CONSTRUCTING THE CONVENTION ON MEDIATION

The Chairperson's Perspective

This article explores how the new United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation ("Singapore Convention"), was developed, through the lens of the chairperson of the negotiating process. It revisits the history of early discussions on an international mechanism for the enforcement of mediated settlement agreements, on which no real agreement could be reached. Fast-forwarding to more than a decade later, this article looks in particular at the five issues in the packaged deal that made the conclusion of negotiations on the Singapore Convention possible. Through an exploration of the considerations that went into finalising the most difficult issues through the compromise package, this article appreciates the considerations behind the construction of the Singapore Convention, and how the diversity of representatives and perspectives in the room was harnessed as a strength in favour of a more robust outcome.

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I. Introduction

It always seems impossible until it's done.

Nelson Mandela

* The views expressed herein are the views of the author and do not necessarily represent the views of the Government of Singapore. This contribution works off the author's prior work in Natalie Y Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on The Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123. Specifically, paras 6–23, 29–33 and 73 of this contribution draw from the author's prior work. The author expresses her appreciation to the publishers of the *Austrian Yearbook on International Arbitration* for their support in this regard.

1 In its work from 2014 to 2018 on mediation, the United Nations Commission on International Trade Law ("UNCITRAL") achieved a consensus outcome that had eluded it in 2002. As part of this consensus outcome, we now have a cross-border regime for international mediated settlement agreements to be enforced and invoked.

2 The cross-border regime comes in the form of a multilateral convention: the new United Nations Convention on International Settlement Agreements Resulting from Mediation,[1] which will also be known as the Singapore Convention on Mediation ("Singapore Convention").[2] The text of the Singapore Convention was adopted by the United Nations ("UN") General Assembly in December 2018, and will open for signature in Singapore on 7 August 2019.

3 This work by UNCITRAL was undertaken following a proposal in 2014 to develop a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, with the goal of encouraging mediation in the same way that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3] ("New York Convention") had facilitated the growth of arbitration.[4] Over a decade ago, UNCITRAL had considered the question of enforcement of settlement agreements when preparing its Model Law on International Commercial Conciliation.[5] As part of their work then, the "smallest common denominator between the various legal systems"[6] was to leave the question of how to address the enforcement of conciliated settlement agreements to individual states that chose to enact the Model Law on International Commercial

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

2 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) OP 3.

3 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

4 United Nations Commission on International Trade Law (hereinafter "UNCITRAL"), *Note by the Secretariat, Planned and Possible Future Work – Part III, Proposal by the Government of the United States of America: Future Work for Working Group II* (A/CN.9/822) (2 June 2014).

5 Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law GA Res 57/18, adopted at United Nations General Assembly, 57th Session (24 January 2003) (hereinafter "Model Law on International Commercial Conciliation"). Also available in UNCITRAL, *Yearbook, Vol XXXIII: 2002* (A/CN.9/SER.A/2002) (2005) Part Three, Annex I.

6 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-fifth Session* (Vienna, 19–30 November 2001) (A/CN.9/506) (21 December 2001) at p 37. See also UNCITRAL, *Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* (A/CN.9/514) (27 May 2002) at p 26.

Conciliation.[7] In other words, no real agreement could be reached at the time.[8] The differences in views in 2002 over the possibility of an international mechanism for enforcement continued to persist in 2014.[9] Many a time during the UNCITRAL discussions, it seemed that the differences in views could not be reconciled. However, all who were part of the process were dedicated to constructive dialogue. This enabled us to achieve informed mutual understandings of the core positions and interests, so that we could construct a Convention that we hope will stand the test of time.

4 This article will examine the history of the discussions that led to the Singapore Convention, as well as the key issues of the packaged deal that made the Singapore Convention possible. This article seeks, through an exploration of the considerations that went into finalising the issues of the compromise package, to appreciate the considerations behind the construction of the Singapore Convention. Part II[10] will study UNCITRAL's earlier work on international commercial conciliation, with a specific focus on the discussions regarding a harmonised approach to enforcement; and Part III[11] will examine UNCITRAL's latest work on the enforcement of mediated settlement agreements, through the lens of the five-issue packaged deal, and will include some of my reflections from having chaired the process; before concluding remarks are offered in Part IV.[12]

7 Article 14 of the Model Law on International Commercial Conciliation states:

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

8 This fate is shared. See Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (The Netherlands: Kluwer Law International, 2009) at p 301, noting that the Model Law on International Commercial Conciliation and 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, which Alexander describes as "the primary international legal instruments on mediation", "both fall short of establishing uniform standards in relation to the enforceability of mediated agreements". See also Edna Sussman, "The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements" *ICC Dispute Resolution Bulletin* (2018) at pp 43–44.

9 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 5; Natalie Y Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123 at 126–130.

10 See paras 6–21 below.

11 See paras 22–72 below.

12 See paras 73–74 below.

5 In this article, as in the Singapore Convention, "mediation" refers to instances where disputing parties seek to reach an amicable settlement with the assistance of a third party who lacks the authority to impose a solution at the time of the mediation.[13] Furthermore, in this article, the terms "mediation" and "conciliation" are used interchangeably. UNCITRAL's earlier work uses the term "conciliation". In the Singapore Convention (and the amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation[14] ("the amended Model Law"), the term "mediation" is used, as it was assessed that it was the more widely used term internationally. The intention, however, was not to introduce any substantive change in meaning. Rather, the term "mediation" is intended to "cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used".[15]

II. UNCITRAL's earlier work on the 2002 Model Law on International Commercial Conciliation

6 UNCITRAL was established in 1966 with the mission of enhancing world trade by harmonising international trade law.[16] The

13 Article 2(3) of the Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted by the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "Singapore Convention on Mediation") states:

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

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

15 See UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at p 16; 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 p 19. In fn 2 in the amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "the amended Model Law"), it is stated in the relevant part that the decision to use the term "mediation" instead was:

> … in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

16 Establishment of the United Nations Commission on International Trade Law GA Res 2205 (XXI), adopted at United Nations General Assembly, 21st Session (17 December 1966).

harmonisation of laws takes place through, amongst others, the preparation of instruments such as international treaties or conventions, model laws, legislative guides and model provisions.[17] An element of the harmonisation project is also served through educational efforts such as databases and training and capacity-building initiatives.[18]

7 UNCITRAL has work processes in place that enable it to work – generally successfully – to find suitable common ground for the building of harmonised approaches and legal responses to a variety of issues in international trade.[19] Foremost of these are its convening power, which ensures input from different legal cultures and traditions as well as the relevant expertise,[20] and its consensus-basis of decision-making, which enables the identification of points of convergence for viable options for harmonisation. In UNCITRAL, there is "a conscious striving for balance, whether between developed countries or between socialist and market economy countries".[21]

