

**THE SINGAPORE CONVENTION ON MEDIATION:
A FRAMEWORK FOR THE CROSS-BORDER RECOGNITION AND ENFORCEMENT OF MEDIATED
SETTLEMENTS**

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I. Introduction

The Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) is a new multilateral treaty developed by the U.N. Commission on International Trade Law (UNCITRAL). The Convention provides a uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international, commercial disputes—akin to the framework that the 1958 New York Convention provides for arbitral awards.¹ The text of the Convention was finalized by UNCITRAL on June 25, 2018, and after adoption by the U.N. General Assembly, it will open for signature in August 2019.² Unlike the other primary international organizations that develop commercial law treaties,³ UNCITRAL does not commission official

* J.D., Yale Law School. Although the author proposed and negotiated this Convention on behalf of the United States, this article expresses his personal views and should not be read as representing the views of the U.S. Department of State. The author would like to thank Natalie Morris-Sharma, Corinne Montineri, Itai Apter, Johan Tuftte-Kristensen, Héctor Flores Senties, Khory McCormick, and Don Wallace for their comments on earlier drafts of this article. Any remaining errors are attributable solely to the author and most likely result from his failing to adequately respond to all of the helpful comments provided by the Chair, the Secretary of Working Group II, the distinguished delegates from Israel, Denmark, Mexico, and Australia, and the distinguished observer from the International Law Institute.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc E/CONF.26/8/Rev.1 (1958) (hereinafter New York Convention).

² U.N. Comm. on Int'l Trade Law, Report of the U.N. Comm. on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17 (2018) at para. 49 (finalization of the Convention) and Annex I (text of the U.N. Convention on International Settlement Agreements Resulting from Mediation (hereinafter the “Convention” or “Singapore Convention”)); Convention at Article 11(1) (designating Singapore as the location at which the Convention will open for signature). The treaty’s designation as the “Singapore” Convention was based on the location of the planned signing ceremony, which Singapore offered to host. However, both the title of the Convention and UNCITRAL’s acceptance of the offer to host the signing ceremony should be seen as an expression of delegates’ appreciation for the outstanding job done by the Singaporean chair of the negotiations, Natalie Morris-Sharma. *See, e.g.,* intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. Note that most of the citations in this article to the travaux of the Convention direct the reader to the publicly-available audio recordings of the negotiations rather than to the published reports of the Working Group or the Commission, as those reports provide much less useful detail regarding the discussions. In many cases, the interventions cited in this article were not the only statements that delegations made on particular issues; rather, the cited interventions are those deemed most relevant to the points being discussed.

³ Both UNIDROIT and the Hague Conference on Private International Law often assign responsibility for writing explanatory materials to one or two individuals. *See, e.g.,* Sir Roy Goode, OFFICIAL COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (3d. ed. 2013); Trevor Hartley and Masato Dogauchi, *Explanatory Report, Convention of 30 June 2005 on Choice of Court Agreements* (2005), available at <https://assets.hcch.net/upload/exp137final.pdf>.

commentaries or explanatory reports for the treaties it produces. This article aims to fill this gap by providing an explanation of the key provisions of the Convention based on the records of the negotiations and the firsthand experiences of the author in proposing and participating in the negotiations.

Section II of this article provides a brief overview of the purposes and goals of the Convention, followed by a summary of the course of the negotiations in Section III. Section IV addresses some significant issues that were debated in UNCITRAL but that did not ultimately find their resolutions explicitly addressed in the text of the Convention. The remaining sections address the main legal rules of the Convention: the scope of the Convention (Section V), the Convention's formality requirements and procedures (Section VI), the main obligations of Parties to the Convention (Section VII), the grounds on which a court (or other "competent authority" applying the Convention, such as a bailiff in a civil law system) can refuse to recognize or enforce a mediated settlement (Section VIII), declarations available under the Convention (Section IX), and issues related to supra- and sub-national legal systems (Section X).

II. Purposes of the Convention

The primary goal of the Convention is to promote the use of mediation for the resolution of cross-border commercial disputes, as mediation is seen as not only a faster, less expensive form of dispute resolution but also as more likely to preserve commercial relationships.⁴ The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation; a significant amount of time and energy might be needed in order to reach an agreement, and if the other party later fails to perform, the company seeking compliance would essentially have to start over in litigation or arbitration.⁵ Particularly for the many disputes arising out of alleged breaches of contract, mediation may be less attractive if even a successful mediation would simply result in another contract that would have to be enforced through normal contract litigation.⁶

⁴ See, e.g., interventions of the United States and Belarus, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), July 2, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. The General Assembly has also noted that it produces savings for states in the administration of justice. G.A. Res. 57/18, U.N. Doc. A/Res/57/18 (Jan. 24, 2003).

⁵ See, e.g., intervention of the International Institute for Conflict Prevention and Resolution (CPR), in Audio Recording: U.N. Comm'n on Int'l Trade L., 47th Session (United Nations 2014), July 9, 2014, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the Institute of International Commercial Law, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶ U.N. Comm'n on Int'l Tr. L., 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) (hereinafter U.S. Proposal) at 3. See also Guide to Enactment of the Model Law on International Commercial Conciliation (2002) (hereinafter Guide to Enactment), para. 87 ("Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award.").

UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation to resolve cross-border disputes.⁷ Many companies find it hard to convince their business partners in some jurisdictions to engage in mediation based on views that it lacks a stamp of international legitimacy like the New York Convention has given to arbitration since 1958.⁸ Thus, the proponents of developing the Convention expressed a hope that it will be able to give mediation the same type of boost that arbitration received from the New York Convention.⁹ The development of the Convention was said to be deemed critical by the international business community.¹⁰ In particular, a new framework was seen as necessary to combat the perception that if a company successfully mediates a contract law dispute, but the other party to the settlement fails to comply, the company is worse off than if it had not attempted mediation in the first place; having spent time and money on mediation, the company would still have to litigate a contract law dispute over the settlement agreement.¹¹

Notably, the Convention was not designed to provide enforceability for settlement agreements that otherwise would not have been enforceable at all,¹² but rather to provide a framework for enforcement (and also for recognition, as discussed in Section VII *infra*) that would be more efficient than litigation under contract law. Some delegates cited many experiences where cross-border litigation resulted from a party's failure to comply with a settlement.¹³ Yet although the Convention should provide significant benefits to parties who have to seek relief in court, its main goal is to provide an incentive to mediate in the many cases in which mediation might otherwise not be attempted.¹⁴ Ideally, the Convention will rarely need to be invoked in court, as in most cases, parties will abide by the mediated settlements they conclude.¹⁵

⁷ See intervention of the American Society of International Law (ASIL), in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸ See, e.g., intervention of the Corporate Counsel International Arbitration Group (CCIAG), in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00,

<http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Canada, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹ See, e.g., intervention of the United States, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), July 2, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰ See, e.g., intervention of ASIL, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of CCIAG, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹ See, e.g., intervention of CPR, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹² See, e.g., Guide to Enactment, para. 89.

¹³ See, e.g., intervention of CCIAG, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴ See, e.g., intervention of the International Mediation Institute (IMI), in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>

III. Course of the Debate in UNCITRAL

Work on a mediation convention was proposed by the United States at the 2014 Commission session,¹⁶ as UNCITRAL’s Working Group II was completing its efforts to address transparency in treaty-based investor-state arbitration. After brief consideration, UNCITRAL delegated consideration of the topic to Working Group II, assigning it to discuss the matter at its February 2015 session.¹⁷

The project did not get off to an auspicious start. Based on the first day of discussion in the Working Group, the chair¹⁸ assessed that the group did not have a great prospect of arriving at consensus on the desirability of work on this topic.¹⁹ Sobering views dominated the discussion, e.g., a prediction that development of a convention would take many years,²⁰ and fears that even if UNCITRAL did spend years working on the project, that work would be no more successful than prior efforts to address the issue in the context of UNCITRAL’s development of the Model Law on International Commercial Conciliation²¹ (which did not include substantive provisions on enforcement procedures, despite efforts to address the topic).²² In the end, the Working Group did request a mandate from the Commission to work on the topic, but did not commit to developing any particular form of instrument.²³ Instead, a broad mandate was granted that enabled the Working Group to determine for itself the proper outcome for its deliberations.

¹⁶ See, e.g., U.S. Proposal, *supra* n.6; intervention of the United States, in Audio Recording: U.N. Comm’n on Int’l Trade L., 47th Session (United Nations 2014), July 9, 2014, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. The idea for the project was suggested at a public meeting of the State Department’s Advisory Committee on Private International Law (ACPIL) on February 26, 2014. See Public Meeting on International Arbitration and Conciliation, <https://2009-2017.state.gov/s/1/229037.htm>. See also S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. OF L. & POL’Y 11, 32-38 (2014) (suggesting, in a paper presented at the ACPIL meeting, the development of a convention addressing enforcement of both agreements to mediate and mediated settlement agreements). The idea seems to have emerged in the Asia-Pacific region at a similar time. See, e.g., Laurence Boulle, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7(1) CONTEMP. ASIA ARB. J. 35, 61 (2014) (noting that “an international or regional convention” would be needed for a systematic attempt at enforcement of mediated settlements); Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research*, 7(1) CONTEMP. ASIA ARB. J. 87 (2014); Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements*, 7(1) CONTEMP. ASIA ARB. J. 119 (2014).

¹⁷ See Report of the U.N. Comm’n on Int’l Tr. L. on its Forty-Seventh Session (7-18 July 2014), U.N. G.A.O.R. 69th Sess., Supp. No. 17, U.N. Doc. A/69/17, para.129.

¹⁸ At that point, prior to Working Group II receiving a mandate from the Commission, Michael Schneider from Switzerland was serving as the chair. See Report of UNCITRAL Working Group II on the Work of its Sixty-Second Session (2-6 February 2015), U.N. Doc. A/CN.9/832 (hereinafter Working Group II Feb. 2015 report), para. 8.

¹⁹ See intervention of the Chair, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰ See intervention of the Russian Federation, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹ See intervention of Mexico, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²² See UNCITRAL Model Law on International Commercial Conciliation (2002) (“Model Law”), Article 14.

²³ See Working Group II Feb. 2015 report, *supra* n.18, at para. 59 (noting the possibility of preparing “a convention, model provisions or guidance texts”).

At the Commission that summer, the tone was far more positive, with most states viewing work in this area as being promising and worthwhile. The only strong opposition to authorizing work on the topic came from the European Union and some of its member states. The European Union stated that it saw no evident need for harmonization on the topic and opined that finding agreement on a harmonized approach—beyond the model law’s decision to leave the issue of enforcement to domestic law—was unrealistic.²⁴ (This skepticism from the European Union continued into the negotiations.²⁵) Nevertheless, the Commission authorized work to begin at the fall 2015 session of Working Group II.²⁶

The Working Group focused on the mediation project for six sessions; most of the sessions were one week long, although the Working Group was given an extra week for its session in the fall of 2016.²⁷ Natalie Morris-Sharma from Singapore chaired all six sessions.²⁸ Although the United States and Israel proposed some initial draft provisions for a convention at the first session,²⁹ the Working Group did not decide that its work would take the shape of a convention until its fourth session of work. That session, in February 2017, was the key turning point in the negotiations; after many hours of substantive discussions, the time was ripe for development of a compromise package that tied a number of divisive issues together. At the end of the morning session on February 7, the chair requested that delegations continue informal consultations over the lunch break.³⁰ When the afternoon session resumed two hours later, Israel presented a proposal on behalf of interested delegations³¹ that had developed it during the break.

²⁴ See intervention of the European Union, in Audio Recording: U.N. Comm’n on Int’l Trade L., 48th Session (United Nations 2015), July 2, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. By contrast, the proponents argued that by taking an approach modeled on the New York Convention—i.e., not seeking to harmonize procedural law, just the substantive result that would need to be provided—the work could be made feasible. See, e.g., intervention of the United States, in Audio Recording: U.N. Comm’n on Int’l Trade L., 48th Session (United Nations 2015), July 2, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting skepticism regarding the project and doubting that an instrument is desirable).

²⁶ See Report of the U.N. Comm’n on Int’l Tr. L. on its Forty-Eighth Session (29 June-16 July 2015), U.N. G.A.O.R. 70th Sess., Supp. No. 17, U.N. Doc. A/70/17, para. 142.

²⁷ See Report of the U.N. Comm’n on Int’l Tr. L. on its Forty-Ninth Session (27 June-15 July 2016), U.N. G.A.O.R. 71st Sess., Supp. No. 17, U.N. Doc. A/71/17, para. 365.

²⁸ Report of UNCITRAL Working Group II on the Work of its Sixty-Third Session (7-11 September 2015), U.N. Doc. A/CN.9/861, para. 11; Report of UNCITRAL Working Group II on the Work of its Sixty-Fourth Session (1-5 February 2016), U.N. Doc. A/CN.9/867, para. 10; Report of UNCITRAL Working Group II on the Work of its Sixty-Fifth Session (12-23 September 2016), U.N. Doc. A/CN.9/896, para. 9; Report of UNCITRAL Working Group II on the Work of its Sixty-Sixth Session (6-10 February 2017), U.N. Doc. A/CN.9/901 (hereinafter Working Group II Feb. 2017 report), para. 10; Report of UNCITRAL Working Group II on the Work of its Sixty-Seventh Session (2-6 October 2017), U.N. Doc. A/CN.9/929 (hereinafter Working Group II Oct. 2017 report), para. 8; Report of UNCITRAL Working Group II on the Work of its Sixty-Eighth Session (5-9 February 2018), U.N. Doc. A/CN.9/934 (hereinafter Working Group II Feb. 2018 report), para. 9.

²⁹ See Comments by Israel and the United States of America, U.N. Doc. A/CN.9/WG.II/WP.192.

