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Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015)

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I. Introduction

1. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[1] (the "Notes") could be considered as a topic of future work.[2] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[3] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.[4] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the preparation of a convention on transparency in treaty-based investor-State arbitration.[5] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[6]

2. At its forty-seventh session, the Commission further agreed that, in addition to the revision of the Notes, the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[7] The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[8]

3. At its forty-seventh session, the Commission also recalled that it had identified, at its forty-sixth session, in 2013,[9] that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration. In relation to that item, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. The Commission requested the Secretariat to report to the Commission, at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[10]

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[1] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[4] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 122 and 128.

[7] A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its forty-seventh session is contained in document A/CN.9/822.

[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123 to 125 and 129.

[9] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 131 and 132.

[10] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 126, 127 and 130.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-second session in New York, from 2-6 February 2015. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, France, Georgia, Germany, Greece, India, Indonesia, Italy, Japan, Kuwait, Mexico, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Finland, Guatemala, Libya, Netherlands, Norway, Portugal, Romania, Somalia, South Africa, Sweden and Viet Nam.

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

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

(a) *United Nations System*: World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association Suisse de l'Arbitrage (ASA), Belgian Center for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Centre for International Environmental Law (CIEL), Chartered Institute of Arbitrators (CIARB), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention and Resolution (CPR), International Law Institute (ILI), International Mediation Institute (IMI), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for

International Commercial Arbitration — Lagos (RCICAL) and Swedish Arbitration Association (SAA).

8. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland)
Rapporteur: Mr. Prem K. Malhotra (India)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.185); (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.186) and regarding enforceability of settlement agreements resulting from international commercial conciliation/mediation (A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Enforcement of settlement agreements resulting from conciliation proceedings.
5. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.
6. Organization of future work.
7. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 and resumed its work on agenda item 5 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.186, A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188). The deliberations and decisions of the Working Group with respect to items 4 and 5 are reflected in chapters IV and V, respectively.

12. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a draft of revised UNCITRAL Notes on Organizing Arbitral Proceedings, based on the deliberations and decisions of the Working Group, for consideration by the Commission at its forty-eighth session, to be held in Vienna, from 29 June-16 July 2015.

IV. Enforcement of settlement agreements resulting from international commercial conciliation/mediation

A. General remarks

13. It was noted that the Commission, at its forty-seventh session, agreed that the Working Group should consider the issue of enforcement of settlement agreements

resulting from conciliation/mediation[11] based on a proposal to prepare a convention, modelled on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") (see A/CN.9/822).

14. The Working Group recalled that UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002) (the "Model Law on Conciliation" or the "Model Law"), which formed the basis of an international framework for conciliation. The issue of enforcement of settlement agreements had been considered when preparing the Model Law on Conciliation[12] resulting in article 14 which provided as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

15. It was generally agreed that conciliation, as a means of resolving commercial disputes, should be promoted. The benefits of conciliation were also highlighted, such as reducing the instances where a dispute would lead to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings for the parties.

16. The Working Group decided to first consider the legal and practical issues that could arise from a convention on enforcement of settlement agreements and later to assess the feasibility of preparing such a convention.

B. Legal and practical questions

Nature of the instrument to be developed

17. It was said that providing a mechanism to enforce settlement agreements would make conciliation a more efficient means for resolving commercial disputes. During the discussion, the Working Group heard the results of an empirical study on the use of conciliation, which consisted of a survey of different categories of users. The survey found that, in the view of those responding, (i) it was generally more difficult to enforce settlement agreements outside the State in which the agreements were concluded; and (ii) the lack of a harmonized enforcement mechanism was a disincentive for parties to proceed with conciliation.

18. In that context, it was said that a convention providing such a mechanism would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement agreements could be relied on and easily enforced. It was further said that such a convention would provide a clear and uniform framework for facilitating enforcement in different jurisdictions. In addition, it was mentioned that the preparation of a convention would itself encourage the use of conciliation.

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[11] The terms "conciliation" and "mediation" are used interchangeably as broad notions referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[12] *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex I.

19. However, it was underlined that preparing a convention might be a lengthy process. By way of illustration, it was said that the New York Convention, which followed the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), built upon the experience gained through long years of arbitration practice. In contrast, it was said that, in some States, there was a lack of experience in international conciliation, particularly due to the diversity in conciliation processes as well as different legal traditions. It was suggested that a more gradual approach should be taken to harmonize the regime of enforcement of settlement agreements, possibly starting from the harmonization of domestic legislation.

20. It was further pointed out that article 14 of the Model Law merely stated the principle that settlement agreements were enforceable, without attempting to specify the method by which such settlement agreements might be enforced, a matter which had been left to each enacting State. It was suggested that the circumstances that led to that result had not changed since the adoption of the Model Law and that the Working Group might face similar difficulties in addressing the issue as when it prepared article 14 of the Model Law.