8 In 1980 and 2002, UNCITRAL had adopted instruments that had the objective of harmonising international commercial conciliation: (a) the Conciliation Rules;[22] and (b) the Model Law on International Commercial Conciliation. In the course of UNCITRAL's work on the Model Law on International Commercial Conciliation, the question whether a settlement reached during a conciliation should be treated

17 See UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (Vienna: United Nations, 2013) at pp 13–17.

18 For example, on databases, see the Case Law on UNCITRAL Texts or "CLOUT", a system established for the collection and dissemination of court decisions and arbitral awards relating to UNCITRAL legislative texts http://www.uncitral.org/clout/index.jspx (accessed 20 May 2019). On training and capacity-building initiatives, see UNCITRAL, *Note by the Secretariat, Technical Cooperation and Assistance* (A/CN.9/905) (18 April 2017).

19 See generally UNCITRAL, *Note by the Secretariat: UNCITRAL Rules of Procedure and Methods of Work* (A/CN.9/638) (17 October 2007) and its addenda 1–6.

20 For example, see UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (2013) at p 2: "Members of UNCITRAL are selected from among States Members of the United Nations and represent legal traditions and levels of economic development." The 66th session of the UNCITRAL Working Group II (Dispute Settlement), that met 6–10 February 2017 in New York, was attended by 60 State delegations, two observer delegations, and 41 intergovernmental and non-governmental organisations. See 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 p 3.

21 Mary E Hiscock, "Changing Patterns of Regional Law Making in Southeast Asia" (1994–1995) 39 St Louis U LJ 933 at 943.

22 Conciliation Rules of the United Nations Commission on International Trade Law GA Res 35/52, adopted at United Nations General Assembly, 49th Session (4 December 1980). Also available in UNCITRAL, *Yearbook, Vol XI: 1980* (A/CN.9/SER.A/1980) (1982) Part Three, Annex II.

"as an enforceable title as, or similarly to, arbitral awards" was discussed. Views were divided on the question.[23]

A. Views for and against a harmonised approach to enforcement

9 The issue was whether a harmonised model provision on enforcement was to be pursued. Views against harmonisation were accompanied by various reasons which showcased the not-so-straightforward relationship between conciliated settlement agreements and arbitral awards, occasioned by the dissociation and association between the two that was sought. The reasons can be placed into two categories: (a) conceptual difficulties with distinguishing amongst settlement agreements to determine which could be enforced akin to arbitral awards; and (b) lack of need for a harmonised mechanism of enforcement.

10 In terms of the conceptual difficulties, it was said that it would be difficult to distinguish in a legislative provision between settlements that should, and settlements that should not, be treated as enforceable titles. It was also said that there were fundamental differences between arbitration and conciliation that rendered it inappropriate to equate conciliated settlement agreements with arbitral awards. In other words, conciliated settlement agreements and arbitral awards needed to be dissociated from each other.

11 In respect of the lack of need, delegations argued that there was no need to treat such settlement agreements as enforceable titles because many states had simple ways of rendering settlement agreements enforceable. These ways included converting the settlement into a notarised document, or obtaining a judicial sanction for the settlement. Further, if the parties to the settlement agreement wanted to make their agreement an enforceable title, they could initiate arbitral proceedings with the sole purpose of converting the settlement award into an arbitral award on agreed terms.[24] In a sense, conciliated settlement agreements benefited from being associated with arbitral awards.

12 Views in favour of harmonisation in this regard were premised on the satisfactory functioning of legislation in some states that treated conciliated settlement agreements as enforceable title. Regarding the

23 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-second Session* (Vienna, 20–31 March 2000) (A/CN.9/468) (10 April 2000) at p 9.

24 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-second Session* (Vienna, 20–31 March 2000) (A/CN.9/468) (10 April 2000) at p 9.

lack of a need, it was pointed out that not all states had simple ways of rendering settlement agreements enforceable. Further, sometimes the parties to a settlement agreement did not take advantage of the ways of rendering their agreement enforceable at the time the agreement was entered into; the need to enforce the settlement only became apparent later when one party refused to live up to its part of the deal. Some delegations also suggested that legislation to that effect would increase the attractiveness of conciliation.[25]

B. Options considered for a harmonised approach

13 Subsequently, to assist in the UNCITRAL Working Group's deliberations, a draft model provision was prepared. The provision simply stated that a conciliated settlement agreement would be binding and enforceable, but otherwise left it to the enacting State to insert provisions specifying provision for the enforceability of conciliated settlement agreements.[26] A unified, harmonised solution regarding how conciliated settlement agreements might become enforceable was not attempted. This was because legislative approaches to the enforceability of conciliated settlement agreements "differ[ed] widely".[27]

14 It was explained that some states left such settlements to be enforced as contracts, whereas others provide for expedited enforcement of such settlements. There were other states that treated settlement agreements as having the same effect as a final award in arbitration, and still other states that enabled settlement agreements to be enforced pursuant to provisions for the enforcement of court decisions. Against this backdrop, the UNCITRAL Working Group was asked to consider whether it would be desirable and feasible to prepare a uniform model provision and, if so, what the substance of the uniform rule should be. As an alternative, it was suggested that instead of providing a uniform solution, guidance could be given in the guide to enactment in the form of setting out possible solutions.[28]

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25 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-second Session* (Vienna, 20–31 March 2000) (A/CN.9/468) (10 April 2000) at p 9.

26 See Art 14 of the Model Law on International Commercial Conciliation.

27 UNCITRAL, *Report of the Secretary-General, Settlement of Commercial Disputes – Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation* (A/CN.9/WG.II/WP.110) (22 September 2000) at p 38.

28 UNCITRAL, *Report of the Secretary-General, Settlement of Commercial Disputes – Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation* (A/CN.9/WG.II/WP.110) (22 September 2000) at pp 38–39. See also UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its*

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15 After the UNCITRAL Working Group's consideration of the proposed draft model provision, views were expressed that it would be useful to endow settlements reached during conciliation with the possibility of enforcement. It was therefore considered desirable to prepare a harmonised statutory provision for states that might wish to enact it.[29] Accordingly, at the UNCITRAL Working Group's last consideration of the matter in November 2001, it had before it four variants of a model provision on the enforceability of settlement.[30] Two of the four proposals sought to achieve the enforcement of a conciliated settlement agreement by means of an arbitral award.

