# CHRONICLES OF THE SINGAPORE CONVENTION – AN INSIDER VIEW

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A. INTRODUCTION

The Singapore Convention was drafted in three years, an exceptionally short time in comparison to most private-commercial international law instruments. The Convention’s success in its early years, reflected in the high number of signatures and ratifications (10 states parties and 55 signatories),1 affirms that the saving in time was not at the expense of quality. This chapter argues that the shape and character of the negotiations not only saved time, but contributed greatly to the Convention’s quick and wide endorsement.

We offer an insider view, from a government delegation perspective, to the drafting process. The chapter mainly focuses on the process and methods of the deliberations and less on the Convention’s substantive content. Analysis will examine how the composition of delegations, the conduct of deliberations, and relationships between participants impacted the convention’s text, contributing to its success. We invite the reader to consider the chronicles of the negotiation on the Singapore Convention and its aftermath as a model for international negotiations in creating new international law norms, which can attain wide adherence.

Section B explores the legal state of affairs of international mediation prior to the Convention. At the same time, it considers the proposal to develop an international law instrument for international mediated settlement agreements and the first steps of the negotiations. It goes on to offer background on the United Nations Commission on International Trade Law (UNCITRAL), the UN forum which facilitated the negotiation of the convention and a discussion of the early stages of negotiations.

Section C focuses on UNCITRAL Commission discussions on whether to mandate work on an international instrument, reviewing the information the Commission relied upon in making its decision. Section D covers the first year

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1 In a couple of similar conventions, when there was a large number of ratifications in a short period this was usually associated with block ratification by all EU member states. As discussed in the chapter the EU has not joined the Singapore Convention and it is difficult to tell whether and if this would occur. The fact that the numbers of signatories and parties are relatively high despite the EU’s lack of participation at this stage, further highlights the relative success of the Singapore Convention so far.
of deliberations in UNCITRAL working group II, highlighting the dynamics of the discourse. Section E presents the main controversies remaining after the first year of deliberations. This is followed by the story of the “snow-day meeting”, resulting in a package deal compromise for finalizing the convention. Finally, Section F describes the closing stages of the drafting process and subsequent developments. The final section (Section G) overviews contemporary legal discourse on the Singapore Convention, including a brief analysis of criticisms, discussing what the future may hold for it.

B. SECTION 1: IDENTIFYING THE GAP

In this section, we offer a view of the legal state of affairs of international dispute resolution, including mediation, before the Singapore Convention. Discussion proceeds to the proposal initiating the drafting process, and some background on the Convention’s facilitating UN organ, UNCITRAL. We then offer a review of the initial stages of negotiations, characterized by a cautious approach.

1. The legal environment prior to the Singapore Convention

Prior to the Singapore Convention, international commercial disputes were largely resolved through international arbitration or cross-border litigation. Alternative mechanisms like mediation and conciliation were, at best, underutilized. It remains to be seen if this state of affairs will alter once the Convention takes hold.

Although cross-border litigation was used for resolving commercial international disputes, in the past few decades, with the advent of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The NY Convention”), the use of international arbitration dramatically increased. International commercial dispute litigation can suffer from a key disadvantage; mainly, it can pose great burdens and waste of resources, as it

3 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 (the NY Convention). As of today, almost 170 states are parties to the Convention. The first state to become a party to the Convention was Israel, and the latest state to ratify the Convention (at the time of the writing of the chapter) was Iraq, on 11 November 2021. <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en> accessed 12 February 2022.
might require frequent cross-border travel to attend court hearings and necessitates hiring foreign lawyers familiar with the local legal system.\textsuperscript{5} This was especially burdensome where one or more of the parties was an international business with multiple global customers or suppliers.\textsuperscript{6} Arbitration, on the other hand, provided flexibility; parties were usually entitled to determine the arbitration seat and nominate its members,\textsuperscript{7} as well as the applicable law.\textsuperscript{8}

C.008 At the same time, international arbitration enjoyed one other substantial benefit distinct from mediation. The NY Convention enabled arbitration awards to benefit from an expedited domestic recognition and enforcement process in almost 170 States.\textsuperscript{9} The NY Convention thus assured, as much as possible, enforcement of awards,\textsuperscript{10} as well as a potentially unique, quick and easy path for enforcement.\textsuperscript{11} Mediated settlements, in contrast, prior to the Singapore Convention, were usually only enforceable like contracts.

\begin{itemize}
\item \textsuperscript{5} Despite recent developments in national laws to address the Covid-19 pandemic and to allow for e-justice measures, the implementation of such measures in a cross-border setting is still challenging. In the context of cross-border litigation in the EU see Marco Velicogna, ‘Cross-border Civil Litigation in the EU: What Can We Learn From COVID-19 Emergency National e-Justice Experiences?’ (2021) 10(2) European Quarterly of Political Attitudes and Mentalities. In this respect see the latest initiatives by the European Commission, <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/digitalisation-cross-border-judicial-cooperation_en> accessed 12 February 2022.
\item \textsuperscript{6} Another possible result of cross-border litigation could be initiating parallel proceedings in several jurisdictions. This issue is currently on the agenda of the working group on Jurisdiction at The Hague Conference on Private International Law (HCCH). See Report on the Jurisdiction Project HCCH Prel. Doc. No 3. (February 2021).
\item \textsuperscript{7} In a case of a conflict of laws, the seat of the arbitration determined several elements of the arbitral award and the law applicable to it. When the seat of arbitration was not agreed by the parties, institutional rules have provided default rules; see UNCITRAL Arbitration Rules (2013) art 18(1), London Court of International (LCIA) Arbitration Rules (1 October 2020) art 16(2), and International Chamber of Commerce (ICC) Arbitration Rules (1 January 2021) art 18.
\item \textsuperscript{8} See, for example UNCITRAL Arbitration Notes (2016), art 20(1), which provides that “The parties and the arbitral tribunal should bear in mind the applicable arbitration law and the law at the potential place(s) of enforcement of the award, as well as the applicable arbitration rules, in considering any requirements as to the form, content, filing, registering, or delivering of the award”.
\item \textsuperscript{9} In some states’ parties, the NY Convention has been implemented into domestic law as part of the ratification process. See, for example, The Regulations for the Implementation of the New-York Convention (Foreign Arbitration) (1977) (Israel).
\item \textsuperscript{10} The NY Convention (n 2) art 3–4.
\item \textsuperscript{11} Since some member states vary in their approaches to the recognition and enforcement procedure, UNCITRAL published guidelines to promote a cohesive implementation of the Convention. For more information see UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 July 2017) which “aims to promote the uniform and effective interpretation and application of the New York Convention with a view to limit the risk that State practice might diverge from its spirit”. UNCITRAL has also developed the CLOUT, a system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Law established by the Commission in order to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts. See CLOUT cases on the NY Convention on <https://www.unctrd.org/cfout/search.jsp?ref=en%23cloutDocument.textTypes.textType_s1%3aNew%5c-York%5c-Convention%5c+%5c(1958%5c)> accessed 9 November 2021.
\end{itemize}
contract law differs between jurisdictions, enforcing settlement agreements often required familiarity with the contract law of the jurisdiction where the agreement is asked to be enforced, similarly to litigation.\textsuperscript{12}

2. First steps toward change: the American proposal

a. Turning academic research to a proposal for future work

S.I. Strong, fellow contributor to this book,\textsuperscript{13} addressed this gap in her article “Beyond International Commercial Arbitration? The Promise of International Commercial Mediation”.\textsuperscript{14} According to Strong, in recent years, arbitration failed to provide the flexibility and efficient use of resources that made international parties turn to it originally. International arbitration, Strong argues, “has become too slow, expensive, and legalistic”.\textsuperscript{15}

In her seminal work, Strong analyzed the legal framework leading to the limited use of mediation to resolve cross-border commercial disputes compared to more traditional mechanisms, despite the fact that “mediation will be faster, easier, and less expensive”.\textsuperscript{16} Strong concluded that the next step in encouraging international commercial mediation would be through public international law.\textsuperscript{17} According to Strong, increased use of arbitration suggests that the assurance as to the possibility to enforce the result plays a big role in international Parties’ choice of dispute settlement mechanisms.\textsuperscript{18}