21. It was further questioned whether an international mechanism on enforcement might result in a more cumbersome review of settlement agreements than under current domestic mechanisms. It was pointed out that a contract could circulate without formalities or control in any State, the situation being different for a foreign judgment or an arbitral award. In that regard, it was stated that further analysis of the domestic legislation and its implementation would greatly assist the Working Group in evaluating the need for, and the feasibility of, a convention. The Working Group recalled that a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation had been circulated by the Secretariat. The Working Group was informed that the replies received would be available for the Commission at its forty-eighth session, in 2015. It was proposed that the Secretariat should reiterate the invitation to States to respond to the questionnaire (see above, para. 2).

22. It was questioned how an international instrument on enforcement of settlement agreements would interact with domestic legislation on conciliation. It was suggested that procedural issues addressed by the Model Law should not be reopened by a convention on enforcement of international settlement agreements. It was clarified that the envisaged convention would not address the procedural aspects dealt in domestic legislation and would only introduce a mechanism to enforce international settlement agreements.

23. It was suggested that the aim should be to provide a simple mechanism to enforce settlement agreements. It was further mentioned that flexibility of the conciliation process should be preserved. Nonetheless, the concern was expressed for the need to ensure respect for public policy of the State in which the enforcement would be sought (see also below, para. 31).

24. It was said that many multinational businesses had difficulties convincing other parties to attempt conciliation because of questions regarding the international standing of conciliation and the enforceability of resulting settlements. It was also said that there were many instances in which attempts to enforce a settlement agreement led to re-litigation on the merits.

New York Convention as a model

25. A question was raised as to whether the New York Convention would be the appropriate model for preparing a convention on enforcement of settlement agreements. In that context, the Working Group considered whether a convention should also address recognition of the agreement to submit a dispute to conciliation and the settlement agreement. It was said that the exclusive nature of the arbitration agreement (referring a dispute to arbitration) created the need for the recognition, which did not necessarily arise with respect to conciliation.

26. It was further questioned whether a convention on enforcement of settlement agreements should refer to "foreign" as opposed to "international" settlement agreements. By way of comparison, it was noted that the Model Law on International Commercial Arbitration (1985, as amended in 2006) (the "Model Law on Arbitration") referred to enforcement of awards "irrespective of the country in which [they] were made" in its article 35, while the New York Convention referred to the enforcement of "foreign" arbitral awards.

27. It was stated that one of the key questions that would need to be addressed in a convention was how to determine the notion of "international" and the relevant criteria for such determination (for example, based on a territorial approach (place where the conciliation took place or place of conclusion of the settlement agreement), a personal approach (parties' place of business) or an approach based on the law applicable to the settlement agreement). It was suggested that the notion of "settlement agreement" would also need to be determined.

28. With regard to a suggestion that the scope of a convention should be limited to international settlement agreements, concerns were raised about the potential detrimental effect of a convention that would treat international and domestic settlement agreements differently.

29. It was further stated that a settlement agreement differed quite significantly from an arbitral award and therefore, caution should be taken when making an analogy. In that context, reference was made to article 30 of the Model Law on Arbitration which provided that the arbitral tribunal should record the settlement in the form of an arbitral award on agreed terms, if requested by the parties and on the condition that the arbitral tribunal itself had no objections (see below, para. 39).

30. It was mentioned that the introduction of an enforcement mechanism for settlement agreements could blur the distinction that currently existed between arbitration and conciliation by adding more formal requirements to conciliation.

31. It was questioned whether a procedure similar to that of article V of the New York Convention could be envisaged for a convention providing grounds to refuse enforcement. It was further stressed that the public policy of the State in which the enforcement would be sought could constitute a ground for refusing enforcement (see above, para. 23).

Other international instruments

32. While a point was made that the Convention on the Choice of Court Agreements (2005) prepared by the Hague Conference on Private International Law (the "Hague Conference") could shed some light on the project (particularly, article 12), it was generally felt that the scope of that Convention was quite distinct

from the issue at hand. It was further mentioned that the Secretariat had been in communication with the Permanent Bureau of the Hague Conference on the proposed project for a convention on enforcement of settlement agreements and it had been identified that the work by the Hague Conference on the enforcement of mediated agreements in the context of international family contracts might raise similar issues with respect to the proposed convention.

Settlement agreement to be enforced

33. It was stated that very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement.

34. It was said that the type of obligations stipulated in a settlement agreement might be broad. Elements of complexities pertaining to settlement agreements were mentioned, such as reciprocal obligations, or conditions for the implementation of obligations that would render enforcement more complex. It was also stated that settlement agreements usually contained dispute settlement clauses to resolve disputes arising from the agreement.

35. A view was expressed that the contractual nature of the settlement agreement should be preserved. Concerns were raised that treatment of settlement agreements as distinct from an ordinary contract could distort the law of contracts. In response, it was argued that while a settlement agreement was contractual in nature, it might deserve a different treatment as it was the result of a procedure to resolve a dispute.

36. It was suggested that a convention should not deprive the parties of the contractual remedies provided under the applicable contract law.

