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Settlement of commercial disputes

International commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[6]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft amended Model Law, with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft convention with annotations is contained in document A/CN.9/942.

II. Draft model law on international commercial mediation and international settlement agreements resulting from mediation

A. Text of the draft amended Model Law

4. The text of the draft amended Model Law reads as follows.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.
[2] Ibid., para. 129.
[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.
[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.
[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.
[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.
[7] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

"Section 1 — General provisions

"Article 1. Scope of application of the Law and definitions

"1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

"2. For the purposes of this Law, 'mediator' means a sole mediator or two or more mediators, as the case may be.

"3. For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

"Article 2. Interpretation

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

"Section 2 — Mediation

"Article 3. Scope of application of the section and definitions

"1. This section applies to international[3] commercial mediation.

"2. A mediation is 'international' if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

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[1] 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; carriage of goods or passengers by air, sea, rail or road.

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" 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 Model Law. This change in terminology does not have any substantive or conceptual implications.

[3] States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

"3. For the purposes of paragraph (2):

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

"5. The parties are free to agree to exclude the applicability of this section.

"6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

"7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

"**Article 4. Variation by agreement**

"Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

"**Article 5. Commencement of mediation proceedings**[4]

"1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

"2. If a party that invited another party to mediate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

"**Article 6. Number and appointment of mediators**

"1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

"2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

"3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

"4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

"5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

"**Article 7. Conduct of mediation**

"1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

"2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

"3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

"4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

"**Article 8. Communication between mediator and parties**

"The mediator may meet or communicate with the parties together or with each of them separately.

"**Article 9. Disclosure of information**

"When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

"**Article 10. Confidentiality**

"Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"**Article 11. Admissibility of evidence in other proceedings**

"1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

"2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

"3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

"5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

"**Article 12. Termination of mediation proceedings**

"The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

"**Article 13. Mediator acting as arbitrator**

"Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

"**Article 14. Resort to arbitral or judicial proceedings**

"Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to

be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

"**Article 15. Binding and enforceable nature of settlement agreements**

"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

"**Section 3 — International settlement agreements**[5]

"**Article 16. Scope of application of the section and definitions**

"1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This section 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.

"3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"4. A settlement agreement is 'international' if, at the time of the conclusion of the settlement agreement:[6]

(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 to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"6. 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

[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles. Further, a State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[6] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4.

communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“7. ‘Seeking relief’ means a party to a settlement agreement requesting enforcement of a settlement agreement under article 17, paragraph 1 or invoking a settlement agreement under article 17, paragraph 2. Similarly, ‘granting relief’ means a competent authority enforcing a settlement agreement under article 17, paragraph 1 or allowing a party to invoke a settlement agreement under article 17, paragraph 2.

“**Article 17. General Principles**

“1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

“2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

“**Article 18. Requirements for reliance on settlement agreements**

“1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator’s signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

“2. 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 if:

(a) A method is used to identify the parties or the mediator and to indicate the parties’ or mediator’s intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

“3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

“4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

“5. When considering the request for relief, the competent authority shall act expeditiously.

"**Article 19. Grounds for refusing to grant relief**

"1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

"**Article 20. Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

B. Annotations

1. Title, sections and terminology

5. The Commission may wish to note that the Working Group tentatively approved the title of the draft amended Model Law (A/CN.9/934, para. 144; see also A/CN.9/929, para. 106) as well as its structure and presentation in three different sections (A/CN.9/934, para. 119; see also A/CN.9/929, para. 105 and annex). The Working Group also approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments, as well as the explanatory text describing the rationale for that change reproduced in footnote 2 to the draft amended Model Law (A/CN.9/934, para. 16; for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120; see also below, para. 19).

6. The Commission may wish to note that in its deliberations of the draft amended Model Law, the Working Group generally agreed that the guiding principles would be to ensure a level of consistency with the draft convention and, at the same time, to preserve the existing text of the Model Law to the extent possible (A/CN.9/934, para. 119).

2. Remarks on section 1 — General provisions

7. Section 1 of the draft amended Model Law applies to sections 2 and 3. This is reflected in article 1, paragraph 1, which provides that the law apply to both international commercial mediation and international settlement agreements. The Commission may wish to note that, in line with the decision of the Working Group, paragraphs 4 to 9 of article 1 of the Model Law have been moved to section 2 of the draft amended Model Law (see below, paras. 9 and 10).

8. Article 1, paragraphs 2 and 3 and article 2 are in substance unchanged from the Model Law.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106;

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

3. Remarks on section 2 — Mediation

9. Section 2 addresses the mediation process, and includes the following provisions of the Model Law: article 1, paragraphs 1 and 4 to 9, and articles 3 to 14.