Straying a bit from the historical overview, it is noteworthy that in the era of the Covid-19 pandemic and resulting global economic crisis, which at the time of the writing of this chapter is still somewhat raging,\textsuperscript{19} global enforcement of legal rights, through alternative dispute resolution mechanisms, is becoming even more necessary.\textsuperscript{20}

\textsuperscript{13} See also “Preamble” in this book.
\textsuperscript{15} Ibid, p 26.
\textsuperscript{16} Ibid, p 15.
\textsuperscript{17} Ibid, p 38.
\textsuperscript{18} Ibid.
C.012 At the time of Strong’s publication, in 2014, there was one legal tool to promote cross-border mediation, the 2002 UNCITRAL Model Law on International Commercial Conciliation. As a soft-law instrument, the Model Law lacked a binding effect as the one provided in by the NY Convention. At the time of Strong’s article, the 2002 Model Law has only been adopted by 28 States, a relatively small number. The fact that UNCITRAL, the leading UN body responsible for developing instruments for cross-border dispute resolution, decided to facilitate a soft law instrument for international mediation might indicate that at the time it was not possible to reach consensus on a multilateral binding instrument. Without a matching hard-law instrument for cross-border mediation like the NY Convention, it is understandable why the Model Law had limited popularity.

C.013 Strong presented her findings at a US Department of State Advisory Committee on Private International Law meeting. One participant was Tim Schnabel, then an attorney-adviser at the US Department of State and head of the US Delegation to UNCITRAL Working Group II (dispute resolution). The ULC has set up a study committee to advise the US Government on ratification of the Singapore Convention. One of the authors is an observer in this committee. Following consultations with stakeholders, Schnabel drafted a proposal for future work to UNCITRAL for its July 2014 Commission session.

b. UNCITRAL’s working methods

C.014 Choosing UNCITRAL was natural, as it is the UN organ responsible for regulating as well as facilitating international trade. UNCITRAL fulfills its

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23 UNCITRAL was established in 1966. It was mandated by the UN General Assembly to further the progress harmonization and modernization of the international trade law. It does so, among other means, by drafting new international conventions, model laws and uniform laws, as well as promoting wider participation in existing international conventions and wider acceptance of existing instruments.
25 See Abramson (n 11).
26 Schnabel is currently the Executive Director of the Uniform Law Commission (ULC). The ULC is an American organization which provides states of the United States with legislation that brings clarity and stability to critical areas of state statutory law, in order to promote consistency and strengthen the American federal system.
1966 mandate from the UN General Assembly (UNGA), through enacting instruments like conventions, model laws, and sets of rules. UNCITRAL is also responsible for promoting the NY Convention (concluded before UNCITRAL’s establishment) as part of its efforts to promote global alternative disputes resolution.

In order to follow the course of the drafting process, some background on UNCITRAL’s procedural framework could be helpful. UNCITRAL mainly develops instruments through working groups. Participation is open to delegates from member and observer States, including government officials, private sector experts and academics. In some cases, non-governmental organizations (NGOs) and private bodies may also attend working group sessions. Each working group has a chair, responsible for navigating deliberations towards consensus. As will be elaborated, the Chair of Working Group II during the Convention’s negotiations was key to their success.

UNCITRAL Secretariat staff also play a key role, preparing agendas and drafts, reflecting comments of delegates in meetings or comments submitted between sessions. In some cases, as common for UNCITRAL, alternative drafts are presented for delegates to discuss and choose from.

Currently, the Commission has six working groups, each focusing on a different international commercial law topic. The Commission mandates working groups to work on proposals for future work it approves. Working groups

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32 Commission and working groups sessions are open to representatives of international NGOs invited by the Commission, when following several criteria such as legal or commercial experience. However, those organizations do not participate in the decision-taking but possess the status of an observer.
35 See, for example, the discussion and approval of the proposal by the Government of Japan to collect and compile information on the latest trends regarding international dispute resolution on Report of the United Nations Commission on International Trade Law 53rd session, UN Document A/75/17 (29 September 2020), para. 85.
usually meet once or twice a year, and report progress to the Commission. They may also ask for guidance or request the Commission to make determinations with respect to its work, such as clarifying its mandates. After the work is finalized, the Commission adopts the texts, which are subsequently presented for approval or endorsement by UNGA.

c. Introducing the proposal to the Commission

At the 47th UNCITRAL Commission session held in 2014 in NY, the US delegation submitted its proposal for future work on a convention on the enforceability of international commercial settlement agreements reached through mediation, based on the NY Convention modality. The proposal stated that the goal was “encouraging conciliation in the same way that the NY Convention facilitated the growth of arbitration”. Working Group II was finalizing its project on the Convention on Transparency in Treaty-based Investor-State Arbitration and the Transparency Rules, and was therefore available.

The proposal noted elements that Working Group II could address; applying the convention to “international” settlement agreements resolving “commercial” disputes; excluding agreements involving consumers from the Convention’s scope; providing certainty on covered settlement agreements; and providing flexibility for States Parties by allowing them to enter declarations regarding the Convention’s application to government entities. These features likely

37 See, for example, 2016 Notes on Organizing Arbitral Proceedings UNGA Res. 71/137 (13 December 2016).
38 Following the example of the Convention and the decision by the working group, we will use the term “mediation” throughout this chapter. Report of Working Group II (Dispute Settlement) on the work of its 67th session UN Document A/CN.9/929 (11 October 2017), paras 102–104.
40 Ibid.
41 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014, 54 ILM 747. Parties to the Convention, also known as the “Mauritius Convention”, agree to apply the UNCITRAL Rules on Transparency whenever taking part in an investor-state arbitration. The rules require parties to an investor-state arbitration to provide certain information regarding the dispute as well as that the hearings of the arbitration procedure would be made public and allow submissions by third parties and non-disputing parties to the Convention, under several exceptions. As of the writing of this chapter, there are nine parties to the Convention <https://unct帘al.org/en/texts/arbitration/ conventions/transparency/status> accessed 9 November 2021.
42 Future working projects are usually assigned to a specialized working group with expertise in the area of the new tools to be developed, but that this is not always the case. Recently, the UNCITRAL Commission changed its practice as it now attempts to prioritize projects and to assign them to working groups which have completed their mandate. Report of the United Nations Commission on Trade Law 51st session, UN Document A/73/17(31 July 2018), para. 252.
43 Ibid, p 3.
reflected the outcome of prior consultations by the US delegation with various stakeholders, including other Commission delegations.\footnote{The Israeli delegation was also consulted on the proposal (on file with authors).}

The Commission viewed the proposal positively, although there were doubts regarding its feasibility and questions raised on the topic.\footnote{Report of the United Nations Commission on Trade Law 47th session, UN Document A/69/17 (July 2014).} The Commission decided that Working Group II would consider the topic and report to the Commission on the feasibility and possible form of work.\footnote{Ibid, para. 129.} The Commission invited delegations to inform the Secretariat on enforcement of settlement agreements in national legislation.\footnote{Ibid, para. 130.}

### 3. Beginning of the work at Working Group II

Before diving into the drafting process, it is worth noting how Working Group II deliberates. While the working group operates under a similar framework as discussed, it has some unique features.

At the time of the Commission’s consideration of the US proposal, the working group was composed of delegates from various States (members and observers) as well as the European Commission (EC), alongside representatives from arbitration and mediation institutions. Delegates and representatives included government officials responsible for private and public international law, arbitration, or mediation; experienced arbitrators, mediators; academics, and private sector attorneys.

This combination, which can be characterized as “experts meeting diplomats”,\footnote{Matti Jousten Adam Graycar, ‘When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption’ (2012) 18 Global Governance, 425–439.} resulted in the sharing of interesting and diversified experiences and understandings. Working groups reach decisions by consensus. As delegates hailed from different legal systems and cultural traditions, including in respect of mediation practices,\footnote{For an extensive analysis see Klaus J Hopt and Felix Steffek (eds.), Mediation, Principles and Regulations in Comparative Perspectives (Oxford University Press 2013).} reaching consensus was challenging. Nevertheless, the diversity of views and experiences also provided fertile ground for creative solutions.
a. Working group II – 62nd session

Following the Commission’s decision, Working Group II began working on enforceability of settlement agreements resulting from international commercial mediation, at its 62nd session held in February 2015 in NY. Corinne Montineri served as the legal secretary and Singapore’s Natalie Morris-Sharma as chair.