16 The first variant ("Variant A") was a reiteration of the draft model provision that had been earlier proposed, that is, simply stating that a conciliated settlement agreement would be binding and enforceable, but otherwise leaving it to the enacting State to insert provisions specifying provision for the enforceability of conciliated settlement agreements. Under this variant, examples of solutions provided under national laws would be given in the guide to enactment.

17 The second variant ("Variant B") reflected that a settlement agreement would be binding and enforceable as a contract.

18 The third and fourth variants ("Variant C" and "Variant D") reflected the view that a settlement agreement should be dealt with as an arbitral award. Variant C provided that disputing parties who reached an agreement on a settlement may appoint an arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms. Variant C was based on Art 30 of the UNCITRAL Model Law on International Commercial Arbitration.[31] Variant D simply stated that a settlement agreement would be binding and enforceable as an arbitral award. In this latter variant, there was no indication as to the procedure through which such an arbitral award was to be produced. However, the accompanying draft guide to enactment referred to the provisions of Arts 30, 35 and 36 of the UNCITRAL Model Law on International

Thirty-fourth Session (New York, 21 May–1 June 2001) (A/CN.9/487) (15 June 2001) at pp 41–42.

29 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-fourth Session* (New York, 21 May–1 June 2001) (A/CN.9/487) (15 June 2001) at p 42.

30 UNCITRAL, *Note by the Secretariat, Settlement of Commercial Disputes: Model Legislative Provisions on International Commercial Conciliation* (A/CN.9/WG.II/WP.115) (19 September 2001) at pp 25–26.

31 GA Res 40/72, adopted by the United Nations General Assembly, 40th Session (11 December 1985).

Commercial Arbitration for guidance on what the words "enforceable as an arbitral award" meant.[32]

19 In addition to the four variants, during the UNCITRAL Working Group's session, various proposals were made regarding a revised text of the draft provision on enforcement of settlement agreements. These proposals touched on issues such as the permissible grounds upon which a conciliated settlement agreement could be challenged, and whether a conciliated settlement agreement could be enforceable "in the same way" as an arbitral award.

20 None of these proposals attracted consensus.[33] With this in mind, the current language found in Art 14 of the Model Law on International Commercial Conciliation was proposed, to reflect "the smallest common denominator between the various legal systems".[34] No significant amendments were introduced as a result of the informal consultations and official comments received on the draft text before its adoption by the UNCITRAL Commission.

21 At the end of the day, it was not for want of trying that a harmonised approach to the enforcement of conciliated settlement agreements was not reflected in the Model Law on International Commercial Conciliation. Rather, the differences in the approaches taken by various jurisdictions proved to be difficult to surmount.

III. UNCITRAL's latest work on the enforcement of mediated settlement agreements

22 The discussions and difficulties identified in the UNCITRAL discussions over the Model Law on International Commercial Conciliation did not disappear when the work was taken up again and began in earnest in 2015. The issue of summary or expedited enforcement of mediated settlement agreements continued to attract differences in views. As chairperson of the UNCITRAL deliberations over its latest work, I understood that, as Ellen Deason put it, "[t]here

32 UNCITRAL, *Note by the Secretariat, Settlement of Commercial Disputes: Draft Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]* (A/CN.9/WG.II/WP.116) (12 October 2001) at p 21.

33 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-fifth Session* (Vienna, 19–30 November 2001) (A/CN.9/506) (21 December 2001) at pp 36–37.

34 UNCITRAL, *Report of the Working Group on Arbitration on the Work of Its Thirty-fifth Session* (Vienna, 19–30 November 2001) (A/CN.9/506) (21 December 2001) at p 37. See also UNCITRAL, *Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* (A/CN.9/514) (27 May 2002) at p 26.

are important values at stake on each side, and any enforcement procedure, including the status quo, compromises some of those values".[35] With that in mind, the only immediate way forward was open dialogue in the search of possible compromise.

23 The exchange of views during this process revealed that, internationally, there continued to be a variety of approaches to the enforcement of mediated settlement of agreements.[36] It was suggested that "the circumstances … had not changed since the adoption of the Model Law", and that "the Working Group might face similar difficulties in addressing the issue as when it prepared article 14 of the Model Law".[37] At the same time, it was noted that the developments in domestic legislation since the adoption of the Model Law on International Commercial Conciliation "were an indication that States were giving importance to the matter". As such, the consideration of the enforcement of mediated settlement agreements "might be timely".[38]

24 It was the five-issue packaged deal or "compromise proposal", reached during the Working Group's meeting in February 2017, that was pivotal in helping to strike a balance between the different concerns and interests such that a harmonised approach to the enforcement of mediated settlement agreements could be achieved.[39] The packaged deal built on the work of the September 2016 session, where we had had the opportunity to go over the issues twice – three times in the cases of treatment as binding and settlement agreements concluded in the course of judicial or arbitral proceedings. On the heels of the September 2016 session, I had high ambitions for our meeting in February 2017. I recall opening the session with a specific encouragement to delegations to focus first on the issues that the Working Group needed to reach consensus on, and to maximise the time we had that week, including outside of our formal meetings, to bridge gaps and arrive at compromise solutions. Even then, the packaged deal almost did not happen, because sometimes things just happen that are outside of any control.

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35 Ellen E Deason, "Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide" (2005) 80 Notre Dame L Rev 553 at 585.

36 For example, see 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 9.

37 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 6.

38 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 10.

39 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 pp 10–11.

25 When we were at the cusp of a breakthrough in the negotiations in February 2017, a snowstorm broke over New York, requiring the closure of the UN Headquarters building for a day. To my mind at the time, this posed a serious threat to the pace and momentum of our negotiations. Thankfully, we were able to convene informally. The informal meeting was announced for any and all interested delegations to join. It was vital, as it happened, that the interested delegations who were the furthest apart on the issues were present and at the forefront of the full day of informal negotiations, hammering out the details and language of the five-issue package. The package was presented to the formal meeting – this was, for me, another crucial step to ensure that any delegations who had decided not to join the informal meeting could still be heard on the issues – and adopted as a draft and basis that we could work on, progressively refine and improve, during the October 2017 session and beyond.

