United Nations A/CN.9/WG.II/WP.198*

General Assembly

Distr.: Limited
30 June 2016

Original: English

United Nations Commission on International Trade Law
Working Group II (Dispute Settlement)
Sixty-fifth session
Vienna, 12-23 September 2016

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

Contents

* Reissued for technical reasons on 26 July 2016.

V.16-04009 (E)

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] The Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[2]

2. At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic of enforcement of international settlement agreements resulting from conciliation by the Working Group at its sixty-second session (A/CN.9/832, paras. 13-59) and agreed that the Working Group should commence work at its sixty-third session on that topic to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions, or guidance texts. 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.[3]

3. Accordingly, at its sixty-third and sixty-fourth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[4] As requested by the Working Group at its sixty-fourth session, this note outlines the issues considered so far by the Working Group and sets out draft provisions to be included in a possible instrument on enforcement of settlement agreements resulting from conciliation (referred to below as the "instrument"). The draft provisions have been prepared without prejudice to the final form of the instrument (A/CN.9/867, para. 15) and on the working assumption that the instrument would be a stand-alone legislative text (i.e., a convention or a model law). If a decision is made that the work should instead complement the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation"), the draft provisions would need to be adjusted accordingly. Similarly, if a decision is made that the work should focus on preparing guidance texts, the draft provisions contained in this note may serve as possible examples, and the overall drafting style would need to be adjusted accordingly.

---

[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), para. 142.

[4] The reports of the Working Group on the work of its sixty-third and sixty-fourth sessions are contained in documents A/CN.9/861 and A/CN.9/867, respectively.

II. Preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation: annotated draft provisions

A. Scope of application, definitions and exclusions

1. Scope of application

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

Draft provision 1 (Scope of application)[5]

The [instrument] applies to the [recognition and] enforcement of international commercial settlement agreements resulting from conciliation.

5. Draft provision 1 reflects the understanding that the instrument should apply to the enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/861, paras. 19, 39 and 40; A/CN.9/867, paras. 92, 94, 102 and 115). Definitions contained in paragraphs 7 to 22 below aim at providing clear and simple criteria for determining whether or not a settlement agreement would fall under the scope of the instrument (A/CN.9/867, para. 94). The Working Group may wish to consider whether the territorial scope of application, if the instrument were to take the form of a convention, should be further elaborated. For example, it may include a provision stating that regardless of any other possible criteria (place of business of the parties or place of origin of the settlement agreement), the instrument applies to enforcement of settlement agreements if the enforcement is sought in the State Party to the convention.

6. The term "commercial" is not defined separately, reflecting the preference expressed by the Working Group that the instrument should apply to "commercial" settlement agreements, without providing for any limitation as to the nature of the remedies or contractual obligations (A/CN.9/861, paras. 47 to 50), and without necessarily defining the term (A/CN.9/867, para. 103). The Working Group may wish to confirm this understanding (see A/CN.9/867, paras. 104 and 105).

2. Definitions/terminology

(1) "International"

7. The Working Group may wish to consider the following formulation for the definition of the term "international":

Draft provision 2 (International)

A settlement agreement is international if:

(1) At least two parties to a settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

---

[5] See paras. 21, 23 and 52 for possible additional formulations.

(2) [The State in which the parties have their places of business is different from]/[One of the following places is situated outside the State in which the parties have their places of business]:

(a) The [State][place] where a substantial part of the obligation under the settlement agreement is to be performed; or

(b) The [State][place] with which the subject matter of the [dispute][settlement agreement] is most closely connected; or

[(c) [This State][The [State][place] where enforcement of the settlement agreement is sought]].

(3) The parties to a settlement agreement have expressly agreed that [the subject matter of the agreement relates to more than one State][the settlement agreement is international].

(4) For the purpose 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.

8. Draft provision 2 reflects the understanding that the scope of the instrument should be limited to "international" settlement agreements (A/CN.9/867, paras. 93-96). The definition of the term "international" as provided in draft provision 2 is based on article 1(4) of the Model Law on Conciliation as well as article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration").

9. Draft provision 2(1) takes into account situations where there are more than two parties to a settlement agreement. The Working Group may wish to consider whether a similar drafting formulation should be adopted in other provisions (for example, draft provision 2(2)).

10. Draft provision 2(2) provides a further elaboration of the criteria to determine whether a settlement agreement is "international". It is partly based on article 1(4)(b) of the Model Law on Conciliation as well as article 1(3)(b) of the Model Law on Arbitration. It should, however, be noted that those articles deal with the "international" nature of the conciliation or arbitration process rather than the outcome of that process. Subparagraph (c) of draft provision 2(2) is in square brackets because the Working Group generally felt that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that have their places of business in the same State, even if the enforcement was sought in another State (A/CN.9/867, para. 98). In that context, the Working Group may wish to consider whether subparagraphs (a) and (b) could also result in expanding the scope of the instrument to settlement agreements concluded by parties that have their places of business in the same State.

11. Draft provision 2(3) provides that the internationality criteria could be met when the parties have expressly agreed that the subject matter of the settlement agreement relates to more than one State or that the settlement agreement is international, similar to article 1(6) of the Model Law on Conciliation and article 1(3)(c) of the Model Law on Arbitration (A/CN.9/867, para. 99).

12. Draft provision 2(4) is intended to supplement other paragraphs of draft provision 2 by providing guidance on the determination of a party's place of business (A/CN.9/867, paras. 100-101).

(2) "Settlement agreement"

13. The Working Group may wish to consider the following formulation for the definition of "settlement agreement":

Draft provision 3 (Settlement agreement)[6]

"Settlement agreement" means an agreement in writing that is concluded by parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute.

14. Draft provision 3 is based on a suggestion made during the sixty-fourth session of the Working Group (A/CN.9/867, para. 132). Questions for consideration include how this definition would articulate with form requirements (see draft provision 5 in para. 25 below), and whether it is necessary to qualify a settlement agreement as one concluded by "parties to a commercial dispute" and one "resulting from conciliation", if those elements were to be expressly stipulated in the scope provision (see draft provision 1 in para. 4 above). It may be noted that the finality of the settlement agreement is not mentioned in draft provision 3. Rather the non-finality of the settlement agreement is presented as a possible defence to enforcement (see draft provision 8 (1)(b) in para. 35 below).

(3) "Conciliation"

15. The Working Group may wish to consider the following formulation for the definition of the term "conciliation":

Draft provision 4 (Conciliation)[7]

"Conciliation" means a process, regardless of the expression used, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute[, irrespective of the basis upon which the conciliation is carried out].

16. Draft provision 4 reflects the understanding that the scope of the instrument should be limited to settlement agreements that result from conciliation (A/CN.9/861, para. 19; A/CN.9/867, para. 115), and that the definition of "conciliation" in article 1(3) of the Model Law on Conciliation should be used as a basis (A/CN.9/861, para. 21; A/CN.9/867, paras. 116, 119 and 121). It should be noted that a suggestion that the instrument should apply to settlement agreements

---

[6] See also paras. 21, 23 and 30 for possible additional formulations.

[7] See also paras. 21 and 22 for possible additional formulations.

regardless whether they resulted from conciliation or not, as long as the parties to the settlement agreement expressly agreed to the application of the instrument, did not receive support (A/CN.9/867, para. 115).

17. The Working Group may wish to consider whether the term "mediation" should replace the term "conciliation" throughout the instrument and, if so, the possible implications on existing UNCITRAL texts, which had been prepared using the term "conciliation" (A/CN.9/867, para. 120).

(4) Settlement agreements concluded in the course of judicial or arbitral proceedings

18. The Working Group considered whether the instrument should also apply to instances where the parties had concluded a settlement agreement in the course of judicial, arbitral or any other proceedings (A/CN.9/861, paras. 24-28; A/CN.9/867, paras. 122-131).

19. With respect to settlement agreements concluded in the course of judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award, it was widely felt that they should fall within the scope of the instrument (A/CN.9/867, para. 125). The Working Group may wish to confirm that understanding.

20. With respect to settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as a judicial decision or an arbitral award, differing views were expressed. One view was that such agreements should not fall within the scope of the instrument as inclusion could lead to overlap or conflict with the Judgments Project of the Hague Conference on Private International Law as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ''New York Convention'') (A/CN.9/867, para. 123). Another view was that exclusion of those settlement agreements from the scope of the instrument would result in depriving the parties of the opportunity to utilize the enforcement regime envisaged by the instrument, and that possible complications resulting from multiple enforcement regimes could be handled by the competent authority where enforcement is sought (A/CN.9/867, para. 124). One approach to implement the latter view would be to not address this issue in the instrument (A/CN.9/867, paras. 124 and 130).

21. The Working Group may wish to determine the approach to be taken in the instrument with regard to settlement agreements concluded in the course of judicial or arbitral proceedings, on the basis of the following optional formulations:

(i) Additional paragraph in draft provision 1 (Scope of application) (A/CN.9/867, para. 127):

"The [instrument] also applies to settlement agreements concluded in the course of judicial or arbitral proceedings [as long as the settlement agreements are not recorded as court judgments or arbitral awards]."

(ii) Additional paragraph in draft provision 3 (Settlement agreement) (A/CN.9/867, paras. 118 and 128):

Option 1: *"This definition includes settlement agreements concluded in the course of judicial or arbitration proceedings [as long as the settlement agreements are not recorded as court judgments or arbitral awards]."*

Option 2: *"This definition excludes settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards."*

(iii) Additional paragraph in draft provision 4 (Conciliation) (A/CN.9/867, para. 127):

"This definition includes instances where the conciliation took place in the course of judicial or arbitral proceedings[, as long as the settlement agreement is not recorded as a court judgment or an arbitral award]."

(iv) If the instrument were to take the form of a convention, as possible declarations (A/CN.9/867, para. 129):

Option 1: *"A Party may declare that it shall apply this Convention to the [recognition and] enforcement of settlement agreements concluded in the course of judicial or arbitral proceedings as long as the settlement agreement is not recorded as a court judgment or an arbitral award."*

Option 2: *"A Party may declare that it shall not apply this Convention to the [recognition and] enforcement of settlement agreements concluded in the course of judicial or arbitral proceedings[, and recorded as court judgments or arbitral awards]."*

22. The Working Group may wish to confirm the understanding that 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 (A/CN.9/867, para. 131). The Working Group may wish to consider whether to include an additional paragraph in draft provision 4 (Conciliation) clarifying that the instrument would apply to instances: (i) where a judge or an arbitrator initiated the conciliation process with a third party acting as the conciliator, and (ii) where the judge or the arbitrator initiated the conciliation process and facilitated an amicable settlement. The Working Group may wish also to confirm that court judgments or arbitral awards in the formulations provided in paragraph 21 above, refer to those that were rendered during the judicial or arbitral proceedings that led to the settlement.

3. Exclusions

23. The Working Group generally agreed that settlement agreements dealing with consumer, family and employment law matters should be excluded from the scope of the instrument, and that there was no need to mention any other exclusions in the instrument (A/CN.9/867, para. 106). In that light, the Working Group may wish to consider the following optional formulations:

(i) Additional paragraph in draft provision 1 (Scope of application):

"The [instrument] does not apply to settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; or (b) relating to family or employment law."

(ii) Additional paragraph in draft provision 3 (Settlement agreement):

"This definition does not include settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; or (b) relating to family or employment law."

24. The Working Group may wish to further consider the suggestion that the instrument should not apply to liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*) and that the instrument should not refer to notions of State immunity (A/CN.9/867, para. 113). In line with the decision of the Working Group that settlement agreements involving public entities (States, government entities and other entities acting on their behalf) should not be automatically excluded from the scope of the instrument (A/CN.9/861, para. 46; and A/CN.9/867, paras. 109-112 and 114; see also para. 36 below), the formulation below provides States the flexibility to decide whether to exclude such agreements from the scope of the instrument, if the instrument were to take the form of a convention:

Option 1: *"A Party may declare that it shall not apply this Convention to settlement agreements to which it is a party, or to which any of its governmental agencies or any person acting on its behalf is a party [unless otherwise indicated in the declaration]."*

Option 2: *"A Party may declare that it shall apply this Convention to settlement agreements to which it is a party, or to which any of its governmental agencies or any person acting on its behalf is a party, only to the extent specified in the declaration."*

B. Form requirements of settlement agreements

25. The Working Group may wish to consider the following formulation regarding the form requirements of settlement agreements, should it decide to include a stand-alone provision on the matter:

Draft provision 5 (Form of settlement agreement)[8]

(1) A settlement agreement shall be in writing and [indicate the intent of the parties to be bound by the terms of the agreement][shall be signed by the parties].