³⁰ See intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

³¹ See interventions of the Chair and Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

The compromise package addressed five issues, the resolutions of which were seen as interconnected, in what was described as a dramatic breakthrough.³²

First, as described in Section VII *infra*, the Convention would not use the term “recognition,” but instead would functionally describe (in Article 3(2)) the aspect of recognition that needed to be included—i.e., the ability to use a mediated settlement as a complete defense in domestic legal proceedings.³³ Second, as described in Section V(D)(2) *infra*, mediated settlement agreements that could be enforced as judgments or arbitral awards would be excluded from the scope of the Convention. Third, as explained in Section IX *infra*, the Convention would apply to mediated settlement agreements by default, but each state would be given the option of making a declaration to the effect that it would only apply the Convention to mediated settlement agreements to which the disputing parties affirmatively opted to have the Convention apply. Fourth, as described in Section VIII(H) *infra*, the Convention would include, as among its Article 5 grounds for refusal, two situations in which a court could refuse to grant relief based on misbehavior by the mediator. Finally, as discussed in Section IV *infra*, the Working Group would develop both a Convention and a model law simultaneously; this approach broke new ground for UNCITRAL, which previously had never developed two such instruments as a package. This set of compromises was quickly endorsed by a number of delegations; although its contents did not match what any delegation would have preferred, it provided a basis to move forward.³⁴ The Working Group continued to discuss the compromise proposal throughout the rest of that week. Although the February 9 session was cancelled due to a blizzard,³⁵ many delegations met anyway to continue working on refining some of the compromise language.³⁶ At the end of the week, the compromise package was accepted by the Working Group,³⁷ and was endorsed by the Commission in the summer of 2017.³⁸

³² See intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; Working Group II Feb. 2017 report, *supra* n.28, para. 52.

³³ Accordingly, other articles of the convention, such as Articles 1 and 4, would not only avoid the term “recognition” but would also not refer to “enforcement.” The Article 3(2) formulation used to functionally describe “recognition” was too unwieldy to replicate in other articles, but referring to “enforcement” alone in other articles would risk the implication that recognition was not covered. Thus, other articles of the Convention simply refer to “relief” rather than “recognition and enforcement.”

³⁴ See, e.g., interventions of the United States, the European Union, Israel, Australia, the Beijing Arbitration Center, and the Republic of Korea, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

³⁵ See U.N. Headquarters Emergency Information, Feb. 9, 2017, <https://www.facebook.com/unhqemergencyinformation/posts/658321310959431>.

³⁶ See, e.g., interventions of the Chair and IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting that the Canadian delegation had arranged for space for consultations).

³⁷ See intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

³⁸ See Report of the U.N. Comm’n on Int’l Tr. L. on its Fiftieth Session (3-21 July 2017), U.N. G.A.O.R. 72nd Sess., Supp. No. 17, U.N. Doc. A/72/17, para. 238.

After this breakthrough, the Working Group only needed two more sessions to complete its efforts. The Convention was finalized by the Commission on June 25, 2018, including a recommendation that it should open for signature in Singapore in August 2019.³⁹

IV. Non-Textual Issues Resolved in the Negotiations

Before addressing the structure and contents of the Convention itself, it will be useful to explain several key issues that were not explicitly addressed in the text of the treaty but that were discussed in the negotiations. First, as noted above, the form of the instrument was in doubt until the five-element compromise was assembled. Some delegations consistently advocated for a Convention from the beginning of the project.⁴⁰ The International Mediation Institute cited a survey of various mediation users, most of whom opined that a Convention would make it easier for commercial parties to come to mediation in the first place.⁴¹ Some delegations also suggested that a non-binding instrument such as a model law would not be as effective in promoting mediation or serving the needs of the users.⁴² However, other states were skeptical of a Convention,⁴³ and argued that developing a binding instrument would be premature as mediation was still in its infancy in many states.⁴⁴ This second argument was directly at odds with the primary motivation of the proponents who believed that an international framework was needed in order to encourage the further development of mediation in various jurisdictions. Eventually, some delegations suggested that both a Convention and a model law could be developed,⁴⁵ as that would permit as many states as possible to use an UNCITRAL instrument on the subject, including those that deemed themselves not yet ready to join a Convention. This suggestion

³⁹ Report of the U.N. Comm'n on Int'l Tr. L. on its Fifty-First Session (25 June-13 July 2018), U.N. G.A.O.R. 73rd Sess., Supp. No. 17, U.N. Doc. A/73/17, para. 44.

⁴⁰ See, e.g., U.S. proposal, *supra* n.6; interventions of Singapore, Israel, Colombia, Thailand, and Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Turkey, Israel, Colombia, and Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of China, the United States, Kuwait, Singapore, Israel, and Sri Lanka, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴¹ See intervention of IMI, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴² See, e.g., intervention of China, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴³ See, e.g., interventions of France, Germany, and South Africa, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the European Union, the Russian Federation, and Austria, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴⁴ See, e.g., interventions of Germany and South Africa, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Bulgaria, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴⁵ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

opened the door to the undertaking (unprecedented in UNCITRAL) of developing two forms of instrument in parallel.

Second, the Convention can be seen as creating a new category of legal instrument on the international plane, elevating what would otherwise be a mere contract to a *sui generis* status. In general, the Convention provides for international, mediated settlements to be treated in a manner comparable to arbitral awards.⁴⁶ That this effect would occur was recognized early in the UNCITRAL discussions, and was controversial.⁴⁷ Some delegations argued that settlements are only contracts and should not be given a different status solely because they are mediated.⁴⁸ The ability of disputing parties to convert a mediated settlement into an arbitral award (a “consent award” or “award on agreed terms”) was cited as an adequate workaround; some delegations suggested that such processes suffice to ensure enforceability and that the conversion of settlements into awards under existing processes provided a “useful fiction”⁴⁹ that ameliorated the need for a new approach.

By contrast, others argued that disputing parties should not have to go through the elaborate exercise of converting a settlement into an award, and that they should not have to depend on finding (and hiring) an arbitrator willing to enter it as an award.⁵⁰ One can also question how often parties who successfully mediate a dispute would want to suggest a risk of future noncompliance by seeking to have a settlement converted into an award while the disputing parties are still on good terms. Moreover, in many jurisdictions, whether the New York Convention would apply to all such consent awards is an open question.⁵¹ If an arbitration is only commenced once the parties have already reached a settlement, the requisite “differences” between the parties may no longer exist, thus suggesting that any resulting award would fall outside the scope of Article I(1) of that treaty.⁵² Beyond these concerns about a legal gap, from a

⁴⁶ In doing so, the Convention builds on the approach taken in jurisdictions (and arbitral institutions) where certain mediated settlements are explicitly treated as if they were arbitral awards. *See* Guide to Enactment para. 91 (citing Bermuda, Arbitration Act 1986; and India, Arbitration and Conciliation Ordinance, 1996, arts. 73-74, as examples of laws treating mediated settlements as arbitral awards); Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211; N.C. Gen.Stat. § 1-567.84; Ohio Rev. Code § 2712.87; Ore. Rev. Stat. § 36.546; 11 Korean Comm. Arb. Board, Domestic Arb. R. 18.3 (2011); Arb. Inst. of the Stockholm Chamber of Commerce, Mediation R. 14 (2014). Importantly, though, the Convention severs the conceptual link to arbitration and establishes a mediated settlement as an international instrument in its own right rather than simply a simulacrum of an arbitral award.

⁴⁷ *See, e.g.*, intervention of France, in Audio Recording: U.N. Comm’n on Int’l Trade L., 47th Session (United Nations 2014), July 9, 2014, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴⁸ *See, e.g.*, intervention of Germany, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁴⁹ *See* intervention of Japan, in Audio Recording: U.N. Comm’n on Int’l Trade L., 47th Session (United Nations 2014), July 9, 2014, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁰ *See, e.g.*, intervention of IICL, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵¹ *See, e.g.*, intervention of IICL, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵² New York Convention, *supra* n.1, Article I(1) (applying that Convention to arbitral awards “arising out of differences between persons”). *See also* Edna Sussman, *The New York Convention Through a Mediation Prism*, DISPUTE RESOLUTION MAGAZINE 15(4) (2009); Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, THE FORDHAM PAPERS 2008; Brette L. Steele, *Enforcing International Commercial Mediation Agreements Arbitral Awards Under the New York Convention*, 54 U.C.L.A. L. REV. 1385 (2007).

policy perspective, parties that prefer to use mediation should not be forced to engage in another form of alternative dispute resolution simply in order to receive equal legal protection of the outcome of the dispute resolution process.⁵³

Thus, rather than forcing disputing parties to shoehorn their mediated settlements into the existing legal framework governing arbitration, the Convention accords a new status to mediated settlements in their own right. It converts what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally-binding international framework, and provides an entitlement to privileged treatment in other states, similar to a judgment.⁵⁴ Thus, under the Convention, settlements are no longer merely subject to contract law,⁵⁵ although some aspects of contract law may remain relevant in certain situations⁵⁶ (and, of course, a party could still seek to rely on contract law, as mediated settlements do not lose their status as contracts). Such an approach makes sense, as a mediated settlement should receive more deference than a normal contract, given that parties have likely already given up contractual rights in settling their dispute, and have spent time and money on the mediation.⁵⁷ More importantly, in arbitration, the disputing parties consent only to the process for resolving their dispute, but not to the ultimate outcome, yet the agreement to arbitrate and the arbitral award—which otherwise would only be private acts governed by contract law—are given privileged status under the New York Convention. In mediation, by contrast, the parties have agreed to not only the process for resolving their dispute but also to the ultimate outcome—thus suggesting a far stronger justification for according a privileged status to the mediated settlement agreement.

A third issue debated but not explicitly addressed in the text of the Convention is the question of whether the Convention should cover elements of mediated settlements that provide for more than just monetary relief. Initially, the European Union wanted to restrict the project to pecuniary settlements, but the Working Group rejected that idea.⁵⁸ The Convention does not differentiate between the types of obligations that may be included within a mediated settlement. While a request to give effect to non-monetary obligations may present complicated issues to a

⁵³ See, e.g., intervention of Thailand, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁴ See, e.g., intervention of France, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁵ See, e.g., intervention of Belgium, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁶ See Section VIII(B) *infra* on Article 5(1)(b)(i) (noting that many, but not all, aspects of the applicable contract law may be relevant to determining the validity of the mediated settlement agreement); *infra* at n.97 (noting that under Article 7, disputing parties can still rely on more generous treatment for mediated settlement that may be provided under domestic law).

⁵⁷ See, e.g., intervention of IICL, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁸ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. Even the original proposal from the United States raised the question of whether the Convention should include limitations on the relief available in cases of long-term (or other non-monetary) obligations, although the United States did not pursue such limitations in the Working Group. See U.S. Proposal, *supra* n.6 at 5.

court applying the Convention, such risks are also present for arbitral awards, if not likely to be as common.⁵⁹ Moreover, awards on agreed terms are not seen as causing problems in this respect.⁶⁰ Admittedly, parties can resolve a dispute by entering into a new commercial relationship, which would generally not be provided for in an award.⁶¹ Despite this risk, the room for creativity and innovative solutions is a main reason why mediation can be a more useful form of dispute settlement⁶² and is worth promoting. Limiting the application of the Convention to monetary elements of settlements would dramatically undermine the benefits of mediation.⁶³ Non-monetary elements of mediated settlements were therefore described as critically important for the Convention to cover, and the Working Group was assured that companies understand that courts' ability to enforce particular terms serves as a limit on what would generally be put into a settlement.⁶⁴ In other words, disputing parties who include creative, far-reaching obligations in their settlements bear the risk that courts may find it difficult to fashion appropriate orders. Excluding non-monetary obligations would also have caused problems in terms of any attempt to cover the residual monetary aspects of settlements, as those monetary aspects might not be amenable to being enforced in isolation⁶⁵ (as the obligations might be intertwined), and most settlements include both pecuniary and non-pecuniary elements.⁶⁶ Thus, the Working Group decided not to distinguish between the two types of obligations that may be found in mediated settlements, to protect the flexibility of mediation and to preserve the settlement agreement in its entirety.⁶⁷

A fourth issue notable only for its omission from the text of the Convention is that of double *exequatur*. The Convention enables a mediated settlement to be directly presented for relief in any state that is a Party to the Convention. In the early discussions in UNCITRAL, some delegations suggested that approval by a national court or notary be required before a mediated settlement could circulate to additional states under the Convention, or that the scope be limited

⁵⁹ See, e.g., intervention of Switzerland, in Audio Recording: U.N. Comm'n on Int'l Trade L., 47th Session (United Nations 2014), July 9, 2014, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁰ See, e.g., intervention of the Netherlands, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶¹ See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶² See, e.g., intervention of South Africa, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶³ See, e.g., intervention of IMI, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁴ See, e.g., intervention of CCIAG, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁵ See, e.g., interventions of France and Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁶ See, e.g., intervention of the China International Economic and Trade Arbitration Commission (CIETAC), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁷ See intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

to settlements that are enforceable in a particular state of origin.⁶⁸ These suggestions were not pursued. The Working Group wanted to avoid replicating the problems that arbitration faced prior to the New York Convention—i.e., the Geneva Convention approach that required double exequatur for arbitral awards—due to the fear of creating a system that would be so burdensome that parties would not want to use it.⁶⁹ Additionally, as described further in Section V(B) *infra*, the Working Group determined that identifying a particular state of origin for a mediated settlement would be too difficult, particularly in an age when mediated settlements can be made through electronic means.⁷⁰ Nor does the mediation process itself necessitate the identification of a seat. Thus, the Working Group designed the Convention to provide a process that would be easy and fast, and not overly burdensome.⁷¹

Finally, the Convention diverges from the New York Convention by only addressing the results of a dispute settlement process (i.e., mediated settlements), rather than also applying to agreements to enter into a dispute settlement process (i.e., agreements to mediate). Although the Working Group briefly discussed whether the Convention should address agreements to mediate, that topic was seen as unnecessarily complicating the work.⁷² The Convention also does not require the disputing parties to have had an agreement to mediate; the Convention applies regardless of whether the parties had a prior agreement or not.⁷³ (At most, an agreement to mediate can be relevant to show that mediation occurred. *See* Section VI *infra*.) One consequence of this decision is that the scope of any agreement to mediate is also irrelevant for the application of the Convention; the eventual settlement agreement may address issues outside the scope of an agreement to mediate (as the disputing parties can resolve whatever differences they want at the time of the settlement), unlike the New York Convention's requirement that an arbitral award only address issues within the scope of an agreement to arbitrate.⁷⁴

⁶⁸ *See, e.g.*, intervention of Belarus, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the Chair, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of France, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), July 2, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁹ *See, e.g.*, intervention of the United States, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Finland and Norway, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷⁰ *See, e.g.*, intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷¹ *See, e.g.*, intervention of the Stockholm Chamber of Commerce, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷² *See, e.g.*, interventions of Israel and Finland, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 9, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷³ *See, e.g.*, intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷⁴ *Cf.* intervention of India, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; New York Convention, *supra* n.1, Article V(1)(c).

