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## The Singapore Convention

# Promoting the Enforcement and Recognition of International Mediated Settlement Agreements

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**Current enforcement mechanisms for mediated settlement agreements vary widely across jurisdictions providing little certainty in international disputes. In recent years, there have been numerous calls by scholars, practitioners and users for the development of a mechanism for the uniform enforcement and recognition of international mediated settlement agreements. Following three years of effort, the UNCITRAL Working Group II successfully completed the drafting of a multilateral convention for enforcement and recognition titled ‘The Convention on International Settlement Agreements Resulting from Mediation’ which will be commonly known as the ‘Singapore Convention’. The new convention was approved by consensus of UNCITRAL’s Member States on 25 June 2018, at its fifty-first session. Parallel amendments have been made to the 2002 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation to add provisions that mirror those of the Singapore Convention. These new instruments promise to provide parties with a clear, uniform framework for the enforcement and recognition of international mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.**

### Introduction

In 2002, the United Nations recognized that the use of mediation<sup>1</sup> ‘results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States’.<sup>2</sup> The use of mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, the development of the IBA’s rules for mediation of investor-state disputes, and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of mediation,

it is generally viewed to be under-utilized. Many reasons have been offered to explain this. A commonly cited impediment is that settlement agreements reached in international disputes through mediation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting mediation of international commercial disputes, the United States proposed that the United Nations Commission on International Trade Law (UNCITRAL) Working Group II develop a multilateral convention for enforcement<sup>3</sup>. The US recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through mediation which conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization, just as under the

1 While the process was described in 2002 and in the early discussions of the new convention as ‘conciliation’, the more common and more useful term now is ‘mediation’ and, as discussed below, is the terminology that has now been adopted in the new convention and the amended model law.

2 U.N. Comm’n on Int’l Trade Law, *Model Law on International Commercial Conciliation*, at V, U.N. Sales No. E.05.V.4 (2002).

3 United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL’s business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.

New York Convention, they have their own procedures governing arbitration.<sup>4</sup> The US requested that this initiative be given high priority and explained:

Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.<sup>5</sup>

Thus, the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

After extensive discussions over a period of three years, on 25 June 2018, at its fifty-first session, UNCITRAL approved by consensus of its Member States a 'Convention on International Settlement Agreements Resulting from Mediation'. It will be commonly referred to as the 'Singapore Convention' upon adoption by the United Nations General Assembly and ratification by Member States starting as early as August 2019.<sup>6</sup>

## I - Prior efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements had previously emerged.

4 'Proposal by the Government of the United States of America: future work for Working Group II', A/CN.9/822 (Jun. 2, 2014).

5 'Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation — Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings', 7, A/CN.9/WG.II/WP.188 (Dec. 23, 2014).

6 The final text of the Singapore Convention and the companion Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation is forthcoming on the UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, the draft convention and draft amended Model Law have been made available by the Secretariat. See 'International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation', available at [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html); 'International Commercial Mediation: Draft Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation', A/CN.9/943 (Mar. 2, 2018). See also a commentary on the Singapore Convention by T. Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (August 27, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527).

There was a strong effort by those working on the *UNCITRAL Model Law on International Commercial Conciliation* ('2002 Model Law on Conciliation') to develop a uniform enforcement mechanism.<sup>7</sup> However, notwithstanding the effort made, that goal was not achieved. Article 14 provides:

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

The comments to Article 14 recognized that 'many practitioners put forth 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'.<sup>8</sup> The Commission supported 'the general policy that easy and fast enforcement of settlement agreements should be promoted'.<sup>9</sup> Notwithstanding that, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision left the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The *EU Mediation Directive*<sup>10</sup> recognizes the importance of enforcement and expressly stipulates at paragraph 19:

Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties.

However, while the EU Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be 'made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member state'.

7 Supra note 2.

8 *2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use*, at 55, U.N. Sales No. E.05.V.4 (2002).

9 Id.

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.

The same result was reached by the drafters of the *US Uniform Mediation Act* ('UMA').<sup>11</sup> A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement, but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

## II - Calls for action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNICTRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. Scholars,<sup>12</sup> practitioners and users have called for the development of an enforcement mechanism.

The *European Parliament's study* assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study 'suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector'.<sup>13</sup>

A survey conducted by the *International Bar Association's Mediation Committee* in 2007 emphasized the importance of enforcement.

11 The US Uniform Mediation Act was adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the 2002 Model Law on Conciliation into the UMA and provides that unless there is an agreement otherwise, the 2002 Model Law on Conciliation applies to any mediation that is 'international commercial mediation'.

