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Settlement of commercial disputes

International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

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 at its sixty-second session[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 pursuing its work based on that compromise.[6]

2. At its sixty-third to sixty-sixth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[7]

3. This note, which consists of document A/CN.9/WG.II/WP.202 and its addendum, outlines the issues considered so far by the Working Group. Document A/CN.9/WG.II/WP.202 contains annotations to draft provisions to be included in an instrument on enforcement of international settlement agreements resulting from conciliation (referred to as the "instrument") and highlights provisions that were included in the compromise proposal. The addendum illustrates how the draft provisions would be adjusted where the instrument takes the form of a convention and of a complement to the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law").

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

A. Annotated draft provisions

1. Scope of the instrument

4. The Working Group may wish to consider the following formulation regarding the scope of the instrument:

Draft provision 1 (Scope of application)

> *"1. This [instrument] applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').*

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[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] Report of the Commission on the work of its fiftieth session, under preparation.
[7] The reports of the Working Group on the work of its sixty-third, sixty-fourth, sixty-fifth and sixty-sixth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896 and A/CN.9/901, respectively.

"2. This [instrument] does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

"3. This [instrument] does not apply to settlement agreements that[, prior to any application under article 3]:

"(a) have been approved by a court, or have been concluded before a court in the course of proceedings, either of which are enforceable [in the same manner] as a judgment [according to the law of the State of that court]; or

"(b) have been recorded and are enforceable as an arbitral award [legislative provision: *according to the law of this State] [*convention: *according to the law of the Contracting State where enforcement is sought]."*

Comments on draft provision 1

Paragraph 1

5. Paragraph 1, which was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52), reflects the discussion of the Working Group that the objective of the instrument would need to be clearly spelled out, preferably in draft provision 1 (A/CN.9/896, paras. 151-155 and 200-203 and A/CN.9/901, para. 56). The Working Group may wish to consider whether to move draft provisions 3(1) and 3(2) after draft provision 1(1) where the instrument takes the form of a convention in order to indicate in the scope provision the key obligations of the contracting States (see below, para. 33).

6. The term "settlement agreement" is defined under paragraph 1 (see A/CN.9/896, paras. 32, 64, 117, 145, 146 and 152), in line with the understanding of the Working Group that (i) the written requirement for the settlement agreement should be contained in draft provision 1 (1), with draft provision 2 (3) defining how that requirement is met, in particular in relation to electronic communications (see A/CN.9/896, para. 66); and (ii) the instrument should apply to "commercial" settlement agreements, concluded by parties to resolve a "commercial" dispute, without providing for any limitation as to the nature of the remedies or contractual obligations (see A/CN.9/896, para. 16).

Paragraph 2

7. Paragraph 2 contains draft formulation on exclusion of settlement agreements dealing with consumer, family and employment law matters, in accordance with the discussion of the Working Group (A/CN.9/896, paras. 55-60).

Paragraph 3(a)

- *General comments*

8. Paragraph 3(a), which was addressed under issue 2 of the compromise proposal (A/CN.9/901, para. 52), deals with the exclusion from the scope of the instrument of agreements concluded in the course of judicial proceedings (A/CN.9/896, paras. 48-54, 169-176, 205-210 and A/CN.9/901, paras. 25-34, 58-71). The manner in which paragraph 3(a) is meant to operate had been described by the Working Group as follows: (i) the competent authority where enforcement was sought would determine both the application of the instrument and the enforceability of the settlement agreement; (ii) whether a settlement agreement was enforceable in the same manner as a judgment would be determined in accordance with the law of the State where the settlement agreement was approved or court proceedings took place; and (iii) the more-favourable-right provision would allow States to apply the instrument, for example, to a settlement agreement approved by a court and enforceable in the same manner as a judgment (A/CN.9/901, para. 71).