26 At its July 2017 session, I presented my report to the UNCITRAL Commission, which included an update on the compromise reached by the Working Group at our meeting in February 2017. The UNCITRAL Commission took note of the compromise reached and expressed support for the Working Group continuing to pursue our work based on that compromise.[40] This further entrenched the five-issue package as an endorsed basis for our future work. These small steps affirming the package were significant, because the package was a delicate compromise that would be questioned and sometimes challenged in the next steps of the negotiations, even though it was always eventually upheld as the consensus, by consensus.[41]

27 How were the five issues identified? They were amongst the most difficult issues in the negotiations, because of the divergence of views expressed in respect of each of them. Any one of these issues could not be resolved on their own, as there were different delegations which felt strongly about each of them. However, as a package, delegations were better able to appreciate how their flexibility on one issue would beget flexibility from other delegations on another issue. In this way, we were able to broach the exercise of balancing the different concerns and interests, in our search for a way past various potential pitfalls and impasses.

28 The five issues in the package were: (a) legal effect of settlement agreements; (b) settlement agreements concluded in the course of

40 UNCITRAL, *Report of the United Nations Commission on International Trade Law, Fiftieth Session* (3–21 July 2017) (A/72/17) (2017) at p 42.

41 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at pp 4 and 8.

judicial or arbitral proceedings; (c) declaration on opt-in by the parties; (d) impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure; and (e) the form of the instrument. This article takes the five issues each in turn. Before doing so, however, some brief remarks will be made on the scope and application of the Singapore Convention.

A. The scope and application of the Singapore Convention

29 The Singapore Convention will apply to mediated settlement agreements in cases of commercial disputes, and not disputes pertaining to employment law or family law matters, nor agreements involving consumers.[42] Commercial disputes are to be understood in the context of UNCITRAL's work on international commercial conciliation.[43]

30 Further, the agreement must be international.[44] This would be when at least two parties to the settlement agreement have, at the time of conclusion of that agreement, their places in different states; or the State in which the parties to the settlement agreement have their places of business is different from either the State where a substantial part of the obligations under the settlement agreement is to be performed; or the State with which the subject matter of the settlement agreement is most closely connected.[45]

31 It was, at one stage, suggested that the new instruments should address themselves to "foreign" settlement agreements rather than "international" settlement agreements. This suggestion was made on the basis that practice had already developed under the New York Convention. This practice could then be relied upon. The suggestion was not taken up. There was recognition that, unlike with arbitrations,

42 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 p 9; 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 p 17.

43 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 p 9.

44 Singapore Convention on Mediation Art 1(1). A suggestion to do away with the international requirement, and to apply the new instruments to all conciliated settlement agreements regardless of whether they were international or not, did not receive support. See 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 pp 15–16.

45 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 pp 27–28.

the "seat" of a mediated settlement agreement was not a factor that could be easily identified.[46]

32 The settlement agreement must be in writing and signed by the parties.[47] The requirement of being in writing is to be understood to be met by the content of the settlement agreement being recorded in any form, including by an electronic communication.[48] This incorporates the principle of functional equivalence for writing and signature requirements, embodied in UNCITRAL texts on electronic commerce,[49] and preserves the flexibility for online mediation. Taking into account current practices, it was acknowledged that an exchange of e-mails would suffice to meet the signature requirement. Further, the decision was taken to not include a requirement in the Singapore Convention for the settlement agreement to be found in a "single document" as distinct from an exchange of communication between the disputing parties.[50]

33 Significantly, the settlement agreement had to have resulted from mediation. To this end, evidence must also be shown that the agreement was one that had resulted from mediation, and involved a mediator in the process. The inclusion of this requirement was agreed to after extended discussion. Such evidence could be in the form of the mediator's signature on the settlement agreement, or an attestation in a separate document by the mediator or administering institution that mediation had occurred.[51] The Convention sets out the forms of

46 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 pp 7–8.

47 Singapore Convention on Mediation Arts 1(1) and 4(1)(a). See also 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 pp 10–11; 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 p 21; 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 pp 7 and 12.

48 Singapore Convention on Mediation Art 4(2).

49 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 pp 10–11; 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 p 21; 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 p 12.

50 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 p 21.

51 Singapore Convention on Mediation Art 4(1)(b). See also 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 p 21.

evidence in an "illustrative and non-hierarchical list", in recognition of the different mediation practices in different jurisdictions and legal cultures.[52]

B. The legal effect of settlement agreements

34 The first issue in the compromise package concerned how to address the legal effect that the Singapore Convention would afford to settlement agreements. This issue demanded of delegations the ability to understand how things work in different jurisdictions. Lawyers trained in the civil law tradition had to appreciate legal concepts and processes that lawyers trained in the common law tradition take for granted, and *vice versa*. Sometimes we forget how challenging it can be to ensure that we are not speaking at cross purposes. We assume that when we employ the use of specific terminology, we will be understood as we intend to be understood. This issue was one instance where delegations had to let go of such assumptions and of closely held terms of art. Informal caucuses and conversations on the side-lines of the formal meetings helped greatly; I participated in some of these informal exchanges, and generally sought to observe all of them, so that I too could keep pace with the developments in understandings that delegations were achieving. When we reconvened in the setting of our formal meetings, I tended to favour delegations delivering to the room any updates from their informal caucusing over myself offering a reading of events so that, amongst other reasons, we could all appreciate the progress that delegations were making by their coming together.

35 In the eventual language and approach of the Singapore Convention, a functional approach to the concept of "recognition and enforcement" is preferred. This was so that the Singapore Convention could avoid using the term "recognition", but could still cover, in its scope, the legal effects of "recognition".[53] This approach appreciated how, like an arbitral award, there are two ways in which a settlement

52 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (New York, 5–9 February 2018) (A/CN.9/934) (19 February 2018) at p 7. See also 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 p 11; 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 p 13; UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at pp 9–10.

53 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 p 14; 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 p 23.

agreement can be used in proceedings before a domestic court: (a) as a "sword", for the enforcement of the settlement agreement; and (b) as a "shield", where the settlement agreement is invoked as a defence against a claim. Throughout the drafting of the Singapore Convention, there was particular sensitivity to language so that the provisions of the Singapore Convention were not read as referring only to enforcement or only to invoking a settlement agreement.[54]

36 The concept of "recognition and enforcement" is familiar to us, in the treaty context of the New York Convention, as applied to arbitral awards as well as agreements to arbitrate. In the preliminary draft convention that was adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, and which formed the basis of the work on the New York Convention, the concepts that give meaning to the term are described as follows:[55]

> Art. II. – In the territories of any High Contracting Party to which the present Convention applies, an arbitral award shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

During the UNCITRAL discussions, it was explained that, 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".[56]

37 Indeed, use of the term "recognition" in the Singapore Convention would have provided consistency with existing treaties including the New York Convention.[57] However, as the UNCITRAL discussions revealed, "recognition" is understood differently in different

54 For example, see UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (New York, 5–9 February 2018) (A/CN.9/934) (19 February 2018) at pp 6–7. See also UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at pp 12–13; 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 pp 11–12.

55 International Chamber of Commerce, *Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13 March 1953* (ICC Publication No 174, 1953) at p 12.

56 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 p 14.

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 p 35.

jurisdictions, and various procedures may apply to effect recognition domestically. Domestic procedures for recognition are different, and have different effects, in different jurisdictions.[58] While it was agreed that the instrument should address enforcement, a bone of contention was whether or not the instrument should also refer to the concept of "recognition".

38 Those who were supportive of addressing recognition in the instruments highlighted that it was recognition that gave settlement agreements their legal effect. This legal effect may be necessary for the dismissal of a claim that had already been resolved by the settlement agremeent, or for the purposes of setting off.[59] Additionally, in certain jurisdictions, the enforcement procedure was contingent upon the settlement agreement first being recognised.[60]

39 For those who were not supportive of addressing recognition in the instruments, the very suggestion that settlement agreements, which were acts of a private nature, could have legal value apart from an enforcement procedure was inappropriate. For these delegations, recognition was a step reserved for public acts by another State, such as court decisions.[61] It was neither necessary nor appropriate to give such acts an effect that would be understood as *res judicata* effect in some jurisdictions.[62]

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 p 14; 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 p 23; 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 p 15.

59 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 p 14.

60 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 p 14.

61 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 p 14; 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 p 15.

62 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 p 23; 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 p 15.

40 Various drafting proposals were made throughout the process in a bid to bridge the differences in views. This included using the term "binding and enforceable", which was based on Art 14 of the Model Law on International Commercial Conciliation.[63] That language did not survive into the final drafting stages. There was also the drafting suggestion of giving a settlement agreement "effect in defence … to the same extent as in enforcement proceedings".[64] However, the question was raised over what "legal effect" meant.[65] These discussions led to the critical suggestion in the February 2017 session to refer to the concepts of settlement agreements being enforced and being invoked.[66] With this creative masterstroke, the distance occasioned by the different practices and understandings across various jurisdictions could be bridged.[67]

C. Settlement agreements concluded in the course of judicial or arbitral proceedings

41 In relation to the second issue in the compromise proposal, the Singapore Convention does not apply to settlement agreements that are approved by a court, or that were concluded in the course of proceedings before a court, and are enforceable as a judgment in the State of that court. The Singapore Convention also does not apply to settlement agreements that are recorded and enforceable as an arbitral award.[68] Conversely, settlement agreements that are concluded in the course of judicial or arbitral proceedings, but are not approved or recorded and enforceable as a judgment or arbitral award, fall within the

63 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 p 15. Article 14 of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law states in relevant part that "[i]f the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable".

64 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 p 27.

65 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 p 5.

66 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 p 5.

67 That said, discussions over the drafting continued. Specifically, there were concerns that using only the term "enforcement" might "unintentionally limit the scope of the instrument". At the same time, the phrase "grant relief" may "convey a wider meaning" than "enforcement": see 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 pp 11–12.

68 Singapore Convention on Mediation Art 1(3).

scope of the Singapore Convention.[69] This is so even if the mediation or amicable settlement was initiated or facilitated by the judge or arbitrator in the proceedings.[70]

42 Who decides on what standard were matters of some discussion. Suffice it to say for our purposes that the determination of whether a settlement agreement approved or recorded as a judgment or an arbitral award is enforceable as a judgment or an arbitral award is to be made by the enforcing authority;[71] and the Singapore Convention is silent on the standard to be applied by the enforcing authority in reaching the determination. The understandings were that, in the case of enforceability as a judgment and for consistency with the anticipated Hague judgments convention, the standard to be applied would be that of the State where the settlement agreement was approved as a judgment or of the State of the court before which the settlement agreement was concluded in the course of proceedings; and in the case of enforceability as an arbitral award and for consistency with existing frameworks such as the New York Convention, the standard to be applied would be that of the State where enforcement was sought.[72]

43 The Singapore Convention's treatment of settlement agreements concluded in the course of judicial or arbitral proceedings has a couple of purposes worth highlighting.

44 First, it recognises that many commercial disputes that are resolved by mediation do not necessarily start out with the disputing parties intending to resort to mediation. Rather, "[m]any paths lead to mediation".[73] Many mediations are commenced and disputes settled after

69 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 pp 6 and 7.

70 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 pp 20–21; 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 pp 11 and 35.

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 pp 13–14.

72 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 pp 12–14; UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at p 5.

73 For example, see Klaus J Hopt & Felix Steffek, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at Endnote 347.

the dispute has been submitted to a court or arbitral tribunal. That mediations can be commenced via different channels is similarly acknowledged in Art 1(8) of the Model Law on International Commercial Conciliation (now Art 3(6) of the amended Model Law), which recognises that conciliation can be carried out on different bases, such as an agreement between the parties, an obligation under the law, or a direction or suggestion of a court, arbitral tribunal or competent authority.[74]

45 Second, it seeks to avoid gaps and overlaps in the enforcement regimes of judgments, arbitral awards and mediated settlement agreements. Specifically, the purpose was to avoid overlaps between the Singapore Convention and the Hague Convention on Choice of Court Agreements,[75] the Judgments Project of the Hague Conference on Private International Law ("the Judgments Project") and the New York Convention.[76] This was, in many ways, the main preoccupation of delegations for this issue. It was, in part, a function of the fact that a number of the most interested delegations in the UNCITRAL process were also active in the Judgment Project discussions. They were therefore able to keenly appreciate the various permutations and combinations of how the outcomes of the UNCITRAL discussions and the anticipated output of the Judgments Project could interact.

46 During our discussions, the matter of overlapping instruments was rightfully recognised as a complicated one. In fact, considering the complications, we had considered whether the Convention should leave the matter unsaid, so that it could be left for the enforcing courts to resolve. Another option was to leave this as a matter for parties to the Convention to decide, by providing for a permissible declaration or

74 See also 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 p 6.

75 30 June 2005; entry into force 1 October 2015.

