



**United Nations Commission on
International Trade Law**
Fiftieth session

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**Report of Working Group II (Dispute Settlement) on the
work of its sixty-sixth session
(New York, 6-10 February 2017)**

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I. Introduction

1. At its forty-eighth session, the Commission mandated the Working Group to commence work on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission agreed that the mandate of the Working Group should be broad to take into account the various approaches and concerns.¹

2. At its sixty-third (Vienna, 7-11 September 2015) and sixty-fourth (New York, 1-5 February 2016) sessions, the Working Group considered that topic on the basis of notes by the Secretariat ([A/CN.9/WG.II/WP.190](#) and [A/CN.9/WG.II/WP.195](#), respectively). At its sixty-fourth session, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories.²

3. At its forty-ninth session, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions ([A/CN.9/861](#) and [A/CN.9/867](#), respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation (“instrument”), and confirmed that the Working Group should continue its work on the topic.³

4. At that session, the Commission also held a preliminary discussion regarding possible future work in the area of international dispute settlement. The Commission considered the topics of (i) concurrent proceedings; (ii) code of ethics/conduct for arbitrators; and (iii) possible reform of investor-State dispute settlement system.⁴ After deliberation, the Commission decided to retain the three topics on its agenda for further consideration at its next session. It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II to undertake work in any of the topics, following the current work on the enforcement of settlement agreements resulting from conciliation. In that context, it was reaffirmed that priority should be given to the current work by Working Group II so that it could expeditiously complete its work.⁵

5. At its sixty-fifth session (Vienna, 12-23 September 2016), the Working Group continued its deliberations on the basis of a note by the Secretariat ([A/CN.9/WG.II/WP.198](#)), and agreed that work would proceed with the aim of preparing a uniform text on enforcement of international commercial settlement agreements resulting from conciliation. It requested the Secretariat to prepare draft provisions showing how they would be adjusted depending on whether the instrument would take the form of a convention or model legislative provisions. It was reaffirmed that such work should be without any prejudice to the final form of the instrument.⁶

¹ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 135-142.

² [A/CN.9/867](#), para. 15.

³ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 162-165.

⁴ *Ibid.*, paras. 174-194.

⁵ *Ibid.*, para. 195.

⁶ [A/CN.9/896](#), para. 13.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its sixty-sixth session in New York, from 6-10 February 2017. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Denmark, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Lebanon, Malaysia, Mexico, Namibia, Nigeria, Pakistan, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Algeria, Belgium, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Ethiopia, Iraq, Finland, Luxembourg, Malta, Netherlands, Norway, South Africa, South Sudan, Sweden, Syrian Arab Republic and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC) and International Institute for the Unification of Private Law (UNIDROIT);

(b) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Center for Arbitration and Mediation (CEPANI), Centro de Arbitraje Cámara de Comercio de Lima (CCL), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law (CSPIL), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICA), G.C.C. Commercial Arbitration Centre (GCCAC), Hong Kong Mediation Centre (HKMC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Academy of Mediators (IAM), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Law Association (ILA), International Mediation Institute (IMI), Jerusalem Arbitration Center (JAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Law Association for Asia and the Pacific (LAWASIA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), New York International Arbitration Center (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), The World Association of Former United Nations Interns and Fellows (WAFUNIF), and Union Internationale des Huissiers de Justice (UIHJ).

10. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Ms. Petra Peer (Austria)

11. The Working Group had before it the following documents: (a) provisional agenda ([A/CN.9/WG.II/WP.199](#)); and (b) note by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation ([A/CN.9/WG.II/WP.200](#) and addendum).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation.
5. Organization of future work.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of the note prepared by the Secretariat ([A/CN.9/WG.II/WP.200](#) and addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Working Group requested the Secretariat to prepare draft model legislative provisions complementing the UNCITRAL Model Law on International Commercial Conciliation (“Model Law on Conciliation” or “Model Law”) and a draft convention, both addressing enforcement of international settlement agreements resulting from conciliation, based on the compromise proposal (see para. 52 below) and reflecting the deliberations and decisions of the Working Group.

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

14. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation (“instrument”) on the basis of document [A/CN.9/WG.II/WP.200](#) and its addendum. The Working Group agreed to consider the draft provisions contained therein without prejudice to the final form of the instrument to be prepared.

15. The Working Group began its preliminary deliberation on some of the outstanding issues as provided in paragraphs 4 to 14 of document [A/CN.9/WG.II/WP.200](#).

A. Legal effect of settlement agreements

16. The Working Group recalled its deliberations on how the instrument would express that settlement agreements could or should be given legal effect, for instance, as a prerequisite for enforcement or in defence against a claim, without using the expression “recognition”, which raised concerns in some jurisdictions.