9. Paragraph 3(a) should be considered in light of its objective, which is to avoid possible gaps or overlap with existing and future conventions, namely the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention"), and the draft convention on judgments, under preparation by The Hague Conference on Private International Law ("draft convention on judgments"). The Working Group may wish to consider that the risk of gaps or overlap exists mainly in relation to the provisions of the draft convention on judgments that would apply to "judicial settlements".[8] The draft convention on judgments aims at establishing a system among contracting States whereby judgments in the contracting State of origin would be recognized and enforced as such in the contracting State where enforcement is sought. The Working Group may wish to consider that excluding from the scope of the instrument settlement agreements that would be considered as judicial settlements and are enforceable as judgments at the place of origin would avoid overlap, but may create gaps until the draft convention on judgments is concluded, and adopted by a sufficient number of States. Indeed, under paragraph 3(a), a settlement agreement that is enforceable as a judgment at the place of origin, but cannot be enforced as a judgment at the place of enforcement would be excluded from the scope of the instrument, thereby depriving parties of recourse for enforcement (see below, paras. 15 and 16).

10. On a practical note, the determination of enforceability in reference to other mechanisms poses some questions that the Working Group may wish to consider. First, it creates a hierarchy among the possible options for parties because parties can rely on the instrument only when the settlement agreement is not enforceable under other instruments. If a similar provision were to be inserted in the draft convention on judgments (for example, excluding from its scope settlement agreements that are enforceable under this instrument), it could pose a circular problem where potential enforceability in different regimes would need to be considered prior to enforcement. Further, complications may arise from the fact that the determination by competent authorities may differ if enforcement is sought in more than one jurisdiction.

- *"approved by a court" — "concluded before a court in the course of proceedings"*

11. The Working Group may wish to consider the meaning of, and the difference between, the notions of a settlement agreement being "approved" by a court, and being "concluded before a court" (A/CN.9/901, para. 58). The involvement of a judge might vary from merely recording the parties' settlement agreement to taking an active role in the settlement process and whether the intention is to exclude from the scope of the instrument a wide range of circumstances would need to be confirmed (A/CN.9/901, para. 69). For example, it should be clarified whether situations where court proceedings begin but parties are able to settle through conciliation without any court involvement would be excluded from the scope of the instrument, and whether any formal act by a court would be required (A/CN.9/901, para. 61).

12. The Working Group may wish to recall its understanding at previous sessions that: (i) settlement agreements reached during judicial proceedings but not recorded as judicial decisions should fall within the scope of the instrument (A/CN.9/867, para. 125, A/CN.9/896, para. 48 and A/CN.9/901, para. 25); and (ii) the mere involvement of a judge in the conciliation process should not result in the settlement

[8] Article 13 of the draft convention on judgments (as of February 2017) provides that: "Judicial settlements (transactions judiciaires) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment[, provided that such settlement is permissible under the law of the requested State]." Draft article 14 (1)(d) provides that: "The party seeking recognition or applying for enforcement shall produce — (d) in the case referred to in Article 13, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin."

agreement being excluded from the scope of the instrument (A/CN.9/867, para. 131 and A/CN.9/896, para. 54, and A/CN.9/901, para. 25). The Working Group may wish to consider the extent to which paragraph 3(a) remains consistent with that understanding, in particular as it does not refer to the notion of a settlement agreement being "recorded".

- *Meaning of "enforceable [in the same manner] as"*

13. The Working Group may wish to further consider whether the bracketed phrase "[in the same manner]" should be retained. This phrase may be understood broadly to cover situations where a settlement agreement approved by a court or concluded before a court is considered to "be" a judgment or "has the same effect as" a judgement in that jurisdiction. Possible different interpretations might create uncertainty.

14. The Working Group may wish to confirm its understanding that the phrase "enforceable as" refers to the possibility of enforcement. The competent authority would only determine whether an approved settlement agreement, or a settlement agreement concluded before a court may be potentially enforceable, and would not inquire whether there is the possibility of such an enforcement being granted or refused.