76 See also 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 pp 35–36.

reservation.[77] However, there were concerns that these approaches would not give the competent enforcing authority sufficient guidance.[78]

47 What was the guidance that should be given? There were delegations who saw the existence of overlaps between enforcement regimes as beneficial and a matter that could be left to the enforcing authority to resolve, including as a matter under the rubric of the grounds of refusal for enforcement. There was some appetite to fashion a solution for "co-existence" "where a settlement agreement survived the transformation into a judgment or an arbitral award".[79] However, such overlaps were cautioned against since they could lead to other complications, even abuse by disputing parties, in the implementation of the overlapping instruments.[80] Parties could have multiple bites at the cherry in the State where enforcement of a settlement agreement is sought.[81] There were concerns also in having the Singapore Convention, including its grounds of refusal, which was tailored to settlement agreements, effectively apply to court judgments or arbitral awards.[82] As such, when a settlement agreement was successfully converted into a court judgment or arbitral award, it was decided that, barring any more-favourable-treatment that a state party may wish to apply to the settlement agreement (a possibility expressly preserved by Art 7 of the

77 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 p 20; 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 p 10; 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 p 7.

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 p 10.

79 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 p 13.

80 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 p 6; 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 pp 19–20; 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 p 6.

81 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 p 36; 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 p 13.

82 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 pp 35–36.

Singapore Convention),[83] the underlying settlement agreement would have its effectiveness extinguished.

48 At the same time, there was a desire to ensure that, in seeking to avoid overlaps, gaps were not created. Settlement agreements recorded as judgments or arbitral awards are excluded from the scope of the Convention only to the extent that they would be enforceable as a judgment or arbitral award, respectively. This criterion of enforceability was developed to avoid gaps that may arise, for instance, where a settlement agreement, recorded as a consent award, is denied enforcement under the New York Convention because of the lack of an underlying dispute.[84] Such a settlement agreement might still be considered for enforcement under the Singapore Convention.[85]

49 In this way, the Singapore Convention achieves its objective of promoting the ease of circulation of mediated settlement agreements by striking a balance between plugging the gaps in the cross-border enforcement framework for mediated settlement agreements, whether or not they are transformed into a court judgment or arbitral award, and ensuring that, as far as possible, complications arising from overlapping regimes can be avoided.

D. Declaration on opt-in by the parties

50 The third issue in the compromise proposal was the declaration by signatory states to the Singapore Convention on the need for an opt-in by the disputing parties. The declaration on opt-in enables signatory states to the Singapore Convention to provide that disputing parties need to expressly consent and indicate in their settlement

83 See 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 p 36; and 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 pp 13–14, on the intention for the Singapore Convention on Mediation to operate as a "floor" and not a "ceiling", in facilitating the cross-border enforcement of mediated settlement agreements.

84 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 p 36; 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 pp 6 and 12.

85 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 pp 13–14; UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at p 5.

agreement their willingness to subject the agreement to the enforcement regime of the Convention.[86]

51 For some delegations, requiring the disputing parties to expressly consent to the enforcement regime was a natural follow-through of the consensual nature of mediation, of party autonomy and of being fully aware of what the disputing parties were agreeing to.[87] Otherwise, mandatory enforceability, which was a novel feature that the disputing parties may not be aware of, could prove harmful to the amicable nature of the conciliation process.[88] Such a requirement would also serve the function of raising the awareness of the disputing parties of the question of enforceability.[89]

52 For other delegations, requiring such a step would result in the Singapore Convention being less used, and run counter to the Singapore Convention's objective of promoting international commercial conciliation as well as the ease of enforceability of mediated settlement agreements in commercial matters. Practically speaking, having arrived at the settlement, the disputing parties would unlikely be wont to engage in further discussions to agree on the expedited enforcement regime that should apply. If anything, by that stage of the mediation process, disputing parties would generally expect each other to comply with the settlement agreement, in keeping with the canon, *pacta sunt servanda*; it would be contrary to these expectations to require an opt-in for applicability of the enforcement regime.[90]

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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 p 23. In the amended Model Law, the equivalent provision, reflecting the reservation, is found in the footnote: "A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application." In this regard, see the agreement reached and reflected in UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (New York, 5–9 February 2018) (A/CN.9/934) (19 February 2018) at pp 20 and 34.

87 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 p 12; 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 pp 22–23.

88 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 pp 22–23; 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 p 8.

89 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 p 29.

90 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 p 12; UNCITRAL, *Report of Working Group II (Arbitration*

(*cont'd on the next page*)

53 Further, the purpose of the UNCITRAL discussions in carefully calibrating the requirements of the Singapore Convention, including its scope of application, form requirements and grounds for refusal, was precisely to determine when the Singapore Convention should apply; the choice of the disputing parties should not impact on the application of such a carefully calibrated instrument.[91] It was also pointed out that the New York Convention does not have such an opt-in requirement.[92] A possible alternative to following through on the consensual nature of mediation was to provide disputing parties with the option of excluding their settlement agreement from the enforcement regime of the Singapore Convention.[93]

54 Between having an opt-in or opt-out mechanism, and the Singapore Convention not explicitly providing for either option for disputing parties, delegations were similarly divided. This posed its own challenges.

55 While the first two issues of the compromise proposal had to contend with complicated concepts, conceptions and interactions between and amongst them, this third issue of the package was one that was fairly straightforward conceptually. However, this meant that there were only so many ways to slice the pie, and whichever way we did it,

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and Conciliation) on the Work of Its Sixty-fourth Session (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016) at p 23; 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 p 23; 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 p 7.

91 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 pp 22 and 23; 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 p 7.

92 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 p 12; 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 p 23; 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 p 23; 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 p 7.

93 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 p 12; 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 p 23; 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 p 8.

the room came out divided. Our final landing point, which was a declaration providing signatory states to the Convention with the option of requiring disputing parties to agree to apply the expedited enforcement regime, was settled on as an acceptable compromise.[94] The technique of employing a declaration mechanism was one that had been informally raised and discussed a number of times and in different contexts. It was the solution that we settled on in the end, as it facilitates participation in the Singapore Convention, a multilateral instrument, to the maximum extent, while preserving its purpose and object.[95]

56 There are a number of important implications arising from the declaration mechanism. First, even without such a declaration, disputing parties need not, as a prerequisite for the Singapore Convention to apply, expressly consent in their settlement agreement to such application. However, they may exclude the application of the Singapore Convention in their settlement agreement, and this exclusion would be given effect to as a matter of the terms of the settlement agreement.[96] Second, disputing parties would do well to be aware of where the relevant assets of the other disputing party or parties are located, and whether these are in jurisdictions that have entered an opt-in declaration. If yes, then opting in to the enforcement regime under the Singapore Convention could be a particularly prudent step to take. Third, should disputing parties decide to expressly consent to the application of the Singapore Convention, they may wish to note that no definitive decisions or recommendations were arrived at on the form in which such opt-in should take, even though there was a preliminary exchange of views at the UNCITRAL discussions. In the preliminary exchange of views, it was preliminarily suggested that the opt-in should be in writing, but this was not discussed.[97] Although the idea of a standard form for the expression of the opt-in was raised, one was not developed.[98] Similarly, there is no definitive guidance on when the

94 This idea was first mooted at the 64th session. See 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 p 23.

95 This echoes the words in Allain Pellet, "1st Report on the Law and Practice Relating to Reservations to Treaties" (A/CN.4/470) in (1995) II(1) *Yearbook of the International Law Commission* at 152.