Discussion started on a rocky note. Although the working group agreed that mediation should be promoted, delegates took a cautious approach regarding the Convention option. Some delegates stressed that drafting a convention could be lengthy. By reference to the NY Convention, which was negotiated in ten days, delegations opined that the NY Convention followed the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) and long years of practice. According to those delegates, such experience with respect to international mediation did not exist.

b. The New York Convention as a model

As noted, at its inaugural meeting, the working group’s task was to report to the Commission on the feasibility and possible form of work for supporting enforcement of international mediated settlement agreements. The working group started by considering practical issues that could arise from a convention. The first question was to what extent could the Convention rely on the NY Convention as a model. According to the US, the “New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.” Some delegations remained unconvinced. They argued that arbitral proceedings differ from mediation so such analogy is unwarranted. One key point was that an agreement by disputing parties to submit a dispute to mediation was distinct from an agreement to arbitrate. This was because an agreement in the latter form, which lies at the NY Convention’s core, is exclusive, prohibiting recourse to other mechanisms, unlike the flexible nature of an agreement to

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50 62nd session report (n 23), para 56.
51 Ibid, para 19.
53 Convention on the Execution of Foreign Arbitral Awards, 26 September 1927, 92 UNTS 301.
54 62nd session report (n 23), para. 19.
55 Ibid.
56 The American Proposal (n 26), p 3.
57 62nd session report (n 23), para. 25.
mediate. Delegations also questioned whether a procedure similar to that of NY Convention Article 5 (refusal grounds) could apply to mediated settlement agreements.

Delegations additionally raised some questions on the scope of the proposed convention. These questions later turned out to be key drafting elements. For example, delegations asked whether the instrument should have an opt-out mechanism (that disputing parties would be able to agree on its non-application), or an opt-in mechanism (meaning the instrument would apply to disputing parties that have explicitly agreed on its application to the settlement agreement). As elaborated, this was highly controversial.

c. Leaving room for flexibility

At the end of the 62nd session, the working group agreed to suggest to the Commission to mandate work on enforcement of settlement agreements, including preparing a convention, model provisions or guidance texts. The recommendation stressed that initial discussion revealed differing views as to the instrument’s form and content and the feasibility of any particular instrument. It added that the mandate should leave room for each of the suggestions raised in the preliminary discussion.

This type of compromise is not exceptional for UNCITRAL working groups in initial stages of normative work. The aim is to achieve consensus to ensure the Commission adopts the recommendation. The consensual language of the recommendations adopted by Working Group II was likely to be adopted by the Commission. As it turned out, this broad language of the mandate significantly contributed to the project’s success, almost three years later.

Following the discussion and the report’s conclusions, working group delegates were skeptical as to the possibility to bridge the differing views. However, the broad recommendation allowed delegates to support further work. The working group then prepared to present its conclusions to the Commission. Based on this, it was for the Commission to decide whether and to what extent to mandate the working group to start work on an instrument to facilitate international mediation.

58 Ibid, para. 37.
60 Ibid, para. 59.
61 See, for example, the broad mandate given to working group III regarding its work on the possible reform of investor–State dispute settlement on Report of the United Nations Commission on International Trade Law 50th session, UN Document A/72/17 (July 2017), para. 264.
C. SECTION 2: UNCITRAL DECIDES ON A BROAD MANDATE

C.032 This section describes the discussion by the 48th Commission. It begins with an overview of the information that was before Commission in addition to the working groups’ conclusions. Analysis proceeds to discussing the Commissions’ decision on whether and to what extent to mandate Working Group II to prepare an instrument on enforcement of mediated international commercial settlement agreements.

1. The next step – the 48th Commission

C.033 UNCITRAL’s 48th Commission met in July 2015, in Vienna. One agenda item was the mediation project, based on Working Group II’s recommendation. Prior to the session, the Secretariat prepared a compilation of States’ responses to the questionnaire it had circulated after previous Commission sessions. The questionnaire was aimed at collecting information on legal frameworks concerning enforcement of international and domicile settlement agreements in different jurisdictions.

C.034 The information, collected from more than 40 States, assisted the Commission in considering the feasibility and desirability of a convention, and arriving at an informed decision.

C.035 The following discusses the questions, offering a summary of the responses and the trends they reflected.

2. Compilation of States’ comments and common trends

a. Question 1: information regarding legislative framework

C.036 This question asked States to detail their legislative framework on enforcement of international commercial settlement agreements arising out of mediation.

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63 Armenia, Austria, Belarus, Brunei Darussalam, Canada, Colombia, Cyprus, Ecuador, Egypt, Germany, Hungary, Indonesia, Israel, Japan, Mauritius, Norway, Republic of Congo, Republic of Korea, Singapore, Slovakia, Sweden, Thailand, Turkey, United States of America, Australia, China, Georgia, Paraguay, Poland, Portugal, Algeria, Cameroon, Chile, Mexico, Philippines, Qatar, Spain, Switzerland, Vietnam, Russian Federation, and the Czech Republic replied to the questionnaire.
proceedings, and to specify the enforcement procedure of mediated settlement agreements. The question also asked States whether there was any expedited procedure for such enforcement and whether an international commercial settlement agreement could be treated as a final award rendered by an arbitral tribunal.

Responses revealed some trends shared by different legal systems. For starters, only three States mentioned that they have specific legislation for international settlement agreements. In the United States, some States enacted specific acts to regulate enforcement of international commercial settlement agreements.

In Spain, the Mediation Act regulating mediation in civil or commercial matters, includes provisions on cross-border disputes. For the settlement agreement to be deemed enforceable, Spanish law requires that the agreement has already become enforceable in another State by a foreign authority. Otherwise, it must be recorded in a public instrument by a Spanish notary public. In Canada, only two provinces adopted legislation based on the Model Law. Some States reported that their mediation legislative framework may also apply to international mediated agreements. Others noted that they did not have such a framework for domestic settlement agreements, or that there were designated frameworks only for specific legal procedures such as labour or family law disputes.

Other four categories of answers on how settlement agreements are enforced were prevalent:

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64 The question read “Please provide information regarding the legislative framework or other rules in your jurisdiction regarding the enforcement of international commercial settlement agreements arising out of mediation/conciliation proceedings. In particular, does the law applicable to the enforcement of international commercial settlement agreements include: (i) Specific enforcement procedures if those agreements result from mediation/conciliation proceedings? (ii) Any procedure for expedited enforcement of international commercial settlement agreements? (iii) Any provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal?” Compilation of comments by governments A/CN.9/846, para. 3(1).


67 Compilation of comments by governments UN Document A/CN.9/846/Add.3 (n 61) p. 12.


69 This answer was provided by Israel, Japan and by Portugal (only for EU members).

70 This answer was provided by Armenia, Austria, Germany, Hungary, Thailand and Australia.

71 In Chile, for example, only mediation under family law and labour law is regulated in domestic legislation.
(1) Treating settlement agreements like contracts, meaning general contract law would apply to the enforcement procedure.

(2) Treating International settlement agreements may, through ‘legal fiction’, be treated like arbitral awards, enabling NY Convention based enforcement.

(3) Requiring settlement agreements to be notarized to become enforceable.

(4) Requiring settlement agreements to be based on a judicial decision to become enforceable.

b. Question 2: grounds for refusing enforcement of a commercial settlement agreement

C.040 In response to this question, some States only referred to domestic procedural requirements. One ground repeatedly mentioned was public policy (moral and order). Some States noted that that for a foreign settlement agreement to be enforceable it also has to be enforceable under its law of origin.

c. Question 3: validity of international commercial settlement agreements

C.041 The third question concerned the validity of international commercial settlement agreements, particularly whether there are any criteria that international commercial settlement agreements must meet to be deemed valid. The question asked States to specify legislative bases for challenging the validity of an agreement to refer a dispute to mediation or the validity of the mediated settlement agreement. Responses mostly repeated that validity is examined under contract law, judicial rulings or approvals validating the agreement, or validity under international instruments, like the NY Convention.

d. Question 4: general comments

C.042 The questionnaire allowed States to provide general comments. Most States commenting supported mediation as a dispute settlement, noting the potential
benefits. Alongside such support, concerns were raised that legal regimes in different jurisdictions will make it difficult to establish a unified mechanism.