[(2) A settlement agreement shall indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation.]

(3) For the purposes of this article:

(a) A settlement agreement is in writing if its content is recorded in any form, [whether or not the agreement has been concluded orally, by conduct or by other means]; and

(b) 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"

[8] See also paras. 13, 29 and 30 for possible alternative formulations.

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; and

(c) The requirement that a settlement agreement be signed by a party [or a conciliator] is met in relation to an electronic communication if: (a) a method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and (b) the method used is either: (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

1. Minimum form requirements

26. Draft provision 5(1) reflects the understanding of the Working Group that form requirements of settlement agreements in the instrument should not be prescriptive and should be set out in a brief manner preserving the flexible nature of the conciliation process. It also reflects the understanding that settlement agreements should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement (A/CN.9/867, para. 133).

27. Draft provision 5(3) supplements other paragraphs of draft provision 5 and incorporates the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce, allowing for the use of electronic and other means of communication to meet the form requirements therein (A/CN.9/867, para. 133). It should be noted that draft provision 5(3)(c) would only be relevant if the draft provision 5 requires settlement agreements to be signed by the parties or the conciliator.

2. Other form requirements

28. Regarding other form requirements, the Working Group considered whether there should be some indication in the settlement agreement that (i) a conciliator was involved in the process; and (ii) the settlement agreement resulted from conciliation (A/CN.9/867, paras. 136 and 137). During the deliberations at the Working Group, the need to find a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from conciliation and, on the other, the need for the instrument to preserve the flexible nature of the conciliation process, was underlined (A/CN.9/867, para. 144).

29. Draft provision 5(2) reflects the view that additional form requirements should be provided for in the instrument (such as that the conciliator should indicate his or her identity in the settlement agreement or sign the settlement agreement certifying that conciliation took place, or submit a separate document for that purpose) (A/CN.9/867, paras. 138-140). An alternative approach would be to address the matter in the provision on application for enforcement (see draft provision 7 (1)(b) and (c) in para. 31 below), requiring the parties to show through appropriate means when applying for enforcement that a conciliator was involved in the process and

that the settlement agreement resulted from conciliation. This approach may allow for more flexibility, while giving the necessary level of certainty as to the process that led to the settlement agreement (A/CN.9/867, para. 140).

30. The Working Group may wish to further consider whether minimum and other form requirements discussed above could be formulated as part of the definition of settlement agreements (to complement draft provision 3 above).

C. Direct enforcement and application for recognition and enforcement

31. The Working Group may wish to consider the following formulation regarding application for enforcement:

Draft provision 6 (Recognition and enforcement)

Option 1: *International commercial settlement agreements resulting from conciliation shall be recognized and be given legal effect under the conditions laid down in this [instrument].*

Option 2 (if the instrument were to take the form of a convention): *A Party to this Convention shall recognize international commercial settlement agreements resulting from conciliation and give legal effect to them under the conditions laid down in this Convention.*

Draft provision 7 (Application for enforcement)

(1) To obtain the [recognition and] enforcement of a settlement agreement, the party applying for [recognition and] enforcement shall, at the time of the application, supply:

(a) The settlement agreement;

[(b) [Proof][Evidence] that a conciliator was involved in the process; and

(c) [Proof][Evidence] that the settlement agreement resulted from conciliation.]

(2) A settlement agreement shall be [recognized and] enforced in accordance with the rules of procedure of [this State][the State where [recognition and] enforcement is sought], under the conditions laid down in this [instrument].