96 See Art 5(1)(d) of the Singapore Convention, and the understanding articulated in UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (New York, 5–9 February 2018) (A/CN.9/934) (19 February 2018) at p 13.

97 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 p 34.

98 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 pp 23 and 34.

opt-in would need to be expressed, although it was suggested that it could be at any time including after the conclusion of the settlement agreement.[99]

E. Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

57 The Singapore Convention seeks to enable settlement agreements falling within its scope to be enforced and invoked (similar to Art III of the New York Convention), subject to certain limited exceptions (similar to Art V of the New York Convention).[100] Accordingly, the Singapore Convention features a limited, exhaustive list of grounds for refusal for enforcement of a mediated settlement agreement.[101] Some of the grounds of refusal are inspired by those in the New York Convention, some of the grounds of refusal in the New York Convention do not feature in the Convention, and some of the grounds of refusal in the Convention – inspired by mediator misconduct – are not drawn from the New York Convention.[102]

58 The grounds of refusal specific to mediator misconduct formed the fourth issue in the compromise proposal and were extensively negotiated. In their final form, the misconduct of a mediator that may be the subject of grounds of refusal concern a serious breach of applicable standards or a failure to disclose, where such misconduct had a causal effect on the disputing party entering into the settlement agreement.[103] The intention is for the grounds of refusal to only be applied in exceptional circumstances.[104] The competent authority is to

99 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 p 34.

100 UNCITRAL, *Note by the Secretariat, Planned and Possible Future Work – Part III, Proposal by the Government of the United States of America: Future Work for Working Group II* (A/CN.9/822) (2 June 2014) at p 3. See also 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 p 16.

101 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 p 17.

102 *Cardozo Journal of Conflict Resolution (Special Issue)* (2019) (forthcoming).

103 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 pp 10–11.

104 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 pp 19–20 and 33–34.

determine the standards applicable. The standards may be in the form of the applicable law governing the mediation or codes of conduct.[105]

59 Nobody doubted the importance of ethics and conduct of mediators.[106] In fact, the issue arose because of the recognition for the significant role that mediators play in enabling settlement agreements to be reached.[107] The issue was whether these matters, such as impartiality and neutrality of the conciliator[108] and fair treatment of the parties, which are questions of due process in the dispute resolution context, should be the subject of specific defences or whether such concerns could be addressed via the grounds of refusal for a settlement agreement that is null and void or relating to procedural public policy.[109]

60 This was where the discussion was greatly informed by the differences between the mediation and arbitration processes. What does "fair" treatment mean in a mediation as compared to an arbitration? Is it something that would be separate from codes of conduct or domestic laws?[110] Would introducing such a requirement restrict the process of

105 UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-seventh Session* (2–6 October 2017) (A/CN.9/929) (11 October 2017) at pp 15–16. See also 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 p 16, reflecting a comment that when the relevant standards are applied, account should be taken of the different responsibilities and obligations of an arbitrator on the one hand, and a mediator on the other hand.

106 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 p 8.

107 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 p 33.

108 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 p 19: There is a distinction between requiring independence and impartiality, and requiring disclosure to the disputing parties the circumstances likely to give rise to justifiable doubts about impartiality and independence. The latter was what was in issue.

109 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 p 17; 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 pp 27–28; 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 p 19; and 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 p 9.

110 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)

(*cont'd on the next page*)

conciliation?[111] When actively listening to the various interventions, and even pretending to forget about the profiles of the various experts in the room, I could discern from the interventions who were the experts on delegations who were more familiar with mediation, and who were more familiar with arbitration.[112] Again, we saw the need to abandon certain long-held assumptions in favour of dialoguing with open minds, so that effective compromises could be reached.

61 The discussions in this regard were extensive, and oftentimes fraught. Significant reservations were expressed over having standalone grounds of refusal on mediator misconduct. The need for such an approach was questioned. It was averred that the focus should be on the conduct of the parties and not the conduct of the mediator,[113] considering that a mediated agreement had to be arrived at by the parties voluntarily and could not be imposed by a third party.[114] Additionally, conciliators are not subject to the same impartiality

(17 September 2015) at p 17, para 90; 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 pp 19 and 33.

111 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 p 17; 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 p 33. See also the discussion at 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 p 19, and 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 p 9, recalling the UNCITRAL, *Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* (A/CN.9/514) (27 May 2002), and noting that "the reference in the Model Law to maintaining fair treatment of the parties was intended to govern the conduct of the conciliation process and not the contents of the settlement agreement".

112 See also Stacie I Strong, "Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking" (2016) 50 Akron L Rev 495.

113 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 p 17; 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 p 14.

114 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 p 17; 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 pp 27–28; 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 pp 19–20: that the parties to a mediation can withdraw from the mediation at any time.

requirements as judges and arbitrators.[115] On a practical note, there were concerns that the introduction of grounds of refusal on mediator misconduct could open the door to more litigation, which would undermine the purpose of the instrument. This was compounded by the difficulties that a court at the place of enforcement was likely to be faced with if asked to consider issues relating to a mediation process that had taken place in a different jurisdiction.[116]

62 With time, we were able to crystallise the concerns as pertaining to situations where a disputing party's agreement to a mediated settlement was vitiated by misconduct on the part of the mediator.[117] Two grounds of refusal on the basis of mediator misconduct were therefore introduced. However, the difficult discussions did not end there. Drafting these grounds of refusal proved to be a delicate art. In a bid to balance the different views in the Working Group, we sought to craft the grounds of refusal in objective terms that were sufficiently known in various legal traditions, as the introduction of subjective criteria would bring with them uncertainties in application and implementation. We sought to ensure that only serious breaches would meet the threshold of a ground for refusal, but without setting the standard too high such that proof would be too difficult.[118]

63 Some of our longest consultation breaks were over the drafting of these grounds of refusal. I was, in one instance, asked how long I was going to let a consultation break on this issue go on for. My response was: as long as was required for delegations to feel that they had taken things as far as they could. For me, it was time well spent if the time was used – as it was – to bottom out on lingering doubts and concerns, even if it meant going full circle and deciding to proceed with a drafting proposal that was before us from the start. I was convinced that any such doubts and concerns would not simply disappear with the rapping of my gavel to mark the conclusion of discussions. One way or another, everyone needed to be heard, and to feel that they were heard.