12 See, e.g., Lawrence Boule, 'International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework', 7(1) *Contemp. Asia Arb. J.* 34 (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); Bobette Wolski, 'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research', 7(1) *Contemp. Asia Arb. J.* 87 (2014).

13 Directorate-General for Internal Affairs, "'Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014), [http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI\\_ET\(2014\)493042](http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI_ET(2014)493042).

The results of the survey were summarized by the Committee:

(T)he enforceability of a settlement agreement is generally of the utmost importance...

[...]

[I]n international mediation ... reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.<sup>14</sup>

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the US and confirm that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and it would be a significant factor in encouraging and increasing the use of mediation.

In order to assist the Working Group II delegates in their consideration of the US proposal, a survey was conducted in the fall of 2014 by *S.I. Strong* to ascertain the need for and level of interest in such a mechanism.<sup>15</sup> The survey responses were compelling:

- > An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the New York Convention would encourage mediation and conciliation, with 18% saying maybe.
- > Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country.
- > 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place.

14 IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, IBA (Oct. 2007), [https://www.ibanet.org/ENews\\_Archive/IBA\\_November\\_2007\\_ENews\\_MediationSummary.aspx](https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx)

15 S. I. Strong, 'Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation' (Nov. 17, 2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302). For a discussion of the methodology employed in the survey, see S.I. Strong, 'Large-Scale Empirical Study of International Commercial Mediation and Conciliation Provides Support to UNCITRAL Process', *N.Y. Disp. Resol. L.*, Spring 2015, at 36.

In October and November 2014, the *International Mediation Institute* ('IMI') conducted a short survey of internal counsel and business managers to assist the Working Group's deliberations. The survey sought to assess the extent to which a mediation convention was desired.

- > As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so ('much more likely' or 'probably').
- > In response to whether the existence of a widely-ratified enforcement convention would make it easier for commercial parties to come to mediation in the first place, 87% said yes ('definitely' or 'probably').
- > With respect to whether the absence of any kind of international enforcement mechanism for mediated settlements presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said yes ('major impediment' or 'a deterring factor').<sup>16</sup>

IMI also put a proposition to 150 delegates, comprised of users, educators, providers and advisors, at its conference in October 2014:

An international convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries.

73% of all delegates voted in favor. A sorting of the votes by delegate affiliations showed that not one user disagreed.<sup>17</sup>

A 2015 study by the *Queen Mary University of London* further supported such an effort with a majority (54%) agreeing that a convention on the enforcement of settlement agreements resulting from a mediation would encourage the use of mediation.<sup>18</sup>

<sup>16</sup> Edna Sussman, 'A Path Forward; a Convention for the Enforcement of Mediated Settlement Agreements', 12(6) *Trade Disp. Mgmt.* (2016).

<sup>17</sup> Id.

<sup>18</sup> Queen Mary University of London School of Int'l Arb. and White & Case, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015), [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf).

The most recent relevant survey results were developed at the *Global Pound Conference Series* (GPC Series), which convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017.<sup>19</sup> The delegates who attended the GPC Series, and the hundreds who participated online, voted on a series of 20 Core Questions. In response to the question 'which of the following areas would most improve commercial dispute resolution' 51% selected legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.<sup>20</sup>

Roland Schroeder, speaking on behalf of the *Corporate Council International Arbitration Group*<sup>21</sup> at the UNCITRAL Working Group II session held on February 3, 2015, echoed the clear message delivered by users and strongly supported the US effort. He reported that it is often a challenge to convince counterparties to engage in a mediation process and many decline both because the process does not have a sufficiently international imprimatur and because the result is not easily enforceable cross-border. He was of the view that a convention like the New York Convention would be a catalyst that would drive an increased use of mediation. He noted that the benefits of mediation are generally recognised, but once one is already in a dispute, there is considerable concern about enforceability, suggesting a clear need for a cross-border enforcement mechanism. Mr Schroeder reported that he personally had experiences where he tried to enforce a settlement agreement but was ultimately required to re-litigate the merits of the underlying dispute.<sup>22</sup>

### III - Existing enforcement mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement

<sup>19</sup> Details about the GPC Series, global data trends, and regional differences are all available at [www.globalpound.org](http://www.globalpound.org). Also see, Amal Bouchenaki et al.; 'What Users Want and How to Address their Needs and Expectations Using the Results of the Global Pound Conference', *N.Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

<sup>20</sup> International Mediation Institute, GPC Series 'Cumulated Data Results' (2017), <https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf>.