3. Discussions at the Commission session

a. Reviewing the responses

With the responses and Working Group II’s report before it, the Commission decided the way forward. After some debate, there was general support amongst delegations to resume the work, “with the aim to promote mediation (conciliation) as a time and cost-efficient alternative dispute resolution method”. The Commission highlighted the need for an easy, fast, and harmonized enforcement mechanism.

However, not all Commission delegations shared that view. Some doubted the desirability of an instrument, mentioning it would be contrary to mediation’s flexible nature. Others were skeptical as to the feasibility of an instrument which would go beyond the Model Law. These delegations pointed out the variety of approaches between legal systems, reflected by States’ responses.

b. Conclusions and way forward

Despite the concerns, the general view was that in light of the domestic legislative trends on enforcement of domestic settlement agreements, it was appropriate to develop an international harmonized legal framework. The Commission discussed some ideas as about the content of the instrument.

83 The Republic of Congo replied that: “International commercial trade has always been the basis of human solidarity and interdependence”. Australia, referring to the benefits of the instrument replied that “establishing an international framework for the enforcement of settlement agreements may go toward increasing the popularity and utility of a mediation and conciliation”. Algeria noted that: “The international community would benefit from promoting mediation/conciliation by developing provisions to ensure the enforcement of international settlement agreements resulting from mediation/conciliation”.

84 The Russian Federation replied that “…to develop it will require unified solutions, which will be extremely difficult to achieve given the rather profound differences in approach in this matter among domestic legal systems, which largely reflect their prevailing cultural and legal traditions”. Singapore expressed general support, yet mentioned that “…it would be useful to hear more about what the proposers have in mind for such a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, bearing in mind that the implementation details of such a convention will have to be carefully worked out, taking into account different approaches across jurisdictions”.


86 Ibid.

87 Ibid, para. 139.

88 Ibid.
One idea proposed was that the new instrument should not focus on domestic procedures and that the NY Convention should be a model.\textsuperscript{89}

**C.046** At the end of the discussion, the Commission agreed that Working Group II should begin to work on enforcement of settlement agreements. It noted that solutions may be a convention, model provisions or guidance texts. Due to the concerns expressed, the Commission granted Working Group II a broad mandate.\textsuperscript{90} This decision was the starting point for a three-year process, where the working group met twice a year to draft the instruments.

**D. SECTION 3: REACHING CONSENSUS**

**C.047** This section begins by discussing Working Group II's methodologies in negotiating the Singapore Convention and Model Law amendments. Following this brief overview, this section discusses deliberations in the Working Group II's 63rd–65th sessions.

**C.048** The drafting process officially commenced in the 63rd session, held in Vienna in September 2015.\textsuperscript{91} At the 64th session, the Secretariat first published draft text for the consideration of the working group, reflecting previous deliberations.\textsuperscript{92} The 65th session concluded the first year of drafting. Having agreed on several provisions, some key issues remained unresolved.\textsuperscript{93}

1. Working Group II

   a. Delegates' expertise

**C.049** In the past, while some work was done on mediation,\textsuperscript{94} Working Group II mainly dedicated significant efforts to developing harmonized international commercial arbitration regimes, through instruments like the UNCITRAL Model Law on Commercial Arbitration,\textsuperscript{95} and the UNCITRAL Arbitration

\textsuperscript{89} Ibid, para. 140.
\textsuperscript{90} Ibid, para. 142.
\textsuperscript{92} Report of working group II (Arbitration and Conciliation) on the work of its 64th session, UN Document A/CN.9/867 (10 February 2016).
\textsuperscript{94} As discussed earlier, see UNCITRAL Model Law on International Commercial Conciliation (2002).
This is why working group meetings were usually attended by experienced arbitrators, government representatives and scholars with arbitration expertise.

At first, the working group, which was not yet aware of the nature of the new project, maintained its usual composition. When it decided to work on an international instrument on mediation, possibly a convention, things needed to change, including the composition of delegations.

Increasingly, delegations included state officials specializing in mediation and representatives of mediation institutions. The attendance of the latter was not only beneficial due to delegates’ expertise, but also due to their skills for resolving disagreements through creative compromises. The assistance by mediation experts was crucial for the success of the working process. Throughout the drafting process, participation of “mediator delegates” helped minimize disagreements and find common ground. Considering the consensual nature of the drafting process, this was invaluable.

As the working group moved on from the procedural discussions (discussing what to discuss), and it was apparent that a direction of a convention was taking hold, more international mediation familiar names arrived. Understanding that the convention could have a major influence on their activity, international mediators felt it was valuable for them to follow the process and participate. Active members were Edna Sussman, a leading American mediator who represented the American Arbitration Association, and Michel Kallipetis, a distinguished fellow and vice president of the International Academy of Mediators (IAM). Representing IAM, Mr Kallipetis contributed his experiences to provide examples for international mediation scenarios.
b. Consensus

As emphasized, UNCITRAL decisions are usually based on consensus without voting, to increase the likelihood of global adherence to outcome instruments. This methodology contributes to alignment of different legal domestic standards to conform with global frameworks and norms. ‘Multilateralism’ can lead to creative ideas to achieve agreements between delegations from different countries, geographical regions and legal systems and traditions.

However, this aspiration for consensus can challenge bridging gaps between divergent positions rooted in cultural and social norms and values. Typically, over 100 delegates from dozens of States attended Working Group II. With so many delegates in one room, consensus can be hard to reach. The working group’s chair listens to discussions and deliberates with delegates, seeking to identify common ground and room for compromise. The Secretariat then prepares a draft to reflect common ground and potential compromises. As many meetings take place in the Vienna UN HQ, long time Working Group II delegates were familiar with “Vienna Spirit”. This phrase is often used in UN circles to mark the collegial and inclusive manner which characterizes the work of international organizations in Vienna, with the ultimate goal of reaching consensus (the Vienna Spirit also prevails over the NY UN HQ for UNCITRAL meetings).

c. The European Union

The European Union (EU) Member States have 13 UNCITRAL seats, almost all of them representing civil law jurisdictions when the Convention
was negotiated, rendering it important to understand EU mediation frameworks and their impact on the negotiations.

d. Competence

The EU has exclusive competence for consumer protection and mediation. This means that EU Member States are essentially bound by the EC’s positions on such issues.

Practically, EU Member States delegations are expected to voice common positions guided by the EC, through coordination meetings which can take place in the morning of each meeting day. Even when positions of EU member states delegates are not identical, the position they present is usually a common one with slight variations.

This modus vivendi employed by the EC and the EU is understandable and justified by the relevant internal EU legal frameworks. Nevertheless, the fact that all UNCITRAL EU Member States present a common, almost identical, position might sometimes practically pose an obstacle for reaching consensus.

2. Conflict between legal traditions

Customary for UNCITRAL, many disagreements in the working group were rooted in tensions between legal traditions, common law and civil (continental) law. Roughly described, common law systems rely greatly on case law, highlighting party autonomy, allowing parties to shape the procedure.

107 At the time of the drafting process of the Singapore Convention, the following EU Member States were members of UNCITRAL: Austria, Bulgaria, Czechia, Denmark, France, Germany, Greece, Hungary, Italy, Poland, Romania, Spain, and the United Kingdom. Amongst these States, only the United Kingdom (then a member of the EU) is a common law jurisdiction, while the others are all civil law jurisdictions.


109 Consolidated version of the Treaty on European Union [2012] C (TEU) 326/01 art 5.2: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

110 According to the experience of the authors.

111 Ibid.

112 TEU (n 108) art 4(3).

Conversely, civil law systems aim at achieving certainty, viewing mediation as achieving access to justice.\(^{114}\)

**C.060** Applying these distinctions to dispute resolution processes, common law systems favour a flexible process designed by the parties and controlled by them.\(^{115}\) In contrast, civil law systems seek a structured process with limitation to party autonomy and protection of procedural rights.\(^ {116}\)

**C.061** Mediation in common law jurisdictions developed as a response to lengthy and complicated litigations.\(^ {117}\) In most common law traditions, the practice was creating a supporting environment to facilitate mediation as an alternative to costly processes.

