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Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, 12-23 September 2016)

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I. Introduction

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

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

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

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

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixty-fifth session in Vienna, from 12-23 September 2016. The

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

[2] A/CN.9/867, para. 15.

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

[4] Ibid., paras. 174-194.

[5] Ibid., para. 195.

session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Mexico, Nigeria, Pakistan, Panama, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Algeria, Belgium, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Malta, Netherlands, Norway, Portugal, Qatar, Republic of Moldova, Saudi Arabia, Slovakia, South Africa, Sweden and Viet Nam.

7. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO) and Hague Conference on Private International Law (HCCH);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Belgian Center for Arbitration and Mediation (CEPANI), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Energy Community Secretariat, European Law Institute (ELI), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICACIC), International Academy of Mediators (IAM), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University London School of International Arbitration (QMUL), *Union Internationale des Huissiers de Justice et Officiers Judiciaires* (UIHJ) and Vienna International Arbitral Centre (VIAC).

9. The Working Group elected the following officers:

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

Rapporteur: Mr. Alejandro Márquez García (Colombia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.197); and (b) note by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/WG.II/WP.198).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.

3. Adoption of the agenda.

4. International commercial conciliation: enforceability of settlement agreements.

5. Organization of future work.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered agenda item 4 on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.198). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. The Secretariat was requested to prepare draft provisions, based on the deliberations and decisions of the Working Group (see para. 213 below).

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

13. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation ("instrument") on the basis of document A/CN.9/WG.II/WP.198. The Working Group agreed to consider the draft provisions contained therein without prejudice to the final form of the instrument to be prepared, a matter that would be discussed at a later stage (for discussion on the form of the instrument, see paras. 135-143 and 211-213 below).

A. Scope of application, definitions and exclusions

Draft provision 1 (Scope of Application)

14. The Working Group considered draft provision 1, which dealt with the scope of application, as contained in paragraph 4 of document A/CN.9/WG.II/WP.198. It was generally agreed that draft provision 1 provided clear and simple criteria for determining whether or not a settlement agreement would fall under the scope of the instrument, and no further elaboration on the territorial scope would be required.

15. The following questions were left for consideration at a later stage of the current session: (i) whether draft provision 1 would be redundant with draft provision 6, which sets forth the substantive obligations for recognition and enforcement (see para. 81 below); (ii) whether the term "settlement agreement" was broad enough to encompass various forms of such agreements in different jurisdictions (see para. 38 below); and (iii) whether the notion of "recognition" should be omitted (see paras. 77-81, 145-157, and 200-204 below).

16. The Working Group confirmed the understanding that the instrument should apply to "commercial" settlement agreements, without providing for any limitation as to the nature of the remedies or contractual obligations. Yet, with regard to the

suggestion that the instrument should contain a definition of the term "commercial" in the form of an illustrative list similar to footnote 2 of the Model Law on International Commercial Conciliation ("Model Law on Conciliation"), it was agreed that that should be further considered in light of the form of the instrument. It was clarified that a footnote could be included if the instrument were to take the form of model legislative provisions, but would not be appropriate in a convention.

Draft provision 2 (International)

17. The Working Group considered draft provision 2, which dealt with the notion of internationality, as contained in paragraph 7 of document A/CN.9/WG.II/WP.198.

Chapeau

18. As a matter of drafting, it was pointed out that draft provision 2 should be better aligned with draft provision 1.

19. As a matter of substance, it was suggested that the definition of "international" should apply to the conciliation process, rather than to the settlement agreement. It was said that the international nature of the settlement agreement would be derived from the international nature of the conciliation process. It was suggested that such an approach would be consistent with article 1(4) of the Model Law on Conciliation (see paras. 158-163 below).

Paragraph 1

20. Wide support was expressed to retain paragraph 1, as it provided for a clear criteria of the notion of "international" by referring to situations where the places of business of the parties were in different States.

Paragraph 2, subparagraphs (a) and (b)

21. Divergent views were expressed on whether to retain subparagraphs (a) and (b), which aimed at providing a further elaboration of the criteria to determine whether a settlement agreement was "international". Support was expressed to retain those provisions for the sake of consistency with article 1(4)(b) of the Model Law on Conciliation. However, views were expressed that those subparagraphs might result in expanding the scope of the instrument to settlement agreements concluded by parties that had their places of business in the same State. It was suggested that limiting the definition of "international" to paragraph 1 would be preferable for the sake of clarity and simplicity.

22. After discussion, it was widely felt that subparagraphs (a) and (b) could be retained provided that they were better aligned with article 1(4)(b) of the Model Law on Conciliation. Further, it was agreed that the form of the instrument might have an impact on whether to retain those subparagraphs in the instrument and that that matter should be left for further consideration.

Paragraph 2, subparagraph (c)

23. The Working Group agreed that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that had their places of

business in the same State, even if the enforcement were sought in another State. Therefore, it was agreed that subparagraph (c) should be deleted.

Paragraph 2, suggestions for additional subparagraphs

24. Suggestions were made to insert additional subparagraphs in paragraph 2 so that a settlement agreement or a conciliation would be international: (i) if the location of the conciliation institution where the settlement was reached was different from the places of business of the parties; or (ii) where the settlement agreement dealt with matters of international trade. These proposals did not receive support for the reasons that they would unnecessarily broaden the scope of application of the instrument and create uncertainty.

Paragraph 3

25. The Working Group took note that paragraph 3 was based on article 1(6) of the Model Law on Conciliation, which aimed at expanding the notion of internationality and providing flexibility to parties. In the context of the preparation of the instrument, concerns were expressed that parties should not be in a position to determine whether or not the settlement agreement or the conciliation process was international, in particular if the instrument were to take the form of a convention. Furthermore, it was noted that such a provision, which amounted to an opt-in by parties could expand the scope of the instrument to purely domestic conciliation and settlement agreements.