(3) If the settlement agreement is not in the official language(s) of [this State][the State where [recognition and] enforcement is sought], the party applying for the [recognition and] enforcement shall produce a certified translation of the settlement agreement into such language.

32. Draft provision 6 sets out the principle that settlement agreements within the scope of the instrument are to be given legal effect. Option 1 is a general formulation regardless of the form of the instrument, while option 2 is a formulation if the instrument were to take the form of a convention, obliging States parties to the convention to recognize settlement agreements and give them legal effect. A similar approach can be found, for instance, in article II of the New York Convention (A/CN.9/861, paras. 71-79; A/CN.9/867, para. 146).

33. Draft provision 7 mirrors article IV of the New York Convention and reflects the understanding that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement (referred to as "direct enforcement") without a review or control mechanism in the State where the settlement agreement originated from as a pre-condition (A/CN.9/861, para. 80; A/CN.9/867, para. 147).

D. Defences to recognition and enforcement

34. The Working Group agreed that defences to recognition and enforcement in the instrument should: (i) be limited and not cumbersome for the enforcing authority to implement; (ii) allow for a simple and efficient verification of the grounds for refusing recognition and enforcement; (iii) be exhaustive and be stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation (A/CN.9/861, para. 93, A/CN.9/867, para. 148). As a general comment, it was said that the standard for recognition and enforcement, including the defences to be provided in the instrument, should not be less favourable than that provided for recognition and enforcement of arbitral awards under the New York Convention (A/CN.9/867, para. 148).

35. The Working Group may wish to note that draft provision 8 below differentiates defences that could be raised by the parties and those that could be raised by the enforcing authority at its own initiative (A/CN.9/867, para. 148). Defences have also been broadly categorized into those relating to the parties (draft provision 8(1)(a)), to the settlement agreement (draft provisions 8(1)(b) to (d)), to the conciliation process (draft provision 8(1)(e)) and to mandatory laws and public policy at the place of enforcement (draft provision 8(2)).

Draft provision 8 (Grounds for refusing [recognition and] enforcement)

(1) [Recognition and] enforcement of a settlement agreement may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent authority of [this State][the State where [recognition and] enforcement is sought], proof that:

(a) A party to the settlement agreement was under some incapacity [under the law applicable to it]; or

(b) The settlement agreement is not binding on the parties; is not a final resolution of the dispute [or relevant part thereof]; has been subsequently modified by the parties; or contains conditional or reciprocal obligations; or

(c) The enforcement of the settlement agreement would be contrary to its terms and conditions; the obligations in the settlement agreement have been performed; or the party applying for [recognition and] enforcement is in breach of its obligations under the settlement agreement;

(d) The settlement agreement is null and void, inoperative or incapable of being enforced 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 [this State][the State where [recognition and] enforcement is sought]; or

(e) The conciliator failed to maintain fair treatment of the parties, or did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence.

(2) [Recognition and] enforcement of a settlement agreement may be refused, by the competent authority of [this State][the State where [recognition and] enforcement is sought], if it finds that:

(a) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of [this State][that State]; or

(b) [Recognition or] enforcement of the settlement agreement would be contrary to the public policy of [this State][that State].

36. Paragraph (1)(a) reflects the general understanding that incapacity should be retained in the list of defences (A/CN.9/867, paras. 151-152). The Working Group may wish to consider that, in jurisdictions where public entities are not authorized to conclude settlement agreements, paragraph (1)(a) may provide a defence to enforcement of settlement agreements involving such entities (A/CN.9/861, para. 44; see also para. 24 above). The words "under the law applicable to it" are placed in square brackets for consideration by the Working Group, whether they should be deleted in line with article 36(1)(a)(i) of the Model Law on Arbitration.

37. Paragraph (1)(b) reflects the understanding that recognition and enforcement may be refused if the settlement agreement is not binding on the parties, is not final, or has been subsequently modified (A/CN.9/867, para. 162).