<sup>21</sup> The Corporate Council International Arbitration Group (CCIAG) is an association of corporate counsel from approximately one hundred multinational companies which focuses on international arbitration and dispute resolution.

<sup>22</sup> Confirmation on file with author.

agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. The Secretariat reported that there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that 'the diversity of approaches towards enforcing settlement agreements might militate in favor of considering whether harmonization of the field would be timely'.<sup>23</sup> The UNCITRAL report reviews a variety of methods for enforcement of mediated settlement agreements across jurisdictions.

In many jurisdictions, including the US, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the US, while there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, the mediated settlement agreements nonetheless remain a contract, such that all contract defenses are available to the parties.<sup>24</sup>

In other jurisdictions, mediated settlement agreements can be entered as a judgment. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on a mediated settlement agreement. Some jurisdictions have expedited enforcement mechanisms where settlement agreements can be enforced in a summary fashion provided the requirements are met. Other jurisdictions have opted for a mechanism of deposition or registration at the court as a way of making a settlement agreement enforceable. The practice of requesting a notary public to notarize the settlement agreement is also prevalent in several

jurisdictions as a means of enforcement. In yet other jurisdictions, acts by a notary are required to make a mediated settlement agreement enforceable.<sup>25</sup>

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 155 countries that are signatories to the New York Convention. Thus, even if a judgment or court decree can be obtained, the difficulty of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This moreover leads to an anomalous result. As the US stated:

[G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them.<sup>26</sup>

#### IV - Entry of an arbitration award based on mediated settlement agreements

At the UNCITRAL Working Group II sessions, certain delegates suggested that the simple solution was to have the mediated settlement agreement entered as an arbitral award which would then be recognized under the established enforcement mechanisms of the New York Convention. The rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.<sup>27</sup> Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides for such a process for international conciliations.<sup>28</sup>

<sup>23</sup> Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, 8, A/CN.9/WG.II/WP.187 (Nov. 27, 2014).

<sup>24</sup> For a treatment of all contract defenses in the context of enforcing mediated settlement agreements, see Edna Sussman, 'Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony', *IBA Mediation Committee Newsletter*, Apr. 2006, at 32.

<sup>25</sup> 'Rebooting the Mediation Directive', supra note 13 (reporting a wide variety of enforcement processes in the States of the EU).

<sup>26</sup> Supra note 5, at 8.

<sup>27</sup> See, e.g., Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

<sup>28</sup> Cal. Civ. Proc. Code § 1297.401 (West).

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement,<sup>29</sup> the appointment of an arbitrator after the dispute is settled may not be possible in many jurisdictions because under local law, there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an 'arbitration agreement' means 'an agreement to submit to arbitration present or future disputes'. Similarly, New York state law provides that an 'agreement to submit any controversy thereafter arising or any existing controversy to arbitration' is enforceable.<sup>30</sup> As there is no *present or future dispute or controversy thereafter arising or existing* once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains.

Institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration.<sup>31</sup> Some jurisdictions explicitly give consent awards the same status and effect as arbitral awards.<sup>32</sup> Article 30(2) of the UNCITRAL Model Law on International Commercial Arbitration provides:

An award on agreed terms... shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

<sup>29</sup> See David Weiss & Brian Hodgkinson, 'Adaptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements', 25(2) *Am. Rev. of Int'l Arb.* (2014) (urging the enactment of such legislation).

<sup>30</sup> N.Y. C.P.L.R. 7501 (McKinney).

<sup>31</sup> See, e.g., UNCITRAL Arbitration Rules 2013, Article 36 (Settlement or other grounds for termination); ICC Arbitration Rules 2017, Article 33 (Award by Consent); ICDR International Dispute Resolution Procedures 2014, Article 32 (Settlement or Other Reasons for Termination); LCIA Arbitration Rules 2014, Article 26.9 (Consent award); SIAC Arbitration Rules 2016, Article 32.10 (The Award); HKIAC Administered Arbitration Rules 2013 Article 36 (Settlement or Other Grounds for Termination).

<sup>32</sup> See, e.g., Arbitration Act, 1996, c. 23 §51 (Eng.) ('An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.').