26. After discussion, the Working Group agreed that paragraph 3 should be deleted if the instrument were to take the form of a convention. However, it was also noted that the matter might need to be considered further if the instrument were to take the form of model legislative provisions, which would complement the Model Law on Conciliation.

Paragraph 4

27. Paragraph 4 aimed at providing guidance on the determination of a party's place of business, where a party had more than one place of business or had none. With respect to that paragraph, a suggestion was made that the instrument could provide further guidance on, or a clear definition of, the term "place of business", possibly referring to the place where the party had substantive physical or economic presence or conducted substantial economic activity. It was further mentioned that subparagraph (a), in a sense, provided an indication of the meaning of that term and that it should be set out in a clearer fashion.

28. In response, it was suggested that there was no need for further guidance as the term was well-known and often used in the commercial law context and one that was acceptable in different legal traditions. It was also mentioned that it would be for the competent enforcing authority to determine the place of business and not for the instrument to elaborate further. It was also said that defining the "place of business" would fall outside the scope of the instrument.

29. It was generally felt that subparagraph (a) appropriately provided the link between the settlement agreement and the relevant place of business, in case a party had more than one place of business. Along the same lines, there was general

support to retain the words “the dispute resolved by” and to delete the square brackets.

30. A question was raised whether the term “*établissement*” in the French version of draft provision 2 reflected situations where a party had representations in different locations. In response, it was recalled that the term “*établissement*” had been used consistently in the Model Law on Conciliation as well as in other UNCITRAL texts to translate the term “place of business”.

31. After discussion, it was agreed that paragraph 4 could be retained, including the words “the dispute resolved by” outside square brackets.

Draft provision 3 (Settlement agreement)

32. A number of suggestions were made with respect to draft provision 3, which provided a definition of the term “settlement agreement”, as contained in paragraph 13 of document A/CN.9/WG.II/WP.198.

33. One was to remove the requirement that settlement agreements be in writing (“writing requirement”) in draft provision 3, yet the arguments were based on different grounds.

34. One argument was that the writing requirement would introduce an obstacle in the operation of the instrument, as it was often the case that settlement agreements were concluded or amended orally, by conduct and also using electronic and other means. It was mentioned that the instrument should reflect such changes in trade usage and provide that the written form of a settlement agreement was mere proof of the existence of the agreement and not a requirement for its validity. In that context, reference was made to the deliberations at the thirty-ninth session of the Commission, when it adopted the amendments to article 7 (Definition and form of arbitration agreement) of the Model Law on International Commercial Arbitration (“Model Law on Arbitration”).[6]

35. Yet another argument was that the writing requirement would not need to be repeated in both the definitions and the form requirements (draft provision 5). One view was that it would be better dealt with only as a form requirement. In response, it was said that there was merit in retaining the writing requirement in both the definitions and the form requirements, for the sake of clarity.

36. In general, there was significant opposition to removing the writing requirement entirely from the instrument. It was stated that because the purpose of the instrument was to facilitate enforcement of settlement agreements, it would be essential for the enforcing authority to be presented with a settlement agreement in writing in order to proceed with the enforcement process.

37. Another suggestion was to replace the words “that results from conciliation” with the words “after they have engaged in conciliation”, as the former could be interpreted to require a strict causality between the conciliation process and the resulting settlement agreement. There was no support for that suggestion. Yet another suggestion was that retaining the words “in writing” in draft provision 3 and adding the words “is intended to” between the words “that” and “resolves” would eliminate the need for draft provision 5(1). That suggestion did not receive support

[6] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 146-176.

because draft provision 5(1) dealt with form requirements and not with the objectives of the parties in concluding the settlement agreement. Another suggestion was that the definition of settlement agreement should in itself contain an international element, possibly defining it as an agreement concluded by international parties. That suggestion did not receive support, as the instrument already referred to the notion of "international" in both draft provisions 1 and 2.

38. After discussion, it was generally agreed that draft provision 3 could be retained without modification, with the understanding that whether the writing requirement was to be addressed in draft provision 3 or 5 or in both would be addressed at a later stage.

Draft provision 4 (Conciliation)

39. The Working Group considered draft provision 4, which dealt with the definition of conciliation, as contained in paragraph 15 of document A/CN.9/WG.II/WP.198. It was noted that draft provision 4 reflected the understanding of the Working Group at its sixty-third and sixty-fourth sessions that the scope of the instrument should be limited to settlement agreements resulting from conciliation, and that it was based on the definition of "conciliation" in article 1(3) of the Model Law on Conciliation.

40. One suggestion was made that the process whereby parties reached a settlement agreement should be defined more broadly so that the assistance of a third person would not be a requirement or a precondition. It was pointed out that such involvement could, in certain instances, be costly and burdensome. In response, it was stated that such an approach would broaden the scope of the instrument and be contrary to the understanding that the enforcement mechanism envisaged under the instrument should apply only to the extent that a settlement agreement resulted from conciliation, thus with the assistance of a third person (see also para. 70 below).

41. Nonetheless, the possibility of providing some flexibility to States was discussed. For example, if the instrument were to take the form of a convention, it could provide for a reservation whereby a State party could declare that it would either extend its application to settlement agreements reached without the assistance of a third person, or limit its application to only when a third person assisted the parties. It was also mentioned that if the instrument were to take the form of model legislative provisions, that possibility could be elaborated further, for instance, in a footnote. It was agreed that that matter could be discussed at a later stage in light of the deliberations on the form of the instrument.