**C.062** As can be expected, mediation legislative frameworks differ between jurisdictions. In the US, most states are common law, yet they vary in civil procedure regulations. The Uniform Mediation Act sought to unify mediation frameworks.\(^ {118}\) The Act does not regulate the substance or form of mediation, but rather defines relationships between mediation and court proceedings. It also focuses on mediator’s obligations like limits on disclosures to judges and of conflicts of interest.\(^ {119}\) In Israel, a hybrid common-civil law jurisdiction, regulations provide some guidance for parties who wish to utilize mediation but offer flexibility for parties in the design of the mediation process.\(^ {120}\)

**C.063** In May 2008, the EU enacted the Directive on Certain Aspects of Mediation in Civil and Commercial Matters.\(^ {121}\) The Directive required that the process be structured, and that settlement agreements be reached with a mediator’s assistance. As for enforcement, the directive states that an agreement “shall be


\(^{115}\) This is the basic premise although there could be different approaches on the need for regulation and standards. For a discussion in the context of the US and Australia see Nadja Alexander, ‘What’s Law Got To Do With It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions’ (2001) 13(2) Bond Law Review.

\(^{116}\) See for example the designation of the German approach to mediation as “legalistic”. Katja Funken, ‘Comparative Dispute Management: Court-connected Mediation in Japan and Germany’ (2002) 3(2) German Law Journal 28.


\(^{118}\) The Uniform Mediation Act (Last Revised or Amended in 2003) was drafted by the Uniform Law Commission (ULC) and has so far been adopted in 12 States.

\(^{119}\) Ibid, sec 7 and sec 9.

\(^{120}\) The Israel Courts Regulations (Mediation), 1993.

made enforceable unless … either the content of that agreement is contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability”.122

The dichotomy between the legal traditions, also linked to the EU Directive, played out in the deliberations. EU Member States, led by the EC, argued that due process should guide the drafting.123 Common law delegations, mainly Canada and the US, offered a different focus and advocated for an efficient, expeditious, party-controlled framework.124 One major challenge was creating normative frameworks to address both concerns.


In 2015, the US and Israel submitted a joint proposal highlighting key elements for the instrument.126 The proposal aimed to bridge gaps between different positions to move things forward,127 and addressed several aspects of the future instrument. The proposal clarified that the instrument, if it was to take the nature of a convention, should be flexible, as this could allow States to “tailor its scope of application” through declarations and reservations mechanisms.128

The proposal highlighted that parties to a dispute should be able to opt-out of the Convention and suggested a defence from enforcement where it would be contrary to the terms of the international settlement agreement.129 It also noted that under a potential declaration mechanism, States which adhered to the Convention could declare that the Convention would apply only where parties to the dispute explicitly opt-in to the Convention’s application in the text of the mediated settlement agreement.130

123 Mr Norel Rozner was the lead negotiator for the EC. For his views on a couple of the provisions of the Convention see Norel Rozner, ‘The Singapore Convention: Reflections on Articles 1.3 on Scope, 8.1(b) on Reservations, and 12 on Regional Economic Integration Organizations’ (2019) 20(4) Cardozo J. Conflict Resol. 1259.
124 Report of the 63rd session (n 90), para 90. EU Member States and the EC presented their arguments and positions as associated with the nature of mediation in civil law systems. If there were any other motivations or reasons for these arguments, it is beyond this chapter to speculate on their nature.
127 Ibid, para. 3.
128 Ibid, paras 10–11.
129 Ibid, paras 17–18.
130 Ibid, para. 10.
4. The first year of the negotiations

At first, discussions were characterized by the dichotomy between civil and common law delegations, rendering agreements difficult to reach. As usually happens, delegations made long statements without much room for compromise, rendering it difficult to achieve early compromises.131

Despite these difficulties, the working group managed to agree on several non-controversial features of the convention. Some of the issues were resolved with nearly no discussion, such as that the instrument would also apply to monetary as well as non-monetary obligations in a settlement agreement,132 and will not apply to agreements to submit a dispute to mediation.133 Others required a more thorough discussion to be resolved; like whether the instrument would provide direct enforcement or require a review mechanism as a prerequisite for enforcement; whether parties be required to provide an indication in the settlement agreement that a mediator participated in the process; and the definition of mediation.

Following the 65th session, with a year of deliberations behind, delegations were skeptical as to the ultimate outcomes.134 It was, at the time, hard to imagine shifts towards consensus, because positions were associated with core elements of domestic legal systems.135 At the same time, delegations were in continuous formal and informal dialogue, during working group sessions and between them, and developed friendships and close ties. Sometimes, the cordial dialogue took place over drinks and snacks (brought by each delegation from its home country) in Vienna and NY, including in the small cafeteria space outside the Vienna UN HQ meeting rooms and the NY UN Delegates Lounge.136

The collegial atmosphere provided some ray of hope for potential agreements in the following meetings. As the next section demonstrates, this hope was ultimately realized in the five-point compromise.

131 Records on file with authors.
133 Ibid, paras 68–70.
134 Informal notes on file with authors.
135 Informal notes on file with authors.
136 These informal meetings were originally suggested by Tim Schnabel (as noted, the head of the US delegation to the negotiations) and remain an UNCITRAL Working Group II tradition to this day, including in virtual and hybrid formats. Today, the official name is the “Sustainable Drinking Group”, colloquially termed as the “SDG”.

22
This section describes the discourse on the five unresolved issues leading up to the major compromise. Analysis then proceeds to briefly discussing the compromise (as other chapters in this book discuss the final texts of the provisions).

1. Formal deliberations

Working Group II’s 66th session took place on February 2017 in NY. As per the usual practice, the Secretariat offered drafting options for the provisions. The document also detailed topics the working group left for later consideration after not being able to reach consensus on. This included recognition of the effect of the settlement agreement; settlement agreements concluded in the course of judicial or arbitral proceedings; an opt-in or opt-out mechanism; conduct of the mediator and giving effect to the mediated settlement agreement; and finally, the form of the instrument. However, formal deliberations mostly repeated earlier positions on these topics, and their resolution did not seem near.

2. Informal deliberations – diplomacy behind closed doors

Like many other international organizations, a significant part of UNCITRAL deliberations occurs between formal sessions or in informal discussions during working group sessions. As elaborated below, the main controversies in the drafting of the Singapore Convention were resolved outside the plenary discussion in working group sessions.

Informal deliberations have an advantage over formal ones as they are not bound by the working group’s procedural rules, allowing free and flowing discussion. UNCITRAL practices developed over time helped facilitate a successful and collegial informal deliberations culture. Some of these practices are shortly described below.

137 See, for example, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation – Note by the Secretariat UN Document A/CN.9/WG. II/WP.200 (28 November 2016) para. 37, suggesting the options of opt-in or opt-out mechanism and para. 49 on the choice of whether to apply the instrument on governmental entities.

a. **Preparation for sessions**

Delegations arrived to working group sessions prepared and able to assess where the wind was blowing. They did so by reaching out to each other between sessions, usually based on shared legal traditions and similarities in legal systems, but not always, and had long distance conference calls and ongoing correspondence.

Delegates consulted with each other to gain support to their views or identify grounds for cooperation. Some delegations worked together in order to prepare joint proposal or comments, like the 2015 US-Israel proposal, which ultimately had an important role in the final compromise. In other cases, delegations reached across to those holding opposing views to test out possible compromises.

b. **Consultation and formal breaks**

As the working group only meets twice a year, delegates were eager to use all the time they shared together to make progress. Delegates dedicated their coffee and lunch breaks to discuss pending issues.

The Chair of Working Group II also made frequent use of unscheduled 15 minutes’ consultations breaks where delegates could talk freely, sometimes in smaller groups. This helped when discussions hit a wall and more creativity was required to reach a solution.\(^\text{139}\)

c. **After hours**

As noted, friendly relationships had delegates meeting together after working hours to have drinks or dinner. These get-togethers were friendly, yet in the spirit of using the little time they had with each other, part of the time was also dedicated to talks on issues raised during the session that day, share ideas and cooperate.