But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties' needs. Commentators that have analysed this question have come to differing conclusions. Some have concluded that it is not enforceable.<sup>33</sup> Others have concluded that it is.<sup>34</sup> While yet others conclude that the result is not clear.<sup>35</sup>

The relevant New York Convention section provides in Article 1(1) that the Convention applies to the recognition and enforcement of awards 'arising out of differences between persons'. The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a 'present or future' dispute or a 'controversy thereafter arising or ... existing'. The reference to a 'difference' in Article 1(1) of the New York Convention does not specify when that 'difference' has to exist in time in relation to the time of the appointment of the arbitrator. Thus, the New York Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. But the differences of opinion as to the applicability of the New York Convention to consent awards issued by arbitrators appointed after a settlement agreement is reached suggests that the New York Convention is ambiguous on this point.<sup>36</sup>

Moreover, while it is generally accepted that consent awards are enforceable, at least if the arbitrators are appointed before the settlement is achieved,

<sup>33</sup> Christopher Newmark & Richard Hill, 'Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?' 16(1) *Arb. Int'l* 81 (2000); James T Peter, 'Med-Arb in International Arbitration', 8 *Am. Rev. Int'l Arb.* 83, 88 (1997)

<sup>34</sup> Harold I. Abramson, 'Mining Mediation Rules for Representation Opportunities and Obstacles', 15 *Am. Rev. Int'l Arb.* 103 (2004).

<sup>35</sup> See Edna Sussman, 'The New York Convention Through a Mediation Prism', *Dispute Resolution Magazine*, 8 (Summer 2009); Ellen E. Deason, 'Procedural Rules for Complementary Systems of Litigation and Mediation - Worldwide', 80 *Notre Dame L. Rev.* 553 (2005) (see footnote 173). See also, Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention', 54 *UCLA L. Rev.* 1385 (2007).

<sup>36</sup> Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wish to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. See Nadja Alexander, 'SIAC-SIMC's Arb- Med- Arb Protocol', *N. Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

that matter too is not without some doubt.<sup>37</sup> The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states:

The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.<sup>38</sup>

Two recent decisions in the United States confirmed the enforceability of consent awards issued by arbitrators appointed before settlement was achieved.<sup>39</sup> However, decisions of the French courts raise some uncertainty.<sup>40</sup>

Apart from concerns about enforceability, practical considerations make the enforcement of the mediated settlement agreement by means of a consent award unattractive for many reasons. Even if an arbitrator is already in place, the flexibility of the mediation process may lead to a resolution that is beyond the scope of the arbitrator's authority. If an arbitrator is not already in place, the parties would be required to identify an arbitrator who is willing to rubberstamp a resolution, even though he or she has no knowledge of the parties or the issues in dispute. This would no doubt be a difficult and costly exercise.

The lack of a uniform and certain mechanism for the enforcement and recognition of international mediated settlement agreements and the repeated call for the development of such a mechanism begged for a solution. The US proposal offered the path forward to its development.

## V - Working Group II deliberations: Issues raised and resolved

Launched by the US in 2014, over the course of the following years, the UNCITRAL Working Group II ('WGII') deliberations were conducted at eight UNCITRAL WGII sessions with 85 Member States and 35 non-governmental organizations participating. The delegates addressed and resolved numerous issues and looked for guidance both from the New York Convention and the 2002 Model Law on Conciliation.

For several issues that were difficult to resolve, the delegates continued to work on other aspects while leaving those for later resolution. In February 2017, a compromise proposal on those issues was achieved<sup>41</sup> and served to break through the impasse and ultimately led to the successful completion of the convention.

First, a seminal question was the form of the instrument. Some were of the view that the current divergence and, in some cases, non-existence of practice with respect to mediated settlement agreements did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach, offered by model legislative provisions. The model law would not aim at harmonizing respective legislative frameworks on mediation but focus on enforcement aspects, thus, harmonizing the approach to enforcement of settlement agreements, both in legislation and practice. Others expressed a strong preference for a convention since the 2002 Model Law on Conciliation was not widely adopted and a convention could more efficiently contribute to the promotion and harmonization of mediation given the cross-border nature of the enforcement and the need for a binding instrument to bring certainty. The success of international arbitration under the purview of the New York Convention of 1958 was emphasized as a reference and it was argued that a convention had additional benefits since it could provide State Parties flexibility through declarations or reservations, improving its chances of ratification by more States. As a compromise between the divergent views, it was agreed that WGII would prepare parallel instruments, complementary in nature: a model legislative text amending the 2002 Model Law on Conciliation, and a convention on the enforcement and recognition of international commercial settlement agreements resulting from mediation. The provisions of the draft amended model law would and do mirror in all essential respects the provisions of the convention.

37 Yaraslau Kryvoi & Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement', 40 *Brook. J. Int'l L.* 852 (2015).

38 *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 16-17, U.N. Sales No.: E.16.V.7 (2016).