42. A suggestion was made that "conciliation" should be qualified as a "structured/organized" process to emphasize that conciliation needed to be reliable and trustworthy. It was explained that such a qualification would rule out processes which took place in purely informal settings or mere negotiations. It was further explained that the objective of that suggestion was not to prescribe a specific technique of conciliation nor to introduce rigidity in the instrument, but to encompass processes that were: (i) governed by a legal framework; (ii) administered by an institution; or (iii) regulated in some manner (for example, conducted under specific conciliation rules), all of which could bring more confidence and certainty to the enforcing authority tasked with the enforcement procedure.

43. In that context, the Working Group recalled its discussion at its sixty-fourth session, where it had been stated that referring to a "structured/organized" conciliation process would constitute a departure from the definition contained in the Model Law on Conciliation (see A/CN.9/867, para. 117). It was reiterated that the terms "structured/organized" were not commonly used to qualify the conciliation process and could be understood differently. It was further stated that such qualification would likely introduce domestic requirements, which would reduce the attractiveness of the instrument. It was also mentioned that most provisions of the Model Law on Conciliation as well as the UNCITRAL Conciliation Rules were subject to party autonomy, providing much flexibility to the parties, and even in circumstances where those instruments were applicable, it would be difficult to determine whether the process had been structured or not.

44. Taking account of the divergence of views on the matter, the Working Group agreed to consider at a later stage of its current session: (i) whether to include such qualification in the instrument (for example, in draft provision 4, 5, or 6); (ii) if so, how to define "structured/organized"; and (iii) whether it should only be reflected in explanatory material accompanying the instrument. After discussion, it was agreed that draft provision 4 would be retained without such qualification until further consideration (see paras. 164-167 below).

45. Another suggestion with respect to draft provision 4 was that independence of the third person involved in the conciliation process should be highlighted (see also para. 168 below). No support was expressed for that suggestion because that matter would be better addressed in substantive provisions of the instrument, for example, draft provision 8(1)(e). It was pointed out that if the instrument were to take the form of model legislative provisions complementing the Model Law on Conciliation, that reference would be superfluous, as article 6(3) of the Model Law addressed the need for the conciliator to keep a fair treatment among the parties.

46. Regarding the words in square brackets in draft provision 4 ("irrespective of the basis upon which the conciliation is carried out"), it was clarified that they intended to address the question whether the instrument would apply to instances where the basis of conciliation was not an agreement by the parties to conciliate but for example, an obligation established by law or a suggestion of a court. There was general support for retaining those words outside square brackets, possibly including the additional wording as contained in article 1(8) of the Model Law on Conciliation.

47. As a drafting point, it was agreed that the words "(the "conciliator")" should be inserted after the words "third person or persons" in draft provision 4. Another general drafting point was that if the instrument were to take the form of model legislative provisions complementing the Model Law on Conciliation, efforts should be made to not depart, to the extent possible, from the existing definitions in that Model Law.

Settlement agreements concluded in the course of judicial or arbitral proceedings

48. The Working Group considered whether the instrument should also apply to instances where parties had concluded a settlement agreement in the course of judicial or arbitral proceedings. Recalling its discussion at its sixty-fourth session, the Working Group confirmed its understanding that settlement agreements reached

during judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award should fall within the scope of the instrument (see A/CN.9/867, para. 125).

49. The Working Group then considered whether settlement agreements concluded in the course of judicial or arbitral proceedings, and recorded as court judgments or arbitral awards should fall within the scope of the instrument, or be excluded in order to avoid possible overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention"), and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law.

50. Views were expressed 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 enforcing authority. It was suggested that if the instrument were to take the form of a convention, States parties could be given the flexibility, through a reservation, to exclude settlement agreements recorded as court judgments or arbitral awards to the extent enforcement would be provided under another international instrument to which they were party. It was further suggested that if the instrument were to take the form of model legislative provisions, possible ways to articulate enforcement of settlement agreements recorded as court judgments or arbitral awards in relation to other relevant international instruments could be addressed.

51. Concerns were raised that such an approach might not be sufficient to guide the competent enforcing authorities regarding which instrument to apply in cases of overlap. Therefore, it was suggested to expressly exclude from the scope of the instrument settlement agreements recorded as court judgments or arbitral awards. The Working Group then undertook to consider the various options provided for in paragraph 21 of document A/CN.9/WG.II/WP.198.

52. Preference was expressed for option 2 in paragraph 21 (ii), which excluded settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards. It was further suggested that the language should be aligned with that in article 12 of the Choice of Court Convention, which dealt with judicial settlements (*transactions judiciaires*). It was underlined that the language used in the Choice of Court Convention could encompass procedures akin to homologation of settlement agreements, which were not necessarily rendered in the form of a judgment. It was noted that the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law, used similar terminology (see paras. 169-176 and 205-210 below).

53. In that connection, the Working Group then considered whether settlement agreements not concluded in the course of judicial or arbitral proceedings but recorded as court judgments or arbitral awards should fall within the scope of the instrument. Divergent views were expressed and the Working Group deferred consideration of that question to a later stage of its current session (see para. 169 below).

Similarly, the Working Group agreed to consider at a later stage whether that matter could be dealt with in draft provision 1, 3 or 4.

54. The Working Group confirmed 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 (see also A/CN.9/867, para. 131), and agreed to revisit that question in light of its decision on matters discussed in paragraph 53 above.

Exclusions (consumer, family and employment matters)

55. The Working Group considered draft formulations on exclusions of settlement agreements dealing with consumer, family and employment law matters, as contained in paragraph 23 of document A/CN.9/WG.II/WP.198. It was generally felt that the provision on exclusions should become part of draft provision 1 on the scope of application.

56. Nonetheless, it was questioned whether express exclusion of family and employment law matters was necessary, taking into account that a settlement agreement dealing with those matters would not be considered commercial. It was suggested that, if those exclusions were retained in the instrument, they should be presented as an illustrative list of possible exclusions. That suggestion did not receive support.