- *According to the law of the State of the court that approved the settlement agreement or before which the settlement agreement was concluded*

15. The Working Group may wish to confirm that the intention of referring to a settlement agreement "approved by a court" or "concluded before a court" is to exclude those settlement agreements from the scope of the instrument because they would be subject to a separate enforcement mechanism. For instance, if a settlement agreement has been approved by a court, but is not enforceable as a judgment, the competent authority would determine that the settlement agreement fall within the scope of the instrument and would proceed to enforcement under the instrument.

16. The determination whether a settlement agreement approved by a court or concluded before a court is enforceable in the same manner as a judgment is to be made in accordance with the law of the State where court proceedings took place (A/CN.9/901, paras. 59 and 71). For example, if a party applies for enforcement in State B of a settlement agreement which was approved by a court (or concluded before a court) in State A, the competent authority in State B would examine whether the approved settlement agreement is enforceable in the same manner as a judgment in State A. If it finds that this is the case, the competent authority would determine that the underlying settlement agreement does not fall within the scope of the instrument and would not proceed with the enforcement of the settlement agreement under the instrument (due to it being outside the scope). The competent authority in State B would decide so, even if State B does not have an enforcement regime for foreign judgments. In other words, the settlement agreement would be denied enforcement, and this would be regardless of whether the approved settlement agreement (or the settlement agreement concluded before a court) is enforceable in the same manner as a judgement in State B. In confirming this understanding, the Working Group may wish to take into account the view that requiring the competent authority to inquire about the enforceability in a different jurisdiction could be an additional burden, costly and potentially lead to complications and delays (A/CN.9/901, paras. 28 and 63). By comparison, the draft convention on judgments aims at establishing a mechanism whereby the State of origin would issue a certificate stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin. This mechanism would only operate among contracting States because the purpose of the

draft convention on judgments is to include judicial settlements within its scope, and to provide a mechanism for mutual recognition and enforcement of judgments.[9]

Paragraph 3(b)

17. Paragraph 3(b), which was addressed under issue 2 of the compromise proposal (A/CN.9/901, para. 52), deals with the exclusion from the scope of the instrument of agreements concluded in the course of arbitral proceedings (A/CN.9/896, paras. 48-54, 169-176, 205-210 and A/CN.9/901, paras. 25-34, 58-71). This provision should be considered in light of its objective, which is to avoid possible gap or overlap with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

18. The Working Group may wish to confirm its understanding that: (i) if the arbitral award recording the settlement agreement falls outside the scope of the relevant enforcement regime (such as the New York Convention) at the place where enforcement is sought, the settlement agreement would be considered for enforcement under the instrument (A/CN.9/901, para. 71 (v)); and (ii) the word "enforceable" refers only to the possibility of enforcement as the competent authority would only determine whether the award may be potentially enforceable, and not inquire whether there is the possibility of such an enforcement being granted or refused.

Other comments on paragraph 3

- *Determination by the court at the place of enforcement ex officio or upon request, burden of proof*

19. The Working Group may wish to clarify whether the determination that the settlement agreement cannot be enforced through the regime available for judgments and arbitral awards is to be made by the competent authority on its own initiative. If so, it may be appropriate to provide the parties an opportunity to be heard particularly as the competent authority may not necessarily have all relevant information on the matter.

20. If the burden of proof would be on the parties, the party seeking enforcement of the settlement agreement would need to indicate that there is no other mechanism to enforce the settlement agreement; the party against whom the application is being invoked would need to indicate that there exists such a mechanism (A/CN.9/901, para. 70). If it is the latter, the Working Group may wish to further consider whether paragraph 3 could be instead formulated as a ground to refuse enforcement under draft provision 4 (A/CN.9/901, para. 67), as follows.

Option for draft provision 4

"*1. The competent authority of [*legislative provision*: this State][* convention*: the Contracting State where the application [under article 3] is made] may refuse to grant relief [under article 3] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that: (...)*

"(f) The settlement agreement has been approved by a court [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court;

"(g) The settlement agreement has been concluded before a court in the course of proceedings [prior to any application under article 3] and is enforceable [in the same manner] as a judgment under the law of the State of that court; or

[9] Ibid.