17. It was questioned whether there was a need for the instrument to include provisions to that effect as the main objective of the instrument was to envisage an

enforcement mechanism. Along the same lines, it was suggested that the instrument should not address the legal effect of a settlement agreement between the parties. It was also argued that there was no need for the instrument to address that point as the legal effect of a settlement agreement as binding on the parties was implicit in the notion of an agreement.

18. In response, it was said that it would be appropriate for the instrument to address situations where a party might not be necessarily seeking enforcement of a settlement agreement but instead would be seeking to rely on the settlement agreement as a defence or for other procedural purposes. In that context, the Working Group recalled the drafting suggestion made at its sixty-fifth session (A/CN.9/896, para. 155), which read: “A settlement agreement shall be enforced and shall be given effect in defence against any claim made by either party to the settlement agreement [as far as the defence is available in national law] to the same extent as in enforcement proceedings [in accordance with the rules of procedure of the State where enforcement is sought and subject to (the provisions on defences in the instrument)].”

19. With regard to the proposed wording in draft provisions 1(1), 3(1) and 4(1), a concern was raised about the meaning of the phrase “legal effect”, as it was ambiguous, including whether it referred to the substantive or procedural legal effect.

20. To address that concern, the following alternative text was suggested: “In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement, the interested party may invoke the existence of the settlement agreement in accordance with the law of the State where the settlement agreement is sought to be relied upon and under the conditions laid down in this instrument to prove that the dispute has been settled.”

21. It was explained that the alternative text would make it clear that a settlement agreement could be used as a defence in court proceedings, if the conditions set out in draft provision 3 were met and there were no grounds for refusing enforcement under draft provision 4. It was explained that, as a settlement agreement might have different legal effects depending on the jurisdiction, the alternative text would not address the legal effect of a settlement agreement. Instead, the effect would be deferred to the law of the State where the settlement agreement was sought to be relied upon. As to the placement of the alternative text, it was suggested that it could be placed in draft provision 3 with corresponding revisions made to other parts of the instrument.

22. Some questions were raised regarding the alternative text. One question related to the consequences on enforcement when the law of the State where the settlement agreement was sought to be relied upon prohibited a party from invoking the settlement agreement. It was understood that the alternative text should not be read as allowing a State which implemented the instrument to prohibit a party from invoking the settlement agreement in accordance with this provision. It was also mentioned that reference to the law of the State where the settlement agreement was sought to be relied upon might be understood to refer also to the substantive law of that State and thus, would be broader than the “rules of procedure” provided in draft provision 3. It was further questioned whether the conditional phrase in the alternative text (“In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement”) was necessary.

23. To address some of those questions, it was suggested that the alternative text could be further revised to read: “In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement, that party may invoke the existence of the settlement agreement in the State where the settlement agreement is sought to be relied upon in accordance with the law of that State and

under the conditions laid down in this instrument to prove that the dispute has been settled.”

24. After discussion, the Working Group agreed to further consider the above-mentioned drafting proposals (see paras. 18, 20 and 23) in addition to draft provisions 1(1) and 3(1).

B. Settlement agreements concluded in the course of judicial or arbitral proceedings

25. The Working Group recalled its understanding that: (i) settlement agreements reached during judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards should fall within the scope of the instrument; and (ii) the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument.

26. The Working Group further recalled its deliberations on the exclusion of settlement agreements concluded in the course of judicial or arbitral proceedings, in light of the objective to avoid possible gap or overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”), the Convention on Choice of Court Agreements (2005) (the “Choice of Court Convention”), and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law.

27. While some preference was expressed for option 1 in draft provision 1(3), it was suggested that settlement agreements recorded as judgments should be excluded from the scope of the instrument only to the extent that they would be enforceable in the same manner as judgments. It was further suggested to clarify that settlement agreements concluded before a court in the course of proceedings but not recorded as judgments would fall under the scope of the instrument to the extent that they were not enforceable in the same manner as a judgment. In that context, the Working Group considered the following drafting suggestion: “The instrument does not apply to settlement agreements approved by a court, or which have been concluded before a court in the course of proceedings, and which are enforceable in the same manner as a judgment, or recorded as an arbitral award.”

28. With respect to that drafting suggestion, it was pointed out that additional burden would be put on the enforcing authority as it would need to determine enforceability under conventions or domestic law applicable to judgments. Therefore, it was suggested that it would be preferable not to include the additional criteria of enforceability in draft provision 1(3).

29. Concerns were raised that the drafting suggestion (see para. 27 above) might create a gap, if it did not provide that a settlement agreement recorded as an arbitral award but not enforceable as an arbitral award would fall under the scope of the instrument (for example, when the enforceability of a consent award is denied under the New York Convention due to the lack of an underlying dispute). It was further questioned whether the assessment of enforceability should be made in accordance with the law of the State where the settlement agreement was recorded as a judgment (the originating State) or in accordance with the law of State where enforcement was sought. In response, it was said that reference to the law of the originating State would be consistent with the approach adopted in the 2016 preliminary draft convention on judgments under preparation.

30. Concern was expressed that parties might be deprived of the opportunity to enforce a settlement agreement in instances where the settlement was recorded as a

judgment or an arbitral award, but the law of the State where enforcement was sought did not permit enforcement under those regimes. It was therefore suggested that option 2 in draft provision 1(3) would be preferable as it would permit application of the instrument to settlement agreements recorded as judgments or arbitral awards, to the extent that they cannot be relied upon for enforcement as judgments or arbitral awards.

31. It was noted that, in certain jurisdictions, it was typical for parties to request a court to record a settlement agreement as a judgment. It was highlighted that in such circumstances, a large number of settlement agreements would be excluded from the scope of the instrument under option 1 of draft provision 1(3). In order to avoid such negative consequences, it was suggested that the instrument could provide for some flexibility to the enacting or implementing State to expand the scope of the instrument (possibly through declarations if the instrument were to be a convention). Support was expressed for that suggestion. It was noted that an alternative approach might be for the instrument to provide States with the flexibility to limit the scope of application, rather than to expand it, through declarations.

32. However, it was pointed out that uncertainties might result from such declarations, and therefore, doubts were expressed on the need to adopt an open and flexible approach to the matter. It was suggested that if the parties to a settlement agreement decided to record their settlement agreements in the form of a judgment or an arbitral award, there would be little need for allowing enforcement under the instrument.

33. The Working Group then considered whether settlement agreements not concluded in the course of judicial or arbitral proceedings but afterwards recorded as judgments or arbitral awards should fall within the scope of the instrument. It was widely felt that such situations could be addressed along the same lines as settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as judgements or arbitral awards.

34. After discussion, the Working Group agreed to consider the matter further at a later stage of its deliberations.

C. Opt-out or opt-in for the parties to the settlement agreement; declaration by States regarding the effect of an opt-in by the parties

35. The Working Group considered whether the application of the instrument would depend on the consent of the parties to the settlement agreement. The wide range of views that had been expressed at the previous sessions of the Working Group were reiterated.

36. One view was that the parties' choice should not have any impact on the application of the instrument and, therefore, the instrument should apply generally and automatically provided that the requirements therein were met and no grounds for resisting enforcement existed. It was said that such an approach would provide an enforcement regime comparable to that of the New York Convention for arbitral awards. That approach would avoid potential conflicts between the parties regarding the application of the enforcement regime envisaged in the instrument. It was further mentioned that requiring an opt-in would run contrary to the underlying objective of the instrument, which was to make it easier for businesses to enforce settlement agreements. Requiring an opt-in would also be contrary to the expectations of the parties as they would generally expect the other party to comply with the settlement agreement and thus its possible enforcement.

37. A different view was that parties should decide whether the instrument would be applicable in light of the importance of party autonomy, and that this could be achieved by providing for an opt-in or opt-out mechanism in the instrument. It was argued that parties needed to be fully aware of the consequences of the instrument becoming applicable and the opt-in or opt-out mechanism would provide a gradual introduction to the new enforcement regime.

38. The Working Group considered draft provision 4(1)(f) which dealt with the question of opt-out or opt-in by the parties to the settlement agreement as a ground for refusing enforcement. It was suggested that such a provision, if kept in the instrument, would be better placed under draft provision 4(2). Another suggestion was to require opt-in or opt-out by the parties in the provision on the scope or on application requirements.

39. Considering the divergence in views, the Working Group heard the suggestion also made at its sixty-fifth session that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement could be left to States when adopting or implementing the instrument. For example, if the instrument were to be a convention, a State could be given the flexibility to declare that that it would apply the convention only to the extent that the parties to the settlement agreement agreed to its application (as provided in option 1 in paragraph 52 of document [A/CN.9/WG.II/WP.200](#)). If the instrument were to take the form of model legislative provisions, an opt-in mechanism could be included as an option for States to consider when enacting such legislative provisions. In that context, reference was made to articles 1(6) and 1(7) of the Model Law on Conciliation.

40. The suggestion in paragraph 39 above was considered as one possible means to address the divergence of approaches on the question of opt-in or opt-out mechanisms. However, it was pointed out that providing flexibility to States to formulate declarations to that effect might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between parties in different jurisdictions as a settlement agreement might be enforceable in one but not in another.

D. Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

41. The Working Group recalled its discussion at its previous sessions on the impact of the conciliation process, and the conduct of conciliators, on the enforcement procedure. In that context, diverging views were expressed regarding the inclusion of defences for resisting enforcement of settlement agreements as formulated in draft provision 4(1)(d), which addressed manifest failure of the conciliator to maintain fair treatment of the parties, and draft provision 4(1)(e), which addressed non-disclosure by the conciliator of circumstances likely to give rise to justifiable doubts as to its impartiality or independence.

42. One view was that draft provisions 4(1)(d) and 4(1)(e) struck an appropriate balance providing an efficient mechanism for enforcement of settlement agreements and assuring legal certainty. It was explained that draft provisions 4(1)(d) and 4(1)(e) would contribute to ensuring that the process leading to a settlement agreement was conducted in an appropriate manner and provide a review mechanism by a court or an enforcing authority through which the parties could be protected. It was also noted that the inclusion of draft provisions 4(1)(d) and 4(1)(e) would highlight the importance of ethics and conduct of conciliators.

43. In support of that view, it was mentioned that draft provision 4(1)(d) introduced objective standards. With regard to the term “manifest”, it was said that the inclusion of that term raised the threshold, adding to the objectiveness of the standard and suggesting that only serious irregularities or failure by the conciliator would be grounds for refusing enforcement. On the other hand, views were also expressed that the “manifest” threshold was too high a standard and one which would be difficult to prove. A proposal was made to replace the notion of “manifest failure to maintain fair treatment” with “impropriety”.

44. With regard to the notion of “fair treatment”, it was mentioned that the notion was included in article 6(3) of the Model Law on Conciliation, which justified the inclusion in the instrument. It was mentioned that paragraph 55 of the Guide to Enactment and Use of the Model Law further provided guidance on the meaning of that term. In response, it was said that paragraph 55 was not meant to provide guidance on the issue under consideration, and that paragraph 55 further stated that the reference in the Model Law to maintaining fair treatment of the parties was intended to govern the conduct of the conciliation process and not the contents of the settlement agreement.

45. With regard to draft provision 4(1)(e), a suggestion was made to insert the words “in the eyes of the parties”, but there was little support as that phrase would be introducing a subjective criteria. A further suggestion was made to introduce in draft provision 4(1)(e) language similar to that in draft provision 4(1)(d) which would require that non-disclosure by a conciliator had a material impact or undue influence on the parties entering into the settlement agreement.

46. Another view was that draft provisions 4(1)(d) and 4(1)(e) would run contrary to the objective of the instrument and were not necessary. It was stated that those matters were covered under other grounds for resisting enforcement in draft provision 4, such as paragraph 1(c), which referred to the settlement agreement being null and void, and paragraph 2(a), which addressed violation of public policy. It was suggested that any material accompanying the instrument could clarify that paragraphs 1(c) and 2(a) were intended to include circumstances dealt with in paragraphs 1(d) and 1(e). In response, the view was expressed that there was merit in retaining paragraphs 1(d) and 1(e) as explicit defences.

47. It was further said that draft provisions 4(1)(d) and 4(1)(e) might be problematic, as they would require the enforcing authority to take into consideration relevant domestic standards on conduct of the conciliator and the conciliation process. It was also mentioned that as the instrument was being prepared to allow for cross-border enforcement, the enforcing authority might have to inquire about a misconduct or a process which did not necessarily take place in that jurisdiction, which also posed problems.

48. In addition, it was underlined that manifest failure by a conciliator to maintain fair treatment would, in most cases, be very difficult to establish due to the confidential or informal nature of the process and the confidentiality obligation of the conciliator. Proving such failure might result in the parties violating the terms of confidentiality, which was a core characteristic of conciliation. In response, it was said that article 9 of the Model Law on Conciliation provided exceptions to confidentiality obligation, where disclosure would be required under the law or for the purposes of implementation or enforcement of a settlement agreement.

49. With respect to draft provision 4(1)(e), it was pointed out that in the preparation of the Model Law on Conciliation, a suggestion had been made to address the consequences that might result from non-disclosure by the conciliator. Reference was made to paragraph 52 of the Guide to Enactment and Use of the Model Law on

Conciliation which read: "... the prevailing view was that the consequences of failure to disclose such information should be left to the provisions of law in the enacting State ... In particular, a failure to disclose facts that might give rise to justifiable doubts ... does not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law." It was said that 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. In that context, a suggestion was made that draft provision 4(1)(e) could be merged with draft provision 4(1)(d) (see para. 76 below).

50. It was further pointed out that from practitioners' standpoint, inclusion of draft provisions 4(1)(d) and 4(1)(e) would deter the utility of the instrument, as it could create ancillary disputes. It was also mentioned that the standards in draft provision 4(1)(d) were subjective and could be interpreted differently. It was highlighted that conciliators were bound by ethical duties and professional standards and those provisions would be superfluous. In that context, a suggestion was made that work to prepare ethical standards for conciliators could be undertaken.

E. Proposal

51. With a view to make progress on the preparation of the instrument, a possible compromise proposal (hereinafter referred to as "compromise proposal") was made in relation to the following issues: legal effect of settlement agreements (issue 1); settlement agreements concluded in the course of judicial or arbitral proceedings (issue 2); declaration on opt-in by the parties (issue 3); impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure (issue 4); and the form of the instrument (issue 5).

52. The compromise proposal read as follows:

"Issue 1

"Draft provision 3: In case of a dispute concerning a matter that a party claims to have already been settled by a settlement agreement, the party may invoke the existence of the settlement agreement in the State where the settlement agreement is sought to be relied upon in accordance with the rules of procedure of the State and under the conditions laid down in this instrument to prove that the dispute has been settled.

"Draft provision 1(1): This instrument applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement').

"Draft provision 4 (chapeau): The competent authority of the 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 it is invoked, only if that party furnishes to the competent authority proof that: ...

"Issue 2

"Draft provision 1(3): This instrument does not apply to settlement agreements: (a) approved by a court; or (b) that have been concluded before a court in the proceedings, either of which are enforceable in the same manner as a judgment; or (c) recorded and enforceable as an arbitral award.

“Issue 3

“A Party 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.

“Issue 4

“Draft provision 4(1)(d): Gross misconduct by the conciliator that violated applicable standards and that had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

“Draft provision 4(1)(e): The conciliator did not disclose circumstances unknown to the parties that were likely to give rise to justifiable doubts as to its impartiality or independence and such lack of disclosure had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

“Report to give examples of applicable standards of conduct, such as paragraph 55 of the Guide to Enactment and Use of the Model Law on Conciliation, and codes of conduct.

“Issue 5

“Model Law and Convention prepared simultaneously. Some have suggested use of the formula from the Transparency Convention.”

53. The Working Group undertook the consideration of the compromise proposal, which was supported as providing a sound basis for further deliberations. It was generally felt that the drafting could be improved.

Issue 1, draft provision 3

54. It was explained that draft provision 3 aimed at addressing situations where a settlement agreement might be raised in defence against a claim. It was clarified that draft provision 3 would not replace draft provision 3(1) in document [A/CN.9/WG.II/WP.200](#) but rather would be an additional paragraph. Further, it was underlined that that provision would permit a party to rely on a settlement agreement in different procedural contexts.

55. It was questioned whether the phrase “to prove that the dispute has been settled” was necessary as a defence would not always be limited to that aspect. It was further questioned whether requiring proof at the stage of application that a matter had been settled was appropriate. In addition, it was pointed out that the notion of a dispute having been settled was unclear. Therefore, it was suggested to either delete that phrase or revise it along the following lines: “to prove that the dispute has been conclusively settled, subject only to review under draft provision 4”. It was further suggested that draft provision 3 should refer to the specific provisions in the instrument containing conditions (for example, draft provisions 3 and 4). A suggestion was made that draft provision 3 should clarify which State was being referred to in the phrase “rules of procedure of the State”. It was suggested that draft provision 3 would be open to flexible application in the light of the different judicial systems.

Issue 1, draft provision 1

56. A comment was made that draft provision 1 no longer referred to “enforcement” and therefore did not define the objective or scope of the instrument. It was suggested that draft provision 1 should at least include a reference to “enforcement”, indicating the key purpose of the instrument and following the approach in the New York

Convention. In response, it was explained that it might be difficult to refer to the concept embodied in draft provision 3 and that including only “enforcement” might unintentionally limit the scope of the instrument. On that point, it was suggested that draft provision 3 was ancillary to the main purpose of the instrument and need not be referred to in draft provision 1. It was therefore suggested that reference to “enforcement” should be retained in draft provision 1.

Issue 1, draft provision 4

57. A comment was made that the phrase “grant relief” in draft provision 4 might convey a wider meaning than “enforcement”, possibly referring to substantive relief. In response, it was clarified that the phrase “granting relief” intended to encompass both the right of a party to seek enforcement and to invoke a settlement agreement under draft provision 3.

Issue 2, draft provision 1(3)

58. In relation to draft provision 1(3), questions were raised regarding: (i) which authority would determine the enforceability in the same manner as a judgment and on what basis, whether it would be the law of the State where enforcement was sought or that of the State where the settlement agreement was approved or court proceedings took place; (ii) the implications of the reference to the “enforceable as an arbitral award”; and (iii) the difference between the notions of a settlement agreement being “approved” by a court in paragraph (a), and being “concluded” before a court in paragraph (b).

59. In relation to question (i) in paragraph 58 above, it was explained that it would be the enforcing authority that would determine enforceability. With regard to a settlement agreement approved by a court or concluded before a court, that determination would be based on the standard (or law) of the State where the settlement agreement was approved or court proceedings took place, for the sake of consistency with the 2016 preliminary draft convention on judgments under preparation. With respect to a settlement agreement recorded as an arbitral award, that determination would be based on the law of the State where enforcement was sought in light of existing enforcement frameworks including the New York Convention. It was explained that draft provision 1(3) was silent on the matter as the basis for determination might vary depending on whether settlement agreements were approved by a court or concluded before a court, or recorded as arbitral awards. In response, it was said that the applicable standard for the determination of enforceability should be clarified, in particular as the law of different jurisdictions might be applicable, for example, the law of the place where the conciliation took place, where the settlement agreement was concluded and where the court approved the settlement agreement.

60. In relation to question (ii) in paragraph 58 above, it was explained that the addition of the phrase “enforceable as an arbitral award” in paragraph (c) was intended to address the gap that might arise from non-enforceability of a consent award in certain jurisdictions. Questions were raised on practical implications of that provision, in particular whether it might create an overlap with existing enforcement frameworks for arbitral awards.

61. In relation to question (iii) in paragraph 58 above, it was explained that paragraphs (a) and (b) were intended to cover a wide range of different circumstances, as in some jurisdictions, a settlement agreement that was approved by a court was not necessarily enforceable as a judgment. It was further clarified that they were meant to refer to situations, such as where parties would proceed with out-of-court conciliation and then seize a court to have the settlement approved and where parties would start court proceedings and settle out of court.

62. It was clarified that the phrase “of which are enforceable in the same manner as a judgment” would apply to both paragraphs (a) and (b). As a matter of drafting, it was suggested that paragraphs (a) and (b) could be combined.

63. The Working Group heard a number of additional comments and questions on draft provision 1(3). On a practical note, it was cautioned that the enforcing authority would need to inquire about the enforceability at the State where the settlement agreement was approved or court proceedings took place. Such a process was said to be costly and potentially lead to complications and delays. It was highlighted that that procedure would be an additional burden on the enforcing authority.

64. It was questioned whether a party denied enforcement of a settlement agreement, which was approved by a court or concluded before a court, could then apply for enforcement of the settlement agreement itself. It was explained that the purpose of draft provision 1(3) was to avoid overlap and therefore a party would not be able to enforce a settlement agreement in such circumstances. In response, it was said that overlaps among various enforcement regimes would be unavoidable and could be beneficial to parties. Therefore, reservations were expressed on draft provision 1(3), in particular in light of the complications that might result therefrom. Along the same lines, a further suggestion was made to leave it entirely to the enforcing authority to decide the applicable enforcement regime.

65. It was suggested that a State could provide a more favourable regime than that provided in draft provision 1(3) by applying the more-favourable-right provision (see para. 48 of document [A/CN.9/WG.II/WP.200](#) and article 7 under paragraph 2 of document [A/CN.9/WG.II/WP.200/Add.1](#)). It was suggested that draft provision 1(3) should be considered in conjunction with that more-favourable-right provision.

66. However, it was pointed out that the more-favourable-right provision would not solve issues arising from multiple enforcement regimes. It was said that where a settlement agreement survived the transformation into a judgment or an arbitral award, a solution could be sought to allow their co-existence. In that context, it was suggested to replace draft provision 1(3) by the following text: “This instrument does not apply to a settlement agreement which, in the State where enforcement is sought, can be enforced as a judgment or an award.”

67. A different suggestion was to address the matter as a defence to resist enforcement, leaving the determination to the enforcing authority. It was suggested that an additional ground for refusing enforcement could read along the following lines: “The settlement agreement has been approved by a court, concluded before a court or recorded as an arbitral award, and the enforcing authority finds that its enforcement can be satisfactorily pursued outside the instrument.”

68. With a view to provide more flexibility in the application of the provision, a drafting suggestion was made to replace the words “either of which are enforceable in the same manner as a judgment” by the words “to the extent that the judgment is enforceable”.

69. It was pointed out that the involvement of a judge might vary from merely recording parties’ settlement agreement to taking an active role in the settlement. It was questioned whether the different types of court decisions that would result therefrom would have an impact on the operation of draft provision 1(3).

70. It was suggested that draft provision 1(3) should indicate that the party against whom the application was being invoked should bear the proof that the settlement agreement in question did not fall within the scope of the instrument.