57. With respect to the words “for personal, family, or household purposes”, a suggestion was made that the instrument should instead refer to “consumers”, “consumption purposes”, or “consumer protection law”. In a similar context, a suggestion was made to delete the word “household”.

58. In response, it was recalled that the Working Group had considered the issue at its sixty-fourth session and the fact that the use of the term “consumer” might be too generic and could be understood differently in various jurisdictions was reiterated (see A/CN.9/867, para. 107). It was further recalled that those words were initially used in the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) (art. 4 (a)) as well as in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (article 2(a)) to provide an objective criterion for excluding from their scope sale of goods for consumer purposes.

59. While there was general support for retaining the current descriptive wording, it was suggested that the instrument could include explicit reference to “consumers”. Article 2 of the Choice of Court Convention was cited as an example that included both descriptive language and a reference to consumers in parentheses.

60. It was also agreed that subparagraph (b) in both formulations should be revised to make it clear that settlement agreements relating to “inheritance” or “succession” were excluded from the scope of the instrument.

Settlement agreements involving public entities

61. The Working Group then considered the provisions addressing the questions of liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*) and state immunity, as contained in paragraph 24 of document A/CN.9/WG.II/WP.198. The Working Group confirmed its understanding that the

instrument would not have any impact or interfere with the public international law aspects of state liability or state immunity. As to the latter, a suggestion was made that that point could be explicitly stated in the instrument and reference was made to article 2(6) of the Choice of Court Convention as a possible basis for formulation.

62. The Working Group also reaffirmed its decision that settlement agreements involving States and other public entities should not be automatically excluded from the scope of the instrument. Suggestions were made to the possible formulations for a declaration on the basis of option 2 in paragraph 24 of document A/CN.9/WG.II/WP.198. One was that the possible exclusion should be broader, so that it not only dealt with settlement agreements where the declaring State or the government agency or any person acting on behalf of that State was a party, but rather where any State or a government agency or any person acting on behalf of a State was a party to the settlement agreement. Another was to delete the reference to "or any person acting on its behalf" as that phrase could be interpreted broadly. While it was generally agreed that flexibility should be provided to States on the matter, the Working Group decided to consider that question further in light of its deliberations on the form of the instrument.

B. Form requirements of settlement agreements

Draft provision 5 (Form of settlement agreement)

63. The Working Group considered draft provision 5, which dealt with form requirements of settlement agreements, as contained in paragraph 25 of document A/CN.9/WG.II/WP.198.

Paragraph 1

64. The Working Group generally agreed that settlement agreements should be in writing, and be signed by the parties, so as to provide certainty in the enforcement procedure. The Working Group agreed to delete the phrase in the first square brackets, which referred to the intent of the parties to be bound by the terms of the agreement, as it would be redundant.

Paragraph 3

65. The Working Group agreed to delete the phrase in square brackets in subparagraph (a).

66. As a drafting point, it was suggested that subparagraphs (b) and (c) could be simplified or replaced by a cross reference to article 9(2) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). After discussion, it was agreed that those subparagraphs provided for a functional equivalence rule for writing and signature requirements and should remain unchanged for the sake of consistency among UNCITRAL standards.

Other form requirements

A single document

67. A suggestion was made that the instrument should require that the settlement agreement should be a single document. In that respect, it was recalled that the Working Group had discussed the matter at its sixty-fourth session (see A/CN.9/867, para. 134). Doubts were expressed about introducing such a requirement as it would not necessarily reflect the current practice where the form and content of settlement agreements varied greatly. It was mentioned that settlement agreements might consist of more than one document including annexes, and might comprise of different forms which might not necessarily be captured in a single document. It was pointed out that introducing such a requirement would make the process rigid, putting additional burden on parties.

68. In response, it was said that introducing such a requirement would enhance certainty and make it possible to expedite the enforcement procedure, as the content of what was to be enforced would be fully set out in a single document.

69. After discussion, the Working Group agreed to further consider at a later stage of the current session whether the instrument would require that a settlement agreement should be in the form of "a complete set of documents" and whether that reference should be contained in draft provision 5 on form of settlement agreements or in draft provision 7 on application for enforcement (see paras. 177-185 below).

Paragraph 2

70. With regard to paragraph 2, while some doubts were expressed about including additional form requirements to those stipulated in paragraph 1, it was generally felt that the instrument would need to provide, in some fashion, that the settlement agreement should indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation. It was generally felt that that indication would distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse. However, it was also emphasized that the additional requirement should not be burdensome and should be kept simple to the extent possible (see also paras. 40 and 41 above).

71. As to how to formulate the additional requirement, it was noted that a mere indication of the conciliator's identity in the settlement agreement would not be sufficient. Therefore, one view was that the conciliator should be required to sign the settlement agreement. In response, it was mentioned that requiring the conciliator to sign the settlement agreement posed difficulties, both legal and practical. It was said that, in certain jurisdictions, conciliators were advised not to sign such agreements as it could lead to liability issues, conflicts with professional obligations and questions about the intent of the parties to the settlement agreement.

72. It was suggested that the instrument should provide more flexibility in the means for a party to demonstrate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation. As an alternative to requiring the signature of a conciliator in the settlement agreement, it was suggested that a declaration, by which the conciliator would attest its involvement in the conciliation process, could suffice. It was explained that such a declaration would

usually be attached to the settlement agreement, but not become part of it. Another suggestion was that the agreement to conciliate would provide sufficient evidence of the involvement of the conciliator in the process. However, that suggestion did not receive support.