38. Paragraph (1)(c) includes as a defence where the recognition and enforcement would be contrary to the terms and conditions of the settlement agreement (A/CN.9/867, para. 158). In this context, the Working Group may wish to consider whether that defence could be raised when the settlement agreement contains a dispute resolution clause (such as an arbitration clause or a choice of court provision) (A/CN.9/867, para. 177-179). If a party were to seek recognition and enforcement of a settlement agreement which contains a dispute resolution clause, a question for consideration is whether the party against whom the recognition and enforcement is invoked would be able to resist recognition and enforcement on that basis under paragraph (1)(c).

39. Paragraph (1)(d) seeks to reflect the view of the Working Group that the instrument should not give the enforcing 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 enforcing authority should not extend to form requirements (A/CN.9/867, paras. 159-161). The drafting is based on article II(3) and article V(1)(a) of the New York Convention. The Working Group may wish to consider whether the formulation of paragraph (1)(d) would be sufficiently broad to cover instances of fraud (A/CN.9/867, para. 153), mistake, misrepresentation, duress and deceit (A/CN.9/867, para. 167).

40. Paragraph 1(e) addresses the possible impact of the conciliation process and of the conduct of conciliators on the enforcement process with the purpose of protecting the parties' right to self-determination through a fair process. When the

Working Group considered that question, it recalled article 6(3) of the Model Law on Conciliation, which requires the conciliator to maintain fair treatment of the parties (A/CN.9/867, para. 174). The emerging view in the Working Group was that serious misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by the other defences in the instrument (A/CN.9/867, para. 175). During the discussions, the voluntary nature of the conciliation process, as well as the freedom of the parties to withdraw from the process at any time were underlined (A/CN.9/867, para. 172). In that light, the Working Group may wish to consider whether paragraph (1)(e) should be retained.

41. Paragraph (2)(a) deals with instances where the subject matter of the settlement agreement is not capable of settlement in the State where enforcement is sought (A/CN.9/867, para. 154). The Working Group indicated that this defence could be considered by the enforcing authority ex officio.

42. Paragraph (2)(b) deals with instances where the enforcement of the settlement agreement would be contrary to public policy (A/CN.9/867, paras. 155-157). It was noted that public policy covered both substantive and procedural aspects. There was general agreement that public policy as a defence could be considered by the enforcing authority ex officio.

Additional defences for possible consideration

- *Absence of conciliation and non-commercial settlement agreements*

43. The scope provision (draft provision 1) and the provision on application for enforcement (draft provision 7) require that the settlement agreement result from conciliation. Therefore, including the absence of conciliation process to the list of defences might be redundant. The same would apply to non-commercial settlement agreements not falling within the scope of the instrument.

- *Enforcement of the settlement agreement contrary to a decision of another court or competent authority*

44. The Working Group may wish to consider whether the fact that the enforcement of the settlement agreement would be contrary to a decision of another court or competent authority should also be construed as a defence in the instrument. Diverging views were expressed with respect to whether such a defence should be provided (A/CN.9/867, paras. 163-166). One view was that there was merit in providing such a defence, if it were to be presented in a permissive manner (“may be refused”) and it could accommodate the interest of States that have obligations under certain treaties regarding recognition of decisions by foreign courts (A/CN.9/867, para. 165). Another view was that there was no need to provide such a defence in the instrument as that might invite forum shopping by parties and inadvertently expand the principle of res judicata to those decisions that did not have such effect. In addition, it was stated that a refusal of enforcement by a court or competent authority in another State should not have an impact on the decision to be made by an enforcing authority (A/CN.9/867, para. 166).

Set-off

45. This note does not include formulations for a provision dealing with instances where the settlement agreement might be used for set-off purposes. That matter was left open by the Working Group for further consideration (A/CN.9/867, para. 176).

E. Other aspects

1. Confidentiality and the enforcement process

46. During the enforcement process, certain information in the settlement agreement as well as the process that led to it might have to be disclosed. Such disclosure may be at odds with the confidential nature of the conciliation process (article 9 of the Model Law on Conciliation) and the confidentiality obligation arising from that process (article 10 of the Model Law on Conciliation).[9] The Working Group may wish to consider how this should be addressed in the instrument including whether a specific provision is necessary.