3. **New York snow-day pre-compromise – the international mediator works his magic**

During the 66th session, an unusual snow blizzard hit New York. Schools closed, flights were cancelled, and residents were guided to stay home.\(^\text{140}\) The

\(^{139}\) Abramson (n 11), 1043.

UN HQ was closed down. At first, it seemed like the working group would lose a day of deliberations. However, Allan J. Stitt, one of the Canadian delegates, managed to find a place for deliberations in a NY firm whose offices were empty due to the weather and invited delegations to continue working. Some delegations gladly accepted Stitt’s invitation, left their heated hotel rooms and braved the snowstorm, although not all delegations participated.

The intimate atmosphere and freedom from procedural rules allowed using unconventional working methods to overcome difficulties which arose at the last meeting. Attendants took advantage of the presence of experienced mediators in the room, like Kallipetis.

Kallipetis utilized mediation techniques, working with delegates in order to reach compromise. For example, he sat with small groups of delegates in separate rooms, gathering information as to the differences in positions and where parties were ready to make concession. This method allows the mediator to talk with parties intimately, without the pressure of having the presence of the opposing party. The methodology proved successful, demonstrating why mediation was important to promote as an alternative dispute settlement mechanism.

During these intimate discussions, Working Group II’s chair demonstrated good chairing skill, ordering delivery of sandwiches and soft drinks when energy was low. To stress the informal nature of the meeting, other working group delegates facilitated the discussions and not the chair. At the end of the day, which started at 10:00 AM and lasted into the night, delegates managed to form a compromise of five elements.

4. The five-elements package deal

Some of the compromise elements were not entirely new to the working group as they were raised in the formal discussions, yet after a year of work some delegates demonstrated more flexibility. Another feature of the compromise which made it possible, was that since the beginning of the attempts to reach a compromise, it was clear to everyone that it would be formed as a package

142 This snow storm is sometimes referred to in scholarly work on the Convention marking its surprising importance for the process. See for example, Abramson (n 11), 1152.
144 One of the authors was a co-facilitator for the discussion.
deal. This allowed delegates to feel more comfortable to make concessions, as they have also gained something in return. The compromise elements are briefly described below.

\[ a. \quad \text{The compromise} \]

C.085 With respect to the first issue concerning recognition and reflected in provisions 1(1), 3(1) and 4(1), the phrase “legal effect” was replaced by indicating that a party may invoke the existence of a settlement agreement as a defence, in accordance with the rules of procedure of the forum State. Delegations did suggest this phrasing in the plenary session of the working group, but gained no agreement. However, when wrapped with other compromise elements, opponents of the suggestion could agree to it. The compromise reflected terms broad enough to allow courts flexibility when interpreting “recognition” and the applicable rules of procedure.

C.086 The solution for the question of mediated settlement agreement concluded in the course of court or arbitral proceedings reflected the understandings in the formal session. The compromise text included under the scope of the Convention settlement agreements approved by a court or concluded before a court only to the extent that they are not enforceable in the same manner as a judgment. By focusing on the agreement’s enforceability, the text addresses the varied interpretations of the term “approved by a court” in different jurisdictions and procedural rules regarding mediated agreements concluded before a court.

C.087 Concerning the opt-in or opt-out mechanisms, the Israel-US suggestion was accepted. The working group agreed that the Convention will generally apply to all mediated settlement agreements under the scope of the Convention, but will also allow States Parties to declare that they will apply the Convention only if the mediated settlement agreement explicitly referenced the Convention.

C.088 With respect to defences, instead of referring to mediator’s conduct that violated “applicable standards”, according to the new draft, the mediator’s conduct

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146 For further discussion from the perspective of an NGO representative, see Abramson (n 11) 1052–1059.

147 Report of the 63rd session (n 90), para 79.


149 Ibid, para. 71.

will be examined “in light of the circumstances of the case” and whether there was “a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement”. This phrasing was meant to allow courts flexibility as to which sort of mediator’s misconduct could be considered a defence.

Finally, the working group managed to agree on the instrument’s form and to prepare a model law and a convention simultaneously. To gain support from delegations initially opposing a convention, it was decided to adopt the language of the UNGA Resolution accompanying the Transparency Convention, Working Group II’s last project. It was agreed that the resolution on the Convention and Model Law would not take a stand regarding the adoption of the instruments nor express expectations regarding the adoption of the instruments, considering the different levels of experience with mediation amongst jurisdictions.

b. Presentation at the working group and the Commission

The next day, the blizzard soothed, and the UN HQ reopened. Satisfied at their final product, delegates who attended the snow-day meeting presented the compromise to the working group for approval. Since not all delegates participated in the informal meeting, for some it was the first introduction to the compromise’s content. Some delegates were pleased, while others expressed concerns. Several compromise elements were questioned, but the working group did decide to continue working an amendment to the 2002 Model Law, alongside a convention.

Despite this initial setback, the 50th UNCITRAL Commission session, held in July 2017 in NY, welcomed the compromise. The Commission supported continued negotiations in the working group based on the compromise text. The Commission also requested the working group to expeditiously complete its work. Validation and support from the Commission encouraged working group II’s delegates to embrace the compromise. This also demonstrated the wide consent on the content of the compromise between UNCITRAL members and observers.

154 Ibid, para. 93.
Working Group II’s 66th session started out roughly, but as this section demonstrated, the unusual circumstances were eventually one of the factors leading to its success. The flexible nature of the snow-day informal meeting allowed the conclusion of the five-points compromise with assistance of professional mediators. Although some delegates were skeptical at first, the Commission’s response convinced delegations that the compromise reflects an appropriate balance. As the last section of this chapter describes, the endorsement of the Commission paved the way for the working group to complete its work.

F. SECTION 5: ALL’S WELL THAT ENDS WELL

This section describes the negotiation’s final stages and the adoption of the convention by the Commission and the UNGA. Analysis then turns to events subsequent to the adoption including the signing ceremony in Singapore, the signatures and ratifications which followed, and a brief review of academic discourse and practices, demonstrating the early impact of the Convention. The sub-section ends by an assessment of the potential of the Convention to reach a similar number of contracting parties to that of the NY Convention (almost one hundred and seventy).155

1. Finalizing the instrument

At the Working Group II’s 66th session, some delegates were not entirely satisfied with the compromise reached during the snow day informal meeting. The next two meetings were dedicated to finalizing the convention. Bearing in mind the Commission’s request to complete the work expeditiously, as well as the advanced stage of the draft text, discussions were efficient, and focused on the remaining matters that were not yet resolved. At the end of the 68th meeting, the draft convention was ready for approval at the Commission.

a. The 67th and 68th sessions

Working Group II’s 67th session took place in Vienna on October 2017. Before the session, the Secretariat had published draft provisions which reflected the previous agreements of the working group as well as the compromise. Deliberations focused on the draft provisions resulting from the
principles agreed to as part of the compromise, with delegates asking for clarifications and suggesting alternative texts or approaches.\textsuperscript{156}

At the 68th session, the working group approved all of the provisions it drafted, some not without discussion. At this session, one delegation suggested to name the convention as the "Singapore Convention".\textsuperscript{157} In response, Singapore suggested to host the signing ceremony.\textsuperscript{158}

\textit{b. Approval at the Commission and General Assembly}

At its 51st session, the Commission discussed the finalization and adoption of the Convention.\textsuperscript{159} The Commission was generally satisfied with the final draft and approved almost all of the provisions without modifications. The Commission did, however, decide to make some minor modification. It is not unusual for the Commission to suggest drafting changes when the matter concerns the coherence of UNCITRAL texts.\textsuperscript{160}

At the discussion, the Commission also decided that the Convention would be referred to as the “Singapore Convention on Mediation”. The Commission highlighted the generosity of the Singapore government in its proposal to host the signing ceremony and to bear the additional costs of having the event outside the premises of the UN.\textsuperscript{161} It is common to name conventions after the place where they were first open for signature, like the NY Conventions and the various Hague and Geneva Conventions.\textsuperscript{162}

\textsuperscript{156} Report of working group II on the Work of its 67th session, UN Document A/CN.9/929 (11 October 2017). See, for example, clarification made on the term ‘approved by a court or concluded before a court’ in para. 20.
\textsuperscript{157} The Israeli delegation suggested this in recognition of Singapore’s important role in the working group. For elaboration on this issue see the next sub-section.
\textsuperscript{158} UNCITRAL, Report of working group II on the work of its 68th session, A/CN.9/934 (19 February 2018) para. 94.
\textsuperscript{160} Ibid, para. 23. The Commission agreed to delete the definition of the terms “electronic communication” and “data message” from Article 2 as these were already explained in other United Nations and UNCITRAL instruments, such as the United Nations Convention on the Use of Electronic Communications in International Contracts, 23 November 2005 2898 UNTS, art 4, the UNCITRAL Model Law on Electronic Commerce (1996) art 2, and the UNCITRAL Model Law on Electronic Signatures (2001) art 2.
\textsuperscript{161} Ibid, para 43.
It is interesting to note other factors that were considered in the naming of the Convention like the nation State of the working group’s chair. Natalie Morris-Sharma demonstrated exceptionally professional and creative chairing skills. This did not go unnoticed by the working group.\textsuperscript{163} Naming the Convention after the chair’s nationality was not a first for UNCITRAL. The previous UNCITRAL convention drafted by Working Group II was the Convention on Transparency in Treaty-based Investor-State arbitration, which is also referred to as the Mauritius Convention (the chair was Mr Salim Mollan from Mauritius).\textsuperscript{164} Mr Edwin Tong, Minister for Culture, Community and Youth and Second Minister for Law of Singapore later noted that naming the Convention after Singapore was also natural as Singapore places high value on developing mediation tradition and practices.\textsuperscript{165}

At the end of the debate, the Commission agreed to adopt the Convention and the amended Model Law. It then prepared a recommendation to the UNGA, the main policy making UN organ which grants a final approval to all UN texts and instruments.\textsuperscript{166} The recommendation mentioned 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 would contribute to the development of harmonious international economic relations”.\textsuperscript{167}

As part of the compromise, the recommendation noted that the Commission recalls that the Convention and Model Law were “intended to accommodate the different levels of experience with mediation in different jurisdictions … without creating any expectation that interested States will adopt either instrument”. Finally, on 20 December 2018 the UNGA adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation as well as the amended Model Law. UNGA also approved the plan

\textsuperscript{163} Apter, Proceedings of the ASIL Annual Meeting (n 19).
2. Signing ceremony and entry into force

The signing ceremony hosted by Singapore was beautifully orchestrated, with a long list of dignified speakers like Singapore Government officials, including Mr Lee Hsien Loong, Singapore’s Prime Minister, and State representatives and jurists from around the world. Key drafting players like Tim Schnabel, Hector Flores, Jaemin Lee, Norel Rosner, and Corinne Montineri from the UNCITRAL Secretariat, participated in a lunch time panel as part of the event.

The signing ceremony was a great achievement. Seventy countries attended, and 46 countries signed the Convention. This outstanding number of initial signatures in comparison to other instruments in their first steps, reaffirmed that the Convention was needed and timely. This also inspired optimism regarding the Convention’s future success.

On 12 September 2020, after Singapore, Qatar and Fiji deposited their ratifications instruments, the Singapore Convention entered into force. As the Covid-19 pandemic was still roaring at the time of the entry into force of the Convention, the ceremony took place in Singapore and was broadcasted online.

As of the writing of this chapter, since the signing ceremony, a total of 55 countries signed the Convention, and 10 of them ratified it, making them parties to the Convention.

170 Itai Apter, one of the co-authors of this chapter, also took part in the panel.
171 For comparison, the Mauritius Convention was signed by eight States at its signing ceremony (status on <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en> last accessed 16 October, 2020), and 10 signed the NY Convention on its signing ceremony (see on <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en> accessed 16 October, 2021).
172 Singapore Convention, art 14(1).
3. Reservations and declarations made so far

As noted earlier, as part of the compromise, the Singapore Convention offers two options for reservations. So far, Belarus, Georgia, Iran and Saudi Arabia made reservations in accordance with Article 8.1(a) which allows States to exclude from scope settlement agreements that the State was a party to. Iran and Georgia, as well as Kazakhstan, have also made reservations with respect to Article 8.1(b). This means that the Convention would only apply where parties to the settlement agreement have agreed to its application.

The fact that 4 out of the current 10 parties to the Convention made reservations reaffirms the assumption that the broad and flexible nature of the Convention could allow States from different legal traditions to accede. Hopefully, the reservations mechanism would encourage more States to join without having to make concessions on substantial matters such as the scope of application of the Convention.

4. Responses to the Singapore Convention

Since the Convention’s finalization, it has taken a significant spot in the international legal discourse on international mediation. The Convention attracted practitioners and academics, who wrote articles, hosted panels, and took part in events since its adoption. Positive responses also came from governmental representatives. For example, at the 73rd session of the UN Sixth Committee, UNGA’s legal committee, delegations expressed support and welcomed the finalization of the draft Convention and the Model Law. They stated that this was “very useful for fulfilling alternative mechanisms for amicable dispute settlement while contributing to the development of international trade.”

a. Academic and practitioner responses to the Convention

Since its finalization, the Convention has been discussed in academic publications scholarship and legal panels, including through webinars (due to the Covid-19 pandemic). The webinars facilitated global participation and an

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175 Apter & Henig Muchnik (n 149).
177 Ibid.
178 Apter & Henig Muchnik (n 149), 1267. Iran signed the Convention on 7 August 2019 but has not ratified it yet.
179 Ibid, 1281.
opportunity for wide audiences to learn about the Convention. Mediation institutions and practitioners took special interest in hosting and participating in panels to discuss the Convention’s impact on the course of their business and how they could benefit from it.\textsuperscript{181}

Although not free of criticism, responses to the Convention are mostly positive. Academics and practitioners highlighted the benefits of mediation in resolving international commercial disputes, and how the Convention could develop the use of international mediation and promote global consistency in mediation.\textsuperscript{182} Some writers even urged States to join the Convention emphasizing its benefits to international trade.\textsuperscript{183}

\subsection*{b. Criticism and potential difficulties in joining the Convention}

Criticism of the Convention sometimes focuses on the lack of defined legal standard on the mediator’s conduct and refusal grounds, which could lead to abuse by parties to a settlement agreement.\textsuperscript{184} Critics claimed that this mechanism does not provide parties certainty as to their ability to enforce settlement agreements, as the Convention’s interpretation may vary between jurisdictions according to their legal standards.\textsuperscript{185}

As noted earlier in this Chapter, at the initial stages of the discussions on the Convention, delegations emphasized simplicity as a crucial element to the instrument’s success, in the spirit of the NY Convention.\textsuperscript{186} The relatively simple and broad language of the Convention’s provisions aimed to allow States with different legal traditions to accede without having to transform their legal systems or to implement mechanisms conflicting with the fun-

\footnotesize{181} See, for example, the panel hosted during ASIL annual meeting <https://wwwasilorg/events/singapore-convention-mediation-and-future-appropriate-dispute-resolution> and The Singapore Convention and the JAMS/SCMC Joint Mediation Panel <The Singapore Convention and the JAMS/SCMC Joint Mediation Panel (jamsadrcom)> accessed 16 October 2021.
\footnotesize{186} The American Proposal (n 26).}
damental principles of their legal systems (“constructive ambiguity”). This conscious choice demonstrated that there are no perfect conventions, and compromises are crucial to developing international norms. After all, international law instruments are ineffective unless they gain wide endorsement and adherence. It is also worth recalling that the main goal of the Convention was to promote mediation to facilitate international trade. Ultimately, the convention’s aim was to provide incentives and reassurances for disputing parties to pursue mediation to resolve cross-border disputes. This means that the convention will succeed if it would rarely be activated, as disputing parties would comply with mediated settlement agreement.

C.113 It is also understandable that generally, joining a new international instrument could raise some concerns for States and individuals. A common criticism of private international law instruments refers to their impact on parties’ autonomy and due process. With respect to parties’ autonomy, it can be argued that instead of promoting it, private international law instruments limit the possibility of parties to a dispute settlement procedure to enforce or recognize its result, limiting their ability to shape their own process. In the context of due process, it is argued that private international law instruments usually do not provide jurisdictions with enough tools to act independently where procedural irregularities or injustices occurred.

192 Ibid. In the context of The Hague Choice-Of-Court Agreements Convention, Born argues that ‘Importantly, the Convention does not replicate these safeguards for procedural fairness. Article 9(d) of the Convention permits non-recognition of a judgment where it was ‘obtained by fraud in connection with a matter of procedure,’ defined as ‘deliberate dishonesty or deliberate wrongdoing’. Although important, this provision is directed only to deliberately fraudulent conduct – not to other denials of procedural fairness, including through incompetent, negligent, inadvertent or biased decision-making’ and that “The Convention’s treatment of procedural fairness also significantly dilutes the protections that are available under national law in many jurisdictions… in most states, courts may deny recognition of awards rendered by legal systems that lack independence or impartiality”.

34
The Convention offers adequate responses to these criticisms. First, mediation is by nature a consensual and flexible process preferably shaped by the parties. Second, the Convention does not add any procedural limitations to the mediation process. Instead, formal requirements in the Convention are meant to ensure that the settlement agreement resulted from mediation, to differentiate it from other types of agreements. The Convention does not limit parties’ ability to design their procedure as they wish as a condition for the Convention’s application. Rather, the Convention sets standards for courts when deciding whether to give effect to a mediated settlement agreement under the Convention. The Convention also provided refusal grounds to grant relief that reflect basic due process, such as that a party to the settlement agreement was not under some incapacity. The Convention also referred to mediator’s misconduct when the misconduct would impact the decision by a party to agree to the settlement agreement, allowing broad discretion for courts to refuse to grant relief in such cases.

Additional criticisms argue that the empirical foundations for the Convention, particularly the survey presented by Strong, are unfounded, as the reasons for the lack of use of mediation to resolve cross-border disputes is the reluctant attitude by the business community and not lack of enforceability. Scholars making this argument argued that the Convention will only cater to the interests of private sector lawyers, adding there is no merit, but only harm, in the Convention.

As public international lawyers engaged with the Convention and its aftermath and international dispute resolution design, it is difficult to objectively respond to these arguments. At the same time, it is important to note that the decision to develop the Convention was also based on voices by States themselves,

C.114

C.115

C.116

193 Hopt and Steffek (n 48).
195 Ibid, art 5(a).
196 Ibid. Some critics claim that this defence is inappropriate as it does not address good faith reliance (see Eric S. Sherby, ‘The Singapore Convention: The Emperor’s New Clothes of International Dispute Resolution’ International Dispute Resolution News, ABA Section of International Law (Fall 2020)). However, the broad language of the article is meant to allow courts the discretion to take other due process elements, such as this one into account when deciding whether to grant relief according to the convention.
independent of Strong’s survey,199 and that the UNCITRAL Commission representing 60 States continuously supported the Convention. Moreover, many working group delegations, including, \textit{inter alia}, Israel, the US, Canada, Germany, South Korea, Singapore, UK, the Russian Federation, Denmark, Sweden, the EC, China, and Argentina were primarily represented by government lawyers with, presumably, the best interests of private commercial parties also as a top priority in drafting the Convention.200 Finally, the scholars presenting this line of criticism noted that the UK and Australia have not signed the Convention.201 While this might have been true when the article making the noted criticism was written, Australia has signed the Convention on 10 September 2021,202 and the UK had announced its inclination to join the Convention a few months earlier.203

C.117 The Convention is not without faults, as this chapter demonstrates. However, it is difficult to see how the international community could change business sector attitudes towards mediation to resolve cross-border disputes by utilizing any other means.

c. \textit{Response to the Convention in the EU}

C.118 So far, no EU Member State nor the EU itself has signed the Convention. As noted, the EC actively participated in negotiations. At the panel hosted at the signing ceremony, Rosner, the EC representative to the negotiations, explained that the EU wants to thoroughly assess the Convention.204 There are also doubts regarding the appropriate competence for joining the Convention, namely whether EU Member States may act independently in joining the Convention, or whether the EU would join, applying it to all its Member States.205 It seems that despite the passage of time, the state of affairs for EU

199 See section 2.
200 On file with authors.
201 Clarck and Sourdin (n 199).
204 On file with authors.
Member States (or the EU) accession to the Singapore Convention has not changed as indicated by Rosner in June 2021.206

The EU’s hesitancy in joining the Convention might be attributed to the fear of risk of abuse of process by one of the parties against the other when applying to the competent authority to give effect to the mediated settlement agreement. Hopefully, further experience in utilizing the Convention and its implementation would allay these concerns, and the EU will respond to calls from the private sector to accede to it.207

5. What does the future hold?

The rapid pace of States becoming signatories to the Convention, and important States seriously considering accession, since 2019, provides a reason for optimism regarding the future success of the Convention.208 However, for the Convention to reach its full potential, it is necessary that more countries will sign and ratify it.

a. Promoting the Convention

Promoting the Convention’s wider endorsement is an ongoing task. Through events, lectures and publications, UNCITRAL and interested stakeholders seek to increase the Convention’s popularity among the international business community which in turn could encourage States to adhere to the
Convention.209 Such attempts are also meant to promote a unified interpretation of the Convention, and a platform for sharing experiences in utilizing it.210

C.122 One prominent example was the event organized to in September 2021 to mark the first anniversary of the Convention’s entry into force. The Singapore Ministry of Law in cooperation with UNCITRAL has held the Singapore Convention Week, a week long program of lectures, panels and workshops with global participants on the Singapore Convention and dispute resolution.211 A similar event is set to occur this year.

b. Implications of Covid-19

C.123 The Covid-19 pandemic significantly impacted the international business community, grounding practitioners as travel restrictions took hold.212 The Convention, emerging at the beginning of the global crisis, could be an appropriate solution for parties who are not able to go abroad for the purpose of legal or arbitral hearings. Mediation is not bound to the procedural rules of its seat, making it ideal for conducting remote discussions.213 As some dispute resolution processes can take longer due to uncertainties regarding travel restrictions, parties entering a mediation process may be assured that their agreement would be valid regardless whether the process was physical or through remote means. This may encourage States to join in order to minimize disruptions to international trade at a time of a global crisis.

C.124 However, the pandemic also carries implications that delay the Convention’s progress. Many governments are occupied with handling the pandemic through legislative work and governmental actions.214 The often-changing reality leaves little resources for long-term reforms and legislation which are not related to the concurrent crisis. As the ratification process of a convention...
often requires a legislative and operative work, States may not be able to ratify the Convention as long as the pandemic effects our everyday lives. Hopefully, the rate of signatories and ratification will rise as the pandemic will fade.215

As elaborated, the final drafting stages progressed quickly, which allowed the adoption of the Convention after only three years of work. In terms of international conventions, this is an especially short time. Besides its expeditious manner, the drafting process has proven itself to be successful with the quick endorsement by the UNCITRAL Commission and UNGA. After its adoption, the Convention gained high popularity with an outstanding number of States signing it during the signing ceremony. Since then, more States signed and ratified the Convention, and it receives praise from international organizations, States representatives, practitioners and academics.216 The Singapore Convention has emerged in very unusual times, which could delay the international community response to it, but considering the rate of signatories and ratifications so far, we are carefully optimistic that the Convention might reach the success rate of its parallel, the NY Convention.

G. CONCLUSION

The Singapore Convention’s drafting process demonstrates the benefits of mediation, especially in the international context, as well as the importance of compromise for promoting common global interests. Having experience in the field of private international law research and norm making, we believe that the Singapore Convention’s drafting process is a model for creating new international norms in international law, beyond commercial spheres. The Convention’s drafting process highlighted the benefits of informal deliberations for creating international norms as their flexible nature supports creative working methods.


The Convention’s success could inspire similar processes in the future. This chapter provided a look into the working dynamics, thinking processes and rationales behind the Convention’s text. We are hopeful that this chapter would not only shed light on the “Singapore Convention” negotiation process and its aftermath but also be conducive to further research and study of the role of informal negotiations in international norm making.