73. During the discussion, attention was drawn to the fact that the Model Law on Conciliation did not include any provisions on form requirements of settlement agreements, and that introducing form requirements in the instrument would create a discrepancy with the Model Law. Along the same lines, suggestions were made that requiring a signature or an attestation need not necessarily be formulated as a form requirement in draft provision 5 but rather could be formulated as a requirement in the application process in draft provision 7. In support of that view, it was stated that the involvement of a conciliator should be a question of proof at the stage of application for enforcement and that parties should be left to provide evidence thereof. Based on similar grounds, it was mentioned that the requirement could be construed as a defence, where the party resisting enforcement would have the burden of proving that a conciliator was not involved in the process or that the settlement agreement had not resulted from conciliation.

74. During the discussion, a suggestion was made that in preparing the instrument, it would be useful to include standard forms or model declarations by conciliators. That suggestion did not receive support.

75. Recognizing the need to balance the necessity for certainty and to preserve flexibility, the Working Group agreed to provide that a settlement agreement should indicate that it had resulted from conciliation. It was further agreed that that indication could be achieved by the conciliator signing the settlement agreement or providing a separate declaration, which would attest its involvement in the conciliation process. In that context, it was also clarified that a signature or an attestation by the conciliator would simply be to prove its involvement in the process and should not be construed as an endorsement of the settlement agreement nor as an indication that the conciliator was a party to the agreement. The Working Group decided to consider the placement of such a provision at a later stage of its current session in light of the suggestion made in paragraph 73 above (see paras. 186-190 below).

C. Direct enforcement and application for recognition and enforcement

Draft provisions 6 (Recognition and enforcement) and 7 (Application for enforcement)

76. The Working Group considered draft provision 6, which addressed the principle of enforcement, as well as draft provision 7 on application for enforcement, both of which were contained in paragraph 31 of document A/CN.9/WG.II/WP.198.

77. Focusing on the notion of “recognition” of settlement agreements by courts, the Working Group recalled its discussion at its sixty-third and sixty-fourth sessions where divergent views were expressed on whether the instrument should address

recognition of settlement agreements (see A/CN.9/861, paras. 71-79 and A/CN.9/867, para. 146).

78. At the current session, it was generally felt that in the interest of flexibility, the text of the instrument would not necessarily include a reference to "recognition" in light of the different procedures akin to recognition and the effects attached thereto in various jurisdictions. It was said that settlement agreements did not have res judicata effect, and if recognition were to be provided for in the instrument, it might, in certain jurisdictions, confer such res judicata or preclusive effect. In addition, it was said that recognition usually meant giving legal effect to a public act emanating from another State, such as court decisions, rather than to private agreements between parties.

79. Instead of using the term "recognition", it was suggested that the instrument could incorporate wording based on article 14 of the Model Law on Conciliation which referred to settlement agreements being "binding and enforceable", acknowledging the private nature of the settlement agreement to be enforced, and providing for neutral language. It was recalled that when the Commission adopted article 14 at its thirty-fifth session, it carefully considered the implications of using the words "binding and enforceable". At that session, the Commission agreed that: (i) those words were intended to reflect the common understanding that conciliation settlements were contractual in nature; and (ii) while the word "binding" reflected the creation of a contractual obligation as between the parties to the settlement agreement, the word "enforceable" reflected the nature of that obligation as susceptible to enforcement by courts, without specifying the nature of such enforcement.[7]

80. It was generally felt that the reference in the instrument to the binding nature of settlement agreements would accommodate various procedures that existed in different national procedural laws prior to enforcement, and that aimed at protecting or acknowledging rights of the parties. Noting that the non-binding nature of settlement agreements was a ground for resisting enforcement in draft provision 8(1)(b), it was agreed to consider at a later stage of the current session articulation between those provisions (see para. 87 below).

81. After discussion, the Working Group generally felt that draft provision 7(2) should provide that settlement agreements should be treated as binding and should be enforced or enforceable in accordance with the rules of procedures of the enforcing State, under the conditions laid down in the instrument. The Working Group agreed to delete draft provision 6, as it would be redundant with draft provision 7(2). It was also agreed that draft provision 7(3) could be retained in its current form (see paras. 147-157 and 200-204 below).

82. Suggestions were made that draft provision 7 could also provide that the enforcing authority (i) should act expeditiously, and (ii) should have the right to request any further documents from the parties to proceed with the enforcement, along the lines of article 13(2) of the Choice of Court Convention (see also para. 183 below).

83. In the context of those discussions and in relation to the question of direct enforcement of settlement agreements as indicated in paragraph 33 of

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[7] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 124.

document A/CN.9/WG.II/WP.198, it was recalled that the notion of recognition in the context of international commercial arbitration found its origin in both the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) ("Geneva Convention") and the New York Convention. In particular, it was recalled that the Geneva Convention required as a condition for recognition and enforcement of an award that proof be supplied that the award had become final in the country in which it was made (article 4(2) of the Geneva Convention). The omission of that requirement in the New York Convention, thereby permitting direct enforcement of awards in the country of enforcement, was considered as an important step to facilitating enforcement of arbitral awards. Along the same lines, it was reiterated 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 without a review or control mechanism in the State where the settlement agreement originated from as a precondition.

D. Defences to recognition and enforcement

Draft provision 8 (Grounds for refusing enforcement)

84. The Working Group considered draft provision 8, which addressed possible defences to enforcement, as contained in paragraph 35 of document A/CN.9/WG.II/WP.198.

Paragraph 1, subparagraph (a)

85. There was a general agreement in the Working Group to retain subparagraph (a), without the text in square brackets "[under the law applicable to it]". It was recalled that that phrase which had been initially contained in the New York Convention was omitted from the Model Law on Arbitration because it was viewed as providing an incomplete and potentially misleading conflict-of-laws rule.

Paragraph 1, subparagraph (b)

86. The Working Group considered the various grounds listed in subparagraph (b).

87. Regarding the ground that the settlement agreement was not binding on the parties, it was suggested that inclusion of that ground would be contrary to draft provision 7(2) as revised by the Working Group (see paras. 80 and 81 above) and should be deleted.