V. The Scope of the Convention

To fall within the scope of the Convention, a settlement agreement must meet several criteria. It must be mediated, international, and commercial, and must not be the subject of a specific exclusion.

A. Mediated

The Convention draws on the Model Law on International Commercial Conciliation as the starting point for its definition of “mediation”: a process “whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ... lacking the authority to impose a solution upon the parties to the dispute.”⁷⁵ Importantly, the name of the process does not matter: metaphysical distinctions between “mediation,” “conciliation,” and other types of processes (as various terms may be used in different legal cultures) are not relevant. The Convention uses a broad definition as an umbrella that can cover many types of processes. (Note that the term “conciliation” was used by UNCITRAL for most of the negotiations, as the earlier UNCITRAL instruments used that term. However, the Working Group eventually decided to use “mediation” in the final text, as it was seen as the more widely-used term.)⁷⁶

During the negotiations, some delegations argued that the Convention should only cover mediation insofar as it qualifies as a “structured” process. These delegations not only wanted to distinguish mediated settlements from non-mediated settlements but also to exclude settlements resulting from an “informal” process,⁷⁷ such as a process that happens in a pub,⁷⁸ as opposed to those conducted in an “organized” manner.⁷⁹ An alternative explanation given regarding the proposed requirement of a “structured” process was that mediation would only be covered if it

⁷⁵ Convention at Article 2(3). *See, e.g.*, intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. *Cf.* Model Law Article 1(3).

⁷⁶ Working Group II Feb. 2018 report, *supra* n.28, para. 16; Note by the Secretariat, A/CN.9/WG.II/WP.205 (2017), para. 5.

⁷⁷ *See, e.g.*, intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Austria, the European Union, and Germany, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 12, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁷⁸ *See, e.g.*, intervention of Finland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 12, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting that a word other than “structured” would be needed to make the desired distinction); intervention of Austria, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Finland, Italy, and Croatia, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (suggesting that coverage of settlements reached in pubs would be problematic).

⁷⁹ *See* intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

took place within a domestic legal framework that regulates mediation, such as the Model Law⁸⁰ (even though the Model Law, which reinforces the value of party autonomy, permits parties to alter its default rules).⁸¹

Yet despite repeated, lengthy discussions, the Working Group never received a satisfactory answer to what a “structured” process would be,⁸² and the requirement was not included in the Convention.⁸³ The Working Group chose not to disadvantage mediation that occurs outside of an institution, nor to devalue other approaches (even mediation in a pub) that take advantage of the benefits of mediation being a flexible process. One delegation even said that the number one rule of mediation is that there are no rules, and that mediators are supposed to do whatever may be needed in the situation rather than impose a particular structure.⁸⁴ Other delegations explained that the results of the mediation—a written agreement, signed by the parties—should suffice to provide the requisite level of formality for a court to be confident in giving effect to the settlement, regardless of the “structure” of the process.⁸⁵

Additionally, the definition makes clear that the basis on which mediation begins is not relevant.⁸⁶ As under the Model Law, the mediation can be based on agreement between the parties before or after the dispute, or a legal obligation, or a suggestion or direction of a court or arbitral tribunal, among other possibilities. Similarly, the parties could have entered mediation voluntarily, or they could have been mandated to mediate but voluntarily reached a settlement.⁸⁷ The involvement of an administering institution is also irrelevant.⁸⁸

⁸⁰ See, e.g., interventions of Germany and the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸¹ See, e.g., intervention of the UNCITRAL Secretariat, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (referring to Article 3 of the Model Law)

⁸² See, e.g., intervention of the International Law Association (“ILA”), the United States, Canada, and Thailand, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the Russian Federation, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸³ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸⁴ See intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; see also intervention of Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting that imposing a requirement of structure would be “Kafkaesque”).

⁸⁵ See, e.g., interventions of Switzerland and the Russian Federation, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸⁶ Cf. Model Law Article 1(8); intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 12, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸⁷ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁸⁸ See, e.g., interventions of the United States and Thailand, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

Thus, for a settlement to qualify as “mediated” for purposes of the Convention, the only requirement is that the disputing parties sought to reach an amicable settlement with assistance of a third party who lacked authority to impose a solution.⁸⁹ The last element in the definition does not exclude mediation in which the mediator could be converted into an arbitrator, as long as the mediator did not have authority to issue an arbitral award at the time of the mediation.⁹⁰ By contrast, the definition generally would not cover a situation in which a judge acted as a mediator if that judge was also seised with deciding the dispute in ongoing litigation; this restriction is necessary to avoid situations in which the judge could pressure parties into a settlement. However, if another person mediates a dispute during litigation, a resulting settlement is still covered (except to the extent the settlement is converted into a judgment, Section V(D)(2)(a) *infra*).

Per the definition, the settlement has to “result” from mediation, but this rule should be seen as applying a very broad standard. No clear line is provided regarding how much involvement from a mediator is sufficient. The mediator does not have to be involved throughout the entire process; for example, if the parties have come to a resolution on most issues, the mediator can leave them to work out any remaining issues on their own, even if the lingering issues take months longer to get resolved.⁹¹ Such a settlement would still be sufficiently “mediated” for purposes of the Convention. The definition could even cover situations in which a mediator simply helps the parties move forward on one contentious aspect and then the parties resolve the rest themselves. Such a broad approach is consistent with the policy motivating the Convention—i.e., the promotion of the use of mediation. Generally, for a party to resist a request for relief under the Convention on the basis that the settlement did not “result” from the mediation, the party would need to demonstrate that fraud or collusion occurred in the other parties’ attempt to portray a link between a dispute and an entirely unrelated mediation.⁹²

In any disputes regarding this issue or other elements of the Convention framework, the court where relief is sought would need to protect the confidentiality of the mediation process, in accordance with applicable law. Thus, the court generally would not need to get into details of whether and to what extent the mediation was successful in developing the terms of the settlement, as such inquiries would undermine confidentiality, but would just need to be satisfied that the parties used mediation and a settlement resulted. (More generally, the Convention does

⁸⁹ Singapore Convention Article 2(3).

⁹⁰ *See, e.g.*, intervention of the Chair, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 5, 2018, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; Working Group II Feb. 2018 report, *supra* n.28, paras. 31-32.

⁹¹ *See, e.g.*, intervention of Sweden, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹² As the party seeking relief must provide “[e]vidence that the settlement resulted from mediation” in the forms listed in Article 4(1)(b), such evidence suffices to demonstrate that this requirement was met; the burden would be on the party resisting relief to demonstrate that the proffered evidence is not trustworthy.

not address confidentiality issues; the applicable domestic law would govern such evidentiary matters.)⁹³

The Working Group repeatedly discussed whether the Convention should also cover non-mediated settlements.⁹⁴ Some states advocated for coverage of all settlements, mediated or otherwise, or at least sought to have such broad coverage be an option that a state could choose via a declaration mechanism (or that the Convention should let parties to non-mediated settlements opt in to the Convention’s framework).⁹⁵ However, the Working Group decided at its first session only to cover mediated settlements,⁹⁶ and this decision was never reversed. Most delegations wanted to require involvement of a third party in order to distinguish mediated settlements from ordinary contracts.⁹⁷ No good reason was ever provided for not permitting states to extend the Convention via a declaration, particularly given that Article 7 already permits them to provide non-mediated settlements with identical treatment under domestic law.⁹⁸

The Working Group also discussed whether to include a requirement that the mediator be independent. However, this idea was not included in the Convention, as independence does not play the same role in mediation (where the settlement is agreed to by the parties) as it does in arbitration, and as including the requirement could risk generating unnecessary litigation.⁹⁹ (For more discussion of the role of the mediator’s behavior and independence, see Section VIII(H)

⁹³ See, e.g., interventions of France, Israel, India, Australia, and Pakistan, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹⁴ See, e.g., intervention of Mexico, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Cameroon, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 12, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹⁵ See, e.g., intervention of Mexico, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Mexico, and Cameroon, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Cameroon, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 2, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Cameroon, Mexico, and the ILA, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹⁶ See intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>

⁹⁷ See, e.g., intervention of China, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 12, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of France, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁹⁸ See also interventions of the United States, Canada, and France, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. The original United States proposal raised the question of whether the Convention needed rules designed to “avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law,” but the United States did not pursue this issue in the Working Group. U.S. Proposal, *supra* n.6 at 5. Notably, the Model Law does explicitly note the possibility for states to extend the scope of the framework to non-mediated settlements—one of several subtle but important differences between the two instruments.

⁹⁹ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

infra.) Similarly, the Working group briefly discussed requiring the mediator to meet certain qualifications,¹⁰⁰ but that suggestion did not receive support.¹⁰¹

B. International

In addition to being “mediated,” a settlement must be “international” to be covered by the Convention.¹⁰² Domestic and international settlements may not be analytically different in ways that would necessitate separate treatment at the stage of recognition and enforcement, but the Working Group nevertheless made a pragmatic decision to restrict the scope of the Convention to settlements that are in some sense international, in order to make it easier for countries to join the convention without requiring significant changes to their existing law addressing purely domestic settlements.¹⁰³ However, in their domestic law, states could choose to apply the same standards to domestic settlements if they want.¹⁰⁴

The settlement must be international at the time it was concluded,¹⁰⁵ regardless of whether the relevant criteria would have been met earlier during the mediation or at the time relief is requested. Thus, for example, a settlement can be international even if the mediation itself would not have been international for purposes of the existing Model Law (such as if one of the parties moved its place of business during the mediation, thus creating an international aspect at that stage). Whether a mediated settlement is international will depend on the identity of the disputing parties.¹⁰⁶ In most cases, the requirement will be met by the parties having their places of business in different states. If both parties have their places of business in one state, the mediated settlement can still qualify as international if that state is different from either the state where the obligations of the mediated settlement are to be performed or the state with which the subject matter of the mediated settlement is most closely connected.¹⁰⁷

If a party has more than one place of business, the relevant state for purposes of the Convention is the state with the closest relationship to the dispute resolved by the settlement, having regard to circumstances known to or contemplated by the parties at the time of the conclusion of the settlement.¹⁰⁸ This approach is based on a similar rule in the Vienna

¹⁰⁰ See, e.g., intervention of Austria, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰¹ See, e.g., intervention of Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰² Singapore Convention Article 1(1).

¹⁰³ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰⁴ See, e.g., interventions of South Africa and Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰⁵ See, e.g., intervention of China, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰⁶ See, e.g., interventions of the United States and Thailand, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁰⁷ Singapore Convention Article 1(1).

¹⁰⁸ *Id.* Article 2(1)(a).

Convention on Contracts for the International Sale of Goods (CISG).¹⁰⁹ If a party has no place of business, the relevant state is the party’s habitual residence,¹¹⁰ although this rule is unlikely to be practically relevant given that the Convention is limited to commercial, non-consumer disputes. Like the definition of “mediation,” the definition of “international” is thus based on the Model Law, but it omits other elements. Although the Model Law enables parties to a mediation to opt into being covered even if the “international” criterion is not otherwise met, that approach was seen as too broad for the Convention (e.g., it risked abuse).¹¹¹

As noted above, a key feature of the Convention is that it does not attempt to incorporate the concept of a seat of the mediation.¹¹² Because of that choice, the scope of the Convention could not be delineated by referring to whether relief is sought in a jurisdiction other than the mediated settlement’s state of origin, as no particular state of origin is designated. Many jurisdictions may be involved in one cross-border mediation.¹¹³ A particular dispute may involve parties that do business in two jurisdictions but are physically present in two other jurisdictions at the time of the mediation, with the mediator in a fifth jurisdiction, and with applicable law from a sixth state. Such a situation would provide no obvious answer to the question of which state the settlement is “from”; identifying a “seat” of the mediation, especially if the settlement is developed via email, would be unnecessarily difficult.¹¹⁴ Although the Working Group heard an early suggestion that the Convention should apply to “foreign” settlements, akin to the approach that the New York Convention takes for arbitral awards, that approach would have required identifying the state from which a settlement originates.¹¹⁵ Instead, the Working Group expressed a desire to avoid replicating the “artificial” concept of the place of the arbitration and its consequences in terms of applicable law.¹¹⁶

This decision had significant implications for other issues. Notably, neither the mediation nor the settlement has to comply with the domestic legal requirements of any particular state of origin in order to be covered by the Convention (e.g., domestic law requirements that the parties must use a locally-licensed mediator, a particular institution, or specific mediation rules), and no one state has the ability to set aside the settlement in a manner that would be binding on other jurisdictions.¹¹⁷ The mediator and the disputing parties would of course still be subject to any

¹⁰⁹ U.N. Convention on Contracts for the International Sale of Goods (hereinafter CISG), Article 10.

