (A/RES/57/18) (24 January 2003).

> parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,
>
> *Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,
>
> *Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,
>
> *Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations …

25 What has resulted from the discharge of the Mandate within such a positive environment has been a position in which "there is something for everyone" in the output of Working Group II in the sense that any State can proceed as it wishes by having recourse to either the Convention or Model Law, with the ability over time to move from recourse to the latter to recourse to the former.

26 These matters of agreement were augmented by a significant further agreement on a procedural issue that took real effect after the compromise had been agreed on and acknowledged in open general session. The agreement was that if a matter was encompassed within the compromise, it was to be considered settled and "closed" unless there was a substantial body of support for a view to the contrary (that is, for reopening the matter for discussion). The significance of the application of this agreement will be explained in Part II.[25] It is noted at this juncture in passing terms to highlight the spirit which the delegations brought to executing the Mandate and to better explain how they were collectively able to achieve the "milestone" which they achieved.

C. From context to content

27 The question is whether the dynamics within Working Group II had any impact on the Convention and the Model Law. They did. As a consequence of opportune timing and the collaborative attitude of participating states (and Observer delegations), underpinned by a

25 See paras 34–65 below.

competent and supportive Secretariat, Working Group II was able to engage with its Mandate with confidence and to disciplined productive effect.

28 Before it entered upon the Mandate, Working Group II had the guidance of the Commission that the New York Convention might be a worthwhile reference point for its work. Supported by a Secretariat familiar not only with that convention, but other instruments and texts to which the Working Group needed to have regard in order to ensure that its output was not unnecessarily discordant or in conflict with other operative international instruments or texts, the Working Group was well placed to have regard to this guidance.

29 A thoughtful analysis of the detailed text of the two instruments will confirm that discordance and conflict has been avoided by very careful technical drafting, and some general provisions were inserted with a view to ensuring this outcome.

30 Article 7 (other laws or treaties) is the clearest example. Parties to disputes are to be afforded access to the most favourable enforcement regime available to them, subject only to the limitation in Art 1(2) (scope of application) and the operation of Arts 6 (parallel applications or claims) and 8 (reservations). In this way, the instruments anticipate and accommodate the future work that might be done on choice of courts and reciprocal judgment enforcement.

31 In a somewhat similar vein, Working Group II, by inserting Art 8(1)(a), gave allowance for the work currently being done in Working Group III on investor–State disputes and the general accepted principle that states retain the sovereignty to determine when the activities of their agencies or representatives will be covered by a given international instrument.

32 At a practical level, Working Group II had the benefit of updating improvements made to the New York Convention in order to ensure it maintained functionality, having regard to technological developments. This modernising was achieved by incorporating Art 2(2) on electronic communication.[26]

---

26 Working Group II discussed and agreed that, as a drafting point, the formulation of Art 2(2) of the Singapore Convention on Mediation provided for a functional equivalence rule for writing and signature requirements of Art 9(2) of the United Nations Convention on the Use of Electronic Communications in International Contracts (2 November 2005; entry into force 1 March 2013), and that it should remain unchanged for the sake of consistency among UNCITRAL standards: UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its*

(*cont'd on the next page*)

33 Through careful technical but practical drafting and retaining flexibility for possible future work, and with a spirit of co-operation and compromise, Working Group II's work was able to be concluded in six sittings.

III. Part II: The compromise

> A good compromise, … is like a good sentence. … Or a good piece of music. … Everyone can recognize it. They say, 'Huh. It works. It makes sense.' That doesn't happen too often, of course, but it happens.
>
> Barack Obama[27]

34 The compromise happened during the fourth round of deliberations of Working Group II, at its 66th session in February 2017 in New York ("the Breakthrough Session"). It was born out of a confluence of factors. As one delegate observed:[28]

> … [t]hat session, in February 2017, was the key turning point in the negotiations; after many hours of substantive discussions, the time was ripe for development of a compromise package that tied a number of divisive issues together.

