United Nations Commission on International Trade Law (UNCITRAL)

Enforcement of International Commercial Settlement Agreements resulting from Mediation
Mr. Björn Alholm, representative of Finland, is exchanging views with Dr. Roedel, of the Federal Republic of Germany.

Mr. Jacek Machowski, (left), of Poland and Dr. Dusan Spacil, of Czechoslovakia.

Mr. Bakhtov (left), Representative of the USSR with Mr. Savchenko, representative of the Ukrainian SSR.
(28 May 1958)
Tuan Syed Adam Hogan-Shaidali, an Observer from Malaya, is discussing a document with Mr. Suwardi Sujud (right), Observer from Indonesia.

(29 May 1958)
M. Carlos S. Gomes Pereira, Representative of Brazil, is discussing a document with Mr. Albert Herment (right), representative of Belgium.

(29 May 1958)
Mr. M. Kestler Farnes, of Guatemala, is discussing a document with M. Georges Holleaux (right), representative of France.

(29 May 1958)
Mr. Haim Cohn (left), representative of Israel, is exchanging views with Professor A. Bulow, representative of the Federal Republic of Germany.
UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958
(20 September 1963, New York)

“Our conflicts, to be sure, are real. Our concepts of the world are different. No service is performed by failing to make clear our disagreements”
What is UNCITRAL?

- Inter-governmental body with universal membership
- Core legal body of the UN system in the field of private international trade law
- Established by the United Nations General Assembly in December 1966
Origin of UNCITRAL

- Established to address:
  - Dramatic expansion of world trade
  - Need for uniform rules for international trade
  - Divergences in the laws of different States are a barrier to development of world trade
    - Create uncertainty and dispute
    - Add to transaction, information and negotiation costs
    - Increase need for coordination and cooperation
Membership

• **60 member States**
  – Elected by the UN General Assembly for a term of 6 years
  – Terms of half the members expire every 3 years
  – Ensures representation of the world’s geographic regions and principal economic and legal systems
    • 14 from Africa
    • 14 from the Asia-Pacific region
    • 10 from Latin-America and the Caribbean
    • 8 from Eastern Europe
    • 14 from “Western Europe and Others”

• **Observer States and organizations**
Organization of work

- The Commission
- Working Groups
- The Secretariat
The Commission

• Annual sessions held alternately in New York and Vienna (2018 New York, 2019 Vienna)

• Work at the sessions:
  • Finalization and adoption of draft texts referred to the Commission by the working groups
  • Consideration of progress reports of the working groups
  • Selection of topics for future work or research
  • Reporting on technical assistance activities
The Commission and Working Groups

- Works in the 6 UN-languages
- Takes decisions on consensual basis
- Participants:
  - Members,
  - observer States,
  - non- and inter-gouvernamental organizations
Energy Community Participation in 51st session of UNCITRAL

- Member State
- EU Participant
- Observer

B. Membership and attendance


5. With the exception of Armenia, Belarus, Côte d’Ivoire, El Salvador, Kenya, Lesotho, Liberia, Mauritania, Pakistan, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Algeria, Bahrain, Belgium, Bolivia (Plurinational State of), Cambodia, Croatia, Dominican Republic, Finland, Gambia, Georgia, Iraq, Morocco, Myanmar, Nepal, Netherlands, Norway, Senegal, Sudan, Uruguay and Viet Nam.
Working Groups

- **WG I** (Micro-, Small- and Medium-sized Enterprises)
- **WG II** (Dispute Settlement)
- **WG III** (ISDS Reform)
- **WG IV** (Electronic Commerce)
- **WG V** (Insolvency Law)
- **WG VI** (Security Interests)
Working Group I
- 2014 to present: Micro, Small and Medium-sized Enterprises
- 2004-2012: Procurement
- 2001-2003: Privately Financed Infrastructure Projects
- 1959-1971: Time-limits and Limitation (Prescription)

Working Group II
- 2000 to present: Arbitration and Conciliation / Dispute Settlement

Working Group III
- 2017 to present: Investor-State Dispute Settlement Reform
- 2010-2016: Online Dispute Resolution
- 2002-2008: Transport Law
- 1970-1975: International Legislation on Shipping
UNCITRAL Dispute Settlement Texts

1958 • Convention on the Recognition and Enforcement of Foreign Arbitral Awards the "New York" Convention

1976 • UNCITRAL Arbitration Rules (revised in 2010)

1980 • UNCITRAL Conciliation Rules


1985 • UNCITRAL Notes on Organizing Arbitral Proceedings (currently updated)

2002 • UNCITRAL Model Law on International Commercial Conciliation

2012 • Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)

2013 • UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration

2014 • UN Convention on Transparency in Treaty-based Investor-State Arbitration

2018 • draft UN convention on international settlement agreements resulting from mediation

• Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation
Model Law on International Commercial Conciliation

✓ Uniform rules in respect of the conciliation process

✓ Procedural aspects of conciliation including:
  ✓ appointment of conciliators;
  ✓ commencement and termination of conciliation;
  ✓ conduct of the conciliation;
  ✓ communication between the conciliator and other parties;
  ✓ confidentiality and admissibility of evidence in other proceedings;
  ✓ post-conciliation issues (conciliator acting as arbitrator) and enforceability of settlement agreements.
Dispute settlement instruments:

2002 Model Law


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:

<table>
<thead>
<tr>
<th>State</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Albania</td>
<td>2011</td>
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<td>Belgium</td>
<td>2005</td>
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<td>Benin</td>
<td>2017</td>
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<td>Burkina Faso</td>
<td>2017</td>
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<td>Bhutan</td>
<td>2013</td>
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<td>Cameroon</td>
<td>2017</td>
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<td>Canada</td>
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Article 14: GAP

Article 14. Enforceability of settlement agreement

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.
Working Group II mandate

Issues with reform:
- Difficulty to harmonise the procedure on enforcement of settlement agreements, given variance between countries
- Conciliation is flexible in nature, so questions about the need for regulation

But:
- Mediation is more attractive if settlement agreements are enforceable, subject to a harmonised regime, rather than diverse procedures
- Many countries are currently adopting/reforming mediation laws

Ultimately, UNCITRAL decided to expand on Article 14
- Broad mandate
- Result: First time ever two texts have been issued:
  - Convention; and
  - Model Law
Development process

47th session (2014) - UNCITRAL decision to undertake preliminary considerations on enforcement of settlement agreements

48th session (2015) – UNCITRAL decision to give a broad mandate to develop solutions, leaving open the form of the instrument

50th session (2017) - UNCITRAL decision on the need to accommodate different levels of experience with conciliation in different jurisdictions -> Compromise proposal to prepare a Model Law and a Convention simultaneously, confirming no preference on the instrument to be adopted

51st session (2018) - Finalization of the Convention on International Settlement Agreements resulting from Mediation and Adoption of the Model Law by UNCITRAL
Provisional agenda, annotations thereto and scheduling of meetings of the fifty-first session

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation.
Two new instruments

- Draft 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
- Submitted for adoption by UN General Assembly; then open for signature in August 2019
New package

UNCITRAL
United Nations Commission on International Trade Law

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

Convention on international settlement agreements resulting from mediation

UPDATED
Draft convention on international settlement agreements resulting from mediation

Annex I

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation 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,

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

Have agreed as follows:
General principles

• States parties to the Convention shall enforce a settlement agreement.
• If a dispute is already resolved by a settlement agreement, the party is allowed to invoke it.
Practical requirements

For a settlement agreement to qualify under the Convention, it must be:
1. Mediated
2. International
3. Commercial
4. Not excluded from the scope

The requesting party must further prove that the agreement is:
5. In writing (may be in multiple documents)
6. Signed by the parties
7. The product of the mediation process (evidence might include minutes, recordings)
Definitions

- Attempt to reach a settlement with third person assistance lacking binding authority.
- A settlement agreement is ‘in writing’ if its content is recorded in any form (electronic communication: see other UNCITRAL instruments).

EC Procedural Act: ““Mediation” means a form of facilitation which includes a more active involvement by the mediator, including by making concrete proposals for the settlement of a dispute by the mediator” (Art 2(5))
Exclusions:

- Personal, family, inheritance and employment matters;
- Settlement enforceable as a judgment or as an arbitral award
  - aims at avoiding possible overlap with existing and future conventions
    - New York Convention
    - Convention on Choice of Court Agreements (2005) and
    - 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law
Requirements for reliance on settlement agreements

• Signature by parties
• Evidence that the settlement agreement resulted from mediation, such as:
  – The mediator’s signature
  – Attestation by the mediation institution
  – Any other evidence
• Translations
• Any necessary document

EC Procedural Act: “The determination will be binding for the Parties and for the Facilitator, and it shall be in writing, include a description of the issue referred, state the reasons on which it is based, be signed and dated.” (Art 10(6))
Grounds for refusing to grant relief

• (a) Incapacity of parties;
• (b) The settlement agreement:
  – (i) Is null and void, inoperative or incapable of being performed
  – (ii) Is not binding, or is not final
  – (iii) Has been subsequently modified;
• (c) The obligations in the settlement agreement:
  – Performed or not clear or comprehensible;
• (d) Granting relief contrary to terms of agreement;
• (e) Serious breach by mediator of standards applicable to the mediator/ mediation
• (f) Mediator’s impartiality

Grounds might overlap
Grounds for refusing to grant relief

- The competent authority may also refuse to grant relief if:
  - (a) Contrary to the public policy
  - (b) The subject matter not amenable to mediation
Other laws or treaties

- Mirrors Article VII of the New York Convention – More favourable national legislation or treaties
Reservations

- Agreements with governmental agencies

- Application of the Convention only to the extent that the parties to the settlement agreement have agreed to its application
New Model Law

- Basis: Model Law on International Commercial Conciliation, 2002
- Law applies to international commercial mediation and international settlement agreement
- Section 3 (Art. 16-20) new Convention

Stand-alone text

Supports implementation of Convention
Amendment to the UNCITRAL Model Law on International Commercial Conciliation (2002)

- Replaced ‘conciliation’ with ‘mediation’
- Aimed for consistency with Convention and to preserve text of 2002 Model Law
- UNCITRAL currently working on a guidance document for how the amended Model Law should be enacted as stand-alone legislation
MAL // Convention

- Art. 16: Scope of application + definitions
- Art. 17: General principles regarding
  - Para. 1: enforcement of settlement agreements
  - Para. 2: the right for a party to invoke a settlement agreement as a defence against a claim
- Art. 18: Requirements for reliance on a settlement agreement
  - Balance formalities ./ need for the instrument to preserve flexible nature of process
Footnote: scope and application

- Fn 5: Option to broaden the scope of the section to agreements not reached through mediation.

- Fn 6: Option to apply to agreements not international at the time of conclusion, but that result from international mediation in Art 3.
Future work

Secretariat: Revision of the Conciliation Rules and preparation of notes on mediation
252. After discussion, the Commission agreed that priority, in the allocation of working group time, should be given to the topics of judicial sale of ships and issues relating to expedited arbitration; that judicial sale of ships should be allocated to the first available working group, possibly Working Group VI when it had completed its current work on the practice guide, and that Working Group II should be mandated to take up issues relating to expedited arbitration.
264. The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.
CLOUT

- A collection of court decisions and arbitral awards interpreting UNCITRAL texts

- Case abstracts in the 6 UN official languages
Thank you!

For more information please visit

www.uncitral.org