*"(h) The settlement agreement has been recorded as an arbitral award [prior to any application under article 3] and that award is enforceable under the law of [*legislative provision*: this State][* convention*: the Contracting State where enforcement is sought]."*

- *Invoking a settlement agreement in accordance with draft provision 3(2)*

21. The instrument not only addresses enforcement but also the possibility for a party to invoke a settlement agreement in accordance with draft provision 3(2). The Working Group may wish to consider whether this notion needs to be covered and, if so, whether it would be considered as covered under the term "enforceable as".

- *"[prior to any application under article 3]"*

22. The Working Group may wish to confirm that paragraph 3 shall not allow a party against whom the enforcement of a settlement agreement is sought to, at that stage, seek a consent award or apply to a court for the approval of a settlement agreement as a means to resist enforcement of the underlying settlement agreement. The Working Group may wish to consider inserting the bracketed words "[prior to any application for relief under article 3]" to clarify this point. In addition, this language would make it clear that consideration by a court of an application under draft provision 3 would not fall under paragraph 3(a).

- *Alternative approaches*

23. Some of the alternative approaches discussed at the sixty-sixth session of the Working Group were to (i) include settlement agreements reached during judicial or arbitral proceedings recorded as judicial decisions or arbitral awards within the scope of the instrument to the extent that they were not enforceable under the specific enforcement regime applicable to them (A/CN.9/901, para. 30); (ii) leave it to contracting States to determine the application of the instrument regarding such settlement agreements (A/CN.9/901, paras. 31 and 32); or (iii) leave it to the enforcing authority to determine the applicable enforcement regime (A/CN.9/901, para. 64).

2. Definitions

24. The Working Group may wish to consider the following formulation regarding the definitions:

Draft provision 2 (Definitions)

"1. A settlement agreement is 'international' if:

"(a) At least two parties to the settlement agreement 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 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.

"2. For the purposes of this article:

"(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.

"3. 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; '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.

"4. 'Conciliation' means a process, regardless of the expression used and irrespective of 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 conciliator') lacking the authority to impose a solution upon the parties to the dispute."

Comments on draft provision 2

Paragraphs 1 and 2

25. Paragraphs 1 and 2 contain a definition of "international" settlement agreement and are modelled on article 1(4) and (5) of the Model Law on Conciliation (A/CN.9/896, paras. 17-31 and 161). Upon considering whether the international nature of settlement agreements should be derived from the international nature of the conciliation (as defined in article 1(4) of the Model Law), the Working Group agreed that the instrument should instead refer to the internationality of "settlement agreements" (A/CN.9/896, paras. 19 and 158-163).

26. Paragraph 1 does not include a provision similar to that found in article 1(6) of the Model Law on Conciliation that "*This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law*". The Working Group agreed that the instrument should not contain a similar provision where it takes the form of a convention, but that the matter might need to be considered further where it takes the form of a complement to the Model Law (A/CN.9/896, para. 26).

Paragraph 3

27. Paragraph 3 addresses the requirement found in draft provision 1(1) that settlement agreements should be in writing (A/CN.9/896, paras. 33-38 and 64-66). It may be recalled that the definition of the written requirement incorporates the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce.

Paragraph 4

28. Paragraph 4 contains a definition of "conciliation", based on article 1, paragraphs (3) and (8) of the Model Law (A/CN.9/896, paras. 39-47 and 164-168).

3. Application requirements

29. The Working Group may wish to consider the following formulation regarding the application to the competent authority.

Draft provision 3 (Application)

"1. [Legislative provision:] *A settlement agreement shall be enforced in accordance with the rules of procedure of this State and under the conditions laid down in this Law.* [Convention:] *Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.*

"2. [Legislative provision:] *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 Law[, in order to conclusively prove that the matter has been already resolved.] [Convention:] *If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention[, in order to conclusively prove that the matter has been already resolved]*.