¹¹⁰ Singapore Convention Article 2(1)(b).

¹¹¹ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹² See, e.g., intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹³ See, e.g., interventions of Bulgaria and Thailand, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹⁴ See, e.g., interventions of the United States, Finland, and Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹⁵ See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹⁶ See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹¹⁷ Although the original United States proposal posed the question of whether the Convention would need to give effect to “an originating jurisdiction’s determination that a settlement agreement is not enforceable (similar to the

applicable legal regimes in their various jurisdictions, and they could be subject to other legal sanctions if they violate those requirements. Yet such questions would not affect their ability to get the mediated settlement recognized and enforced under the Convention. Thus, a mediated settlement is essentially made a stateless instrument that is generally not subject to domestic law requirements except insofar as the Convention permits a state to apply some domestic concepts and procedures when relief is requested (i.e., its rules of procedure for administering the request for relief, and the grounds for refusal in Article 5(2)).

C. Commercial

An international, mediated settlement must also resolve a “commercial” dispute in order to fall within the scope of the Convention. The Working Group agreed at an early stage to restrict the scope of the Convention to commercial disputes; the only question was whether and how to define that concept (e.g., an illustrative list such as the Model Law uses), and what exclusions to provide.¹¹⁸ As in the New York Convention, the concept is not defined here, but should be read in an equally broad manner.¹¹⁹ The scope of the term could thus include at least some investor-state disputes,¹²⁰ in areas such as construction or natural resource extraction. However, even if a dispute would otherwise qualify as commercial, a mediated settlement resolving the dispute will not fall within the scope of the Convention if one of the exclusions discussed in the next section applies.

D. Exclusions from Scope

1. Types of Disputes

Regardless of whether the other scope requirements are met, mediated settlements resolving consumer disputes are excluded from the Convention. The Working Group chose a formulation drawn from the CISG—i.e., disputes “arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes.”¹²¹ The parenthetical

New York Convention’s treatment of set-aside proceedings),” the United States did not pursue this issue in the Working Group. U.S. Proposal, *supra* n.6 at 5.

¹¹⁸ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. Cf. Article 1(1) n.2 of the Model Law.

¹¹⁹ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹²⁰ By contrast, although the draft Hague Convention on the Recognition and Enforcement of Foreign Judgments covers civil and commercial matters, it excludes public law matters and thus would not cover any judgments resolving investor-state disputes, whether or not such judgments came from a “common court.” See Hague Conference on Private International Law, Draft Convention of May 2018, *available at* <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission>, Article 1(1) (excluding “administrative matters”); *compare id.* Article 4(5) (providing for certain judgments of “common courts” to fit within the scope of the convention).

¹²¹ Singapore Convention Article 1(2)(a). Cf. CISG, *supra* n.109, Article 2(a).

reference to the term “consumer” was added as a clarification, as some delegations did not find “personal” to be sufficiently clear.¹²² By excluding consumer disputes, delegations sought to avoid the problems that UNCITRAL encountered in previous discussions in Working Group III’s project on online dispute resolution, which floundered due to diverging views regarding the ability of consumers to enter into pre-dispute agreements to arbitrate¹²³; thus, Working Group II carved out consumer disputes at the beginning of its work, so as to avoid the need to take into account consumer protection issues.¹²⁴

Similarly, mediated settlements resolving disputes related to family law, employment law, or inheritance law are also excluded.¹²⁵ Although these categories of disputes were seen as important, the Working Group viewed them as raising different issues¹²⁶ than commercial disputes and as being sufficiently sensitive¹²⁷ to merit exclusion. After an early agreement to exclude family law,¹²⁸ inheritance law was later added as a separate category, as it may be considered a family law matter in some legal cultures but not others.¹²⁹ These exclusions not only ensured that UNCITRAL would avoid treading on the turf of the Hague Conference on Private International Law (which has done work on voluntary agreements in the family law context),¹³⁰ but would exclude the categories of disputes in which fears of the disputing parties’ unequal bargaining power might make some states reluctant to apply the Convention.

2. *Mediated Settlements Enforceable as Judgments or Awards*

a. Judgments

Mediated settlements that are enforceable as judgments are also excluded from the scope of the Convention.¹³¹ Although this issue will likely not arise frequently in practice, it was one of the central issues in the negotiations and thus a part of the five-issue compromise in February 2017. The exclusion of mediated settlements that are enforceable as judgments was extremely

¹²² See, e.g., interventions of Colombia, Argentina, Israel, and Germany, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹²³ See, e.g., Ronald A. Brand, Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project, 10 Loy. U. Chi. Int’l L. Rev. 11 (2012).

¹²⁴ Cf. intervention of Canada, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹²⁵ Singapore Convention Article 1(2)(b).

¹²⁶ See, e.g., intervention of Finland, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹²⁷ See, e.g., intervention of Egypt, 1 February 2015

¹²⁸ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹²⁹ See, e.g., interventions of the United States, Egypt, Israel, Singapore, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³⁰ Hague Conference on Private International Law, *Family Agreements Involving Children*, <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements>.

¹³¹ Singapore Convention Article 1(3)(a).

important to the European Union,¹³² and thus was a key part of the Working Group’s ability to construct a package approach that resolved other issues in a manner the European Union had previously opposed (e.g., development of a Convention, inclusion of the concept of recognition (albeit without the word), and application of the Convention by default without requiring parties to opt in).

The exclusion of settlements enforceable as judgments was designed to avoid overlap with Hague Conference instruments—the 2005 Choice of Court Agreements Convention and the draft judgments convention¹³³— and to avoid parties having two bites at the apple (i.e., two routes to seek relief based on one settlement agreement). This exclusion was not necessary in terms of avoiding the creation of conflicting treaty obligations, as this Convention and the Hague Conference instruments all set floors rather than ceilings, such that states can provide more generous treatment to mediated settlements or judgments than is required by the various treaties. Thus overlap would not be a problem, as a state could provide relief under one treaty even if not required to do so under another. The instruments would generally not conflict directly.¹³⁴ If overlap had been permitted, parties to a dispute could simply have used whichever framework is most useful in a given situation.¹³⁵ Moreover, as not all states will be parties to both conventions,¹³⁶ permitting overlap would have avoided the risk that some situations may not be covered in a given state. Yet the decision to include this exclusion in the Convention was clearly worthwhile, as it will be relevant only in marginal cases, and it enabled a compromise on much more significant issues.

To be affected by this exclusion, a mediated settlement would have to be approved by a court or concluded before the court during proceedings, in a manner that enables the settlement

¹³² See generally intervention of the European Union, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³³ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³⁴ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³⁵ See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³⁶ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

to be enforced as a judgment in the courts of that state.¹³⁷ Mere involvement of a judge in the mediation does not suffice for the exclusion to apply.¹³⁸ As noted above, the exclusion creates some risk of a gap, if the settlement agreement is enforceable as a judgment in the state of origin but not in the receiving state. Some states sought to eliminate such a gap,¹³⁹ or at least give states flexibility in dealing with the issue,¹⁴⁰ but the text included in the compromise package abandoned this effort to avoid any gap. The European Union wanted to ensure that, even if a gap were created, settlements would not be covered under this Convention if they were covered by the Hague instruments.¹⁴¹

Importantly, exclusion of settlements that are “approved by a court” does not cover instances in which the mediated settlement is presented for recognition or enforcement under this Convention.¹⁴² If the exclusion did cover such situations, mediated settlements could only be presented in one jurisdiction before they could no longer circulate under the Convention, which would be inconsistent with the need for parties to be able to seek relief in as many jurisdictions as may be required to ensure that the obligations are fulfilled. Rather, the exclusion only covers instances in which the parties to the dispute get a court to bless the settlement at a time at which they both still accept the settlement and no relief is needed; granting a request for relief under the Convention does not qualify as “approval.” Additionally, mediated settlements are not excluded from the scope of the Convention merely because they can be recognized as a judgment, as long as they cannot also be enforced as a judgment. Thus, if a limitation period for enforcement has passed in a particular jurisdiction, thus rendering a court-approved mediated settlement no longer enforceable as a judgment in that jurisdiction, that mediated settlement may then come within the scope of the Convention (even if it can still be recognized as a judgment in the state in which it was issued).

b. Awards

Mediated settlements otherwise within the scope of the Convention are also excluded if they have been recorded, and are enforceable, as arbitral awards.¹⁴³ This exclusion was an attempt to avoid creating an overlap with the New York Convention; as with the exclusion of mediated settlements enforceable as judgments, the exclusion is not legally necessary, as both treaties create floors rather than ceilings on states’ obligations to give effect to covered

¹³⁷ Singapore Convention Article 1(3)(a).

¹³⁸ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹³⁹ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴⁰ See, e.g., interventions of Israel, Switzerland, and Singapore, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴¹ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴² See Note by the Secretariat, A/CN.9/WG.II/WP.202 (2017), para. 22; Working Group II Oct. 2017 report, *supra* n.28, para. 28.

¹⁴³ Singapore Convention Article 1(3)(b).

instruments. However, in contrast to the exclusion of mediated settlements enforceable as judgments, the exclusion of mediated settlements enforceable as arbitral awards must be analyzed from the perspective of the state where relief is being sought, rather than from the perspective of the seat of the arbitration (if different); this perspective is necessary as the Working Group desired to avoid not only overlap with the New York Convention but also a gap.¹⁴⁴ As noted above, states may take differing approaches regarding whether a consent award is enforceable under the New York Convention when the settlement is reached before the arbitration is commenced.¹⁴⁵ If a mediated settlement were analyzed from the perspective of the seat of an arbitration in which it was transformed into an arbitral award, it might be excluded from the scope of the Convention based on enforceability in that jurisdiction even if it would not be treated as an enforceable arbitral award in the state where relief under the Convention was sought. Of note, the exclusion applies only if a mediated settlement is both enforceable as arbitral award and also “recorded” as one. Thus, the exclusion would not apply to mediated settlements that are merely treated as being akin to arbitral awards under non-Convention law.¹⁴⁶

VI. Formality Requirements and Procedures

When a party to a mediated settlement that fits within the scope of the Convention presents the settlement to a court and requests relief, only certain limited formality requirements may be imposed. The Working Group expressed a desire for formality requirements to be brief and not overly prescriptive, but rather the minimum that would permit proper functioning of the Convention.¹⁴⁷

First, a mediated settlement must be in writing.¹⁴⁸ This basic requirement was deemed to be important in order for courts to have proof regarding the contents of the settlement and in order to focus the attention of the parties on their conclusion of a covered settlement.¹⁴⁹ To qualify as being in writing, the mediated settlement must be recorded, but it can be in any form, including electronic formats in which the information is accessible in a manner that makes it useable for subsequent reference.¹⁵⁰ As such, an exchange of emails would be sufficient (although text in the draft Convention that would have explicitly mentioned email along with

¹⁴⁴ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴⁵ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴⁶ Cf. *supra* n. 46 (giving examples of jurisdictions that treat some mediated settlements as equivalent to arbitral awards).

¹⁴⁷ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁴⁸ Singapore Convention Article 1(1).

¹⁴⁹ See, e.g., intervention of Norway, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁰ See Singapore Convention Article 2(2). This approach to the requirements for electronic communications draws on Article 9 of the U.N. Convention on the Use of Electronic Communications in International Contracts.

other, more outdated, formats was deleted when the Commission finalized the text of the Convention.)¹⁵¹

Although a mediated settlement must be in writing for the Convention to apply, it does not have to be contained in one document. Such a requirement was proposed;¹⁵² a number of delegations claimed that if mediated settlements did not have to be contained in one document, competent authorities could have difficulty determining whether a pile of documents really constituted a settlement. In this view, a judge could not easily address a situation in which a party presents forty-five emails in a file and asks for enforcement.¹⁵³ After extensive debate, this proposed restriction was rejected,¹⁵⁴ as in practice, a mediated settlement may frequently not be contained in (or reduced to) one document; it may be contained in an exchange of emails or may rely on other cross-referenced documents (e.g., separate annexes).¹⁵⁵ Regarding the burden on competent authorities, it was said that if a judge has to read a set of documents (e.g., the previously-noted forty-five emails) to understand the full context of whether a settlement was concluded, then reading those documents is the judge's duty.¹⁵⁶ Still, the burden is on the parties to draft a settlement in ways that will facilitate a judge's ability to provide them with any necessary relief.¹⁵⁷

A mediated settlement must also be signed by the parties,¹⁵⁸ a requirement that can be met in appropriate situations via signature by their counsel.¹⁵⁹ For electronic documents, the signature requirement is satisfied if certain functional standards are met, drawing on past

¹⁵¹ U.N. Comm. on Int'l Trade Law, Report of the U.N. Comm. on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17 (2018) at para. 23.

¹⁵² See, e.g., interventions of Bulgaria, Finland, Belgium, France, and the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the European Union, Germany, Spain, Austria, and Belgium, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵³ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁴ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁵ See, e.g., interventions of Argentina, Canada, the UNICTRAL Secretariat, Mexico, Kuwait, and the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Switzerland, and IAM, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Italy, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁶ See, e.g., intervention of IAM, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁷ See, e.g., intervention of Sri Lanka, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁵⁸ Singapore Convention Article 4(1)(a).

¹⁵⁹ See, e.g., interventions of Canada and Israel, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 2, 2017, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Israel, Canada, Germany, and the Chair, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; Working Group II Oct. 2017 report, *supra* n.28, para. 50.