88. Regarding the ground that the settlement agreement was not a final resolution of the dispute, it was said that such a ground might be useful to retain, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be considered as a final determination of the dispute by a party. It was questioned whether the finality of the settlement agreement should be dealt with in the definitions.

89. In relation to the phrase in square brackets "[or relevant part thereof]", it was said that that phrase should be retained without square brackets since a settlement agreement was defined as an agreement that might solve all or part of a dispute in draft provision 3. It was suggested to clarify the operation of that provision in

complex settlements where parties would settle parts of their dispute over time but might wish to enforce the entire agreement after all matters had been resolved.

90. Regarding the ground that the settlement agreement had been subsequently modified by the parties, there was general agreement that that ground should be retained, and could possibly be merged with the grounds in subparagraph (c). It was suggested that that ground resonated with the form requirement that settlement agreements should be submitted in one complete set of documents for enforcement, and that, therefore, it might be further considered in light of that form requirement (see paras. 67-69 above and 177-185 below).

91. Regarding the ground that the settlement agreement contained conditional or reciprocal obligations, it was said that those terms had legal connotations, and could be interpreted differently in different jurisdictions. It was suggested that a more descriptive language could be used to refer to those obligations. Further, it was pointed out that it was usual for settlement agreements to contain such types of obligations. Therefore, the ground for refusing enforcement should not be that settlement agreements contained such obligations, but that the conditions stipulated in the agreement were not met or that the obligations had not been performed or complied with. It was suggested to clarify that the party either requesting or resisting enforcement should be given the right to avail itself of that ground. After discussion, the Working Group agreed to retain the ground "contains reciprocal or conditional obligations" with adequate modifications reflecting its deliberations. The Working Group agreed to consider at a later stage whether subparagraph (b) as amended should be merged with subparagraph (c).

Paragraph 1, subparagraph (c)

92. The Working Group considered the first ground provided in subparagraph (c) ("the enforcement of the settlement agreement would be contrary to its terms and conditions"). It was noted that that ground was based on party autonomy, meaning that the enforcement of the settlement agreement should not run contrary to what the parties had agreed in the settlement agreement, including any dispute resolution clause.

93. While there was support for retaining the text as currently drafted, a concern was raised that the text would need to be further clarified as it could open doors for a wide range of defences.

94. With regard to the question whether a party would be able to resist enforcement based on that ground if the settlement agreement contained a dispute resolution clause (see A/CN.9/WG.II/WP.198, para. 38), it was said that the purpose of a dispute resolution clause was generally to address matters pertaining to the performance of obligations in the settlement agreement and not those pertaining to enforcement.

95. It was also stated that the existence of a dispute resolution clause in the settlement agreement should not be a ground for resisting enforcement in the instrument, as there were existing mechanisms to address those issues. For example, it was mentioned that if there was an arbitration clause in the settlement agreement, the enforcing authority would generally refer the parties to arbitration in accordance with article II(3) of the New York Convention.

96. A suggestion was made that the ground should be limited to instances where the manner in which the enforcement was carried out would be contrary to the terms of the settlement agreement.

97. In response to a suggestion to add the words ", including any provision limiting the application of this instrument" at the end of that ground, questions were raised on how that would operate if the instrument were to require opt-in by the parties.

98. After discussion, it was agreed that the latter two grounds contained in subparagraph (c) ("the obligations in the settlement agreement have been performed" and "the party applying for enforcement is in breach of its obligations under the settlement agreement") should be retained. As to the first ground contained in subparagraph (c) ("the enforcement of the settlement agreement would be contrary to its terms and conditions"), it was agreed that the wording was acceptable but might need further elaboration to provide a clear meaning and scope in accordance with the deliberations, as it should not inadvertently introduce defences not contemplated.

Paragraph 1, subparagraph (d)

99. It was noted that subparagraph (d) was based on article II(3) and article V(1)(a) of the New York Convention. It was recalled that subparagraph (d) sought to reflect the understanding 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 (see A/CN.9/867, paras. 159-161).

100. A suggestion was made to add the words "voidable, or legally voided" after the word "void" to put it beyond doubt that the scope of subparagraph (d) covered instances of fraud, mistake, misrepresentation, duress and deceit. That suggestion did not receive support, as it was agreed that the current draft was sufficiently broad to encompass those elements.

101. Another suggestion was to delete the words "under the law to which the parties have subjected it" as it would be preferable to leave the determination of the applicable law to the enforcing authority. In support of that suggestion, it was said that mandatory laws, not necessarily the law chosen by the parties, could apply thereby limiting party autonomy. In response, it was said article V(1)(a) of the New York Convention contained a similar provision and that it would be preferable not to depart from such language. It was clarified that in any case party autonomy operated within the limits of mandatory laws and public policy. Therefore, it was agreed that those words would be retained in subparagraph (d).

102. In the context of the consideration of subparagraph (d), a question was raised whether the instrument should more clearly differentiate between the procedure for enforcement of settlement agreements on the one hand, and the procedure regarding the validity of the settlement agreement on the other, which might be carried out by a different authority.

Paragraph 1, subparagraph (e)

103. The Working Group considered subparagraph (e), which addressed the possible impact of the conciliation process, and of the conduct of conciliators, on the enforcement process. The Working Group recalled that when it considered that matter at its sixty-fourth session, the emerging view was that serious misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by other defences in the instrument (see A/CN.9/867, para. 175).