115 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 p 17; 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 pp 27–28.

116 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 pp 19–20.

117 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 pp 14–15.

118 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 pp 9 and 14–16.

F. The form of the instrument

64 The fifth and final issue in the compromise proposal was the form of the instrument.

65 This article has focused on the Singapore Convention. However, it bears noting that, alongside the Singapore Convention, UNCITRAL also concurrently developed the amended Model Law. The contents of the two instruments are complementary.[119] There is the option of either signing the Singapore Convention or adopting the amended Model Law; neither UNCITRAL nor the UN General Assembly has expressed a preference as to which instrument should be adopted. Similarly, there is no expectation to adopt both instruments. However, the model legislative provisions could be adopted as a first step, before becoming party to the Convention subsequently.[120] Both could even be done at the same time, as adopting the amended Model Law could be the means by which a party to the Singapore Convention implements the Convention domestically.[121]

66 Evidently, there is a fair amount of utility in UNCITRAL having concurrently developed the Singapore Convention and the amended Model Law. That said, this does not change the fact that developing both the Singapore Convention and the amended Model Law in parallel was a highly unusual course of action to have undertaken.

67 When the work commenced, the Commission was given the mandate to develop possible solutions to address the enforcement of settlement agreements, including a convention, model provisions or guidance texts.[122] Delegations were divided as to whether efforts should be focused on developing a convention or an amended model law.[123] The decision on the forms our work would take was repeatedly postponed; the negotiators were not ready to decide on the form of the instrument.

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119 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 p 25.

120 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 p 17.

121 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 p 24.

122 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 pp 19–20.

123 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 p 24.

68 Some delegations had reservations over the development of a convention. While the New York Convention had been built upon experience gained through long years of arbitration practice, in some states, there was a lack of experience in international mediation. This was compounded by the diversity in mediation processes as well as different legal traditions.[124] Further, there was a lack of a harmonised approach to the enforcement of settlement agreements.[125] In fact, not all states had developed legislation to address the enforcement of settlement agreements. This being the case, it was felt by some that it was premature to prepare a Convention.[126] It was suggested that guidelines or model provisions could be developed instead.[127]

69 However, a number of other delegations expressed their preference for a convention, so as to more efficiently contribute to the promotion and harmonisation of mediation.[128] For these delegations, a binding international convention would bring certainty to the cross-border enforcement process. It would underscore the importance and promote the use of mediation as a form of dispute resolution.[129]

70 Against this backdrop, the suggestion to consider preparing two separate but parallel instruments was made. Whether to do so simultaneously, or if not then which first, then became the subject of some discussion.[130]

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124 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 6.

125 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 p 24.

126 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 pp 9–11; 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 pp 24–25.

127 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 11.

128 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 pp 19–20.

129 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 p 24.

130 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 pp 25 and 36–37.

71 While some delegations strategised over which procedural outcome would better serve their interests in the discussions, I agonised over how we would go about preparing the instruments, whether the Working Group decided to do so simultaneously or consecutively. Especially in the case of the work on both instruments proceeding in parallel, which would be unprecedented in the history of UNCITRAL's work, I needed to foresee how we could progress the work so that we would not move faster on one instrument than on the other, as this may have been seen as a threat to any understanding to develop both instruments in parallel. I also needed to be able to visualise a roadmap for the issues that could be taken up together because they were common to both instruments and the issues that needed to be dealt with separately by virtue of being unique to one of the two envisioned instruments. The Secretariat's preparatory work was particularly valuable in this regard, when we agreed to begin our work on a "uniform text", without prejudging the question of form of the instrument.

72 At the Working Group sessions, we had before us draft provisions – and sometimes more than one version of the same draft provision to reflect the necessary adjustments to accommodate issues relevant only to a convention, and those relevant only to a model law.[131] The confidence that was built during this process formed the foundations for the eventual decision to develop the Convention in parallel, or "simultaneously", with an amended Model Law. The decision to do this, which was taken only at the Working Group's meeting in February 2017, was part of the larger packaged deal or "compromise proposal", and was a decision reached "in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions".[132]

IV. Conclusion

73 At 16 articles, the Singapore Convention is not long. Indeed, its beauty is in its simplicity. But the discussions behind constructing the Convention were anything but simple. In addition to the pivotal five-issue packaged deal, we had to consider other fundamental

131 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 p 20; 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 pp 36–37.

132 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 pp 10–11 and 17.

questions such as whether and how mediated settlement agreements could be distinguished from mere contracts. This debate is not unfamiliar, and has been addressed in academic literature. Robert Burns, for instance, has argued against a special rule on enforceability of mediated agreements. In his view, mediation does not "so alter the nature of relationship or consent as to justify a separate rule on enforceability" than that which contract law provided.[133] On the other hand, commentators such as Peter Thompson have noted that "[e]ven under the view that a mediation is simply a negotiation with a stranger present, this 'neutral stranger,' … must be accounted for".[134] For instance, it has been highlighted that a mediator may "facilitate information exchange, communication, deliberation and decision-making", and that mediators often assist disputing parties "to diagnose and address the cause/s of a dispute, and to overcome strategic and cognitive barriers".[135] After discussion, the UNCITRAL Working Group generally felt that the involvement of a mediator in the process of reaching a settlement agreement was important, as it would "distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse".[136] Many landmark understandings such as these were reached during the course of our discussions. Working together, we ensured that we turned over each stone we came across along the way.

74 Knowing when we started that there had been a prior attempt at introducing a harmonised regime for the cross-border enforcement of mediated settlement agreements in some ways gave me comfort that we could acquit ourselves by giving our best to exploring all possible angles for a consensus outcome. Many a time the task before us seemed impossible. However, rather than get caught in a stalemate, we were able to harness the diversity of representatives and perspectives in the room in favour of a more robust outcome. It was a distinct privilege for me to have been part of the camaraderie and teamwork, amongst delegations and also with the Secretariat. Now that it is done, those who contributed to the process in one way or another can take a step back with a sense of honour and relief, and be humbled from having been given the

133 Robert P Burns, "The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity" (1986) 2 Ohio St J on Disp Resol 93 at 93.

134 Peter N Thompson, "Enforcing Rights Generated in Court-connected Mediation – Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2003–2004) 19 Ohio St J on Disp Resol 509 at 519.

135 Bobette Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research" (2014) 7 Contemp Asia Arb J 87 at 103.

136 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 p 13.

opportunity to participate in the construction of a game-changing contribution to the world of dispute resolution.