39 *Albtelecom Sh.A v. Unifi Communications, Inc.*, 2017 WL 2364365 (S.D.N.Y. May 30, 2017); *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, 2018 WL 1251924 (S.D. Tex. Mar. 12, 2018).

40 *Société Viva Chemical (Europe) NV c APTD*, CA Paris, 9 April 2009, No 07/17769; *M A c Société 'B-C*, Cass civ 1e, 14 November 2012, (2013) *Rev arb* 138. The aforementioned case has been referred to as a 'death sentence for awards on agreed terms.' See Giacomo Marchisio, 'A Comparative Analysis of Consent Awards: Accepting their Reality', 32(2) *Arbitration International* 331, 343 (2016).

41 Report of Working Group II (Dispute Settlement) on the Work of its Sixty-Sixth Session, 51-53, A/CN.9/901 (Feb. 16, 2017).

Second, consideration was given to whether an opt-in should be required. It was suggested that since mediation was by its nature a consensual process, the regime envisaged by the instrument should apply only where the parties consented to its application. An opt-in provision would ensure that parties were aware of the international framework to which they would be subjected and could avoid situations which they might not find desirable. Opposing views were expressed that making application of the convention the default would be more consistent with party autonomy because it is what parties would want and would reinforce that agreements should be respected. An opt-out, which the parties can include in their settlement agreement under the convention, would provide party autonomy and would be more consistent with the purpose of the convention. Moreover, an opt-in as a practical matter limits the draft instrument's application. Numerous studies have demonstrated that where a choice is required to opt-in, few elect it.<sup>42</sup> It was noted that the New York Convention does not have an opt-in provision. It was further suggested that it was counterintuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Moreover, there was concern that allowing flexibility on this issue could result in an imbalance between parties in different jurisdictions as the settlement agreement might be enforceable in one jurisdiction, but not in another. It was agreed that the convention would apply by default but that State Parties could include a reservation that the convention would only apply to the extent that the parties to the settlement agreement had agreed. A parallel footnote is inserted in the draft model law as an optional provision.

Third, whether or not the convention would provide for recognition of a mediated settlement agreement when it is presented to a State's competent authority by a party to prove that a claim brought against it had already been settled and resolved was a subject on which it was difficult to achieve consensus. Following further discussions, it was agreed that the convention would not only cover enforcement of mediated settlement agreements but also their recognition - and would do so without using the term 'recognition' - which was seen to imply different procedural consequences in different legal systems.

Fourth, in assessing the grounds for refusing to grant relief, there was concern that if there were too many bases upon which a party could resist enforcement, it would be an invitation to extensive and protracted litigation which would defeat the purpose of the convention. There was a particularly vigorous debate as to whether there should be any defenses based on the conduct of the mediator or a mediator's failure to make disclosures related to independence and impartiality, since that would open the door to some of the gamesmanship that has become problematic in the context of enforcement under the New York Convention. Others felt that it was crucial that these grounds be included in order to ensure the fairness of the mediation process. As part of the package of compromises, it was agreed that grounds related to the conduct of mediators would be included as grounds for refusing to grant relief but that they would only apply in narrow circumstances.

Fifth, there had been ongoing discussions as to how to handle mediated settlement agreements which resulted in a consent award or a court judgment. While some delegates disagreed, many thought it was essential to exclude mediated settlement agreements in these contexts in order to avoid conflicts with other enforcement mechanisms available pursuant to the New York Convention, the Hague Convention on Choice of Courts and the Hague Convention on Foreign Judgments in Civil and Commercial Matters. It was agreed that these would be excluded.

Other material issues considered included whether the convention should include enforcement of agreements to mediate, just as the New York Convention provides for enforcement of agreements to arbitrate. Whether or not agreements to mediate are enforceable and whether they are considered conditions precedent that preclude the progression to employing other dispute resolution modalities varies across jurisdictions. Moreover, mediations are not always employed by parties pursuant to an agreement and it was considered too difficult to achieve consensus on including enforcement of agreements to mediate. Thus, the consensus view was that the convention should be limited to only mediated settlement agreements.

What to call the process that was being addressed was the subject of considerable discussion. While there was some desire to preserve the word 'conciliation' which was the term used in previous UNCITRAL instruments, there was recognition of the fact that the term 'mediation' was currently more commonly and more broadly used. Moreover, some view conciliation as a process in which the neutral facilitator suggests a solution whereas mediation is a broad term that

<sup>42</sup> See, e.g., SPARQ Social Psychological Answers to Real-World Questions, 'Opt Out' Policies Increase Organ Donation, Stanford, <https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation> (last visited Aug. 15, 2016) (demonstrating that in opt-out countries 90% of the population donates their organs while in such countries as the U.S. and Germany which are opt-in countries fewer than 15% donate their organs at death).

encompasses a variety of process design modalities. It was concluded that the word mediation would be used instead ‘in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]’.<sup>43</sup> The change in terminology is not intended to have any substantive or conceptual implications.