UNCITRAL electronic commerce instruments.¹⁶⁰ (Under Article 4(2), a “method” must be used to identify the parties and to indicate their intentions with respect to the information contained in the electronic documents, such as the email coming from the party’s account. The method must be either as reliable as appropriate given the circumstances, or be proven to have actually demonstrated the party’s identity and intentions.) This issue was not seen as likely to be frequently litigated; these standards were included in the Convention to avoid any possible confusion over whether electronic settlements were covered, per UNCITRAL’s view of best practices in drafting instruments.

A party seeking to rely on a mediated settlement must also submit evidence that the settlement resulted from mediation.¹⁶¹ In this respect, the scope requirement that a settlement be mediated is different from the requirements that a settlement be international, commercial, and not fall within an exclusion, as the party seeking relief is not affirmatively required to provide evidence of those elements. The stated reason for imposing this requirement was to reduce the risk of fraud and to make it easier for competent authorities to ensure that the settlement was indeed mediated.¹⁶² (At the same time, it seems unlikely that this issue will be contested in many cases.)¹⁶³ The party seeking relief has several options for the form in which to submit this evidence, an approach that developed as a compromise between states that wanted such evidence to be required only if the party resisting relief contested that the settlement was mediated¹⁶⁴ and those states that wanted one specific form of evidence (i.e., the mediator’s signature on the settlement) to be required in all cases.¹⁶⁵

The first option for demonstrating that the settlement resulted from mediation is to have the mediator’s signature on the settlement agreement itself.¹⁶⁶ While perhaps the simplest method of satisfying this requirement, it is not seen as appropriate in some legal cultures.¹⁶⁷ In

¹⁶⁰ Singapore Convention Article 4(2).

¹⁶¹ *Id.* Article 4(1)(b).

¹⁶² *See, e.g.*, intervention of China, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁶³ *See, e.g.*, intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁶⁴ *See, e.g.*, intervention of Australia, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States and CIETAC, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Mexico and the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁶⁵ *See, e.g.*, intervention of Vietnam, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Italy, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁶⁶ Singapore Convention Article 4(1)(b)(i).

¹⁶⁷ *See, e.g.*, intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of CIETAC, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

some jurisdictions, mediators are taught not to sign the settlement, both in order to ensure that the settlement is seen as the parties' settlement (not the mediator's) and to avoid any risk of being seen as a party to the settlement themselves.¹⁶⁸ Moreover, in some jurisdictions, mediators are not only taught to let the parties draft the agreement but may not even read it, both because reaching the terms of the settlement is seen as a component of party autonomy and also because drafting the agreement may be considered the practice of law (whereas some mediators may not be lawyers, and even those who are lawyers would not want to have to treat the parties as clients, in terms of the legal and ethical obligations that could then apply).¹⁶⁹ Finally, mediators generally want to avoid being called as witnesses to testify about what the meaning of the agreement was supposed to be.¹⁷⁰

Thus, as an alternative to the mediator's signature on the settlement, a party seeking relief can provide a separate document signed by the mediator, indicating that the mediation was carried out.¹⁷¹ This separate document can be produced later in time, and does not have to describe the extent of the dispute or the terms of the settlement, let alone vouch for the fairness of the settlement or otherwise approve it. It only has to state that the mediation occurred. Although a proposal was made to require this separate document to take a standardized form, that idea was not supported.¹⁷²

Alternatively, if the mediation was administered by an institution, the party seeking relief can provide an attestation from the institution.¹⁷³ The inclusion of this option was an attempt to address situations in which the mediator may no longer be available or willing to sign a separate document (e.g., if the mediator has died), but its use is not limited to those situations.

Finally, if none of those three default options are available, the party seeking relief can submit any other evidence acceptable to the competent authority. (Although alternative forms of evidence are only acceptable if the first three forms are not available, that condition is not likely to be litigated frequently, as the party resisting relief would have few incentives to demonstrate that one of the listed forms of evidence would in fact be available.) Alternative forms of

¹⁶⁸ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Canada and CIETAC, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁶⁹ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁰ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷¹ Singapore Convention Article 4(1)(b)(ii).

¹⁷² See, e.g., intervention of Russian Federation, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷³ Singapore Convention Article 4(1)(b)(iii).

evidence could include an agreement to mediate paired with documents demonstrating that the mediator was paid (suggesting that the mediation did indeed occur).¹⁷⁴

Beyond these limited requirements of writing, signature, and evidence of mediation, no other formality requirements may be imposed by competent authorities: the Convention’s list of required formalities is exhaustive. During the negotiations, other suggestions were made regarding formalities that could be required (such as mandating that the main points of the dispute had to be mentioned in the settlement), but these proposals were not accepted by the Working Group.¹⁷⁵ The Working Group limited the formality requirements for several reasons: reducing the barriers to obtaining relief,¹⁷⁶ avoiding inconsistencies with existing mediation practice, and avoiding the creation of possibilities for unnecessary litigation.¹⁷⁷ Overall, the Working Group strove to ensure that the formality requirements would not interfere with the Convention’s utility and would not undermine the use of mediation.¹⁷⁸

Thus, a state cannot impose other formality requirements such as mandating the signature of the mediator in all cases (which would contradict flexibility explicitly built into the Convention) or requiring different formalities such as notarization or a demonstration that the mediator was licensed by any particular state (e.g., the mediator’s home state or the state where the request for relief was made). These other types of formalities are not explicitly addressed in the Convention but are precluded, as such requirements would unduly restrict parties from obtaining relief based on settlement agreements within the scope of the Convention.¹⁷⁹ A central purpose of the Convention’s uniform framework is to preempt more burdensome requirements and facilitate circulation of settlements.¹⁸⁰ At the same time, it should be noted that this preemption does not prevent a state from applying unrelated form and process requirements for

¹⁷⁴ See, e.g., intervention of Australia, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁵ See, e.g., intervention of France, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Vietnam, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁶ See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁷ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁸ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁷⁹ Cf. intervention of the Belgian Center for Arbitration and Mediation (“CEPANI”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting that Belgian law requires accreditation of mediators); intervention of the Swiss Arbitration Association (“ASA”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting that some systems would require village elders to be involved in a mediation). Moreover, a suggestion was made early in the negotiations that foreign mediators may have different training than might be required in domestic frameworks, such that enforcing settlements resulting from their mediations might not be lawful, but the Working Group did not embrace this line of reasoning. See, e.g., intervention of Belarus, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸⁰ See, e.g., intervention of the United States, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

real property transfers; a settlement purporting to transfer real property will suffice to require a party to transfer the property by undertaking any formal requirements related to deeds, but the mediated settlement itself does not replace a need to comply with title transfer requirements under domestic law. This limitation only applies in narrow circumstances such as real property transfer or registration of security interests, where the functioning of public registers cannot be undermined by parties trying to circumvent those registries' requirements via a private settlement.¹⁸¹

Under Article 4(4), a court can also require the submission of “any necessary document in order to verify that the requirements of the Convention have been complied with.”¹⁸² However, this authority cannot be used to circumvent the Convention's limitation on formality requirements;¹⁸³ for example, a court cannot require the submission of a copy of the settlement that was contemporaneously notarized or signed by the mediator. Rather, this clause merely applies to documents that may be needed for a court to be assured that the requirements contained elsewhere in the Convention have been met. In this respect, the “requirements of the Convention” cited in this clause are generally the same as the “conditions” referred to in Article 3(2)—i.e., the provisions related to the scope of the Convention, the definitions, the Article 5 grounds for refusal, and any relevant declarations that a state has made.

The “competent authority” before which these issues may arise can be a court or any other authority empowered by the relevant state to address these issues, including an arbitral tribunal seated in that state. The competent authority must act expeditiously on requests for relief.¹⁸⁴ No specific timelines are required, but the competent authority is obliged to provide relief on a reasonable timeline. A state would be breaching its obligation under Article 4(5) if its courts act so slowly as to effectively be denying disputing parties the benefits of the Convention.

VII. The Obligations of Parties to the Convention

If a party to a mediated settlement agreement that resolves an international, commercial dispute presents that settlement—in writing, signed by the parties, and accompanied by evidence of mediation—to a court of a Party to the Convention, that court must recognize and enforce the settlement (subject to the Article 5 grounds for refusal, discussed in Section VIII *infra*).

For much of the negotiations, the European Union opposed having the Convention cover “recognition” in addition to enforcement.¹⁸⁵ Along with some of its member states, it argued that

¹⁸¹ See interventions of Germany and the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸² See, e.g., intervention of Israel, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the Russian Federation and Belgium, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸³ See, e.g., intervention of the United States and the ILA, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸⁴ Singapore Convention Article 4(5).

¹⁸⁵ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

recognition is only appropriate for acts of a state, such as judgments¹⁸⁶ (although this perspective ignored that agreements to arbitrate and arbitral awards can—and must, under the New York Convention—also be recognized),¹⁸⁷ and that mediated settlements are mere contracts.¹⁸⁸ Similarly, the European Union argued initially that *res judicata* effect should not apply to mediated settlements,¹⁸⁹ and that mediated settlements should not be given preclusive effects.¹⁹⁰

However, other states saw covering recognition as being an important component of a new Convention;¹⁹¹ these states saw recognition of a settlement as being a prerequisite to enforcement,¹⁹² and emphasized the need for a Convention to provide for the use of a mediated settlement both as a sword and a shield.¹⁹³ If a party could only rely on a mediated settlement when affirmatively seeking enforcement but could not rely on it equally as a defense, the party seeking to avoid compliance with a settlement could just initiate litigation itself (e.g., to seek declaratory relief) and thereby preclude application of the Convention and its streamlined framework. Moreover, in some instances, enforcement is not needed, only recognition.¹⁹⁴ Finally, as a mediated settlement under the Convention is not identified as being tied to a particular state of origin, recognition would not entail recognizing the settlement as an act of a particular state, but merely recognizing it as an (international) mediated settlement as defined by the Convention.¹⁹⁵

Much of the debate on this topic related to the nature of recognition and what it would entail. Some civil law states also worried that providing for recognition in the Convention would

¹⁸⁶ See, e.g., interventions of Germany, Bulgaria, and the European Union, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸⁷ Cf. intervention of France, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (arguing that arbitral awards are an exception but can be recognized because they are closer to judgments than to contracts)

¹⁸⁸ See, e.g., interventions of Germany and Sweden, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁸⁹ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹⁰ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹¹ See, e.g., interventions of Colombia and Ecuador, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹² See, e.g., intervention of Vietnam, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹³ See, e.g., intervention of Australia, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹⁴ See, e.g., intervention of Argentina, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹⁵ See, e.g., intervention of United States, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Iran, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. (noting that a court would have to decide whether an agreement is a settlement agreement and could recognize it as such).

preclude courts from opening a case and thus prevent them from considering other evidence (beyond the mediated settlement itself) to analyze the availability of defenses available under the Convention.¹⁹⁶ For example, using the “sword” and “shield” metaphor noted above, one delegation explained that its legal system provided two types of “shields”: one type that would consist of treating a document as evidence helping a court to decide a case, and another type that would prevent a court from admitting a lawsuit entirely.¹⁹⁷ From that perspective, “recognition” was said to necessarily imply the second type of shield, whereas for purposes of the Convention, a third—intermediate¹⁹⁸—type of shield was said to be needed, i.e., a shield that would let a court open a case and consider defenses but that would not reduce a mediated settlement to merely one piece of evidence among others (as opposed to being conclusive proof of a dispute’s resolution, if none of the limited set of defenses apply).¹⁹⁹

One suggestion was that the Convention could give mediated settlements the same effect when raised in defense as they are given in enforcement, but only to the extent that national law provides such a defense.²⁰⁰ But this limitation was also not accepted, as it would have made the availability of recognition contingent on the choices made in each state’s domestic law.

However, the repeated discussions made clear that “recognition” means different things in different legal systems and entails different consequences.²⁰¹ Thus, the Working Group made the decision to avoid using the term “recognition,”²⁰² and instead take a functional approach,²⁰³ describing the aspects of recognition that are needed here.²⁰⁴ The result is that the Convention

¹⁹⁶ See, e.g., intervention of Denmark, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Denmark, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹⁷ See intervention of Denmark, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

¹⁹⁸ Cf. intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting the possibility of a middle option between the two alternative procedural approaches described by Denmark)

¹⁹⁹ See, e.g., intervention of the United States, in Audio Recording: U.N. Comm’n on Int’l Trade L., 50th Session (United Nations 2017), July 7, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Japan and the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (Japan asked whether the meaning of invoking the settlement agreement was to use it as evidence in litigation, and the United States clarified that the clause provides for more than just introducing the settlement into evidence, and that by meeting the conditions in the Convention, the party seeking relief is thereby able to prove that the dispute was resolved).

²⁰⁰ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰¹ See, e.g., interventions of Germany and Denmark, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰² Cf. intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (noting at the first Working Group session that even if “recognition” isn’t seen as the right word to use, the practical effect of recognition is needed)

²⁰³ Cf. intervention of Norway, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (proposing at the first session that the intended effects be described, rather than using a word that has different associations in different legal traditions)

²⁰⁴ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in

does require recognition,²⁰⁵ at least as that term is understood in many legal systems (particularly in the common law world).

In developing the functional approach to describing recognition, the Working Group experimented with various formulations. One idea that was discussed but discarded was the suggestion to require that settlements be “treated as binding.”²⁰⁶ Ultimately, those wanting the Convention to cover recognition were not assured that “binding” would have the same effect as recognition in their systems.²⁰⁷ Those delegations wanted to ensure that the Convention would provide mediated settlements with a greater effect than simply the binding nature that any other contract would have—i.e., they wanted to ensure that a mediated settlement would have the same effect when used as a defense that it would have when enforcement is sought.²⁰⁸ An approach using the “binding” terminology did not provide these delegations with sufficient assurance that a mediated settlement would not merely be treated as one piece of evidence that the dispute was resolved but rather definitive proof.