37. A question was raised as to whether any regime that would be created by a convention on enforcement of settlement agreements would be optional in nature and would allow the parties to either opt-in or out of that regime. It was said that a convention should take into consideration the need to respect party autonomy and for instance, consent would be required to make any settlement agreement directly enforceable. It was suggested that in order to both simplify enforcement and provide a mechanism that would take account of party autonomy in relation to enforcement of settlement agreements, it should suffice that the parties expressly confirmed in the settlement agreement itself that they intended to make such agreement subject to enforcement under the convention.

38. A question raised concerned the interrelationship between a contractual claim based on the breach of a settlement agreement and the enforcement of the settlement agreement itself.

39. It was highlighted that some domestic legislation treated a settlement agreement in a manner similar to an arbitral award for the purpose of enforcement. It was further noted that some legislation permitted a settlement agreement to be recorded as an arbitral award on agreed terms (“consent award”) when certain conditions were met (see above, para. 29). In that context, arbitration institutions were invited to provide information on the number of consent awards rendered, so as to provide an indication of the significance of such practice.

40. Concerns were raised about specific issues pertaining to the enforcement of settlement agreements that included non-monetary aspects, in light of the fact that certain domestic legislation imposed restrictions on such non-monetary obligations.

41. In response, it was argued that the scope of a convention should cover all types of settlement agreements, without limitations as to the remedies or nature of obligations that would be provided under those agreements. It was also pointed out that in many States, there were existing instruments to enforce monetary obligations (for example, through the issuance of a bill of exchange or a promissory note). It was pointed out that the New York Convention applied to monetary as well as non-monetary obligations resulting from an award.

42. It was also argued that the scope of a convention could cover not only settlement agreements resulting from conciliation but also those resulting from mere negotiation between the parties.

43. It was suggested that settlement agreement involving consumers might be excluded from the scope of the convention.

Validity of the settlement agreement

44. A question was raised as to whether a court enforcing a settlement agreement under the proposed convention would have jurisdiction to also consider the validity of that agreement.

C. Feasibility and possible form of future work

45. The Working Group then discussed the various solutions to address the enforcement of settlement agreements. In doing so, it was suggested that any recommendation to the Commission as to possible work in the area should be made when there was reasonable expectation that the issues identified could be resolved.

Domestic legal framework

46. A question was raised as to whether States had adopted domestic legislation to address the issue of enforcement of settlement agreements, as contemplated by article 14 of the Model Law. It was suggested that if States had not yet adopted such legislation, it would be preferable to first concentrate on promoting the development of domestic legislative frameworks and work on an international instrument at a later stage.

47. In response, the Working Group was informed that a number of States had adopted legislation to provide for enforcement of settlement agreements (see document A/CN.9/WG.II/WP.187, paras. 21 to 30). During the discussion, the following information was provided to the Working Group.

48. Some States had no specific legislation on enforcement of settlement agreements, with the result that contract law would apply. However, it was noted that despite the absence of legislation, courts in a jurisdiction adopted an expedited and streamlined process for the enforcement of domestic settlement agreements. Other States had legislation providing for enforcement of settlement agreements as court judgements, where the agreement was approved by a court. Some States permitted enforcement of settlement agreements through summary proceedings, provided that the agreement was signed by the mediator or by the parties and that the agreement contained a statement expressing the parties' intent to seek summary enforcement. Other States required deposition or registration of the agreement at a

court for it to be enforceable. The practice of requiring a notary public to notarize the settlement agreement or establishing a public deed was adopted by some States. Other States had legislation which permitted parties who have settled a dispute to appoint an arbitral tribunal for the specific purpose of issuing a consent award based on the agreement of the parties. It was also highlighted that certain States provided for more than one measures mentioned above to enforce settlement agreements.

49. It was noted that those developments in domestic legislation since the adoption of the Model Law on Conciliation were an indication that States were giving importance to the matter, and that it might be timely to consider future work in the area.

Enforcement of the settlement agreement or of an instrument giving force to the settlement agreement

50. It was questioned whether a convention should make settlement agreements directly enforceable or whether it should incorporate a control mechanism. For instance, it was questioned whether a settlement agreement would need to be authenticated to benefit from any enforcement procedure and, if so, the competent authority (the conciliator, an institution or a court) and the procedure of obtaining authentication would need to be further addressed.

51. It was suggested that a convention on enforcement of settlement agreements could either provide for the enforcement of the agreement itself, or for the enforcement of an instrument that would be issued by a competent authority.

52. It was mentioned that the advantage of the first option was that it provided for a simple and straightforward solution. However, it was said that some formal requirements would need to be met in order for an agreement to be enforceable in another State (for example, the obligation stipulated in the agreement should be capable of being enforced in that State and the conciliation procedure complied with due process). It was pointed out that a convention should set out the minimum requirement that a settlement agreement would need to meet to be enforceable.

53. In that light, it was said that the second option would give international legal effect to domestic enforcement procedures, thereby streamlining the cross-border enforcement procedure, although requiring formal actions in several jurisdictions. It was mentioned that under that option, the court where enforcement would be sought would undertake limited review of the settlement agreement.