Adopting what may be an emerging tradition in WGII, the new Convention on International Settlement Agreements Resulting from Mediation will be commonly referred to as the ‘Singapore Convention’, in honor of the home jurisdiction of the very able chair, Natalie Morris-Sharma of the Singapore Ministry of Law, who shepherded the deliberations in WGII. This designation follows the designation of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration as the Mauritius Convention on Transparency in honor of Salim Moollan from Mauritius, who chaired WGII in its deliberations on that convention.

## VI - The Singapore Convention text

The final text of the Singapore Convention (the ‘Convention’) has not yet been released at the time of this writing. However, it is anticipated that no significant changes will be made. This review of the articles of the Convention is based on the draft of the Convention reviewed and approved at the United Nations Commission on International Trade Law at its 51<sup>st</sup> session held in June, 2018 subject to any further modifications provided by the Commission.<sup>44</sup>

### Preambles

The Parties to the Convention recognized the value for international trade of mediation as a method for settling commercial disputes, noted the increasing use of mediation as an alternative to commercial litigation, considered the significant benefit in facilitating the administration of international transactions and producing savings in the administration of justice, and are convinced that the establishment of a framework for international settlement agreements resulting from mediation would contribute to the development of harmonious international economic relations.

### Scope of application (Article 1)

Article 1 defines the essential parameters of the Convention. It identifies the requirements necessary for a settlement agreement to fall within the scope of the Convention, and it specifies the exclusions.

The Convention requires that the settlement agreements resulting from mediation be:

- 1) In ‘writing’.
- 2) ‘International’ at the time of its conclusion based primarily on the place of business of the parties. The definition tracks the definition in the 2002 UNCITRAL Model Law on International Commercial Conciliation and resolved the debate as to when the international nature of the dispute should be determined in favor of ascertaining coverage at the time of the mediation’s conclusion;
- 3) Specifies that it be ‘commercial’ by excluding transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family inheritance or employment law. With these limitations, the Convention avoids conflicts with local mandatory laws that address disputes that arise in connection with such transactions and relationships.
- 4) Excludes categories of settlement agreements that have been approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment and settlement agreements that have been recorded and are enforceable as an arbitral award.

### Definitions (Article 2)

Article 2 provides further specification as to the meaning of certain terms.

- 1) The Convention clarifies further Article 1’s ‘internationality’ requirement. It provides the solution to a situation where a party has more than one place of business. In such a case, the relevant place of business is the one that has closest relationship to the dispute resolved by the settlement agreement. Where the party does not have a place of business, the Convention prescribes that reference be made to the party’s habitual residence.
- 2) The Convention then expands on what it means by ‘writing.’ and reflects that the writing requirement may be satisfied by various forms of electronic communication.

<sup>43</sup> International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation, paras. 4-5, A/CN.9/WG.II/WP.205 (Nov. 23, 2017).

<sup>44</sup> Supra note 6.

- 3) The Convention defines 'mediation' as 'a process, irrespective of the expression used or the basis upon which the process is carried out, where parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator"), lacking the authority to impose a solution upon the parties to the dispute'.

The Convention deliberately avoided defining 'mediation' *prescriptively* so as to allow for the wide range of differences in the understanding of the term among different jurisdictions. How mediations are conducted and what process modalities are permitted in mediation vary across jurisdictions. The Convention's broad definition resolves those differences by offering a definition that is simple and does not introduce any rigidity. It does not prescribe a specific technique of mediation; for example, the Convention does not specify whether the mediation must be evaluative, facilitative, or transformative, does not address whether or not caucus sessions can be used, and does not address whether or not the mediator can propose solutions. The Convention's usage of broad phrases provides coverage for all mediations, however, the process is carried out in different jurisdictions and by different mediators.

### General principles (Article 3)

Article 3 addresses the obligations of the Parties to the Convention and provides both for affirmative enforcement of mediated settlement agreements and for recognition of mediated settlement agreements as a defense if a party seeks to relitigate a dispute already resolved in mediation.