*"3. A party relying on a settlement agreement under this [instrument] shall supply to the competent authority of [*legislative provision: *this State] [*convention: *the Contracting State where relief is sought]:*

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"4. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator'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 article 2(3) above, by itself or together with further evidence.

*"5. If the settlement agreement is not in an official language of [*legislative provision: *this State][* convention: *the Contracting State where the application is made], the competent authority may request the party making the application to supply a translation thereof into such language.*

"6 When considering the application, the competent authority shall act expeditiously."

Comments on draft provision 3

Paragraphs 1 and 2

30. Paragraph 1 reflects the principle that the instrument should provide a mechanism whereby a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement without a review or control mechanism in the State where the settlement agreement originated from as a precondition (see A/CN.9/896, para. 83).

31. Paragraph 2, which was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52), reflects the understanding of the Working Group that the instrument should address situations where a party might not necessarily be seeking enforcement of a settlement agreement but instead would be seeking to rely on the settlement agreement in different procedural contexts, including when a settlement agreement might be raised in defence against a claim (A/CN.9/901,

para. 54).[10] The Working Group may wish to consider whether there is a need to address set-off claims using a settlement agreement and if so, whether paragraph 2 is broad enough to cover such claims. Regarding drafting, the Working Group may wish to consider whether the last square bracketed text "[in order to conclusively prove that the matter has been already resolved]" could be deleted so as to avoid narrowing the scope of the application (A/CN.9/901, para. 55).

32. It is suggested that, where the instrument takes the form of a convention, paragraphs 1 and 2 should be drafted as an obligation to a contracting State rather than a right of party to invoke a settlement agreement.

33. Regarding placement, the Working Group may wish to consider whether paragraphs 1 and 2 which address contracting States' obligations would be better placed under draft provision 1 where the instrument takes the form of a convention (see above, para. 5), and under a new article provisionally titled "General principles" where the instrument takes the form of a complement to the Model Law (see A/CN.9/WG.II/WP.202/Add.1, para. 6, article 14 of the draft Model Law, as amended).

Paragraphs 3 to 6

34. Paragraphs 3 and 4 deal with the requirements for an application under the instrument. Paragraph 3(a) provides that a settlement agreement shall be signed by the parties (A/CN.9/896, para. 64), and paragraph 4 determines how that requirement would be met in relation to a settlement agreement concluded through electronic communication, in line with UNCITRAL texts on electronic commerce.

35. Paragraph 3(b) corresponds to the understanding of the Working Group that the instrument would need to require, in some fashion, that the settlement agreement indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation (A/CN.9/896, paras. 70-75 and 186-190). It was generally felt by the Working Group that such an indication would distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse. However, it was also emphasized that the additional requirement should not be burdensome, should be kept simple to the extent possible (see A/CN.9/896, paras. 40 and 70), and that the means of proving that a conciliator was involved should not be construed as an exhaustive list (A/CN.9/896, para. 188).

36. Paragraphs 3(c) and 6 correspond to suggestions that the competent authority should have the ability to require additional documents that would be necessary and should act expeditiously (A/CN.9/896, paras. 82 and 183). By way of background, the Working Group considered whether the instrument should provide that the settlement agreement should be in one single document, or in a complete set of documents. After discussion, there was general support for not including such a requirement in the instrument, but instead providing that the competent authority should have, at the stage of the application, the ability to require from the parties documents that would be strictly necessary (A/CN.9/896, paras. 67-69 and 177-185).