2. Relationship of the enforcement process with judicial or arbitral proceedings

47. The Working Group may wish to consider the following formulation regarding parallel applications:

Draft provision 9 (Enforcement of a settlement agreement and substantive claim before a court or an arbitral tribunal)

If an application relating to the settlement agreement has been made to a court, arbitral tribunal or any other competent authority [which may affect recognition or enforcement of the settlement agreement], the competent authority of the 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 application of the party claiming enforcement of the settlement agreement, order the other party to give suitable security].

48. The draft provision reflects the proposal that the instrument could include a provision similar to article VI of the New York Convention (A/CN.9/867, paras. 168 and 169).

3. Parties' choice in the application of the instrument

49. The issue of whether the application of the instrument should depend on the consent of parties to the settlement agreement was left open for further consideration, as it would largely depend on the form of the instrument and the mechanism envisaged therein (A/CN.9/867, paras. 142, 180-182). The Working Group may wish to consider the following possible approaches: (i) an opt-in

---

[9] In particular, article 10(3), which provides as follows: "The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement."

approach, requiring parties' express consent for the application of the instrument (which could be formulated as a requirement in the application process or as a defence by a party refusing enforcement); or (ii) an opt-out approach, providing that parties may exclude the application of the instrument, which is the approach taken, for instance, in article 6 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), and article 1(7) of the Model Law on Conciliation. It should be noted that if an opt-in or opt-out approach were to be included in the instrument, the latter would be more usual. Indeed, parties can exclude the application of a legislative text which is not of an imperative nature; and it is rare that parties confirm the application of an existing legislative text. For instance, if the instrument were to be a model legislative text, the provisions could be drafted as default rules ("unless otherwise agreed by the parties, …").

50. During the discussion, those in support of the opt-in mechanism argued that it would provide parties with a choice, highlight the voluntary nature of the conciliation process and raise the parties' awareness on the enforceability envisaged in the instrument. Those not in favour stated that requiring an opt-in would substantively limit the scope of the instrument and that it would be very unlikely for parties to agree to the expedited enforcement envisaged in the instrument at the final stages of the conciliation process (A/CN.9/867, para. 142).

(1) Opt-in

51. The Working Group may wish to consider the following formulations for requiring an opt-in:

(i) Additional paragraph in draft provision 7 (Application for enforcement)

"(1) To obtain enforcement of the settlement agreement, …:

…

(d) [proof]/[evidence] that the parties to the settlement agreement consented to the application of the [instrument]."

(ii) Additional paragraph in draft provision 8 (Grounds for refusing recognition and enforcement)

"(1) Enforcement of a settlement agreement may be refused …:

(f) The parties to the settlement agreement did not consent to the application of the [instrument]."

(2) Opt-out

52. The Working Group may wish to consider the following formulations for an opt-out mechanism:

(i) Additional paragraph in draft provision 1 (Scope of application)

"The parties to the settlement agreement may exclude the application of this [instrument]. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the [instrument]."

(ii) Additional paragraph in draft provision 8 (Grounds for refusing recognition and enforcement)

"(1) Enforcement of a settlement agreement may be refused …:

(f) The parties to the settlement agreement have agreed to exclude the application of the [instrument]."

53. Another approach, if the instrument were to take the form of a Convention, would be for the instrument to not provide any opt-in or opt-out mechanism but allow States that wish to incorporate such a mechanism to make a declaration to that effect. The Working Group may, however, wish to consider the possible complications that might arise from allowing such declaration. The Working Group may wish to consider the following formulations:

Option 1: *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.*

Option 2: *A Party may declare that it shall apply this Convention unless the parties to the settlement agreement have agreed to exclude the application of the Convention.*

F. Form of the instrument

54. The Working Group may wish to consider the final form of the instrument. At its sixty-third session, the Working Group considered possible forms of the instrument, which could be a convention, model legislative provisions (either as a stand-alone text or as a complement to article 14 of the Model Law on Conciliation) or a guidance text (for instance, expanding paragraphs 87 to 92 of the Guide to Enactment on article 14 of the Model Law). The prevailing view was that there were a number of issues that would require further consideration before a decision could be made on the form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as a convention could more efficiently contribute to the promotion and harmonization of conciliation (A/CN.9/861, para. 108).