71. After discussion, it was understood that draft provision 1(3) could operate in the following manner: (i) the competent authority where enforcement was sought would

determine the application of the instrument; (ii) whether a settlement agreement was enforceable in the same manner as a judgment under paragraphs (a) and (b) would be determined in accordance with the law of the State where the settlement agreement was approved or court proceedings took place; (iii) the determination on that enforceability would be made by the competent authority where enforcement was sought; (iv) 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 judgement; and (v) with regard to paragraph (c), the competent authority would determine the enforceability in accordance with the law where enforcement was sought and if the arbitral award fell outside the scope of the relevant enforcement regime, such as the New York Convention, the settlement agreement would survive and be considered for enforcement under the instrument.

Issue 4, draft provisions 4(1)(d) and 4(1)(e)

72. With regard to issue 4, it was explained that the proposed draft provisions 4(1)(d) and 4(1)(e) sought to reflect a compromise among the divergence in views expressed.

73. A question was raised whether there was a need for draft provision 4(1)(e) when the substance of that provision could sufficiently be covered by draft provision 4(1)(d). In response, it was said that draft provisions 4(1)(d) and 4(1)(e) addressed different issues, the former concerning the conduct of the conciliator based on applicable standards and the latter concerning non-disclosure by the conciliator.

74. With regard to draft provision 4(1)(d), it was mentioned that terms such as “gross misconduct”, “violate”, “material impact” and “undue influence” were ambiguous, unknown in certain legal traditions and might introduce uncertainties. In that context, a few drafting suggestions were made, for example, deleting reference to “gross misconduct” and referring to the violation of applicable standards by the conciliator or reinstating the terms “manifest failure” or “fair treatment.”

75. In response, it was explained that the introduction of those terms in the compromise proposal was an attempt to incorporate more objective standards with a higher threshold, balancing the different views expressed in the Working Group on the need for such a provision in the instrument. It was stated that while those terms might be novel, the enforcing authorities would not have much difficulty in interpreting them.

76. With regard to draft provision 4(1)(e), a number of concerns were expressed. It was mentioned that it would be difficult for a party to prove the failure of a conciliator to disclose circumstances likely to give rise to justifiable doubts. It was further mentioned that draft provision 4(1)(e) still retained subjective standards and did not have much practical implication. It was reiterated that grounds for refusing enforcement should focus on the conduct of the parties and not on the conduct of the conciliators. It was emphasized that failure of disclosure by a conciliator should not constitute a ground for refusing enforcement. It was also said that draft provision 4(1)(e) should be merged with draft provision 4(1)(d) (see also para. 49 above).

77. In addition, it was also questioned why the disclosure obligation would apply only to circumstances unknown to the parties. In response, it was explained that there might be situations where a conciliator did not disclose circumstances giving rise to justifiable doubts as the parties were already aware of such circumstances. It was stated that in such instances, non-disclosure by a conciliator should not be construed as a ground for resisting enforcement, thus explaining why draft provision 4(1)(e) was limited to those circumstances “unknown” to the parties.

78. In support of retaining draft provision 4(1)(e), it was said that disclosure requirements were common in relevant applicable standards including in domestic legislation. It was also said that by qualifying the situation to where the non-disclosure by a conciliator had a material impact or undue influence on the parties, it achieved a balance between an oversight mechanism and the interest of the parties.

79. To address some of the concerns, it was suggested that draft provisions 4(1)(d) and 4(1)(e) could be combined to read: “a material breach of applicable standards by the conciliator but for which a reasonable party would not have entered into a settlement agreement”. It was explained that the word “material” would ensure that only serious (non-trivial) breach constitute grounds for refusal, the word “reasonable” would provide for objective standards, the words “applicable standards” would encompass the various standards on conduct (including fair treatment) as well as disclosure, and the “but for” phrase would ensure that the ground could be invoked only when the consent of the parties to enter into a settlement agreement had been vitiated. There was support for this drafting proposal as providing a more objective standard compared to that of draft provisions 4(1)(d) and 4(1)(e).

80. It was questioned which standards would be applicable in draft provision 4(1)(d), whether standards applicable at the place where the conciliation took place or at the place where enforcement was sought. As to the comment in the compromise proposal that the report should give examples of applicable standards of conduct, delegations were invited to provide such examples. However, a note of caution was expressed that it was likely that such applicable standards might change over time and that providing examples might not be appropriate.

81. The Working Group continued its deliberation on the following drafting proposal:

Draft provision 4(1)(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.

Draft provision 4(1)(e): The conciliator failed 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 that party, without which failure that party would not have entered into the settlement agreement.

82. It was said that draft provisions 4(1)(d) and 4(1)(e) should be understood as an extension of draft provision 4(1)(c), 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 there was merit in retaining draft provisions 4(1)(d) and 4(1)(e). It was further explained that draft provisions 4(1)(d) and 4(1)(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.

83. With respect to that proposal, a number of questions were raised including: (i) the meaning of “serious” breach and on what basis a breach would be considered “serious”; (ii) the need for the qualification that a breach had to be “serious” considering that the breach was further qualified as having a certain impact on a party; (iii) whether the non-inclusion of a reference to a “reasonable” party in draft provision 4(1)(d) (which reference was originally in draft provision 4(1)(d) of the compromise proposal, see above para. 52) made the ground subjective; (iv) whether the non-inclusion of the word “unknown” in draft provision 4(1)(e) (which word was originally in draft provision 4(1)(e) of the compromise proposal, see above para. 52) might lower the threshold; (v) the need and purpose of including the words “undue

influence” in addition to “material impact” in draft provision 4(1)(e); and (vi) whether the phrase “and such failure to disclose had a material impact or undue influence on the party” in draft provision 4(1)(e) was necessary.

84. It was explained that the drafting proposal in paragraph 81 aimed at providing for an objective criteria. It was further explained that by limiting the grounds to when a breach or a failure to disclose had an impact on the parties entering into the agreement, the draft provisions provided for an objective threshold. It was mentioned that the term “serious breach” was used instead of the terms “gross misconduct”, which was less known in civil law jurisdictions, and “manifest failure”, which was considered ambiguous. It was also explained that the word “unknown” from the compromise proposal was deleted, not because a party would be able to rely on circumstances known to that party to resist enforcement, but rather because such knowledge would not have had a material impact on that party and thus would not construe ground for refusing enforcement under draft provision 4(1)(e). As to the word “reasonable” from the compromise proposal, it was explained that that word introduced subjective elements, which should be avoided, and that it was therefore not retained in the drafting proposal.

85. On the question about the need to retain draft provision 4(1)(e) in addition to draft provision 4(1)(d), it was said that draft provision 4(1)(e) would allow an enforcing authority to refuse enforcement even when the applicable standard did not necessarily include a disclosure obligation, yet subject to the conditions mentioned in that draft provision.

86. Concerns were raised that the inclusion of draft provisions 4(1)(d) could open doors for the enforcing authority to refuse enforcement based on diverse grounds, which would run contrary to the flexible nature of conciliation. It was pointed out that the responsibilities and obligations of an arbitrator and those of a conciliator differed, and that this should be taken account of when applying the relevant standards.

87. It was mentioned that there was a need to clarify the scope and the meaning of the “standards applicable” in draft provision 4(1)(d). In response, it was explained that the standards applicable were not only those applicable to the conciliator but those applicable to the process. It was mentioned that such standards took different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations. Therefore, it was suggested that the *travaux préparatoires* or any explanatory material accompanying the instrument could provide examples of standards applicable. It was further suggested that reference should be made not only to the different types of standards but also to elements contained in those standards, such as independence, impartiality, fair treatment referred to in article 6(3) of the Model Law on Conciliation and in paragraph 55 of its Guide to Enactment and Use, and confidentiality. A different suggestion was to retain those notions in the text of the instrument. Another proposal was for the Commission to consider preparing a separate code of conduct for conciliators.

88. After discussion, the Working Group agreed to continue its discussion based on the drafting proposal contained in paragraph 81 above at a later stage of its deliberations. It was generally felt that the Secretariat should be given flexibility in improving the draft taking into account suggestions made. It was also agreed that any explanatory material accompanying the instrument could include a reference to different types of, and elements in, standards applicable to conciliators and conciliation.

Issue 5

89. The Working Group considered issue 5 of the compromise proposal, which stated that a model legislative text and a convention should be prepared simultaneously and that a “formula” similar to that in the General Assembly resolution 69/116 of 10 December 2014 accompanying the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration should be used.

90. It was clarified that the “formula” was intended to refer to the preamble of that resolution which read: “Recalling ... that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the Convention.”

91. It was recalled that that wording was adopted in light of the application in time of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. It was suggested that any similar formula would need to be adapted to the specific characteristic of the work on conciliation. In that context, it was suggested that, as the Commission would be developing a model legislative text and a convention in parallel, it should be clarified that States would not be expected to adopt both instruments.

92. During the discussion, views were expressed in preference for preparing only model legislative provisions. It was noted that the preparation of a convention on the topic would allow States that adopt the model legislative provisions in their domestic laws to become a party to the convention at a later stage.

93. After discussion, in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions, it was agreed that the Working Group would continue to prepare both a model legislative text complementing the Model Law on Conciliation, and a convention, on enforcement of international commercial settlement agreements resulting from conciliation. It was further agreed that a possible approach to address the specific circumstance of preparing both types of instrument could be to suggest that the General Assembly resolution accompanying those instruments would express no preference on the type of instrument to be adopted by States.