Additional matter — Informal processes

37. The Working Group may wish to consider whether the form requirements of settlement agreements in draft provisions 1(1) and 2, as well as the application process in draft provision 3, sufficiently ensures that settlement agreements

[10] The Working Group may wish to note the following alternative drafting proposal discussed at its sixty-fifth session: "*A settlement agreement shall be enforced in accordance with the rules of procedure of [*legislative provision: *this State][*convention: *the State where enforcement is sought] and shall be given effect in defence against any claim to the same extent as in enforcement proceedings*" (A/CN.9/896, para. 152).

resulting from informal processes are excluded (A/CN.9/867, paras. 117 and 121; A/CN.9/896, paras. 42-44 and 164-167).

38. The Working Group may wish to consider further the suggestion that flexibility should be provided to States to broaden the scope of the instrument to include agreements between the parties not necessarily reached through conciliation. For example, a reservation (where the instrument takes the form of a convention), or a footnote (where it takes the form of model legislative provisions) could indicate that the application of the instrument extends to agreements settling a dispute reached without the assistance of a third person (A/CN.9/896, paras. 40 and 41). A reservation could read as follows: "*A Contracting State may declare that it shall apply this Convention to international agreements concluded in writing by parties to resolve a commercial dispute regardless of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation]. As a result, articles 2(4), 3(3)(b), 4(1)((d) and (e) would not apply"* A footnote in the model legislative text could read as follows: "*A State may consider applying this Section to international agreements concluded in writing by parties to resolve a commercial dispute, irrespective of whether such agreements resulted from conciliation. Adjustments would need to be made to relevant articles*".

4. Defences

39. The Working Group may wish to consider the following formulation regarding the defences:

Draft provision 4 (Grounds for refusing to grant relief)

"*1. The competent authority of [*legislative provision*: this State][*convention*: the Contracting State where the application [under article 3] is made] may refuse to grant relief [under article 3] at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:*

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

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked and, therefore, have not yet given rise to the obligations of that party; or

*"(c) The 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 thereon, under the law deemed applicable by the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the Contracting State where the application under draft provision 3 is made]; or*

"(d) There was a serious breach by the conciliator of standards applicable to the conciliator or the conciliation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the conciliator to disclose circumstances to the parties that raise justifiable doubts as to the conciliator'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 [*legislative provision*: this State] [*convention*: the Contracting State where the application [under article 3] is made] may also refuse to grant relief [under article 3] if it finds that:*

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

"(b) The subject matter of the dispute is not capable of settlement by conciliation under the law of that State."

Comments on draft provision 4

- *Chapeau*

40. The chapeau to draft provision 4 (1) and (2) was addressed under issue 1 of the compromise proposal (A/CN.9/901, para. 52). The phrase "grant relief" intends to encompass both the right of a party to seek enforcement and to invoke a settlement agreement under draft provision 3 (A/CN.9/901, para. 57). The Working Group may wish to consider whether the phrase "under article 3" needs to be repeated in the chapeau.

- *Paragraph 1, subparagraph (a)*

41. Subparagraph (a) reflects the agreement in substance by the Working Group (A/CN.9/896, para. 85).

- *Paragraph 1, subparagraph (b)*

42. Subparagraph (b) refers to various grounds that relate to the settlement agreement. Regarding the ground that the settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement, the Working Group agreed to retain that ground, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be a final resolution between the parties of the dispute (A/CN.9/896, paras. 88 and 89). Regarding the ground that the settlement agreement had been subsequently modified by the parties, the Working Group generally agreed that that ground should be retained, and could possibly be merged with the ground that the obligations in the settlement agreement have been performed (A/CN.9/896, paras. 90 and 98). Regarding the last ground that the conditions stipulated in the agreement were not met, it is clarified that the ground would apply only if the conditions were not met or if the obligations had not been performed or complied with by the applicant (A/CN.9/896, paras. 91 and 98).

- *Paragraph 1, subparagraph (c)*

43. Subparagraph (c) is based on article II (3) and article V (1)(a) of the New York Convention. It seeks to reflect the understanding of the Working Group that the instrument should not give the competent authority the ability to interpret the validity defence to impose requirements in domestic law, and that consideration of the validity of settlement agreements by the competent authority should not extend to form requirements (A/CN.9/896, paras. 99-102).