- 1) Under the Convention, the Parties to the Convention have the substantive obligation to enforce a settlement agreement (subject to the exceptions, of course) 'in accordance with its rules of procedure.' With this provision, the drafters deftly circumvented the fact that enforcement mechanisms for mediated settlement agreements vary across jurisdictions, a fact which had stymied the earlier efforts to achieve an enforcement mechanism for cross-border mediated settlement agreements. Like the New York Convention which leaves procedural issues to be governed by the law of the seat, this Convention leaves those procedural issues to be governed by the State of enforcement.

- 2) The General Principles also addresses the claim which a party considers to be an attempt to relitigate a dispute already resolved in mediation and provides for recognition of a mediated settlement agreement. By meeting all the conditions set in the Convention, a party seeking relief would be allowed to prove that the dispute had been settled. Here again, the rules of procedure are the prerogative of the Party to the Convention.

### Requirements for reliance on settlement agreements (Article 4)

Article 4 addresses what a party seeking to rely on the settlement agreement must provide to satisfy the Convention's requirements. The delegates vigorously debated whether or not confirmation in the state where the mediation took place should be required before enforcement could be sought elsewhere. It was concluded that there should be no such requirement. As a practical matter, it did not make sense. A mediation in a cross-border dispute might well take place in a jurisdiction with no connection to the parties or to the dispute. And more importantly, as was decided with respect to the New York Convention, requiring such a confirmation would require a double *exequatur* and contribute significantly to the complexity and cost of any enforcement process, precisely what the Convention is intended to remedy.

The draft Convention specifies what a party relying on a settlement agreement must supply to the competent authority of the Party to the Convention where relief is sought.

- 1) A settlement agreement signed by the parties.
- 2) Evidence that the settlement agreement resulted from mediation, which may be satisfied by the mediator's signature on the agreement, attestation by the mediator that a mediation was carried out, or an attestation by the administering institution. In order to allow for situations where none of these are available and to preserve the flexibility of the process, the Convention permits evidence of the fact that the mediation took place by means of any other evidence acceptable to the competent authority. A signature or an attestation would be only to prove the mediator's involvement in the process and is not to be construed as an endorsement of the settlement agreement nor as an indication that the mediator was a party to the settlement agreement. This requirement followed extensive deliberations by the delegates as to whether an unassisted negotiation which leads to a settlement agreement should also be covered by the

Convention. Delegates questioned whether there was a sound basis for distinguishing between those two contexts. Persuaded that mediation provides a qualitatively different process with many jurisdictions regulating the manner in which the mediation must be conducted and the conduct of mediations by many certified mediators, it was concluded that the Convention should be limited to mediated settlements. It is noted that the draft Model Law provides in footnote 5 that a State may consider the application of the Model Law to agreements settling the dispute irrespective of whether they resulted from mediation.

- 3) The draft Convention expands on how the requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication.

### Grounds for refusing to grant relief (Article 5)

Article 5 is intended to encompass both the right of a party to seek enforcement as well as to invoke a settlement agreement. And both these reliefs may be refused by the competent authority if the objecting party furnishes the requisite proof with respect to any of the grounds provided under Article 5.

The development of these grounds for refusing to grant relief was extensively discussed by the delegates. It was concluded that the limited grounds of the New York Convention were insufficient in the context of a mediated settlement agreement where other potential defenses must be addressed. But it was important to limit the available grounds only to those that were necessary so as to prevent litigation over enforcement and defeat the purpose of the Convention. The grounds finally included in the Convention were the result of a compromise solution achieved by the delegates. The grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct. The Convention further adopts two of the principal grounds specified in the New York Convention.

Relief may be refused by the competent authority if the party opposing enforcement or recognition of a mediated settlement agreement furnishes proof with respect to any of the following grounds:

Substantive grounds	<ul style="list-style-type: none"> <li>&gt; Incapacity of a party to the settlement agreement, or</li> <li>&gt; Settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it, or failing any indication, under the law applicable by the competent authority where relief is sought.</li> </ul>
Grounds relating to the terms of the settlement agreement	<ul style="list-style-type: none"> <li>&gt; The settlement agreement is not binding, or is not final, according to its terms, or</li> <li>&gt; The settlement agreement has been subsequently modified, or</li> <li>&gt; Obligations in the settlement agreement have been <i>performed</i> or are <i>not clear or comprehensible</i>, or</li> <li>&gt; Granting relief would be contrary to the terms of the settlement agreement.</li> </ul>
Grounds relating to the mediator's conduct and the process	<ul style="list-style-type: none"> <li>&gt; Serious breach by the mediator of standards applicable to the mediator or the mediation without which breach the party would not have entered into the settlement agreement, or</li> <li>&gt; Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.</li> </ul>
<i>Sua moto/ sua sponte</i> grounds invocable by the competent authority of the Party to the Convention where relief is sought or a requesting party	<ul style="list-style-type: none"> <li>&gt; Granting relief would be contrary to the public policy of that Party, or</li> <li>&gt; The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.</li> </ul>

### Parallel applications or claims (Article 6)

Article 6 grants discretion to the competent authority to adjourn the decision and/or order security in situations where the decision of another court or arbitral tribunal may affect the relief being sought before it. The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense.

