

SINGAPORE CONVENTION ON MEDIATION
PANEL SESSION REPORT

Title of Panel: Lunch-time Panel on the Negotiation of the Convention on Mediation

Date/Time: 7 August 2019, 12.30pm

Venue: Tower Ballroom, Shangri-La Hotel, Singapore

Speakers:

- Mr Itai APTER, Director, International Civil Affairs, Office of the Deputy Attorney General (International Law), Ministry of Justice, Israel (“**Mr Apter**”)
- Mr Héctor FLORES SENTÍES, Partner, Abascal Flores y Segovia (“**Mr Flores Sentíes**”)
- Professor Jaemin LEE, Professor of International Law, School of Law, Seoul National University (“**Prof Lee**”)
- Dr Norel ROSNER, Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission (“**Dr Rosner**”)
- Mr Tim SCHNABEL, Former Attorney, Office of the Legal Adviser, United States Department of State (“**Mr Schnabel**”)

Moderator:

- Ms Corinne MONTINERI, Senior Legal Officer, UNCITRAL Secretariat, United Nations (“**Ms Montineri**”)

Report on Panel

The Lunch-time Panel on the Negotiation of the Singapore Convention on Mediation opened with Ms Montineri hailing the signing of the Convention by 46 States that morning as a great achievement and a powerful demonstration of the international community’s continued support for multilateralism and peaceful means of resolving disputes.

Ms Montineri acknowledged the work conducted by ninety State delegations and forty international organisations in preparing the Convention under the auspices of UNCITRAL before its adoption by the United Nations General Assembly on 20 December 2018. She then opened the floor to the panellists to share their perspectives on the negotiation of the Convention.

The Convention’s origins were addressed by Mr Schnabel. In 2014, on behalf of the United States of America, he proposed the Convention to UNCITRAL as a missing piece in the dispute settlement landscape and subsequently led the United States’ Convention delegation. Stakeholder consultations had demonstrated that certain legal cultures did not view mediation as a co-equal dispute resolution option to litigation or arbitration despite the advantages that mediation could offer in terms of speed, cost, creative solutions and preserving business relationships. The United States’ proposal aimed to change that dynamic while doing no harm to the existing practice of mediation. It was hoped that the ability to give effect to a mediated settlement quickly and efficiently, if the need ever arose, would incentivize the use of mediation. UNCITRAL’s role in recent decades as a custodian of the New York Convention made it a natural candidate to facilitate the Convention given that the proposal’s baseline goal was to develop a convention that would do for mediation what the New York Convention had succeeded in doing for arbitration.

Dr Rosner, from the European Union's Convention delegation, shared his perspective on the EU's position during the negotiations. The EU's initial preference had been for a soft-law instrument. As negotiations progressed, however, the EU had been able to agree on a two-track Convention and Model Law approach provided the Convention reflected certain important elements. Article 1(3), for example, accords with the EU's position that the Convention should not create any overlap or gap with other international instruments. Similarly, the defences in Article 5(1)(e)-(f) give effect to the EU's position that safeguards should apply to the mediator and the mediation process. The "opt-in for the parties" provision in Article 8(1)(b) recognises the EU's position that signatory States should be able to notify that the Convention will apply only if parties to the mediated settlement have agreed to its application. With the signing of the Convention, clear, distinct and complementary international instruments now exist for mediation, litigation and arbitration.

Mr Flores Sentías and Prof Lee, from the Convention delegations of Mexico and the Republic of Korea respectively, reflected on delicate balances in the Convention's text, which were essential to ensuring that the Convention would be signed by States and relevant to prospective users of mediation.

Mr Flores Sentías acknowledged the existence of "hidden defences" in the Convention. For example, a respondent to a Convention enforcement action may show that a settlement was not actually "international" or "commercial". Regarding the "official defences" of Article 5, these had been carefully circumscribed with Article 5(1)(e)-(f) turning on whether the parties' consent to settlement had actually been impacted. The Convention also does not exclude certain types of mediation nor forms of relief despite such proposals being put forward during the negotiations. This outcome preserves mediation's inherent flexibility, including with respect to the ability to reach complex settlements. Finally, in the interests of uniformity, the Convention does not impose a "pre-enforcement stage" requiring, for example, the involvement of a notary public or the certification of documents.

Prof Lee explained that the successful conclusion of the Convention negotiations in only three years reflected market demands for a global enforcement mechanism for mediated settlements. The balances drawn in Articles 1 to 5 of the Convention provide a reliable platform for its successful future implementation. Although the Convention applied only to commercial mediation, the spirit and mechanism embodied in the Convention could apply with equal force to state-to-state and investor-state disputes. Moreover, the use of a two-track system, with the Convention sitting alongside a Model Law, could be adopted for future international projects as it had succeeded in achieving consensus during the Convention negotiations. The Convention therefore represented an important stride forward in formulating the future of international dispute settlement systems.

Mr Apter, from Israel's Convention delegation, identified challenges to the Convention's future. These included the need to encourage stakeholders to mediate their disputes and, once a mediated settlement had been reached, not to turn that settlement into a court judgment. In addition, signatory States to the Hague Choice of Court Convention, the Hague Judgments Convention, the New York Convention and the Singapore Convention would have to take care to ensure that these conventions work in tandem with their own national legislation. The Convention, if successfully implemented, would contribute to a global system governed by the rule of law and the peaceful resolution of disputes.

From the floor, Ms Judith Knieper of the UNCITRAL Secretariat noted the plethora of materials available on UNCITRAL's website concerning the Convention's negotiation. The UNCITRAL Secretariat



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would continue to work on additional materials relating to the Convention and the Model Law that should be available in due course.

In response to a question as to whether States had made any reservations under Article 8, Ms Montineri noted that the Republic of Belarus and the Islamic Republic of Iran appeared to have made reservations and that additional information would emerge at a later stage.

In response to a question regarding the EU's position on the Convention, Dr Rosner explained that the EU had begun a thorough assessment of the Convention in February 2019, which was still ongoing given the need to involve stakeholders from the business community. He noted that the EU's decision as to whether to sign the Convention would be a political one.

Throughout the panel, speakers expressed their thanks to the Government of Singapore, Singapore's Ministry of Law, Ms Natalie Morris-Sharma, UNCITRAL, the Convention's signatories and the delegations who took part in the Convention's negotiation.

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