- *Paragraph 1, subparagraphs (d) and (e)*

44. Subparagraph (d) addresses the impact of serious breach by the conciliator of standards applicable to the conciliator or the conciliation at the enforcement stage (A/CN.9/896, paras. 103-109 and 191-194, A/CN.9/901, paras. 41-50 and 72-88). Subparagraph (e) addresses the impact of failure by the conciliator to disclose information on circumstances likely to give rise to justifiable doubts regarding impartiality or independence at the enforcement stage (A/CN.9/896, paras. 104, 105, 108 and 194, A/CN.9/901, paras. 41-50 and 72-88). Both provisions, which were addressed under issue 4 of the compromise proposal (A/CN.9/901, para. 52), reflect the understanding of the Working Group that the defences should be limited to instances where the conciliator's breach or failure had a direct impact on the party's decision to enter into the settlement agreement (A/CN.9/896, paras. 107 and 194).

45. The Working Group may wish to consider the views expressed that subparagraphs (d) and (e) would run contrary to the objective of the instrument and were not necessary (A/CN.9/901, paras. 46-50 and 76), on the basis that: (i) those matters were covered under other grounds for refusing enforcement in subparagraph (c) and paragraph 2(a) and any material accompanying the instrument could clarify that point; (ii) subparagraphs (d) and (e) would require the enforcing authority to take into account relevant domestic standards on conduct of the conciliator and the conciliation process, and to inquire about a breach or a failure which did not necessarily take place in that jurisdiction; (iii) including non-disclosure by a conciliator as a defence to resist enforcement would run contrary to the approach adopted in the Model Law on Conciliation (see paragraph 52 of the Guide to Enactment and Use of the Model Law on Conciliation); (iv) inclusion of subparagraphs (d) and (e) may deter the utility of the instrument, as it could create ancillary disputes; and (v) conciliators were bound by ethical duties and professional standards and subparagraphs (d) and (e) would be superfluous.

46. Subparagraphs (d) and (e) reflect a compromise among the divergence in views and the drafting proposal that the Working Group agreed to consider further (A/CN.9/901, paras. 52, 72, 79, and 81-88). The proposal had been made on the basis that there was merit in retaining subparagraphs (d) and (e), which were essentially an extension of subparagraph (c). They dealt with a situation where a conduct by the conciliator had an impact on the parties entering into the agreement, which could lead to the settlement agreement being null and void. It was explained that subparagraphs (d) and (e) would not impact the confidential nature of conciliation and that the enforcing authority would generally not be expected to inquire into the details of the process (A/CN.9/901, paras. 82). It was further explained that subparagraphs (d) and (e) provided for an objective threshold by limiting the grounds to when a breach or a failure to disclose had an impact on the parties entering into the agreement (A/CN.9/901, para. 84).

47. With respect to subparagraph (d), the Working Group highlighted the need to clarify the scope and the meaning of “standards applicable” to the conciliator and the conciliation process (A/CN.9/901, paras. 87 and 88). Noting that such applicable standards might change over time, the Working Group may wish to consider clarifying that standards applicable may take different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations. Such standards contain different elements such as independence, impartiality, confidentiality and fair treatment (see for instance article 6(3) of the UNCITRAL Model Law on Conciliation, paragraph 55 of the Guide to Enactment and Use of the UNCITRAL Model Law on Conciliation, article 7 of the UNCITRAL Conciliation Rules).

48. Subparagraph (e) was retained in addition to subparagraph (d), as it would allow the competent authority to refuse enforcement even when the applicable standard did not necessarily include a disclosure obligation (A/CN.9/901, paras. 78 and 85). The Working Group may wish to confirm this approach in light of questions raised about the need to retain subparagraph (e) (A/CN.9/901, paras. 49, 73 and 76) and the fact that it would, in essence, introduce a disclosure obligation for the conciliator into a conciliation process, which may be more flexible in that respect.

- *Paragraph 2*

49. Paragraph 2 covers situations where the competent authority would consider the defences on its own initiative, and reflects the agreement in substance by the Working Group (A/CN.9/896, paras. 110-112).

5. Relationship of the enforcement process to judicial or arbitral proceedings

50. The Working Group may wish to consider the following formulation regarding parallel applications or claims:

Draft provision 5 (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 enforcement of that settlement agreement, the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the Contracting State where the enforcement of the settlement agreement is sought] may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."*

Comments on draft provision 5

51. Draft provision 5 addresses how a competent authority would treat a situation where an application (or claim), which might impact the enforcement, has been made to a court, an arbitral tribunal or any other authority. The Working Group generally agreed that it would be appropriate for the competent authority to be given the discretion to adjourn the enforcement process if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other authority, which might affect the enforcement process (A/CN.9/896, paras. 122-125). It may be noted that draft provision 5 does not deal with applications referred to in draft provision 3(2).

6. Other matters

(a) "More-favourable-right" provision

52. The proposal for a provision mirroring article VII(1) of the New York Convention,[11] which would permit application of more favourable national legislation or treaties to enforcement, was considered by the Working Group. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed (A/CN.9/896, paras. 154, 156, and 204; A/CN.9/901, paras. 65, 66 and 71). The Working Group may wish to consider the following draft formulation: *"This [instrument] 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 Contracting State where such settlement agreement is sought to be relied upon."*

53. The Working Group may wish to confirm the following: (i) whether a more-favourable-right provision would be required only where the instrument takes the form of a convention (because under a legislative provision, States would have the flexibility to address the issue by expanding the scope provision); and (ii) whether the more-favourable-right provision could allow State courts to apply the convention to settlement agreements explicitly excluded from the scope of the convention.

(b) States and other public entities

54. Regarding settlement agreements involving States and other public entities, the Working Group reaffirmed its decision that such agreements should not be automatically excluded from the scope of the instrument (see A/CN.9/896,

[11] Article VII of the New York Convention provides that: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

paras. 61 and 62), and could be addressed through a declaration where the instrument takes the form of a convention. Where the instrument takes the form of a complement to the Model Law, it is for each State to decide the extent to which such agreements would fall under the enacting legislation. The Working Group may wish to consider the following formulation for a declaration on the application of the instrument to settlement agreements concluded by States and other public entities where the instrument takes the form of a convention (A/CN.9/862, para. 62): *"A Contracting State may declare that [*option 1: *it shall apply][*option 2: *it shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration."*

(c) Declaration by contracting States on application of the Convention based on parties' agreement

55. During the previous discussions at the Working Group, it was suggested that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement need not necessarily be dealt with in the instrument, but could be left to States when adopting or implementing the instrument (A/CN.9/896, paras. 130 and 196; A/CN.9/901, paras. 39 and 40). This matter was dealt with under issue 3 of the compromise proposal (A/CN.9/901, para. 52). It may be envisaged that States that wish to incorporate such a mechanism could make a declaration to that effect. The Working Group may wish to consider the following formulation: "*A Contracting State may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention*." Where the instrument takes the form of a complement to the Model Law, an opt-in mechanism could be included as an option for States to consider when enacting the Model Law (A/CN.9/896, para. 196, A/CN.9/901, para. 39).

56. The Working Group may wish to further clarify how the reservation would operate. For example, it may be clarified whether a State, not making this reservation upon becoming a Party to the Convention, could apply the Convention automatically even when the parties to the settlement agreement have opted-out of the Convention.

57. The Working Group may wish to consider that it would generally be in the interest of a State to make that reservation to protect its businesses' interests. It is likely that enforcement of settlement agreements involving businesses in State A would be sought in State A. By making the reservation, State A could protect the interest of those businesses, particularly those that had not agreed to the application of the convention. This might have a domino effect in almost all States making the reservation.