54. However, it was pointed out that a number of questions would need to be addressed under that option such as which jurisdiction would be competent to review the settlement agreement in the first place for it to be enforced abroad and whether a minimum standard should be established to give international effect to domestic enforcement procedures. In addition, it was suggested that for those States that gave effect to a settlement agreement in the form of a judgement, the recognition and enforcement could take place under the law governing the recognition and enforcement of foreign judgements, and would not fall under the scope of a convention on enforcement of settlement agreements. Similarly, if a settlement agreement had been notarized for the purpose of enforcement, cross-border enforcement might then proceed on the basis of existing multilateral or bilateral conventions.

55. It was suggested that a convention on enforcement of settlement agreements could include a combination of the two options mentioned above (see above, para. 51). It was also mentioned that if a convention were to be prepared, it should provide States some flexibility to make declarations or reservations.

Other possible forms of work

56. Views were expressed that there was not sufficient information to embark on the preparation of a convention. It was suggested that guidelines or model provisions could be developed to assist States, as it would preserve the flexibility of conciliation. It was further said that not all States had developed legislation to address enforcement of settlement agreement and that the preparation of a convention was premature. Therefore, it was suggested that a cautious approach should be adopted.

D. Recommendation to the Commission

57. The Working Group recalled the request by the Commission to consider the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and to report on the feasibility and possible form of work in that area (see above, para. 2). The Working Group further recalled that when UNCITRAL prepared the Model Law on Conciliation, the Commission was generally in agreement with the policy that easy and fast enforcement of settlement agreements should be promoted (see para. 88 of the UNCITRAL Guide to Enactment and Use of the Model Law).

58. Questions and concerns were expressed during the deliberation, but it was generally felt that they could be addressed through further work on the topic.

59. After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns.

V. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

60. The Working Group commenced its consideration of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (the “draft revised Notes”) as contained in paragraph 6 of document A/CN.9/WG.II/WP.186. The Working Group noted that the draft revised Notes had been prepared to update the Notes reflecting the decisions of the Working Group at its sixty-first session (see A/CN.9/826).

A. Introduction

61. In relation to paragraph 1 of the draft revised Notes, it was agreed that the word “application” in the second sentence was not appropriate as the Notes were intended to be an instrument for use by arbitration practitioners and not an instrument that would regulate arbitral proceedings.

62. It was agreed that the last sentence of paragraph 3 of the draft revised Notes, which indicated the appropriate time when the arbitral tribunal should bring matters to the attention of the parties, should be revised along the following lines: “..., it is be advisable not to raise a matter prematurely, i.e. before it is clear that the issue need to be addressed”.

63. In relation to paragraph 6 of the draft revised Notes, it was suggested that the words “laws governing the arbitral procedure” should be replaced by the words “applicable arbitration laws” or “laws applicable to arbitration” as the reference to laws governing arbitral procedure was too limited. The Working Group agreed that similar revisions should be made throughout the draft revised Notes. While noting the need to stress the “fair” and “efficient” nature of the arbitration process, it was suggested that repeating those words in paragraph 6 should be avoided.

64. It was agreed that the first sentence of paragraph 7 of the draft revised Notes should be recast to better reflect the hierarchy of norms that might limit the discretion of the arbitral tribunal, with the applicable arbitration law listed first.

65. It was suggested that the draft revised Notes should address the need for the arbitral tribunal to draw the attention of the parties to the wide range of laws that might be applicable during the course of the arbitral proceedings. While there was general support for that suggestion, the need for the arbitral tribunal to remain impartial in drawing the attention of the parties to that matter was stressed.

66. In relation to paragraph 8 of the draft revised Notes, the Working Group agreed that the usefulness of preparing a procedural timetable could be mentioned. In that context, it was further agreed that references could be made to the procedural arrangements agreed by the parties and the arbitral tribunal.

67. In relation to paragraph 9 of the draft revised Notes, it was agreed that the words “pre-hearing review” could be deleted as that term was not commonly used. While a suggestion was made that the words “preliminary meeting” could also be deleted, it was agreed that they should be retained as a generic term to be used jointly with the term “case management conference”. It was further agreed that the draft revised Notes should make consistent use of those terms. The Working Group also agreed that the usefulness of having the parties’ representatives present at those meetings should be highlighted.

68. It was further agreed that paragraph 9 should clarify that in the event of non-participation of a party to those meetings, the procedural timetable should provide the non-participating party with the opportunity to present its case in the arbitral proceedings.

69. It was agreed that paragraph 10 of the draft revised Notes should be expanded to address the possible forms that “decisions” could take (for example, a procedural order), while underlining the significance of those decisions irrespective of their

form. It was also agreed that that paragraph should clarify that decisions could be made not only during but also after the case management conference. The possibility of an oral decision being recorded at a later stage was also mentioned. A suggestion was made that the period in which the procedural arrangement (or "decision") could be revisited should be qualified as the word "later" was too broad.

70. The Working Group also agreed that a sentence along the following lines should be added in paragraph 10: "When modifying procedural arrangements, the arbitral tribunal and the parties may have to take into consideration dispositions which the parties have taken in compliance with those arrangements and avoid creating any unfairness by making such modification".

71. In that context, it was suggested that the draft revised Notes should address the fact that arbitral tribunals might not have the discretion to modify or revisit unilaterally any decision or arrangement which was recorded as an agreement of the parties. It was agreed that the draft revised Notes should address that issue, noting that arbitral tribunals should take caution in relation thereto.

72. A comment was made that the importance of ensuring the efficiency of the arbitral procedure should be reflected in revising paragraphs 10 and 11.

73. It was recalled that paragraph 11 served as a general provision highlighting the importance for arbitral tribunals to consult with parties on questions pertaining to the organization of arbitral proceedings. To clarify that purpose, the Working Group agreed to add a sentence along the following lines: "This is generally the case for most matters addressed in the Notes and therefore normally is treated as a general consideration whenever the arbitral tribunal settles matters of procedure." In that context, the Working Group agreed to consider deleting references to consultations with the arbitral tribunal or with the parties, where appropriate in the text of the draft revised Notes.

74. As a matter of drafting, the Working Group agreed to delete the word "more" before the word "usual" in the first sentence of paragraph 11, and to add at the end of paragraph 11 the words "and the planning of the arbitrators" to alert the parties of the potential impact their decisions could have on the arbitral tribunal.

75. In relation to paragraph 12 of the draft revised Notes, the Working Group agreed to replace the words "the arbitral tribunal may wish to encourage this practice" by wording along the lines of "the arbitral tribunal may wish to give effect to that manner of cost saving". The Working Group agreed that the benefits of holding in-person meetings should also be mentioned as such meetings sometimes also resulted in cost saving.

B. Draft Notes 1 to 6

1. Set of arbitration rules

76. The Working Group agreed that paragraph 14 of the draft revised Notes should be placed before paragraph 13 in order to highlight the benefits of selecting a set of arbitration rules.

77. In relation to paragraph 13, it was suggested that the power of the arbitral tribunal to determine how the proceedings would be conducted should be "based

on", rather than "within the limits" of, the applicable arbitration law. That suggestion did not receive support.

78. It was agreed that paragraph 14 should be revised to better reflect the relation between the various applicable norms. In that context, the Working Group noted that the word "displace" was inappropriate to express the relations between those norms.

79. While a suggestion was made that the draft revised Notes should make reference to other rules or guidelines that might supplement certain sets of arbitration rules (such as those governing emergency arbitrator), it was agreed that reference to general arbitration rules was sufficient. With respect to rules on emergency arbitrator, it was mentioned that the draft revised Notes presupposed that the arbitral tribunal was in place and therefore, reference to such rules would not be relevant.

2. Language or languages of proceedings

80. It was agreed that the last sentence of paragraph 16 of the draft revised Notes should refer to "criteria" to be considered in choosing the language(s) of the proceedings instead of "a common practice".

81. The Working Group considered the last sentence of paragraph 17 of the draft revised Notes, which provided that if more than one language was to be used, the parties might consider whether one of those languages might be designated as being authoritative. It was suggested to clarify that the choice of an authoritative language would be for the purposes of the procedure only.

82. The Working Group further considered whether the example contained in brackets at the end of paragraph 17 should be limited to awards. During that discussion, it was pointed out that the designation of an authoritative language could impact not only the final award but also other procedural aspects, such as procedural orders. In addition, it was suggested that the bracketed text should make reference to situations where there were more than one language version of an award. After discussion, the Working Group agreed that the bracketed text should be expanded to address those points.

83. The Working Group agreed to add text clarifying that while more than one language could be used during the proceedings, procedural decisions as well as awards could be rendered in one of the languages, if so agreed by the parties.

84. It was agreed that paragraphs 17 and 18 of the draft revised Notes should also be addressed to arbitral tribunals in addition to the parties.

85. The Working Group agreed to replace the words "annexed to the statements of claim and defence or submitted later" in the first sentence of paragraph 19 of the draft revised Notes by words along the lines of "on the record".

86. The Working Group agreed to reflect in paragraph 20 of the draft revised Notes that a witness who would be familiar with the language of the proceedings might still require occasional assistance with interpretation.

3. Place of arbitration

87. The Working Group considered the first sentence of paragraph 22 of the draft revised Notes, which stated that some arbitral institutions required arbitrations

conducted pursuant to their rules to take place at the location of the institution. While it was recalled that the 1996 version of the Notes included such text, it did not reflect the current trend whereby institutions generally permitted arbitrations conducted pursuant to their rules to take place at a location which might differ from the place where the institution was located. Despite that general trend, references were made to instances where institutions still required the place of arbitration to be at a specific location (for example, in the field of commodities arbitration and in certain sets of investment arbitration rules).

88. Taking into account the general trend, the Working Group agreed to delete the words "subject to the requirement … of the institution" in the first sentence of paragraph 22. In support of that decision, it was said that the word "usually" in that sentence sufficiently expressed the fact that there might still be exceptions to that general trend.

89. The Working Group agreed that the words "if it has not already been agreed" at the end of paragraph 22 should be deleted as they were redundant.

90. The Working Group agreed that paragraph 23 of the draft revised Notes should clarify that the place of arbitration would normally determine the applicable arbitration law and indicate the various legal consequence that followed as mentioned in the first sentence of paragraph 23.

91. In relation to paragraph 24 of the draft revised Notes, the Working Group agreed that the words "and other relevant matters" should be added after the words "arbitral procedure" under subsection (iv).

92. It was agreed that reference should be made to the "place" of arbitration instead of "seat" in paragraph 25 of the draft revised Notes and other parts of the draft revised Notes, where applicable.

93. The Working Group considered whether the factors listed in paragraph 25 were factors influencing the choice of the legal place of arbitration or the physical venue of the arbitral proceedings.

94. The Working Group agreed to replace the word "will" by "may" and to delete the word "especially" in paragraph 25. It was also agreed that qualification restrictions in certain States with respect to counsels should be added to the list of factors in paragraph 25.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

95. The Working Group agreed that the last sentence of paragraph 30 of the draft revised Notes should clarify that where a secretary was appointed by the arbitral tribunal, the arbitral tribunal ought to disclose that fact to the parties. Therefore, it was agreed that the word "may" in the last sentence of paragraph 30 should be replaced by the words "would normally".

96. The Working Group further agreed that the reference to the "rapporteur" in paragraph 30 of the draft revised Notes should be deleted, as a rapporteur would usually not have the same functions as a secretary.

97. In relation to paragraph 30, attention was drawn to the last sentence of that paragraph, which referred to certain conditions in relation to the appointment of

secretaries including their remuneration. In that context, it was pointed out that certain rules or guidelines that addressed appointment of secretaries provided modalities different from those provided in paragraph 30, for instance, in relation to the permissibility of remuneration. In response, it was pointed out that the last sentence of paragraph 31 sufficiently covered that point.

98. In relation to paragraph 31 of the draft revised Notes, it was said that the functions performed by secretaries were broad in range. It was suggested that paragraph 31 could be restructured to better reflect the different categories of function performed by secretaries, (i) providing purely organizational support, (ii) carrying out more substantive functions (for example, preparation of the facts of the award or the procedural history of the arbitral proceedings in addition to those mentioned in the bracketed text following the second sentence of paragraph 31), and (iii) performing other functions similar to those of the arbitral tribunal. With respect to the last category, the Working Group affirmed that secretaries would normally not be expected to perform decision-making or any other functions that the parties would expect the arbitral tribunal to perform.

99. It was said that the first sentence of paragraph 31 sufficiently described the purely organizational type of functions that secretaries might perform. However, doubts were expressed as to whether such a reference was necessary in the draft revised Notes, as parties to an arbitration would usually not require information about the persons carrying out those functions. In response, it was suggested that information about secretaries that performed those functions should be disclosed to the parties and that those secretaries would also be required to sign a declaration of impartiality, because they might have access to certain information. However, it was generally felt that the draft revised Notes should not provide overly complex guidance and that the matter of confidentiality was dealt separately in the draft revised Notes. It was agreed that the first sentence of paragraph 31 could be retained in its current form.

100. Regarding the more substantive type of functions carried out by the secretaries, a number of suggestions were made. It was generally agreed that information about the secretaries and the functions they performed should be disclosed to the parties, particularly when the functions of those secretaries were broad in scope. A suggestion was made that the words “or overlap” should be deleted from the third sentence of paragraph 31. It was further suggested that the first part of the fourth sentence of paragraph 31 could read along the following lines: “Such a role of the secretary is appropriate only under certain conditions, such as when …”. It was also mentioned that there was no need to retain the words “such role is disclosed” as that point was sufficiently covered by the requirement that parties agree to such role.

101. With respect to the requirement for secretaries to sign a declaration of impartiality as mentioned in the fourth sentence of paragraph 31, it was suggested that secretaries should be required to sign a declaration that would also include independence. Concerns were expressed that requiring a declaration of impartiality could give the wrong impression that those secretaries would indeed be involved in the decision-making process.

102. After discussion, it was agreed that the draft revised Notes should state that the secretaries were expected to be and remain impartial and independent during the

arbitral proceedings and that it would be the responsibility of the arbitral tribunal to ensure this, including by requesting the secretaries to sign a declaration of independence and impartiality. It was also agreed that the draft revised Notes would recognize that there were certain instances whereby secretaries might be required to sign a declaration of independence and impartiality. A concern was raised that such declaration might result in challenges to secretaries.

5. Fees, costs and deposits in respect of costs

103. It was noted that paragraph 32 of the draft revised Notes contained the principle that the costs of the arbitration would normally be borne by the unsuccessful party. It was agreed that paragraph 32 should spell out other possible criteria to apportion costs between the parties, including sharing of costs by parties irrespective of the outcome on the merits or by any other agreement between the parties. It was suggested that the legal environment at the place of arbitration could also be a factor influencing the allocation of costs.