(Note that one downside of the decision not to refer directly to the term “recognition” is that the Working Group then lacked an easy way to refer to the concept elsewhere. The functional definition eventually developed for Article 3(2)—described *infra*—is too lengthy to be easily replicated elsewhere in the text. Thus, Article 1’s discussion of scope is broad, referring to mediated settlements rather than to the forms of relief covered by the Convention, to avoid suggesting that the scope only covers enforcement and not recognition. Elsewhere in the Convention, such as in Article 5, the word “relief” is used to encompass both enforcement and that-which-is-not-called-“recognition.”)²⁰⁹

Ultimately, this issue was resolved as part of the five-issue compromise in February 2017. Article 3 of the Convention covers enforcement of mediated settlements as well as the core of recognition. In Article 3(1), the Convention requires states to enforce mediated settlements, in accordance with their rules of procedure and under the conditions laid down in the Convention (i.e., the procedural requirements in Article 4, the scope and definition requirements in Articles 1 and 2, and the grounds for refusal in Article 5, plus any relevant declarations). This paragraph thus covers the “sword”—the relief sought by a party who attempts to affirmatively compel compliance with a mediated settlement in the face of another party’s breach of its obligations

Audio Recording: U.N. Comm’n on Int’l Trade L., 50th Session (United Nations 2017), July 7, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰⁵ See intervention of Finland, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 2, 2017, 10:00-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰⁶ See, e.g., interventions of the United States and the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰⁷ See, e.g., intervention of Argentina, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰⁸ See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 19, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁰⁹ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in Audio Recording: U.N. Comm’n on Int’l Trade L., 50th Session (United Nations 2017), July 7, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

under the settlement. The Convention imposes no particular rules on execution; the relevant state’s rules of procedure apply, as the Convention only addresses the phase before execution, namely the determination that the settlement is enforceable and that the party is entitled to legal relief. In this respect, the Convention follows the approach of the New York Convention. Depending on their legal systems, some states may at present view “enforcement” as a process through which a document is taken directly to an administrative officer (such as a bailiff) who is not supposed to be required to undertake any complex analytical tasks but rather simply follows simple instructions, whereas in other systems, a judge performs a more thorough analysis (and can look at multiple, complex documents in doing so).²¹⁰ The Convention does not require either approach. States are not obligated to provide access to enforcement without providing the other party with an opportunity to present available defenses. This difference in legal systems may also shed further light on the reluctance of some delegations to address “recognition,” which is seen as being more clearly a judicial procedure rather than one merely undertaken by an administrative officer. Article 3(1) would also cover requests for declaratory relief, but states are not obliged to apply the Convention to other types of legal actions that might be available in some systems, such as if domestic law gives a party the ability to request that a court interpret a contract.²¹¹

Article 3(2) then provides the functional description of “recognition” without using the word. This paragraph applies if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement. In other words, it applies if the parties have successfully mediated a dispute but then one party attempts to relitigate part of the underlying dispute that was resolved via mediation. The paragraph thus provides the “shield” to complement the “sword” in Article 3(1).²¹² If the described situation arises, the state shall allow the party to invoke the settlement agreement. This right is not merely an evidentiary rule permitting a party to cite a settlement and introduce it into evidence where it can be considered alongside other evidence.²¹³ Rather, invoking a settlement means being able to rely on it as a complete defense.

²¹⁰ See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹¹ See, e.g., interventions of Sweden and the Chair, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹² Note that Article 3(2) is one of the pieces of the Convention where “Party” and “party” are both used, although each refers to a different entity; the “Party to the Convention” shall allow “the party” to invoke the settlement agreement. The state or regional economic integration organization that has joined the Convention is the “Party,” and a “party” is one of the disputing parties bound by the settlement agreement itself. While other (potentially less confusing) approaches were considered, such as referring to “Parties” as “Contracting States” as is done in some other private law treaties, the Working Group ultimately chose this approach. See, e.g., intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 7, 2018, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹³ Note that prior to the development of the five-issue compromise, the European Union introduced a different version of this text that was less clear in its purpose and effect. That proposal referred to invoking the mere “existence” of the settlement agreement (rather than to invoking the settlement agreement itself). Moreover, it would have limited a state’s obligation to allowing invocation of the settlement agreement in accordance with the “law” of the state rather than only its rules of procedure. See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 10:00-13:00,

The state can require the invocation to occur in accordance with its rules of procedure, such as if it has to be raised at a particular time in the litigation, via a particular motion, and subject to normal rules governing the conduct of litigation. However, the state’s rules of procedure cannot conflict with, nor result in the denial of, the substantive protections in the Convention. (In this sense, the approach taken is akin to that in Article III of the New York Convention, which also subjects the recognition and enforcement of awards to the state’s rules of procedure.) Article 3(2) also provides that the invocation of the mediated settlement must occur under the conditions laid down in the Convention; in other words, just as for enforcement requests under Article 3(1), the requirements of other articles must be met (i.e., the scope requirements in Article 1, the definitions in Article 2, the procedural requirements in Article 4, the non-applicability of the grounds for refusal in Article 5, and any declarations that may have been made by the relevant state).

The purpose and effect of invoking the mediated settlement is to prove that the matter has already been resolved. Article 3(2) thus provides a definitive result: if the conditions laid down in the Convention are met, in accordance with the state’s rules of procedure, then the “matter” (the underlying dispute that was successfully mediated) is thereby proven to be already resolved—a complete defense to the “dispute” (the ongoing litigation).²¹⁴ Ideally, the text of this paragraph would have been drafted more clearly. Notably, however, the Chair specifically asked the delegations that were involved in the informal consultations on the five-issue compromise to respond to a question about the meaning of “to prove that the dispute has been settled” (a phrasing that was later clarified to “resolved”).²¹⁵ The response (never contradicted, and repeated at the next session) was that, when a party is seeking to invoke a settlement as a defense, “by meeting all of the conditions laid down in the instrument, the party seeking relief is thereby able to prove that the dispute has been settled, which ... is the relief that the party is seeking” (with the “conditions” referring to the defenses, definitions, and formal requirements).²¹⁶

<http://www.uncitral.org/uncitral/audio/meetings.jsp>. The intended effect of that approach was never fully explained, but raised concerns regarding the amount of leeway that it would give states in implementing the obligation. See, e.g., *See, e.g.*, interventions of Israel, Mexico, Honduras, Australia, the United States, the Russian Federation, and the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. Although the eventual text of Article 3(2) drew heavily on the drafting approach suggested by the European Union, the intended effect of the final text is much more robust, as noted below.

²¹⁴ Working Group II Oct. 2017 report, *supra* n.28, para. 44. *Cf.* intervention of Thailand, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (where parties have entered into a settlement and one party then brings a claim that was settled, the other party can ask the court to recognize that the claim was already settled).

²¹⁵ *See* intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹⁶ *See* intervention of the United States, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. Similarly, at the UNCITRAL Commission, it was noted that this provision covered “the use of a mediated settlement as a defense to definitively demonstrate that a dispute was already resolved.” At a later stage, delegations debated whether the word “conclusively” should be included in Article 3(2), but it was deemed unnecessary, as the inclusion would not have changed the substantive meaning. *See*

VIII. Grounds for Refusal

Following the model of the New York Convention, Article 5 includes an exclusive list of grounds on which a court can refuse to recognize or enforce a mediated settlement. The Working Group aimed to keep the available defenses to a minimum,²¹⁷ as a complex mechanism with many review grounds would be problematic for parties who want a fast and efficient process.²¹⁸ The general sense of the Working Group was that the overall approach should be comparable to the regime applicable to arbitral awards under the New York Convention.²¹⁹ Most of the grounds for refusal have to be raised and demonstrated by the party opposing relief. For the remaining grounds (in Article 5(2)), the court can raise concerns *sua sponte*. Of course, a party resisting relief can also demonstrate that other requirements of the Convention have not been met, such as the dispute not being commercial; no explicit grounds for refusal are needed for those issues, as including such grounds explicitly would merely have duplicated the rest of the Convention.²²⁰

All of the Article 5 grounds for refusal are permissive rather than mandatory; a court can choose to provide relief even if a particular exception might apply, and if a state implements the Convention through legislation, it has no obligation to permit courts to use all grounds for refusal. At the same time, the listed grounds are exhaustive²²¹—a state cannot enable courts to deny relief on additional grounds not permitted in the Convention. The Working Group rejected suggestions for other grounds for refusal. Permitting a court to deny relief based on a lack of “due process” during the mediation was discussed²²² but not included as a ground for refusal, because in mediation the final resolution is agreed to voluntarily, making the process by which it was developed less relevant (and in any event, what “process” would be due during a mediation was unclear).²²³ The grounds for refusal related to mediator conduct during the process,

interventions of Spain, Israel, the United States, and Uganda, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹⁷ See, e.g., interventions of Israel and India, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Canada, France, Australia, Thailand, and the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²¹⁸ See, e.g., intervention of the Florence International Mediation Chamber (“FIMC”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; see also intervention of Iran, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. (noting that like a drowning person who will claw to any possible branch, a non-complying party will contest on any ground he can)

²¹⁹ See, e.g., interventions of the Chair and Thailand, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²⁰ See, e.g., interventions of the United States and Israel, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²¹ See, e.g., interventions of Canada, Norway, and the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²² See, e.g., interventions of Germany and Spain, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²³ See, e.g., interventions of Bulgaria, Finland, and Sweden, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

discussed in subsection H *infra*, come closest to addressing those “due process”-type concerns. Additionally, the Working Group considered including a ground for refusal that would have applied in cases where a mediated settlement was inconsistent with a judgment. This proposal gave rise to a fear of forum shopping—i.e., that parties might litigate in various jurisdictions in an attempt to obtain a judgment that could then be used to block relief under the Convention (particularly as, without a “seat” of the mediation, no one forum’s judgments would have a privileged ability to “annul” a mediated settlement).²²⁴ With respect to the issue of litigation in other fora, in lieu of a ground for refusal, only the Article VI authority to adjourn a decision based on pending litigation elsewhere was included in the Convention.²²⁵

A. Incapacity

Article 5(1)(a) permits a court to refuse a request for relief if a party to the settlement agreement was under some incapacity, such as if the party was a minor or intoxicated. This ground for refusal will not likely be applicable very often, as for most settlement agreements within the scope of the Convention, one or more lawyers would typically be involved for each of the parties.²²⁶ The Working Group discussed including language from the analogous provision (Article V(1)(a)) of the New York Convention to point to the law “applicable” to the relevant party, but deemed such a test not to be useful to include, as it did not provide an actual rule for determining the applicable law.²²⁷

B. Invalidity

Article 5(1)(b)(i) permits a court to deny relief if the mediated settlement is “null and void, inoperative or incapable of being performed.” This ground for refusal draws on language from Article II(3) of the New York Convention, in which context it applies to the validity of agreements to arbitrate.²²⁸ The ground for refusal encompasses various contract law concepts

²²⁴ See, e.g., intervention of France, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Mexico, the Republic of Korea, Australia, Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²⁵ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²⁶ See, e.g., intervention of Sweden, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 3, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²⁷ See, e.g., interventions of Finland, Singapore, and Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²²⁸ See, e.g., interventions of Thailand and Finland, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

such as fraud and misrepresentation,²²⁹ and is broad enough to cover instances in which the mediated settlement may be considered voidable at the option of the party resisting relief.²³⁰

However, this ground for refusal does not encompass arguments that a mediated settlement is not valid because of a failure to comply with domestic law requirements that are displaced by the Convention,²³¹ such as any requirements that mediators be licensed in a particular jurisdiction or that mediations must be conducted under certain rules or by certain institutions, or that mediated settlements must be notarized or meet other (extra-Convention) formal requirements.²³² As noted in Section VI *supra*, this restriction on formalities does not prevent a state from enforcing its requirements regarding notarization of documents that transfer real property.²³³

The analysis of a mediated settlement’s validity occurs “under the law to which the parties have validly subjected it, or failing any indication thereon, under the law deemed applicable by the competent authority.” Thus, if the disputing parties make a choice of law that is valid under the law of the state where relief is sought, that choice is effective; otherwise, that state’s private international law rules apply to determine the applicable law. This approach reflects the general principle of respecting party autonomy, which applies to choice of law issues even beyond this defense. It was noted early in the Working Group’s discussions that a mediated settlement may be governed by an applicable law chosen by the parties and that, where such a choice is relevant under the Convention, the court should not ignore the chosen law in order to apply the law of the state where relief is sought.²³⁴ The issue of applicable law is not otherwise addressed in the Convention; no harmonized rules for determining the applicable law were

²²⁹ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³⁰ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Israel, the United States, and the Chair, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 5, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; Working Group II Feb. 2018 report, *supra* n.28, para. 43.

²³¹ See, e.g., Note by the Secretariat, A/CN.9/WG.II/WP.202 (2017), paragraph 43; interventions of the United States, Singapore, and the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of the United States, Finland, and the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³² Comments by the Government of the United States of America, A/CN.9/WG.II/WP.203 (2017), paragraph 4. Note that the proposed language in paragraph 6 of this U.S. paper was not added to the text of the Convention, as what became Article 4(4) was clarified to state that the competent authority could only require additional documents to demonstrate that the requirements of the Convention have been met, and the Working Group’s prior discussion of the scope of the validity defense remained unchanged. See, e.g., intervention of the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³³ See interventions of Germany and the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³⁴ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

developed.²³⁵ On most issues, the Convention rules apply with an autonomous meaning, not drawn from an applicable law, so choice of law rules are generally not relevant to application of the Convention itself.

C. Not Binding, or Not Final, According to Its Terms

Article 5(1)(b)(ii) permits a refusal to provide relief if the mediated settlement is “not binding, or is not final, according to its terms.” This ground for refusal only applies if, in the mediated settlement itself, the parties explicitly stated that they did not intend for that document to be a binding or final agreement. Thus, this ground for refusal is redundant and could have been omitted, as Article 5(1)(d), discussed in subsection G *infra*, would already permit a court to refuse relief in such situations. Some delegations nevertheless insisted that this ground for refusal be explicitly included as a separate subparagraph.

The “according to its terms” restriction means that a court may only look at what is explicitly stated within the four corners of the mediated settlement to determine whether it is final or binding, thus ruling out extrinsic evidence.²³⁶ (The phrasing “on its face” was also considered, but was deemed not sufficiently clear for many legal cultures.) This provision would be far broader if the “according to its terms” phrase were not included, as questions might then arise regarding what makes a settlement final or binding if not compliance with the Convention (e.g., whether those standards have an autonomous Convention meaning or refer to an applicable law). As drafted, however, the parties may not use this provision to argue that the settlement should be considered not binding or final based on any reasons other than their explicit statements in the settlement itself.

Earlier in the negotiations, the Working Group considered whether a settlement should have to explicitly provide that it was intended to be binding, but this idea was rejected, as parties generally do not state explicitly that they intend to be bound, but rather indicate by their signatures that they intend to be bound.²³⁷ The Convention thus assumes that parties intend to be bound by a signed agreement, but permits parties to rebut that presumption by explicitly stating that they do not intend it to be binding.

This exception also does not cover other types of claims that a mediated settlement is not legally binding, as the Convention itself provides the framework for determining whether a mediated settlement is binding; otherwise-applicable domestic law is displaced. A proposal was made to refer to whether a mediated settlement was final or binding under the law of the state where relief is sought.²³⁸ This approach was not followed. The Convention itself determines

²³⁵ See, e.g., interventions of Canada, Finland, and Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³⁶ See, e.g., intervention of Australia, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 5, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³⁷ See, e.g., interventions of Canada and Finland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²³⁸ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

whether the settlement is binding (i.e., as long as the scope and definitions requirements are met and no other grounds for refusal apply), and other provisions cover the different situations where finality would be at issue. Article 5(1)(b)(iii), discussed in subsection D *infra*, separately addresses mediated settlements that are not final because they were superseded, and the signature requirement of Article 4(1)(a) would exclude mediated settlements that are not final because they were never concluded.²³⁹ Similarly, parties cannot claim that a mediated settlement is not final because it only resolves part of a dispute; a mediated settlement that resolves some issues but not others is still covered.²⁴⁰

D. Subsequently Modified

Article 5(1)(b)(iii) permits a court to refuse relief if the mediated settlement “sought to be relied upon ... has been subsequently modified”—in other words, if a party to the settlement agreement seeks relief based on a version of the settlement that was later superseded. As with the ground for refusal in Article 5(1)(b)(ii), this subparagraph was not really needed, but was included at the insistence of several delegations. The subparagraph does not apply as long as the court is presented with the final settlement agreement including all modifications. The reference in the chapeau of Article 5(b) to the mediated settlement “sought to be relied upon” was included because of this subparagraph, in order to clarify that if a mediated settlement has been modified after it is concluded, the settlement that is submitted to the court must be the settlement as modified. Relief cannot be refused simply because the parties have later had to make modifications to a mediated settlement, as long as the modified settlement agreement is provided to the court, regardless of the extent of the modifications and the time elapsed after the mediation.²⁴¹

E. Obligations Have Been Performed

Article 5(1)(c)(i) provides another limited ground for refusal targeted at a very specific situation. This ground applies only if a party has already satisfied its obligations under the mediated settlement; if it has already complied, then further relief should not be ordered against

²³⁹ Cf. A/CN.9/WG.II/WP.203; interventions of the United States, Japan, Mexico, and China, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴⁰ Cf. interventions of the Czech Republic and Colombia, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Canada and Germany, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 5, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴¹ In an extreme situation, perhaps a party could argue that modifications to a settlement agreement take it outside the scope of the Convention, but only if the situation was so attenuated that it would be virtually tantamount to procedural fraud to claim that the settlement agreement was still the original mediated settlement—e.g., if, twenty years after a mediated settlement, the parties modify it to such an extent that the obligations are completely displaced, and the parties seem to have chosen to modify the settlement agreement rather than enter into a new agreement for tactical reasons such as ensuring, in bad faith, continued application of the Convention.

it. Although this exception in some ways seems too obvious to need to be stated, it was included to provide greater certainty to a few delegations.

F. Obligations are Not Clear or Comprehensible

Article 5(1)(c)(ii) similarly provides a narrow ground for refusal, and one that would only apply in a fairly unlikely situation. Under this provision, a court cannot refuse relief merely because the mediated settlement was poorly drafted or includes terms that are vague. Instead, the clause applies only if the mediated settlement is so confusing or ill-defined that the competent authority could not confidently provide the requested relief even if it found the party entitled to relief. When this concept was originally proposed by Germany,²⁴² other delegations opposed it out of a fear that it would create too broad of an exception,²⁴³ but the Working Group agreed to include the concept when it was clarified that such concerns were based on a misunderstanding of the intent behind the German proposal.²⁴⁴ If the competent authority can determine whether the mediated settlement provides for an obligation, and can adequately frame its order providing relief, then this ground for refusal does not apply; the exception is meant only to protect competent authorities from being forced to act in situations in which they truly do not know what relief to provide.

G. Contrary to the Terms of the Settlement

Article 5(1)(d) permits a court to refuse relief if granting relief would be contrary to the terms of the mediated settlement. This provision applies only to situations in which the requested relief would be directly inconsistent with the parties' agreement in the mediated settlement. It therefore reflects the fundamental principle of party autonomy—i.e., as mediation is intended to enable parties to identify their own resolution to a dispute, it would be contrary to the purpose of mediation to apply a mediated settlement in a manner inconsistent with what the parties had agreed.²⁴⁵ Thus, for example, if the parties agree to limitations on their ability to seek relief, those limitations must be given effect.²⁴⁶ Choice of forum clauses under which the parties to the mediated settlement can only seek relief in a particular jurisdiction should be given effect, as should clauses in the mediated settlement providing that further disputes will be resolved by

²⁴² See intervention of Germany, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴³ See, e.g., interventions of Canada and the Forum for International Conciliation and Arbitration (“FICA”), in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴⁴ See, e.g., intervention of Germany, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴⁵ See, e.g., intervention of United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴⁶ See, e.g., intervention of United States, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

arbitration.²⁴⁷ Similarly, the parties might agree in the mediated settlement that they must return to the mediator before seeking relief in court, or that other conditions must be fulfilled before certain obligations even arise (e.g., that one party has to make a payment only if a certain event occurs). In any of these situations, the court can deny relief if granting relief would be inconsistent with the agreement struck by the parties in the mediated settlement. Importantly, the application of this rule provides parties with the ability to opt out of the Convention entirely; if the parties agree in the mediated settlement that they do not want the Convention to apply to the settlement, then it would violate that agreement for a competent authority to apply the Convention in response to a request for relief based on the settlement.²⁴⁸ In that respect, Article 5(1)(d) is similar to Article 6 of the CISG, which lets parties opt out of the application of that treaty.²⁴⁹

H. Mediator Misconduct

In multiple ways, Articles 5(1)(e) and (f) are different from the grounds for refusal described above. Procedurally, these two defenses were included in the Convention as one of the five elements in the compromise package that resolved other significant issues; many delegations sought to exclude such exceptions entirely, and only agreed to narrow versions of the clauses in exchange for other concessions. Substantively, these two clauses relate less to the agreement reached by the disputing parties than to the conduct of the third party who helped them resolve the dispute, and the consequences of such conduct. Some delegations initially sought broader exceptions than are included in the final text, such as permitting a court to refuse relief if the mediator failed to treat the parties fairly,²⁵⁰ and as the compromise package was being discussed, argued for a need to include two separate exceptions to address two different situations.²⁵¹ By contrast, other states had opposed including any exceptions specifically addressing the mediator's behavior, as they saw such issues as being adequately covered by other grounds for refusal.²⁵² These states contended that a mediator does not have to be impartial in the same way

²⁴⁷ See, e.g., intervention of France, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁴⁸ See, e.g., interventions of the United States, Israel, and the Netherlands, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; Working Group II Feb. 2018 report, *supra* n.28, para.78.

²⁴⁹ Cf. CISG, *supra* n.109, Article 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

²⁵⁰ See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵¹ See, e.g., intervention of Germany, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵² See, e.g., interventions of Mexico, Australia, the United States, Singapore, Canada, China, Argentina, and Pakistan, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of Mexico, the United States, and Japan, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

that an arbitrator does;²⁵³ the parties to a dispute can have good reasons to choose to use a partial mediator, such as someone who already has useful knowledge of the situation²⁵⁴ or who might be close to one or both of the parties and therefore able to persuade them.²⁵⁵ Similarly, a mediator may treat parties in a manner that might look unequal but might be justified; a mediator may need to spend only a few minutes with one party but an hour with the other, a disparity that would not be proper in arbitration.²⁵⁶ Moreover, a party can withdraw from mediation if it believes it is not being treated fairly.²⁵⁷ But despite these concerns, the Working Group ultimately agreed to include two narrowly-tailored grounds for refusal on this topic.

Article 5(1)(e) applies only if the party opposing relief can demonstrate a serious breach of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement. This exception only applies to the extent that there are in fact “applicable” standards that governed the mediator or the mediation. Such standards could have applied based on the mediator’s licensing regime or based on the location of the mediation (if the mediation did clearly occur in one place, given the facts at hand), or standards might have applied due to the parties’ agreement with the mediator (or pursuant to the rules of an administering institution). The Working Group cited several examples of potentially applicable standards, which could be imposed by domestic law (such as by enactment of the Model Law on International Commercial Conciliation) or by codes of conduct;²⁵⁸ relevant standards could cover issues such as independence, impartiality, confidentiality, and fair treatment of the parties.²⁵⁹ However, to the extent that no such binding standards applied to the mediator or the mediation at the time of the mediation, the competent authority cannot apply standards on a post hoc basis (e.g., the competent authority cannot deny relief based on an argument that the mediator should have followed certain best practices or other jurisdictions’ requirements). Moreover, the alleged misconduct must be a serious breach of those applicable standards—not just questionable conduct or a minor breach.

Additionally, the party resisting relief must clearly demonstrate that if the breach had not occurred, that party would not have entered into the mediated settlement; the party must establish a causal link between the breach and the decision to settle, not just a correlation. Such an effect may not be presumed. This question is intended to be an objective test, not one that can be

²⁵³ See, e.g., intervention of IMI, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁴ See, e.g., intervention of the ILA, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁵ See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁶ See, e.g., intervention of Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁷ See, e.g., interventions of China and Thailand, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁸ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁵⁹ Note by the Secretariat, A/CN.9/WG.II/WP.202 (2017), para. 47.

satisfied by a party claiming that subjectively it would not have entered into the settlement.²⁶⁰ The Working Group discussed whether to refer explicitly to whether a “reasonable” party would have entered into the mediated settlement given the serious breach of applicable standards.²⁶¹ That term was not put in the text explicitly, as “reasonable” was said not to be a concept that could be easily applied in some legal systems, but the Working Group’s intent was that the test would be applied in the same manner.²⁶² To be covered, the mediator’s misconduct must have vitiated the consent of the party seeking to oppose relief.²⁶³ Thus, this ground for refusal sets up such a high bar that it will only apply in extraordinary circumstances²⁶⁴ that would almost inevitably fall within other grounds for refusal (such as coercion by the mediator that would have made the settlement invalid under applicable law). These conditions will likely be difficult to demonstrate in practice, particularly given the relative paucity of evidence of mediator misbehavior that would likely be available compared to the greater level of documentation often available in arbitration.²⁶⁵ Establishing such a high bar makes sense, however, in light of the Working Group’s desire to avoid creating a test that would generate additional disputes.²⁶⁶

Article 5(1)(f) addresses a slightly different circumstance in which the mediator’s conduct can provide a ground for refusal. This provision covers a “failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.” This provision was controversial, as in many jurisdictions, mediators generally do not make the types of disclosures that arbitrators make, as the mediator does not have the power to force the parties to reach a result.²⁶⁷

²⁶⁰ See, e.g., interventions of the United States, the China Society of Private International Law (“CSPIL”), and IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶¹ See, e.g., intervention of CCIAG, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶² See, e.g., interventions of United States and Bulgaria, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶³ See, e.g., intervention of IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶⁴ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶⁵ See, e.g., intervention of France, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶⁶ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶⁷ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

Unlike Article 5(1)(e), this ground for refusal is not restricted to situations in which other sets of standards independently applied to the mediator’s conduct; rather, Article 5(1)(f) creates an autonomous standard that can be relied upon regardless of whether any “applicable” standards required disclosures. However, in other respects, Article 5(1)(f) is similarly narrow in its scope. For this exception to apply, a mediator must have failed to disclose circumstances that raise “justifiable doubts” as to his impartiality or independence (not merely an “appearance” of a conflict of interest). The circumstances must be significant, such as direct compensation from one of the parties that was not disclosed, and not merely information regarding past relationships or other attenuated links. “Justifiable doubts” is intended to establish an objective standard, not affected by whether the party in question subjectively doubts the mediator’s independence and impartiality.²⁶⁸

If the relevant circumstances were actually known by the party resisting relief, then this ground for refusal does not apply.²⁶⁹ If the party already knew about those circumstances, the mediator’s failure to disclose them explicitly could not have affected that party’s willingness to enter into the settlement.²⁷⁰ Because a mediator does not have the power to impose a settlement on the parties (unlike an arbitrator), the parties can choose someone who has a relationship with one or both of them, as in some situations such a mediator might be best placed to help them come to a settlement (as long as the parties are both aware of the situation).

Additionally, the mediator’s failure to disclose must have had either a material impact or an undue influence on the party resisting relief. Finally, the party resisting relief must show that it would not have settled its dispute but for the misconduct; it must affirmatively demonstrate a causal relationship between the failure to disclose and the decision to settle. Such an effect may not be presumed. The party resisting relief cannot simply identify something that the mediator did not disclose and use that nondisclosure as a reason to get out of a settlement that it now regrets. Rather, as under Article 5(1)(e), this element is intended to establish an objective test, such that the failure to disclose would have led a reasonable person not to consent to the settlement agreement.

I. Public Policy and Subject Matters Not Capable of Settlement by Mediation

Article 5(2) includes two additional grounds for refusal that are contained in a separate subparagraph because the competent authority can raise either of these grounds *sua sponte*.

²⁶⁸ See, e.g., interventions of IAM and FICA, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁶⁹ See, e.g., interventions of Canada, Israel, and Germany, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁰ See, e.g., intervention of IAM, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 10, 2017, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

These provisions are drawn from analogous grounds for refusal in Article V(2) of the New York Convention and should generally be interpreted in a similar manner.²⁷¹

Under Article 5(2)(a), the court can refuse relief if granting relief would be contrary to the public policy of that state. As under the New York Convention, “the standard of proof required to establish a public policy exception . . . is a demanding one,” under which “courts uniformly hold” that its application is “‘exceptional’ and ‘extremely narrow,’ to be applied ‘sparingly’ and with ‘extreme caution,’ and to be interpreted ‘restrictively.’”²⁷² In particular, this ground for refusal cannot be used as a means to circumvent other elements of the Convention to which a state has agreed; for example, a court cannot refuse to recognize or enforce a mediated settlement on the grounds that the a state has a public policy requiring mediation to be conducted by a licensed mediator. The Working Group noted that national security grounds could be among the types of public policy concerns that would justify invoking this exception.²⁷³

Finally, Article 5(2)(b) permits a court to refuse relief if the “subject matter of the dispute is not capable of settlement by mediation” under the law of the state where relief is sought. For this provision, the relevant dispute is the underlying dispute that was mediated, not the dispute over the relief being requested. This provision would only apply in situations where a party would not have been legally able to agree to undertake certain obligations or give up certain rights via mediation, such as if some disputes are subject to mandatory adjudication processes. As under the New York Convention, this “exception is to be applied sparingly, only when statutory provisions clearly forbid” the mediation of “particular categories of disputes or claims.”²⁷⁴ Thus, its application would presumably be quite rare (in particular, less frequent than in the context of arbitration, as states are less likely to restrict the voluntary settlement of disputes than to prevent them from being resolved by arbitration), and in any event would only affect whether a mediated settlement can be relied upon in a certain jurisdiction.

IX. Declarations

Article 8 permits a state to make two types of declarations affecting its obligation to apply the Convention in certain circumstances.

First, under Article 8(1)(a), a state may declare that it “shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.” By default, the convention does apply to mediated settlements to which states are parties, as long

²⁷¹ Thus, as with the analogous grounds of refusal under the New York Convention, the ultimate burden of proof under Article 5(2) remains with the party resisting relief, notwithstanding that the court can raise this issues on its own. *Cf.* Gary Born, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014) § 26.05[C][9][c].

²⁷² *Id.*

²⁷³ Working Group II Feb. 2018 report, *supra* n.28, para. 67; intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 5, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁴ Born, *INTERNATIONAL COMMERCIAL ARBITRATION*, at § 26.05[C][10][b].

as the settlement meets other requirements (e.g., it qualifies as commercial).²⁷⁵ However, the Working Group wanted to give states flexibility on this issue so as not to deter them from becoming Parties.²⁷⁶ In some situations, only certain agencies or individuals in a government may be authorized to enter into settlements, and a state may want to ensure that it avoids problematic situations in which, if a mediated settlement is signed by a person or agency not authorized under its domestic law, it could then be confronted by a request for relief under the Convention. Alternatively, a state may wish to restrict its obligation to apply the Convention to particular categories of mediated settlements involving state actors. Thus, states can make targeted declarations defining the scope within which they want the Convention to be applied in their courts. Such a declaration would only have a limited reciprocal effect: if a Party exempts a particular set of its own state actors from being subject to the Convention in its courts, other Parties would have no obligation to permit those actors to seek relief under the Convention in their courts.²⁷⁷ Moreover, this declaration is not meant to enable states to exempt state-owned enterprise from coverage under the Convention.

Second, Article 8(1)(b) permits a state to declare that it “shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.” Generally, the Convention applies as default law, except to the extent that parties to a mediated settlement affirmatively opt out from having the Convention apply, in which case Article 5(1)(d) would permit a court to refuse a request for relief. However, Article 8(1)(b) permits states to choose to apply the Convention on an “opt-in” basis, such that the Convention will only apply to a mediated settlement if the parties to the dispute affirmatively choose to have it apply. As noted above, this outcome—application of the Convention as the default approach, while giving states the option to apply the opposite rule by requiring disputing parties to opt in to the Convention’s application—was part of the five-issue compromise.

This issue was debated a number of times in the Working Group. At first, the majority of delegations supported an approach in which the disputing parties would have to opt in to the application of the Convention,²⁷⁸ although the debate later shifted to an even split in the room.²⁷⁹ Some delegations argued that the desire for a mediated settlement to be enforceable could not be

²⁷⁵ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁶ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 64th Session (United Nations 2015), Feb. 2, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of Israel, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁷ See, e.g., intervention of Singapore, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁸ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 5, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; interventions of France and the European Union, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁷⁹ See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>

assumed across cultures.²⁸⁰ An opt-in approach was also supported by some of those who wanted greater formality requirements in the Convention, on the basis that the competent authority should be able to see from the face of the mediated settlement—based on an explicit opt-in—that the obligations were intended to be subject to the Convention.²⁸¹ By contrast, others contended that when parties enter into a settlement agreement, the presumption is that they intend to comply with it, and that parties should not have to make further statements to clarify that they want the settlement to have legal effect.²⁸² Thus, for situations in which the parties to a settlement do not explicitly address whether the Convention should apply, the assumption should not be that they did not want their obligations to be enforceable.²⁸³ Similarly, some delegations pointed out that the opt-out approach would result in a broader application of the Convention, which would serve to promote mediation,²⁸⁴ and that, as arbitration does not have an opt-in requirement for awards to be enforceable, imposing such a requirement in this Convention would make mediation less attractive by comparison.²⁸⁵

Based on the five-issue compromise, the Convention will apply to all mediated settlements in which the parties do not opt out, but states that make the Article 8(1)(b) declaration only have to apply the Convention when the disputing parties agree to its application.²⁸⁶ In seeking relief in such a state, a party to a mediated settlement would not have to demonstrate that any specific formulation was used to opt in to the Convention. A court in such a state cannot require any particular “magic words” to have been used; although the parties to the mediated settlement could explicitly cite the Singapore Convention, they could also simply include a choice of law clause that points to the law of a jurisdiction where the Convention applies by default. Similarly, the disputing parties would not have to opt in via the mediated settlement itself; they could also opt in at an earlier stage of the process as well,²⁸⁷ such as in an agreement to mediate.

Hopefully, few states will make such a declaration, as doing so would significantly limit the application of the Convention, given that most parties likely will not be aware of the need to

²⁸⁰ See, e.g., intervention of Germany, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸¹ See, e.g., intervention of Germany, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸² See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸³ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸⁴ See, e.g., interventions of China, Pakistan, and the United States, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸⁵ See, e.g., intervention of Canada, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 5, 2016, 10:00-13:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of China, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>; intervention of BAC, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸⁶ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸⁷ See, e.g., interventions of France, Finland, and the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

opt in and thus will unintentionally fail to do so.²⁸⁸ Moreover, the opt-in approach is inconsistent with the principle that parties should comply with their agreements. Particularly given the exclusion of consumers and family and employment law, states should not need to limit access to the Convention’s more efficient framework. At the same time, if including this declaration option enables additional states to become Parties to the Convention, it may be a useful addition.

An Article 8(1)(b) declaration would not have reciprocal effects, nor would it in any way affect the treatment of mediated settlements in other jurisdictions. The declaration only affects the court where relief is sought; other courts presented with mediated settlements under the Convention would never encounter a need to evaluate whether those settlements are attributable to a state making such a declaration (as mediated settlements are not tied to any particular state, and factors such as the habitual residence of the party seeking relief are only relevant for satisfying the internationality requirement).²⁸⁹

X. REIOs and Territorial Units

Two other provisions of the Convention merit brief discussion. First, under Article 12(4), the Convention gives way to the internal rules applied by regional economic integration organizations (REIOs) such as the European Union, but only in limited situations. First, under Article 12(4)(a), any contrary REIO rules could prevail if relief is sought in a member state of a REIO and all states relevant under Article 1(1) are member states of the REIO (such that none of the factors qualifying the mediated settlement as “international” are tied to a state outside the REIO). If any non-REIO state is relevant in determining whether the mediated settlement is “international,” then Article 12(4)(a) does not apply. In other words, if the European Union and all of its member states join the Convention, and a mediated settlement between two E.U.-based companies is considered by an E.U. member state court, the Convention would still apply (notwithstanding any contrary rules in an E.U. regulation) if a substantial part of the obligations under the settlement were to be performed in a non-E.U. member state. Article 12(4)(b) then provides a separate test under which REIO rules can still prevail (even if the Article 12(4)(a) test is not met) if the application of the Convention would conflict with the REIO’s internal rules about recognition and enforcement of judgments between member states. In other words, if relief under the Convention is sought in one REIO member state, and that state issues a judgment (either granting or denying relief), other REIO member states might be obliged to recognize that

²⁸⁸ See, e.g., intervention of the American Bar Association (“ABA”), in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁸⁹ See, e.g., intervention of Israel, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>. In theory, a race to the bottom would be possible, with states making the declaration to protect those habitually resident in their territory (*i.e.*, entities that would likely have assets in the jurisdiction and against whom relief would more likely be sought in the state’s courts). However, such a scenario seems implausible, as any state joining the Convention would be doing so to promote the use of mediation, not to provide a particular advantage to its nationals. (Given the lack of a reciprocity requirement or any state of origin for settlements, a state seeking an asymmetric advantage for its nationals would simply not join the Convention at all, as its nationals could still use the Convention in other jurisdictions. But such free riding would only be feasible once the Convention has many Parties.)

judgment, rather than applying the Convention de novo.²⁹⁰ A party seeking relief must therefore choose carefully as among REIO member states in which to seek relief, as that party may not be able to seek relief in another REIO member state if relief is denied in the first member state.²⁹¹ However, the party could still seek relief under the Convention in other states outside the REIO without losing the protections of the Convention, even if the REIO member state judgment denies relief.

Finally, Article 13(1) permits a state that has two or more territorial units in which different systems of law apply to declare that the Convention is to extend to all of the territorial units or only to one or more of them.²⁹² However, even if such a state chooses not to apply the Convention to all of its territorial units, a mediated settlement involving a party from an excluded territorial unit will still be covered by the Convention as long as the settlement qualifies as international. Exclusion of a territorial unit merely means that the courts in that territorial unit do not have to apply the Convention when relief is requested, not that the Convention does not apply to parties whose place of business is in that territorial unit.

XI. Conclusion

The development of such a groundbreaking treaty in such a short period of time seemed quite unlikely at the outset of UNCITRAL's consideration of this topic. Yet in several years of work, UNCITRAL has produced a new Convention that, in the decades to come, could alter the landscape of international dispute resolution in a manner previously accomplished only by the New York Convention.²⁹³ The Singapore Convention has great potential to bolster the use of mediation as a method for resolving cross-border commercial disputes. Whether the Convention will live up to this promise will depend on whether a critical mass of states choose to join the Convention, which in turn will depend on whether lawyers (particularly in-house counsel),

²⁹⁰ See, e.g., intervention of Germany, , in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁹¹ See, e.g., intervention of ILA, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

²⁹² Note that Article 13(3)(b) is a clause without any actual effect. That provision states that, for Parties with two or more territorial units in which different systems of law apply, references to a place of business in state shall be construed as referring to the place of business in the relevant territorial unit. Although this formulation is fairly standard for this type of treaty, it accomplishes nothing in this Convention, as a party's place of business is only relevant for determining whether a mediated settlement is international. Whether the party's place of business is deemed to be in a particular territorial unit rather than in the state itself makes no difference for this analysis.

²⁹³ UNCITRAL's success in this regard can be attributed not only to the wise leadership of the Chair and to the dedication of the Secretariat (in particular, Corinne Montineri and Jae Sung Lee), but to the hard work and collegiality of the delegates at the center of the discussions. Not only did many of them work through a blizzard to preserve the momentum of the negotiations, *supra* notes 35-36, but much of the progress was made during informal discussions outside of the conference room. See, e.g., intervention of IAM, 6 February 2017 (reporting a group outing to a hockey game). The finalization of the text was even celebrated via song, ably led by the new Secretary of UNCITRAL, Anna Joubin-Bret. See intervention of the Secretariat, in Audio Recording: U.N. Comm'n on Int'l Trade L., 51st Session (United Nations 2018), June 25, 2018, 15:00-18:00, <http://www.uncitral.org/uncitral/audio/meetings.jsp> (leading the Commission in singing—to the tune of “Home on the Range”—a song celebrating that “the Singapore Convention is live”).

mediators, and other stakeholders make clear that the potential benefits of the Convention make the pursuit of ratification worthwhile.