104. At the current session, diverging views were expressed on that provision. In support of including, as a separate ground, failure to maintain fair treatment of the parties as well as failure to disclose circumstances likely to give rise to justifiable doubts about impartiality and independence of the conciliator, it was said that such defence would ensure consistency with articles 5(4), 5(5) and 6(3) of the Model Law on Conciliation, and that such elements were usually found in codes of ethics for conciliators. It was underlined that subparagraph (e) would underscore the importance of compliance with due process in the conciliation. Those in support of retaining subparagraph (e) clarified that the provision did not necessarily require the conciliator to be independent and impartial, but required it to disclose to the parties circumstances likely to give rise to justifiable doubts about impartiality and independence.

105. In the context of those discussions, the Working Group was referred to paragraphs 52 and 55 of the Guide to Enactment and Use of the Model Law on Conciliation. Paragraph 52 clarified that failure by the conciliator to disclose information likely to raise doubts as to its impartiality or independence did not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law. Paragraph 55 provided that the reference in the Model Law to maintaining fair treatment of the parties was intended to govern the conduct of the conciliation process and not the contents of the settlement agreement.

106. Doubts were expressed about subparagraph (e) on the basis that: (i) misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by other defences in the instrument, such as those in subparagraph (d); (ii) conciliation was a voluntary process, from which parties were free to withdraw at any time, and therefore the misconduct of the conciliator should not have an impact at the enforcement stage; (iii) subparagraph (e) could lead to many litigations, making the enforcement cumbersome, which would run contrary to the purpose of the instrument; and (iv) the court at the place of enforcement might not be best placed to consider issues pertaining to the conciliation process which, in most cases, would have taken place in a different State. On a practical note, views were expressed that it was rare for conciliators to make disclosures referred to in subparagraph (e), as conciliators did not have the power to impose any outcome on the parties.

107. To address those concerns, it was suggested to limit the scope of subparagraph (e) to instances where the conciliator's misconduct had a direct impact on the settlement agreement (see also para. 194 below). A further suggestion was to limit the scope to situations where the conciliator "manifestly" failed to maintain fair treatment of the parties. Another suggestion was to describe objectively, and

give examples of, situations that were meant to be covered under subparagraph (e) in any explanatory material, or in a footnote to the provision if the instrument were to take the form of model legislative provisions.

108. As a matter of drafting, it was suggested that subparagraph (e) should be split into two separate subparagraphs: one dealing with fair treatment and the other dealing with disclosure.

109. After discussion, the Working Group agreed to further consider issues mentioned above at a later stage of its current session (see paras. 191-194 below).

Paragraph 2

110. With respect to the chapeau of paragraph 2, it was clarified that the wording of the chapeau covered situations where the enforcing authority would consider the defences on its own initiative (ex officio) and that it was based on language used in the New York Convention and the Model Law on Arbitration.

111. With respect to paragraph 2(a), a suggestion was made that the applicable law for considering whether the subject matter of the dispute was capable of settlement by conciliation should be the law chosen by the parties rather than the law of the State where enforcement was sought. Another suggestion was made to place paragraphs 1(a) and 1(e) in paragraph 2. Those suggestions did not receive support.

112. After discussion, the Working Group agreed to retain paragraph 2 in its current form.

Additional defences

Scope and other form requirements

113. As a general point, a suggestion was made that the instrument should clarify that parties would be able to raise issues with regard to the scope of application of the instrument as well as the non-compliance of form requirements at the enforcement stage.

114. It was generally agreed that if a settlement agreement did not fall within the scope or did not meet the form requirements, it would not be enforceable under the regime envisaged under the instrument. However, there were divergent views on how to reflect that understanding in the instrument.

115. One was that the different sections of the instrument (such as scope, definitions, form requirements, application to enforcement, grounds for refusal to enforcement) should be construed as being interrelated and therefore it would not be necessary to import elements in those sections into the defences.

116. Another was that it could be clearly stipulated in draft provision 7 on the application for enforcement that, to be admissible for enforcement, the settlement agreement must fall within the scope of the instrument and meet the requirements in the instrument. The possible inclusion in draft provision 7 of cross references to draft provision 5 on form requirements was mentioned. It was also mentioned that any controversy on those matters would be addressed through rules of procedure of the State where enforcement was sought in accordance with draft provision 7(2). It was also noted that those matters should be treated differently from the defences

provided in draft provision 8. Yet another view was that the parties would be able to raise them along with the defences provided in draft provision 8.

117. After discussion, a suggestion to introduce a term in the scope provision to be used throughout the instrument, which would include all of the components relating to the settlement agreement in the instrument (such as that it was commercial, international and resulting from conciliation), received support (see paras. 145-146 below).

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

118. While it was suggested that the instrument could provide that the enforcing authority might refuse enforcement if it found that the enforcement would be contrary to a decision of another court or competent authority, it was generally felt that there was no need to include such a defence, as it would inadvertently complicate the enforcement procedure, invite forum shopping by parties and would generally be covered through the defences already provided in draft provision 8 (para. 8(1)(d) or 8(2)(b)).

Set-off

119. It was also agreed that there was no need to include a separate provision to deal with instances where the settlement agreement might be used for set-off purposes.

E. Other aspects

Confidentiality and the enforcement process

120. The Working Group then considered whether the instrument would need to address the possible contradiction that might arise between the confidential nature of conciliation and the need to disclose information during the enforcement process.

121. It was mentioned that articles 9 and 10 of the Model Law on Conciliation dealt with the matter in an appropriate manner, including possible exceptions to confidentiality (agreement by the parties, to the extent required by the law, or for the implementation or enforcement of a settlement agreement). It was suggested that if the instrument were to be a convention, those articles could be incorporated with some adjustments, as that would also provide guidance to less experienced practitioners and users of conciliation. However, the overwhelming view was that there was no need to include a provision on confidentiality in the instrument, as it was a matter that would be covered by the domestic legislation in the respective enforcing jurisdictions. After discussion, it was agreed that the instrument would not include a separate provision on confidentiality.