104. Furthermore, it was agreed that paragraph 32 should be broadened to include other elements that the arbitral tribunal would consider in determining the allocation of costs, particularly those mentioned in paragraph 35.

105. In relation to paragraph 34 of the draft revised Notes, it was mentioned that decisions on costs would not have to be linked to the final award on merits and could be made at various stages of the proceedings. With respect to when submission on costs would be required, it was agreed that paragraph 34 should mention that the arbitral tribunal had the discretion to request such submissions, when appropriate. Moreover, it was agreed that paragraph 34 should be revised to take account of situations where arbitral proceedings would be terminated without a final award being rendered. In that respect, it was agreed to delete the words “the possibilities being before or after … on the merits” in the last sentence of paragraph 34.

106. It was agreed that paragraph 35 of the draft revised Notes should list the factors to be considered by the arbitral tribunal when allocating costs instead of making a reference to guidance or rules of certain arbitral institutions. It was further agreed that those factors should be considered only for the purposes of costs allocation and not as a means of penalizing parties for their behaviour. In that context, it was suggested that the draft revised Notes should indicate that the arbitral tribunal would not normally take into consideration the behaviour of the parties unless it had an actual impact on the costs of the proceedings.

107. In that context, it was agreed that the words “unreasonable”, “excessive” and “exaggerated” should be deleted and the examples in paragraph 35 should be presented in a neutral, generic manner (for example, referring to cooperation or non-cooperation of the parties). It was also suggested that “failure to comply with procedural orders” could cause additional costs and therefore, should be taken into account.

108. In relation to the reference to “value-added tax” in paragraph 37 of the draft revised Notes, the Working Group considered whether other types of taxes (for example, income tax) should be mentioned. After discussion, it was agreed that while reference to “value-added tax” could be retained, reference to other types of

taxes would not be added as it would generally complicate the text without providing much guidance.

109. During that discussion, it was suggested that the items listed in the second sentence of paragraph 37 would be better placed in the subsection on fees and costs. Suggestions were made to clarify that deposits could be paid in full or in instalments, and that bank guarantees could be a means to make such deposits.

110. In relation to paragraph 39 of the draft revised Notes, the Working Group agreed to include a provision whereby if an institution did not offer the services of managing deposits, the parties or the arbitral tribunal would have to make the necessary arrangements, for instance with a bank or other external provider. In addition, it was agreed to delete the word "payable" at the end of paragraph 38, and to replace it by the words "on the deposit".

111. Differing views were expressed with regard to the words "international sanctions" in paragraph 39 which would limit the arbitral tribunal's ability to manage payments and deposits. One suggestion was to broaden the wording by adding "restrictions", while another was to delete the reference altogether. Yet another suggestion was that sanctions should be limited to those put in place by international organizations thus excluding sanctions by a State or group of States. After discussion, it was agreed that the words "international sanctions" should be replaced by the words "any restriction on trade or payment".

112. The Working Group agreed that paragraph 40 of the draft revised Notes should be placed after paragraph 37 as it addressed a similar issue.

Interim measures

113. It was agreed that the draft revised Notes should include a separate section on interim measures, possibly before the section on "arrangements for the exchange of written submissions". It was generally felt that the new section should not be prescriptive and need not touch upon the various types of interim measures. It was agreed that that section could address the following aspects: (i) most applicable arbitration rules and arbitration law allowed arbitral tribunals to grant interim measures; (ii) normally an expedited process was provided for interim measures; (iii) enforcement of an interim measure was not always assured; (iv) the arbitral proceedings would continue, even if a party requested an interim measures from a domestic court; and (v) cost and security in connection with interim measures (addressed in the draft revised Notes in paragraph 36).

6. Confidentiality of information relating to arbitration: possible agreement thereon

114. The Working Group agreed that paragraph 43 of the draft revised Notes, which dealt with a situation where the parties had not previously agreed on confidentiality, should read along the following lines: "Should confidentiality be a [concern][priority], parties may wish to agree to record a duty of confidentiality in the form of an agreement." While support was expressed for retaining the words "in consultation with the arbitral tribunal" after the words "wish to agree", it was generally felt that those words were not necessary.

115. It was agreed that paragraph 44 of the draft revised Notes should include a reference to the confidentiality obligations of experts and witnesses.

116. In relation to the second sentence of paragraph 45 of the draft revised Notes, it was suggested that an "arrangement" need not necessarily be made by the arbitral tribunal and could be agreed by the parties themselves. It was also mentioned that such an arrangement would generally restrict access to certain information rather than limit disclosure. To address those concerns, it was agreed that the second sentence of paragraph 45 should be revised to read: "Arrangements may be made by the parties and, in certain circumstances, by the arbitral tribunal in respect of that information, for example, by restricting the access to the information to a limited number of designated persons."