Inclement weather or, in legal parlance, an Act of God, also played a pivotal role. As a blizzard swept through Manhattan[29] and the UN headquarters complex in New York remained closed on 9 February 2017,[30] anxious Working Group II delegates, determined to keep the momentum of the previous two days going, decided to congregate at the premises of a law office five blocks from the UN to continue discussing a proposal that was presented as a potential compromise. The compromise sought to address the key sticking points in the negotiations up to that point. During that discussion, the delegates raised, discussed and addressed concerns, formed an informal drafting group and refined the proposal, and, after many hours, finally agreed, in a spirit of compromise, to present the compromise when the Working Group session reconvened the following day.

Sixty-fifth Session (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 66.

27 William Finnegan, "The Candidate" *The New Yorker* (23 May 2004).

28 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) Pepp Disp Resol LJ 1 at 6–7.

29 National Weather Service, "The Blizzard of February 9, 2017" (9 February 2017) <https://www.weather.gov/okx/Blizzard_Feb92017> (accessed 6 January 2019).

30 United Nations Headquarters Emergency Information, Alerts and Emergency Bulletins (9 February 2017) <https://emergency.un.org/alert.php?id=39> (accessed 6 January 2019).

35 The compromise addressed five key issues.[31]

31 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 52. The compromise proposal read as follows:

> *Issue 1*
>
> Draft provision 3: In case of a dispute concerning a matter that a party claims to have already been settled by a settlement agreement, the party may invoke the existence of the settlement agreement in the State where the settlement agreement is sought to be relied upon in accordance with the rules of procedure of the State and under the conditions laid down in this instrument to prove that the dispute has been settled.
>
> Draft provision 1(1): This instrument applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement').
>
> Draft provision 4 (chapeau): The competent authority of the State where the application under article 3 is made may refuse to grant relief under article 3 at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that: …
>
> *Issue 2*
>
> Draft provision 1(3): This instrument does not apply to settlement agreements: (a) approved by a court; or (b) that have been concluded before a court in the proceedings, either of which are enforceable in the same manner as a judgment; or (c) recorded and enforceable as an arbitral award.
>
> *Issue 3*
>
> A Party may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
>
> Issue 4
>
> Draft provision 4(1)(d): Gross misconduct by the conciliator that violated applicable standards and that had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.
>
> Draft provision 4(1)(e): The conciliator did not disclose circumstances unknown to the parties that were likely to give rise to justifiable doubts as to its impartiality or independence and such lack of disclosure had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.
>
> Report to give examples of applicable standards of conduct, such as paragraph 55 of the Guide to Enactment and Use of the Model Law on Conciliation, and codes of conduct.
>
> Issue 5
>
> Model Law and Convention prepared simultaneously. Some have suggested use of the formula from the Transparency Convention.

A. Issue 1: Legal effect of settlement agreements

36 The steady progress made by Working Group II in finding a resolution to this seemingly intractable issue serves as a good illustration of the spirit of flexibility with which Working Group II operated. At the outset of Working Group II's deliberations on the enforceability of settlement agreements at its 63rd session in September 2015, the issue of "recognition" and the legal effect of settlement agreements were extensively debated, and diverging views were expressed regarding the need for the instrument to address the notion of "recognition" of settlement agreements.

37 The split largely occurred along the fault lines of the different legal traditions of states. Those in favour of inclusion argued that recognition would give legal effect to the settlement agreements. In some jurisdictions, recognition was a prerequisite to enforcement, in the sense that recognition was a necessary procedural step to trigger the enforcement procedure (that is, the use of a mediated settlement agreement as a "sword"). There were also jurisdictions where the court may recognise a settlement agreement for purposes other than enforcement, such as for the purpose of set-off, or for dismissing a claim as the dispute had already been resolved by the settlement agreement (that is, the use of a mediated settlement agreement as a "shield"). To avoid doubt that mediated settlement agreements under the Convention could be used both as a sword and a shield, it was suggested that the approach of the New York Convention, which refers to both recognition and enforcement,[32] should be adopted. There could be no danger of the settlement agreement being elevated to an act of a particular State since a mediated settlement under the Convention is "not identified as being tied to a particular state of origin",[33] and recognition by a court of a mediated settlement agreement would simply be recognition of it as an international commercial mediated settlement agreement as defined by the Convention.

---

32 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958; entry into force 7 June 1959) ("New York Convention") provided for the recognition of arbitration agreements as well as arbitral awards. Under the New York Convention, "recognition" of arbitral awards referred to the process of considering an arbitral award as binding but not necessarily enforceable, while "enforcement" referred to the process of giving effect to the award: UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 71.

33 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 28.

38 The resistance against following the New York Convention approach was that recognition is only appropriate for acts of a State, such as judgments (that is, recognition was a procedure usually applied to give legal effect to a public act emanating from another State, such as court decisions),[34] and while arbitral awards are closer to judgments and thus capable of recognition, settlement agreements are more akin to contracts, which are of a private nature. It was also argued that settlement agreements did not have *res judicata* effect, and if "recognition" was to be provided for in the Convention, it might, in certain jurisdictions, confer such *res judicata* or preclusive effect.[35] Several delegations from civil law jurisdictions also expressed concerns that providing for recognition in the Convention would prevent courts from considering evidence beyond the mediated settlement agreement itself to assess whether defences under the Convention are available.

39 In the light of the "different understandings regarding the notions of both recognition and settlement agreements (as private contracts)"[36] and the "different procedures akin to recognition and the effects attached thereto in various jurisdictions",[37] Working Group II at its 65th session in September 2016 – the session before the Breakthrough Session – expressed openness to using more neutral language by making reference to settlement agreements being "binding and enforceable", instead of incorporating the term "recognition"[38] into the instruments.

40 Working Group II continued to work on reconciling the different positions and, as part of the compromise at the Breakthrough Session, agreed to recognise the notion of "recognition" of settlement agreements as traditionally understood in the Convention, but to stay

---

34 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 75.

35 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 78.

36 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 72.

37 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 78.

38 This language was based on Art 14 of the 2002 Model Law on International Commercial Conciliation, which referred to settlement agreements as "binding and enforceable". See the discourse on the aforementioned term when the UNCITRAL adopted Art 14: *Report of the United Nations Commission on International Trade Law on Its Thirty-fifth Session* (17–28 June 2002) (A/57/17) at para 124.

clear of referencing the expression in the text.[39] This was achieved by functionally describing the notion of "recognition" in the text. In Art 3(2), for example, the notion of "recognition" in the sense of the ability of a party to invoke a settlement agreement as a complete defence in domestic legal proceedings was described. It provides that if a party to the settlement agreement attempts to relitigate part of the underlying dispute that had already been resolved in mediation, the other party may invoke the settlement agreement and rely on it as a complete defence or shield against the pending litigation.

41 Through creative drafting, the "functional description" device, which "speaks to the practical effect of recognition"[40] by describing the intended effects, allowed for the recognition of the "shield" to complement the "sword", without using either the word "recognition" or "enforcement", as there was a risk that referring to the latter alone could imply that the former was not covered. In that same vein, other articles in the Convention assiduously avoided either expression, and the term "relief" was used instead.[41] Unlike the New York Convention, the Convention and the Model Law consequently do not have the word "recognition" in their titles.

B. Issue 2: Settlement agreements concluded in the course of judicial or arbitral proceedings

42 Divergent views were expressed in respect of whether settlement agreements concluded in the course of judicial or arbitral proceedings, and recorded as court judgments or arbitral awards, should fall within the scope of the Convention.

43 Several delegations raised arguments for excluding settlement agreements that are enforceable as judgments, and those which have been recorded and are enforceable as arbitral awards from the scope of the Convention.[42] First, it was argued that the Convention should avoid

---

39 The previous suggestion of using the expression "binding and enforceable" in place of "recognition" was not taken up on the grounds that "binding" did not have the same effect as recognition, the latter being a pre-requisite for enforcement. It was pointed out that recognition and binding are two sides of the same coin, and the binding nature of settlement agreements is not the result of recognition but simply refers to the binding character of the settlement agreement which both parties agreed to respect.

40 Eunice Chua, "The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution" (2019) AJIL (forthcoming) at 4 <https://ink.library.smu.edu.sg/sol_research/2861> (accessed 4 January 2019).

41 For example, Arts 4 and 5 of the Singapore Convention on Mediation.

42 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 123.

any overlap or conflict with existing conventions such as the Convention of 30 June 2005 on Choice of Court Agreements[43] ("CoCC") and the New York Convention, and future conventions such as the preliminary draft convention on judgments under preparation by the Hague Conference on Private International Law, as this would complicate how the Convention would be implemented and might lead to abuse by parties in that the parties may seek to have "two bites at the cherry". Second, it was argued that a single legal text should not be subject to different enforcement regimes, and there should not be different routes to seek relief based on one settlement agreement. The third argument was that a standalone settlement agreement resulting from mediation should be treated differently from a judicial decision or an arbitral award which recorded the terms of a settlement agreement, and each should be enforced under a regime relevant to them respectively.

44 Other delegations favoured inclusion. They argued that overlap would not pose a problem, since a State could provide relief under one convention even if not required to do so under another instrument. There was also no conflicting treaty obligations, as the Convention, the CoCC, and the preliminary draft convention on judgments under preparation by the Hague Conference on Private International Law "all set floors rather than ceilings, such that states can provide more generous treatment to mediated settlements or judgments than is required by the various treaties".[44] With regard to the concern raised about the potential for abuse, it was argued that the parties should be given the flexibility to use whichever framework is most useful in a given situation, and a built-in exclusion would automatically deprive the parties of the opportunity to utilise the enforcement regime envisaged by the Convention. Insisting on preventing an overlap might instead create a gap. There would be a risk that some situations may not be covered in a given State as not all states are or will be parties to all the aforementioned conventions. Second, there is nothing inherently wrong with having multiple enforcement regimes, and any possible complications arising from this should be left to the competent authority where enforcement was sought to address.[45] Third, in respect of an award on agreed terms, there is a possibility that that award would not be subject to court enforcement if the court were to find that that award did not fall within the scope of the New York Convention. In such a scenario, the affected party, in addition to not being able to enforce the

43 30 June 2005; entry into force 1 October 2015.

44 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 20.

45 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 124.

award under the New York Convention, would be deprived of the opportunity to resort to the enforcement mechanism afforded by the Convention.

45 There was also a divergence of views on the issue of whether settlement agreements not concluded in the course of judicial or arbitral proceedings but recorded as court judgments or arbitral awards should fall within the scope of the Convention. In the end, the majority felt that such situations "could be addressed along the same lines as settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as judgments or arbitral awards".[46]

46 With the objective in mind to "avoid possible overlap or gap with other existing or future international instruments",[47] the compromise excluded from the scope of application of the Convention settlement agreements that have been approved by a court or concluded in the course of proceedings before a court, and that are enforceable as a judgment in the State of that court, as well as settlement agreements that have been recorded and are enforceable as an arbitral award.[48]

C. Issue 3: Declaration on opt-in by the parties

47 Another challenging issue centred around whether the application of the Convention would depend on the consent of the parties to the settlement agreement. One view was that so long as the requirements in the Convention were met and there were no grounds for resisting enforcement, the Convention should apply, and the parties' choice should not have any impact on the application of the Convention.[49] Such an approach, it was observed, would be comparable to that of the New York Convention, and the advantage of this approach would be that potential conflicts between the parties regarding the

46 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 33.

47 UNCITRAL, *Report of UNCITRAL Working Group II (Dispute Resolution) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 26; *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-seventh Session* (Vienna, 2–6 October 2017) (A/CN.9/929) (11 October 2017) at para 17.

48 Singapore Convention on Mediation Art 1(3).

49 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 127; *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 36.

application of the enforcement regime envisaged in the Convention would be avoided.[50]

48 Another view was that the parties should be given the choice to decide whether the settlement agreement would be enforceable under the Convention, in line with the principle of party autonomy. This choice could be exercised in one of two ways: the "opt-in" approach would require the consent by the parties for the Convention to apply; and the "opt-out" approach would allow parties to exclude the application of the Convention.[51]

49 The arguments made in support of the opt-in mechanism included the observation that as mediation was fully consensual, the enforcement regime envisaged by the Convention should similarly only apply where the parties consented to it.[52] The counter-argument to this was that when parties concluded a settlement agreement resulting from mediation, the parties would expect compliance with the settlement agreement (and hence its possible enforcement), and requiring an opt-in would run contrary to that expectation.[53]

50 It was also highlighted that an opt-in mechanism would ensure that parties would be aware of the expedited enforcement mechanism envisaged by the Convention, instead of having such a strengthened regime imposed upon them, which they may not find desirable.[54] This, it was said, was particularly relevant as the enforceability of settlement agreements was a novel feature which parties may not be aware of, and providing for mandatory enforceability could harm the amicable nature of the mediation process. From a practical perspective, however, it was

50 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 36.

51 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 128.

52 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 61.

53 UNCITRAL, Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 131; *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 36.

54 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 142.

argued that it would be unlikely in most cases for the parties to agree to an expedited enforcement at the final stages of the mediation process.[55]

51 Several delegations contended that the downside of the opt-in mechanism was that it would limit the application of the Convention,[56] which would "run contrary to the underlying objective of widely promoting the use of international conciliation in trade".[57] Further, it would be cumbersome to require such an opt-in mechanism.[58] By contrast, the opt-out approach would result in a broader application of the Convention and thus serve to promote mediation. Furthermore, as arbitration does not have an opt-in requirement for awards to be enforceable, the inclusion of such a requirement in the Convention would make mediation less attractive by comparison.[59]

52 The willingness of Working Group II to find a way forward was on display when at its 64th session, it agreed to move forward on the basis that the opt-in/opt-out issue needed to be considered in the broader context, including the form of the instrument and the mechanism envisaged therein, and that it was premature to make a decision pending the outcome of those issues.[60]

53 It was no surprise, given the plethora of views on this aspect, that the issue of opt-in/opt-out formed part of the compromise. Once an agreement was reached that there would be a Convention (and amended Model Law), it was decided that it would be reserved to states when adopting the Convention to decide whether the application of the Convention would depend on the consent of the parties to the settlement agreement. States would be given the flexibility to declare, if

---

55 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 142.

56 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 142.

57 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 131.

58 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 62.

59 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 45.

60 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 182; *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 134.

they so elected, that the Convention would apply only to the extent that the parties to the settlement agreement agreed to its application.[61]

54 The Convention, via Art 8(1), permits a State to change the otherwise default position by its declaration to apply the Convention on an "opt-in" basis, such that the Convention will apply to a mediated settlement agreement only where the parties to the dispute actively choose to have it apply.

D. Issue 4: Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

55 The broad principles regarding Art 5 (grounds for refusing to grant relief) as a whole were agreed by Working Group II after several rounds of discussion. That agreement contained the following elements. First, the defences to be provided in the Convention should be limited and should not be cumbersome to implement. This would enable the enforcing authority to carry out a simple and efficient verification of the grounds for refusing enforcement. Second, the grounds for refusing enforcement under the Convention should be exhaustive.[62] An enforcing authority should not be permitted to deny relief on additional grounds not provided for in the Convention. Third, the defences should be stated in general terms. This would give flexibility to the enforcing authority with regard to their interpretation.[63] Fourth, the grounds for refusal should be permissive rather than mandatory. This means that notwithstanding that a particular defence may apply, an enforcing authority may still choose to provide relief. Furthermore, a party to the Convention is not under any obligation to implement all the exceptions listed in the Convention in domestic legislation. A party seeking to resist enforcement in a State which has enacted fewer exceptions in its domestic legislation than those listed in Art 5 would have more limited grounds to challenge enforcement. Fifth, the grounds listed for refusing to grant relief under Art 5 should apply both to requests for enforcement under Art 2(1) and to situations where a party invoked a settlement agreement as a defence against a claim under Art 2(2).

56 In terms of the specific defences, one of the most protracted discussions, interconnected with the other issues in the compromise,

---

61 Singapore Convention on Mediation Art 8(1)(b).

62 This follows the model of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958; entry into force 7 June 1959) ("New York Convention") (Art V of the New York Convention).

63 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 93.

took place over Arts 5(1)(e) and 5(1)(f), where the competent authority could refuse to grant relief based on the conduct of the mediator. Both Arts 5(1)(e) and 5(1)(f) address the issue of the impact of the mediation process, and the conduct of mediators, on the enforcement procedure. Article 5(1)(e) addresses the serious breach of the mediator to observe standards applicable to him or her, and Art 5(1)(f) addresses non-disclosure by the mediator of circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. In both cases, the party challenging enforcement has to establish a causal link in that without such breach/failure, that party would not have entered into the settlement agreement; accordingly, the competent authority should refuse to grant relief under the Convention.

57 The resistance to the inclusion of issues on the mediator's behaviour as grounds for refusal was put on several bases. These matters, it was said, were already adequately covered under other grounds for resisting enforcement,[64] such as Art 5(1)(b)(i), which referred to the settlement agreement being "null and void", and Art 5(2)(a), which addressed violation of public policy.[65] Also, the voluntary nature of the mediation process (where the parties were free to withdraw from the process at any time) and the nature of a mediated settlement agreement itself (where the terms were voluntarily agreed to by the parties) distinguished it from some of the grounds to refuse granting relief found in arbitration.[66] Some delegations also made the observation that from a practitioner's standpoint, the inclusion of both these exceptions could create ancillary disputes and hence undermine the attractiveness of the Convention.

58 The proponents of the final Art 5 text, on the other hand, argued that there was merit in retaining Arts 5(1)(e) and 5(1)(f) as

64 UNCITRAL, *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at para 175; *Report of Working Group II (Dispute Resolution) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 103; *Report of UNCITRAL Working Group II (Dispute Resolution) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at paras 46 and 72.

65 It was noted that "serious non-compliance" would fall under the public policy defence and "serious misconduct during the conciliation process", which had an impact on its outcome, would "probably be covered by the other defences to be provided for in the instrument": *Report of UNCITRAL Working Group II (Dispute Resolution) on the Work of Its Sixty-fourth Session* (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at paras 171 and 175 respectively.

66 See, for example, Art V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958; entry into force 7 June 1959).

specified defences.[67] In response to the observation that these provisions would require the enforcing authority to take into consideration relevant domestic standards on the conduct of the mediator and the mediation process, which would pose challenges to the enforcing authority, the proponents explained that Art 5(1)(e) introduced objective standards, and there was value in retaining both these defences as they would:[68]

> … contribute to ensuring that the process leading to a settlement agreement was conducted in an appropriate manner and would provide a review mechanism by a court of an enforcing authority through which the parties could be protected.

These additional defences would also highlight the importance of the ethics and conduct of mediators, it was said.

59 On Art 5(1)(e), the formulation in the compromise proposal in earlier iterations spoke of "gross misconduct" and provided for there to be "material impact or undue influence", whereas in the texts of the instruments, the former was replaced by the term "serious breach" and the latter was removed.[69] The refinements were made when the compromise proposal was brought before the Working Group for discussion when it reconvened on 10 February 2017, the day after the Breakthrough Session. Several delegates raised concerns with terms such as "gross misconduct", "material impact" and "undue influence", which, they said, were unfamiliar in their legal traditions, ambiguous, and could introduce uncertainties.[70] Similar concerns were expressed when rejecting the introduction of a "reasonable" person test as a way of monitoring mediators' conduct and its consequences. Although it was explained that the introduction of those terms in the compromise proposal was "an attempt to incorporate more objective standards with a higher threshold, balancing the different views expressed in the Working Group on the need for such a provision",[71] the discomfort of certain delegations, particularly those from civil law jurisdictions, with those terms, led to the changes.

---

67 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 46.

68 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 42.

69 See n 31 above for draft provision 4(1)(d) in the compromise proposal.

70 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 72.

71 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 75.

60 The other issue which the Working Group grappled with was the operationalisation of the term "standards applicable to the mediator". The Art 5(1)(e) exception only applies if there are standards which apply to the mediator or the mediation process[72] (that is, the competent authority cannot refuse to grant relief on this ground if at the time of mediation, no such standards were applicable to the mediator or the mediation). These standards could be based on the mediator's licensing regime, "the law governing conciliation and codes of conduct, including those developed by professional associations",[73] the agreement between the parties and the mediator on standards to be applied, or pursuant to the rules of an administering institution.[74] As a guide to the different types of, and elements in, standards applicable to mediators and the mediation process, the Working Group agreed that any explanatory material accompanying the Convention could include an illustrative list of examples of such standards.[75]

61 On Art 5(1)(f), the non-disclosure exception was the subject of considerable debate as mediators in many jurisdictions do not make the types of disclosures that arbitrators make.[76] It was argued that including non-disclosure by a mediator as a defence to resist enforcement would run contrary to the approach adopted in the Model Law.[77] It was also said that, compared to arbitration, there are a limited number of procedural rules that govern mediation and therefore provide a basis for

---

72 "[I]t was explained that the standards applicable were not only those applicable to the conciliator but those applicable to the process": UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 87.

73 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 87.

74 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 40.

75 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session* (New York, 6–10 February 2017) (A/CN.9/901) (16 February 2017) at para 88. As part of the compromise proposal, the Working Group also agreed (at para 52) that the "Report [was] to give examples of applicable standards of conduct, such as paragraph 55 of the Guide to Enactment and Use of the Model Law on Conciliation, and codes of conduct".

76 One reason for this is because unlike arbitrators, mediators do not have the power to impose any outcome on the parties.

77 Paragraph 52 of the Guide to Enactment and Use of the Model Law on Conciliation recorded the:

> … prevailing view … that the consequences of failure to disclose such information should be left to the enacting State" and stated that failure by the mediator to disclose information likely to raise doubts as to its impartiality or independence "does not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law.

assessing "fair treatment". Those who were in favour of its inclusion argued that it was important to provide for such an exception, given that unlike arbitration, there was no means to challenge the process or the conduct of the mediator, particularly if the misconduct or unfair treatment was not known to the parties.[78]

62 To address the concerns raised by several delegates on various aspects of Art 5(1)(f), Working Group II agreed to limit the scope of the exception. First, the use of the term "justifiable doubts" was thought to establish an objective standard and set the threshold higher than simply "an 'appearance' or a conflict of interest".[79] Second, this ground for refusal should not apply if the relevant circumstances were actually known to the party resisting relief. Third, the mediator's failure to disclose must have a direct impact on a party. Finally, the requirement was added that but for the mediator's non-disclosure, the party would not have entered into the settlement agreement. These limitations provided the assurance needed in order for this provision to move forward as an agreed text.