10. The Commission may wish to note the following adjustments:

- Footnote 1 of the Model Law which provides guidance to States wishing to enact the Model Law to apply to domestic and international mediation has been moved to section 2 of the draft amended Model Law (article 3(1)); this has been done in light of the disconnection between the definitions of the internationality of mediation and internationality of settlement agreements;
- Article 4 on variation by agreement refers to article 7(3) of the draft amended Model Law (numbered article 6(3) in the Model Law); the reference in article 4 to article 2 has been deleted as article 4 is placed in section 2, and applies only to provisions in that section;
- The title of article 15 of the draft amended Model Law (corresponding to article 14 of the Model Law) has been amended to read: “Binding and enforceable nature of settlement agreements” (A/CN.9/934, para. 132).

For approval of article 3(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120;

For approval of the placement of article 1, paragraphs 4 to 9 of the Model Law under article 3, paragraphs 2 to 7 of the draft amended Model Law at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 128–130; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106.

4. Remarks on section 3 — International settlement agreements

11. Articles 16 to 20 address international settlement agreements in a manner consistent with the draft convention. The title of section 3 has been adjusted as agreed by the Working Group (A/CN.9/934, para. 139(iii)).

(i) Remarks on article 16 — Scope of application of the section and definitions

12. Paragraphs 1 to 6 have been approved in substance by the Working Group. Paragraph 1 introduces the generic term "settlement agreement". Paragraphs 2 to 6 are consistent with the corresponding provisions in articles 1 and 2 of the draft convention.

13. The Commission may wish to consider paragraph 7, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions referred to under article 17 (A/CN.9/934, para. 138).

For approval of the scope of application and definitions under article 16, paragraphs 1 to 6, see:

- For approval of paragraph 1 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94;
- For approval of paragraph 2 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43;
- For approval of paragraph 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–210; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28;
- For approval of paragraphs 4 and 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 28 and 121–127; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 31–35, 39 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98 and 101; and A/CN.9/861, paras. 33–39;
- For approval of paragraph 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133.

(ii) Remarks on article 17 — General principles

14. Article 17 provides for the principles regarding both enforcement of settlement agreements (paragraph 1) and the right for a party to invoke a settlement agreement as a defence against a claim (paragraph 2).

For approval of article 17 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79.

(iii) Remarks on article 18 — Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 18 reflects a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from mediation and, on the other, the need for the instrument to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of

simplification and consistency between paragraphs 3 and 4, the words "the party requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 18 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; A/CN.9/896, paras. 67–75, 82, and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

(iv) Remarks on article 19 — Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

(v) Remarks on article 20 — Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to the settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 20 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth sessions of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

(vi) Footnotes

19. The Commission may wish to note that the following additional footnotes have been inserted in the draft amended Model Law:

- Footnote 2, which addresses the decision to replace the term "conciliation" by "mediation" throughout the draft instruments; footnote 2 reflects the explanatory text that was agreed for use when revising UNCITRAL texts on conciliation (see A/CN.9/934, para. 16; A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The Commission may wish to note that the first sentence of the explanatory text, which reads: "*'Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of,*

or relating to, a contractual or other legal relationship." has not been inserted in footnote 2 in order to avoid possible confusion with the definition of mediation provided for in article 1(3) of the draft amended Model Law.

- Footnote 5 provides States with the options of (i) broadening the scope of section 3 to agreements not reached through mediation (for approval of footnote 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 133–136; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 68–72; A/CN.9/896, paras. 40 and 41; and A/CN.9/867, para. 115); and (ii) applying section 3 only to the extent that the parties to a settlement agreement have agreed to its application (thereby mirroring article 8(1)(b) of the draft convention; see A/CN.9/934, para. 137).
- Footnote 6 provides States with the option of adding a subparagraph to article 16(4) so that section 3 would apply to settlement agreements that are not international at the time of their conclusion, but that result from international mediation as defined under article 3, paragraphs 2 to 4 (A/CN.9/934, para. 127).

(vii) Other matters

(i) General Assembly resolution

20. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

21. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a draft convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument*."

For consideration by the Working Group of the form of the draft instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 21 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft amended Model Law

22. The Commission may wish to note the recommendation of the Working Group that, resources permitting, the *travaux preparatoires* of the draft amended Model Law should be compiled by the Secretariat, so that they could be easily accessible and user-friendly. It was further recommended that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment of the Model Law (A/CN.9/934, paras. 146–148). In that light, the Commission may wish to consider whether the Guide to enactment should provide guidance on how sections 2 and 3 of the draft amended Model Law could each be enacted as a stand-alone legislative text.