

UNCITRAL United Nations Commission on International Trade Law




**UNCITRAL: United Nations Commission on International Trade Law
WG II (Dispute Resolution)**

New instruments in the area of mediation

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UNCITRAL Conciliation Rules

UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002

**UNCITRAL instruments
- up to 2018**

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UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

Home » Texts and Status » International Commercial Arbitration & Conciliation
 » UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)
 » Status: UNCITRAL Model Law on International Commercial Conciliation (2002)

Status: UNCITRAL Model Law on International Commercial Conciliation (2002)

This page is updated whenever the UNCITRAL Secretariat is informed of changes in enactment of the Model Law.
 The UNCITRAL Secretariat also prepares yearly a document containing the Status of Conventions and Enactments of UNCITRAL Model Laws, which is available on the web page of the corresponding [UNCITRAL Commission session](#).

Legislation based on or influenced by the Model Law has been adopted in 33 States in a total of 45 jurisdictions:

State		Notes
Albania	2011	(d)
Croatia	2003	
Montenegro	2005	(c)
Republic of North Macedonia	2009	
Slovenia	2008	

**Dispute settlement instruments:
2002 Model Law**

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Article 14. Enforceability of settlement agreement⁴

Text of article 14

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

⁴When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

Article 14: GAP

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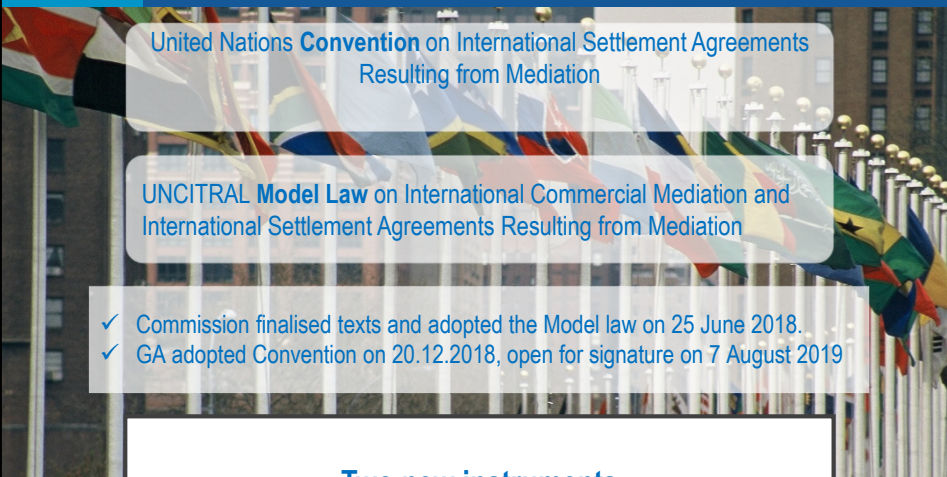
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Working Group II - 68th session

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United Nations **Convention** on International Settlement Agreements Resulting from Mediation


UNCITRAL **Model Law** on International Commercial Mediation and International Settlement Agreements Resulting from Mediation

- ✓ Commission finalised texts and adopted the Model law on 25 June 2018.
- ✓ GA adopted Convention on 20.12.2018, open for signature on 7 August 2019

Two new instruments

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UNCITRAL Conciliation Rules

By the **Secretariat**:

- ✓ Revision of the Conciliation Rules
- ✓ Preparation of Notes on Mediation

Working Group II: Issues relating to expedited arbitration

Current projects

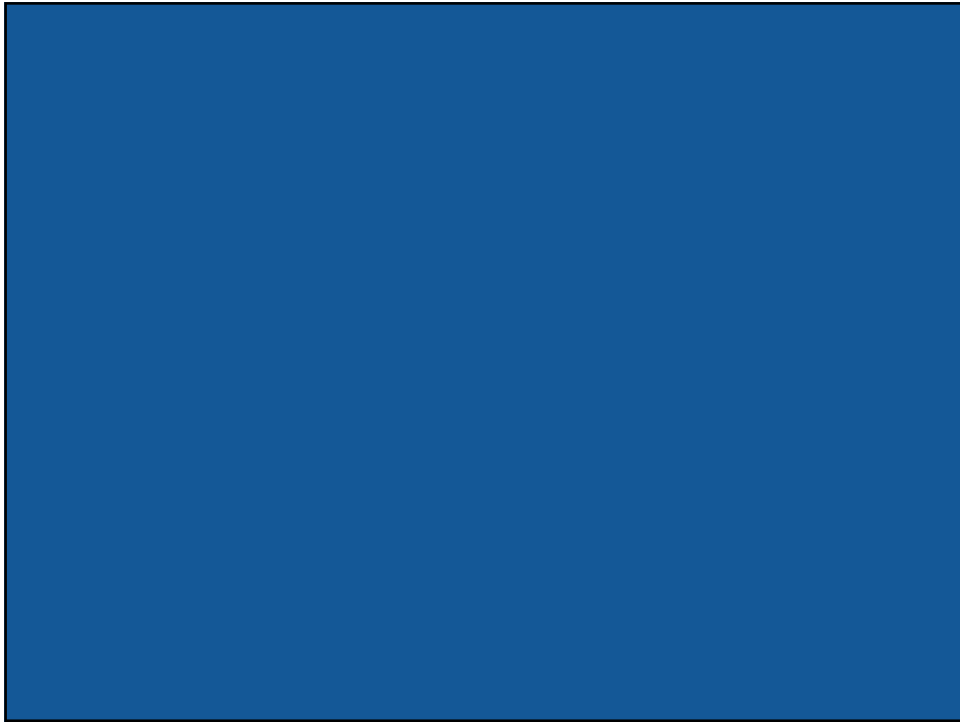
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Singapore: August 2019

UNCITRAL United Nations Commission on International Trade Law



Joint UNCITRAL - LAC Conference on Dispute Settlement – 9 April 2019

Jean-Christophe BOULET, Counsellor, FPS Justice, Belgium



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Session I

New instruments for the enforcement of settlement agreements reached through international mediation



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The negotiation process and contentious issues



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1. The origin of the project

= U.S. Proposal in June 2014 :

*“the United States proposes that Working Group II develop a **multilateral convention on the enforceability of international commercial settlement agreements reached through [mediation], with the goal of encouraging [mediation] in the same way that the New York Convention facilitated the growth of arbitration**”* (U.N. Doc. A/CN.9/822, 2 June 2014)



1. The origin of the project

A subsequent document from the US and Israel further specified that :

“The core of the instrument should be an obligation similar to Article III of the New York Convention, requiring recognition and enforcement of International Settlement Agreements but not dictating a particular procedure for domestic use.” (U.N. Doc. A/CN.9/WG.II/WP.192, 3 August 2015).



2. Opposition to this project

This project aroused opposition from some delegations

- This opposition was based on a main argument.
- This opposition touched the heart of the project since it was the very idea of a Convention on the recognition and enforcement of s.a. which was disputed.



3. The consequences of this opposition on the project

1. It could not prevent the work on this project

During its 2015 session, UNCITRAL decided that its WG II should commence work on this project, despite the disapproval of some delegations.

WG II devoted 6 sessions to this project, from September 2015 till February 2018.



3. The consequences of this opposition on the project

2. Limited impact on the core principles of recognition and enforcement of the s.a. (article 3)

- ▶ as to the principle of recognition (article 3, 2)
- ▶ as to the principle of enforcement (article 3, 1)



3. The consequences of this opposition on the project

3. Provisions capable of containing the effects of the principles of recognition and enforcement, in particular :

- ▶ article 1, 3 : exclusion of the court settlements and the consent awards from the scope of the Convention.
- ▶ article 5 : defences against enforcement and recognition.



3. The consequences of this opposition on the project

4. Impact on the form of the instrument

The opposition to the project led also to another consequence, this time linked to the form of the project :

Convention ↔ Model Law



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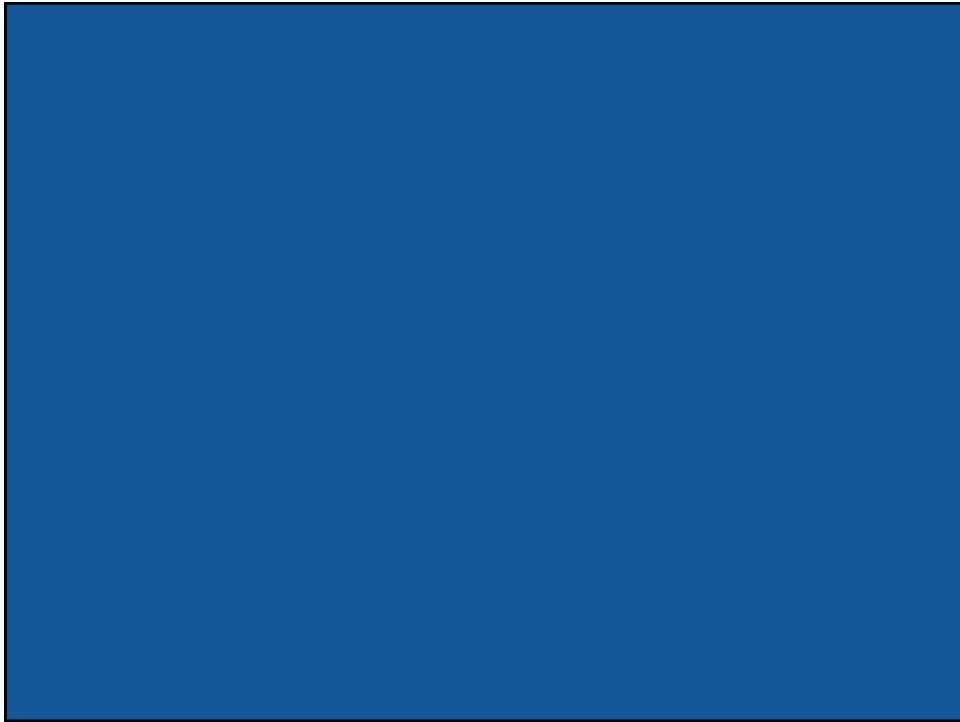
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MANY THANKS FOR YOUR ATTENTION!



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KNOETZL

UNCITRAL: United Nations Commission on International Trade Law - Dispute Resolution

New instruments in the area of mediation

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KNOETZL

The Scope of Application of the Convention Article 1(1)

This Convention applies to

- an agreement resulting from mediation and
- concluded in writing by parties
- to resolve a commercial dispute ("settlement agreement")
- which, at the time of its conclusion, is international...

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KNOETZL

Settlement Agreement Resulting from Mediation Article 2 (3)

"Mediation" means

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

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Exclusions from the Scope of Application Article 1(3)

This Convention does not apply to settlement agreements:

- (a) that have been
- i. approved by a court or concluded in the course of proceedings before a court; and
 - ii. are enforceable as a judgment in the State of that court;
- (b) that have been recorded and are enforceable as an arbitral award.

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KNOETZL

Settlement Agreement in Writing Article 2 (2)

A settlement agreement is "in writing" if its content is recorded in any form.

The requirement that a settlement agreement be in writing is met by

- an electronic communication
- if the information contained therein is accessible
- so as to be useable for subsequent reference.

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KNOETZL

When is the Dispute "Commercial"?

No definition provided by the Singapore Convention.

Guidance may be provided by the

- UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018
- and
- UNCITRAL Model Law on International Commercial Arbitration, 2006

which both contain the same definition in a footnote.

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KNOETZL

Defining the Term “Commercial”

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

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Exclusions from the Scope of Application Article 1(2)

This Convention does not apply to settlement agreements:

- (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
- (b) Relating to family, inheritance or employment law.

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KNOETZL**When is the Settlement Agreement *international*?**
Art 1 (1)

- (a) At least two parties to the settlement agreement have their places of business in different States; or
- (b) The State in which the parties to the settlement agreement have their places of business is different from either:
- i. The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - ii. The State with which the subject matter of the settlement agreement is most closely connected.

JOINT UNCITRAL-LAC CONFERENCE ON DISPUTE SETTLEMENT

BREAKING NEW GROUND

2018 UN Convention on International Settlement
Agreements Resulting From Mediation & Model Law

Mag. Barbara Helene Steindl LL.M MCI Arb
Ljubljana, 9 April 2019

DUTY TO ENFORCE - CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION

- **Article 3 - General principles**
- **Duty twofold: Duty to enforce settlement agreement + to allow for defense**

1. *Convention-Party SHALL ENFORCE a settlement agreement*
 1. *in accordance with its rules of procedure +*
 2. *under the conditions laid down in this Convention.*

2. *Convention-Party SHALL ALLOW party to invoke settlement agreement to prove that matter has already been resolved*
 1. *If dispute on whether matter already resolved by settlement agreement +*
 2. *in accordance with its rules of procedure +*
 3. *under the conditions laid down in this Convention.*

CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION – ART 4.1

• **Art 4.1. – Requirements for reliance on settlement agreements**

• **Content & general form**

1. Party relying on settlement agreement SHALL supply:
 - a) *Settlement agreement signed by parties +*
 - b) *Evidence that settlement agreement resulted from mediation such as*
 - i. *Mediator's signature on settlement agreement*
 - ii. *Doc signed by mediator indicating mediation was carried out*
 - iii. *Attestation by institution administering mediation*
 - iv. *Or, if i. to iii. absent, any other evidence acceptable to competent authority.*
2. Drafting history
3. Is such documentation available under different Mediation Rules?

CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION – ART 4.2

• **Art 4.2. – Requirements for reliance on settlement agreements**

• **Signature in e-communication**

1. Requirement: *settlement agreement* SHALL BE SIGNED by parties or mediator
2. Signature requirement met in e-communication if
 - a) *Method used*
 - i. *to ID parties or mediator +*
 - ii. *to indicate parties' or mediator's intention re information contained in e-communication +*
 - b) *Method used either*
 - i. *As reliable as appropriate for electronic communication's purpose or*
 - ii. *Proven to fulfill ID + indication function by itself or with further evidence*
3. Drafting history
4. Availability under different Rules?

CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION – ART 4.3

- **Art 4.3. – Requirements for reliance on settlement agreements**

- **Translation**

1. If settlement agreement NOT in OFFICIAL LANGUAGE of Convention-Party
WHERE RELIEF SOUGHT:
2. Competent authority MAY request translation.
3. Drafting history
4. Availability under different Rules?

CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION – ART 4.4

- **Art 4.4. – Verification of compliance with requirements under Convention**

- **Verification by any necessary document**

1. For verification that requirements have been complied with:
2. Competent authority MAY require ANY NECESSARY DOC
3. Drafting history
4. Availability under different Rules?

CONDITIONS TO APPLY UNDER SINGAPORE CONVENTION – ART 4.5

- **Art 4.5. – Considering request for relief**
- **How to act**
 1. When considering request for relief:
 2. competent authority SHALL act expeditiously.
 3. Drafting history
 4. Availability under different Rules?

Thank you **very much for your attention!**

Mag. Barbara Helene Steindl LL.M (Columbia) MCI/Arb
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**GROUNDS FOR RESISTING ENFORCEMENT
 OF A FOREIGN SETTLEMENT AGREEMENT**



Davor Bábic
Professor, University of Zagreb



Resisting enforcement

- Key principle: application of the law **most favourable to enforcement**

Article 7. Other laws or treaties

“This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.”



Article 5(1): Grounds applicable at the resisting party’s request

- a) incapacity of a party
- b) settlement agreement
 - i. null and void, inoperative or incapable of being performed (under the applicable law), or
 - ii. not binding or not final according to its terms, or
 - iii. subsequently modified
- c) obligations under the settlement agreement
 - i. have been performed, or
 - ii. are not clear or comprehensible
- d) relief contrary to the terms of the settlement agreement



**e) serious breach of standards by mediator
(standards without which resisting party
would not have settled)**

**f) failure by mediator to disclose conflicts
(where the failure had material impact or
undue influence without which resisting party
would not have settled)**



Article 5(2): Grounds applicable *ex officio*

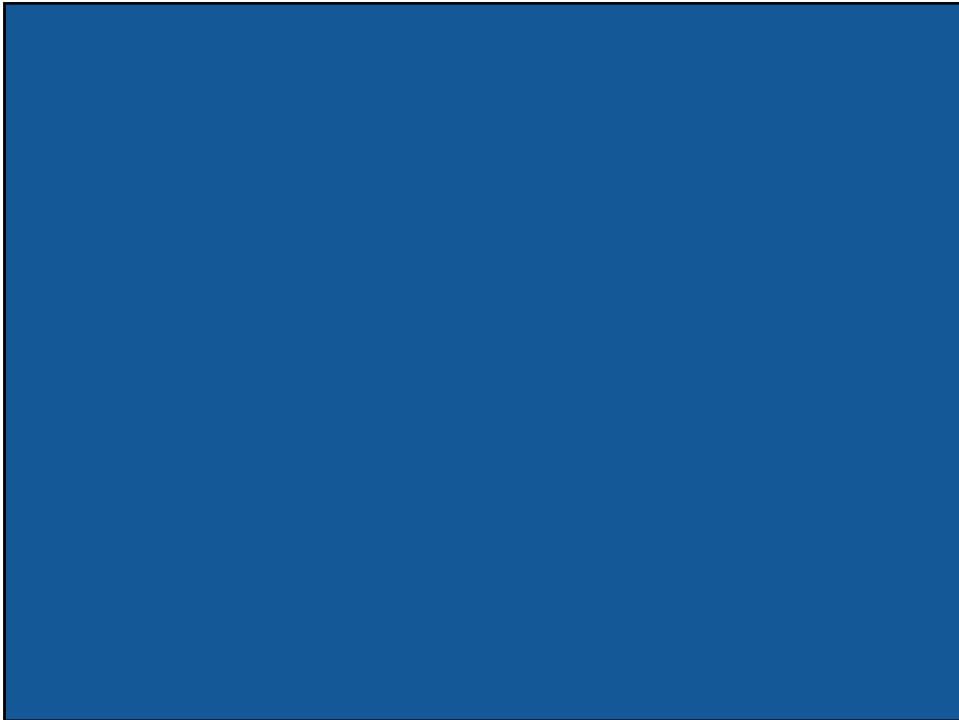
- violation of public policy
- subject matter of the dispute “non-mediabile”

Article 6: Parallel applications or claims

- adjournment of the decision
- ordering suitable security



Thank you





Reservation Options Under the Singapore Convention

UNCITRAL – LAC Conference
9 April 2019

Mark E. Appel
Chair
IMI Investor–State Mediation Taskforce



Option 1 – Non–Application to any Settlement Agreement in which the State, Government Agency, or Any Person Acting On Behalf of a Government Agency is a party, *to the extent specified in the Declaration*

- ▶ *Easy Choice* – Ratify, but exempt the State, providing application and support for cross–border commercial settlements.



Option 1 – Non-Application to any Settlement Agreement in which the State, Government Agency, or Any Person Acting On Behalf of a Government Agency is a party, *to the extent specified in the Declaration*

- ▶ *Better Choice* – Allow for Application of the Convention to the State, under such parameters as are necessary to allow the State to be prepared for mediation.
- ▶ See https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes

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Why Should States NOT Exempt Themselves?

- ▶ Better protection of State Sovereignty; Party Control of Outcomes in Mediation
- ▶ Mediation Allows for Consideration of Political and Economic Realities
- ▶ Broad Range of Remedies Not Available in Arbitral or Judicial Forums

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International Mediation Institute

Option 2 – Reserve the right to apply the Convention until the Settlement Agreement

Why Option 2?

- ▶ Ensure Adequacy of Representation and Quality of Outcome
- ▶ Leverage for late-stage negotiation

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Potential benefits of the new framework on mediation

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