63 It should be noted that the agreement on a procedural issue reached during the Breakthrough Session saved the compromise from being unravelled. Several delegations sought to exclude these limitations entirely; others sought to merge Arts 5(1)(e) and 5(1)(f). Both suggestions did not gain traction. As a matter of procedure, delegates adhered to the agreement reached by Working Group II that the substance of the subparagraphs had been already agreed upon subject only to drafting improvements. There was thus "strong support" for retaining the narrow versions of the provisions largely as they were reflected in the compromise proposal and as separate subparagraphs,[80] in line with the compromise.

78 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 193.

79 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 42.

80 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (Vienna, 2–6 October 2017) (A/CN.9/929) (11 October 2017) at paras 97–98.

E. Issue 5: Form of the instrument

> Two roads diverged in a wood, and [we] –
> [We] took the one less traveled by,
> And that has made all the difference.[81]

64 Early on, Working Group II came upon "the fork in the road" on the possible form that an instrument to address enforcement of international settlement agreements might take. The "prevailing view" was that "there were a number of issues that would require further consideration before a decision could be made on the form of the instrument"[82] and it was "generally felt that the final form would be decided upon at a later stage".[83] The original proposal in support of future work of Working Group II in the area of international commercial mediation advocated the development of a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation,[84] and a number of delegations expressed preference for preparing a convention, as a convention "could more efficiently contribute to the promotion and harmonization of conciliation".[85] Other delegations argued that the current divergence and in some cases, non-existence of established mediation practice in some states, "did not lend itself to harmonisation efforts through the preparation of a convention, but rather required a more flexible approach".[86]

65 The suggestion for Working Group II to prepare two separate instruments in parallel, which would be complementary, was first mooted and agreed on at its 65th session, on the understanding that such work would be without any prejudice to the final form of the

---

81 Adapted from "The Road Not Taken", a poem by Robert Frost.

82 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 108.

83 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 109.

84 *Planned and Possible Future Work – Part III: Proposal by the Government of the United States of America: Future Work for Working Group II* (New York, 7–18 July 2014) (A/CN.9/822) (2 June 2014).

85 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session* (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015) at para 108.

86 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at para 139.

instrument.[87] That Working Group II decided to take the road less travelled, that it allowed the spirit of compromise to guide its approach, and that it chose to exercise flexibility in the conduct of its work, resulted in it creating history by being the first UNCITRAL working group to conclude work on two forms of instrument in parallel. That it accomplished this in six sessions over two-and-a-half years was an unprecedented feat.

IV. Conclusion

66 The creation of the Convention and the Model Law was a milestone not merely for Working Group II, but for international trade through the expansion of the international legal framework for enforcement of settlements of cross-border disputes realised through amicable third-party-facilitated resolution rather than adjudicative process through courts (domestic or international) or international arbitration.

67 The pace at which adoption of the instruments will occur after the Convention is open for signing on 7 August 2019 in Singapore cannot be known. Broad adoption may take time.

68 The New York Convention is often held up as an example of a very successful instrument, notwithstanding that its existence predates the existence of UNCITRAL. It has the sheen of an enormously successful instrument, but to reach its current level of success, it has taken 60 years of global effort. As Greenberg, Kew and Weeramantry[88] remind us, its origins and action by those sponsoring its creation predate World War II. It is therefore arguable that the New York Convention is about to experience the centenary of its conception, having last year celebrated its 60th anniversary.

69 It follows that its complementary sibling convention – the Singapore Convention on Mediation – and complementary Model Law should be given some leeway in terms of time before judgments are made as to its success. It is hoped they will enjoy the level of international acceptance and adoption which they justify.

---

87 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016) at paras 142 and 213.

88 Simon Greenberg, Christopher Kew & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at pp 9–17, paras 2.1, 2.2 and 2.3.