117. A suggestion was made that paragraph 47 of the draft revised Notes should not be placed under the section addressing confidentiality of information in commercial arbitration, as its content dealt with transparency in investment arbitration. Therefore, it was stated that paragraph 47 should form a separate section or subsection. In that context, a suggestion was made that the draft revised Notes should make a clear distinction between commercial and investment arbitration. In response, it was recalled that the general approach of the Working Group had been to not distinguish the different types of arbitration in the draft revised Notes so as to provide general guidance.

118. It was generally felt that paragraph 47 adequately addressed the concerns expressed at the sixty-first session of the Working Group that the matter of transparency as it applied to investment arbitration should be highlighted.

119. After discussion, it was agreed that paragraph 47 should be retained in Note 6, while the heading of that Note could be revised in a manner that also highlighted transparency.

120. With respect to footnote 4 contained in paragraph 47 of the draft revised Notes, it was agreed that reference should only be made to UNCITRAL texts on transparency, and article 1(4) of the UNCITRAL Arbitration Rules (as adopted in 2013), with an indication that there were other rules that also provided for transparency.

121. A suggestion that the draft revised Notes should refer to situations where the arbitration agreement or the underlying contract to the dispute included provisions on confidentiality did not receive support.

C. Draft Notes 7 to 19

122. Before the close of its session, the Working Group heard suggestions with respect to the remaining parts of the draft revised Notes without any deliberation.

Heading of Note 7

123. It was suggested that the word "electronic" be replaced by the word "technological" in the heading of Note 7.

Paragraph 52

124. It was suggested that direct communication between the arbitral tribunal and the parties should be recommended and not merely recognized as a usual practice in paragraph 52.

Paragraph 53

125. It was suggested that paragraph 53 should be revised to include a reference to the procedural timetable that the parties ought to follow.

Paragraph 62

126. It was suggested that paragraph 62 should be revised to reflect more positively the possibility of amicable settlements during arbitral proceedings. It was further suggested that the words "outside the context of the arbitration" in the first sentence and the word "many" in the second sentence should be deleted. It was further suggested that paragraph 62 could provide that where it was possible for the arbitral tribunal to raise the possibility of an amicable settlement, it could, if so requested by the parties, guide or assist the parties in their negotiations. In that connection, a suggestion was made that the words "due caution and restraint" could be deleted.

Paragraph 66

127. It was suggested that reference should be made to applicable law in the last sentence of paragraph 66.

Paragraph 67

128. It was suggested that the word "conclusions" in paragraph 67 should be replaced by the word "inferences".

Paragraph 70

129. It was suggested that paragraph 70 should include a reference to paragraph 56.

Note 13

130. It was suggested that Note 13 should address the consequences of non-appearance of witnesses.

Paragraph 73

131. It was suggested that paragraph 73 should mirror paragraph 81 and include guidance on contacts with the witnesses in the context of written statements.

Paragraph 76

132. It was suggested that paragraph 76 could set out the general practice of the order in which witnesses were examined.

Paragraph 77

133. It was suggested that the last sentence of paragraph 77 should state that when a written statement was submitted, an oral testimony would usually be limited to confirming, summarizing and updating the written statement.

Paragraph 79

134. It was suggested that paragraph 79 should better reflect the diversity in laws and practices with regard to whether a representative of a party could testify as a witness and remain in the hearing room after having testified as a witness.

Paragraph 80

135. It was suggested that a reference should be made to the practice with respect to the order in which witnesses could be heard (for instance, to hear first the witnesses presented by the claimant, followed by those presented by the defendant).

Paragraphs 85 to 95

136. It was suggested that the following could be included in the draft revised Notes: (i) when one or more parties were presenting an expert opinion, it would be advisable for the arbitral tribunal to consult with experts before the preparation of the report; (ii) it would be advisable for the arbitral tribunal to first identify the issues before deciding whether to appoint an expert; (iii) additional information could be provided on the practice of appointing a single joint expert; and (iv) the terms of reference should clearly indicate the expertise required of the expert.

Paragraph 101

137. It was suggested that paragraph 101 was too prescriptive and therefore, should be revised to leave the possibility open for statements made during in-site visits to be treated as evidence in the proceedings.

Paragraph 112

138. It was suggested that paragraph 112 should underline the advisability to consult with the parties on the need for post-hearing submissions. It was also mentioned that arbitral tribunals would usually determine before or during the hearing whether such submissions were necessary.

Paragraph 113

139. It was suggested that paragraph 113 should include the possibility of deliberations taking place before and also “shortly” after the hearings.

Paragraph 115

140. It was stated that while it was true that joinders were more frequent, it would be questionable if that was a result of developments in multiparty transactions. It was also mentioned that not all joinders required the contemporaneous consent of third parties joined as they might already be party to the arbitration agreement.

Additional issues

141. It was suggested that the draft revised Notes could include a provision on the usefulness of including a section on procedural history in the award, particularly to deal with cases where there was a non-participating party.

142. While a suggestion was made that the draft revised Notes should also address circumstances arising after the award, it was generally felt that that was outside the scope of the draft revised Notes.