### Other laws or treaties (Article 7)

Article 7 preserves a Party's right to avail itself of a settlement agreement pursuant to other laws or treaties to which the Contracting State may be a party.

## Reservations (Article 8)

Article 8 addresses two issues vigorously debated by the delegates: whether the Convention should apply to governments or governmental entities, and whether the parties should be required to opt-in for the Convention to apply. The compromise achieved by the delegates was to make these issues the subjects of permissible reservations.

- 1) The Convention provides State Parties with the option to make the following reservations:
  - a. *States and other public entities*: This reservation permits a Party to the Convention to provide that the Convention will not apply to settlement agreements to which it or any government, governmental agency or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.
  - b. *Opt-in*: This reservation permits a Party to the Convention to provide that the Convention will only be applicable if the parties opt-in, and have affirmatively agreed to the application of the Convention
- 2) No other reservations are permitted.

Generally, the rest of the provisions on reservations deal with temporal determinations of the applicable reservation, their confirmation and deposition with the depositary, and withdrawals.

## Effect on settlement agreements (Article 9)

Article 9 specifies that the Convention and any reservation or withdrawal applies only to settlement agreements concluded after the date on which the Convention, reservation or withdrawal enters into force for the Party to the convention concerned.

## Depositary (Article 10)

Article 10 designates the Secretary General of the UN as the depositary of this Convention.

## Signature, ratification, acceptance, approval, accession (Article 11)

Article 11 opens the Convention for signature. In the context of the place of signing of the Convention, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the Convention, once adopted. That proposal was welcomed and supported by the WGII delegates and it was agreed to make the corresponding recommendation to the Commission.

## Participation by regional economic integration organizations (Article 12)

Article 12 facilitates a regional economic integration organization ('REIO') in becoming a Party to the Convention. REIOs that accede to the Convention shall have the rights and obligations of a Party to the Convention to the extent that the organization has competence over matters governed by the Convention. At the time of accession, the REIO shall make a declaration specifying the matters in respect of which competence has been transferred to that organization by its Member States. The Convention specifies the circumstances under which the Convention should not prevail over conflicting rules of an REIO.

## Non-unified legal systems (Article 13)

Article 13 permits Parties to the Convention to declare that the Convention would extend to all its territorial limits or only to one or more of them. State Parties may make such declaration at the time of signature, ratification, acceptance, approval or accession. Moreover, Parties to the Convention shall be free to amend its declaration by submitting another declaration at any time.

## Entry into force (Article 14)

Article 14 provides that it shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

## Amendment (Article 15)

Article 15 provides that any State Party may propose an amendment by submitting it to the Secretary General of the UN, who shall communicate the proposed amendments to the rest of the State Parties. A conference shall be convened if at least one-third of the State Parties favor such a conference. The adoption of any amendment would require a two-thirds majority vote of the State Parties present and voting at the conference.

The Convention also provides that amendments should enter into force for Parties to the Convention only when they expressly consent to it.

## Denunciations (Article 16)

Article 16 provides that a State Party may denounce the Convention by a formal notification in writing addressed to the depositary (the Secretary General of the UN). Such denunciation shall take effect twelve months after the notification is received by the depositary.

However, it must be noted that the Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

## Conclusion

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The Singapore Convention will deliver the uniform enforcement and recognition mechanism for international mediated settlement agreements which has long been called for by scholars, practitioners, and users. It has already gained recognition. For example, the proposed changes to the ICSID rules on conciliation specifically suggests that the parties sign a settlement agreement embodied in the report so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention.<sup>45</sup> The invitation to accede to the Convention will shortly be before the State Parties. Their accession will ensure the success of the UNCITRAL effort, and pave the way for a clear, uniform framework for the enforcement and recognition of mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

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<sup>45</sup> 'ICSID, Proposals for Amendment of the ICSID Rules — Synopsis', para. 95 (Aug. 2, 2018), [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_One.pdf](https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf).