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

*Hal Abramson***

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

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

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

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

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

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tions General Assembly formally adopted the Singapore Mediation Convention.

What is UNCITRAL?

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

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

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

My Vantage Point

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

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

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

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

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

I. INITIATING THE MEDIATED SETTLEMENT PROJECT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *Whole Group Meetings*

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

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

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

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

B. *Consultations*

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

C. *Educational Programs for the Delegates and Public*

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

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

D. *Contributions by NGOs and EU*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² See Section III.

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

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

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

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

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

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

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

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

F. *Voting*

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

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

III. SUBSTANTIVE STORY: KEY ISSUES AND HOW RESOLVED

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

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

2019] *SINGAPORE CONVENTION REFERENCE BOOK* 1049A. *Article 1. Scope of Application*

Article 1 frames the narrow scope of the Convention.

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

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

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

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

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

B. *Article 2. Definitions*

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

The Working Group offered the following explanation:

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. . . the Commission decided to use the term ‘mediation’ instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the instruments. This change in terminology does not have any substantive or conceptual implications.¹⁵

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

C. *Article 4. Requirements for Reliance on Settlement Agreements*

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

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

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

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

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

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

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

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

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

¹⁷ *Id.* at II.A, art. 4.1(a) & (b).

¹⁸ *Id.* at II.B, para. 8.

¹⁹ *Id.* at II.A, art. 5(1)(b)(i).

²⁰ *Id.* at II.A, art. 5(1)(c)(ii).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 1(e) There was a *serious* breach by the mediator of standards applicable to the mediator or the mediation *without which breach that party would not have entered into the settlement agreement*; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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5. Two Options for States: Convention or Model Law

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

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

Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument. See A/CN.9/942, II.B Annotations, Paragraph 12 (2 March 2018).

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

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

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

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

IV. CONCLUSION—WHAT HAPPENED NEXT?

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

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

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

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

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

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

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

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

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

Recalling General Assembly resolution 57/18 of 19 November 2002 noting the adoption of the UNCITRAL Model Law on International Commercial Conciliation and expressing the conviction that the Model Law, together with the UNCITRAL Conciliation Rules recommended by the General Assembly in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

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

Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,³⁸

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

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

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

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

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

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

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

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

2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group II (Dispute Settlement), consider the draft convention with a view to (a) adopting, at its seventy-third session, on the basis of the draft convention approved by the Commission, a United Nations Convention on International Settlement Agreements Resulting from Mediation; (b) authorizing a signing ceremony to be held as soon as practicable in 2019 in Singapore, upon which the Convention would be open for signature; and (c) recommending that the Convention be known as the “Singapore Convention on Mediation”;

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

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

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

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

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

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

⁴⁰ See Singapore Convention art. 14.