Relationship of the enforcement process with judicial or arbitral proceedings

122. The Working Group then considered draft provision 9, which addressed how an enforcing authority would treat a situation where an application (or claim), which might impact the enforcement, had been made to a court, an arbitral tribunal or any other competent authority, as provided for in paragraph 47 of

document A/CN.9/WG.II/WP.198. It was recalled that draft provision 9 was based on article VI of the New York Convention which dealt with an application for setting aside or suspension of an arbitral award.

123. It was generally agreed that it would be appropriate for the enforcing authority to be given the discretion to adjourn the enforcement process, if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other competent authority, which might affect the enforcement process.

124. Noting that the heading of the draft provision included the word "substantive", the Working Group considered three broad categories of applications (or claims), which the enforcing authority would have to take into account. The first category would be an application (or claim) about the substance or content of the settlement agreement. The second category would be an application (or claim) to annul the settlement agreement. The third category would be an additional application for enforcement of the same settlement agreement (in another State or in the same State) or an application by another party to the settlement agreement to enforce the same settlement agreement ("parallel enforcement applications"). A suggestion was made that if the draft provision were to include instances of parallel enforcement applications, the latter part of draft provision 9 in square brackets would need to be revised as the enforcing authority might also order the party applying for enforcement to give suitable security.

125. After deliberation, it was agreed that the discretion provided to the enforcing authority in draft provision 9 should be retained in the instrument and that the first square bracketed texts should remain outside square brackets. It was also agreed that draft provision 9 should not differentiate among the categories of applications (or claims), and the word "substantive" in the heading should be deleted. It was also agreed that the second square bracketed text should be revised to indicate that any party might be ordered to give security.

Parties' choice regarding the application of the instrument

126. A wide range of views were expressed on whether the application of the instrument would depend on the consent of the parties to the settlement agreement.

127. One view was that the parties' choice should not have any impact on the application of the instrument and therefore, the instrument should apply provided that the requirements therein were met and no grounds for resisting enforcement existed.

128. Another view was that parties should be given the choice to decide whether the settlement agreement would be enforceable under the instrument. In that context, the opt-in approach (which would require consent by the parties for the application of the instrument) and the opt-out approach (which would allow parties to exclude the application of the instrument) were discussed.

129. In support of the opt-in approach, it was mentioned that the enforceability of the settlement agreement would be a novel feature which parties might not be aware of, and that providing for mandatory enforceability could harm the amicable nature of the conciliation process. Further, it was said that the opt-in approach would be in line with the voluntary nature of the conciliation process. It was suggested that an

opt-in mechanism could be incorporated in draft provision 8, as provided in paragraph 51 of document A/CN.9/WG.II/WP.198. As a practical suggestion, it was mentioned that the instrument could include standard forms for the parties to use when opting-in.

130. During the discussion on the opt-in approach, it was suggested that whether to require parties' consent to the application of the instrument was not necessarily a question to be dealt with in the instrument, but a question that could be addressed by each State when adopting or implementing the instrument. Therefore, it was suggested that each State party to the instrument should be given the flexibility to declare (if the instrument were to be a convention) that it would treat settlement agreements as binding and enforce them to the extent that the party applying for enforcement indicated the parties' agreement to enforcement under the instrument.

131. Views were expressed that the opt-in approach would run contrary to the underlying objective of widely promoting the use of international conciliation in trade, as it would narrow the use of the instrument. Further, it was pointed out that efforts to carefully define the scope, the form requirements, the application process as well as possible defences were on the basis that if those elements were fulfilled, a settlement agreement would be enforceable cross-border. If, at the end, enforceability was left to the discretion of the parties, it would have been possible to adopt a more lenient approach in those provisions. In addition, it was said that an opt-in mechanism would be difficult for parties to implement as they would have to assess the various legal consequences of such a choice. It was further pointed out that when parties concluded a settlement agreement, they would generally expect the obligations therein to be performed, in accordance with the principle of pacta sunt servanda, and requiring an opt-in would run contrary to that expectation.

132. It was said that article 6 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) was a good example of a convention that provided parties to an international sale contract the autonomy to exclude the application of the Convention, and would be a good model for an opt-out approach.

133. A question that arose during the discussion was with regard to the means to record the possible opt-in or opt-out by the parties, including whether it could be done in the agreement to conciliate, in the settlement agreement itself or in a separate document (see para. 198 below).

134. It was also mentioned that the issue at hand was not free-standing but one that needed to be considered in a broader context, including the form of the instrument as well as the different approaches explored by the Working Group throughout the instrument. Therefore, the Working Group agreed to consider the matter further once it had discussed the form of the instrument, including the possible relation of the opt-in and opt-out approaches with other provisions in the instrument and the manner in which the consent of the parties would be captured (see paras. 195-199 below).

F. Form of the instrument

135. The Working Group had a preliminary discussion about the form of the instrument. While support was expressed for preparing either a convention or model legislative provisions, there was little support for preparing a guidance text.

136. Those in support of preparing a convention highlighted the cross-border nature of the enforcement process and the need for a binding instrument, which would bring certainty. It was mentioned that, compared to model legislative provisions, a convention would underscore the importance of conciliation as an alternative dispute resolution method and thus, greatly contribute to its promotion in international trade.

137. It was mentioned that the New York Convention had paved the path for cross-border enforcement of arbitral awards and that a similar path should be followed for enforcement of settlement agreements. It was also stated that the absence of a text similar to the New York Convention for conciliation was one of the reasons why conciliation was not so often used in commercial disputes. It was also stated that even if the instrument were to be a convention, States could be provided flexibility through declarations or reservations.

138. Those in support of preparing a convention also noted the possibility of preparing model legislative provisions that could support States in domestic implementation of the convention. It was further mentioned that while a convention would aim at cross-border aspects of enforcement, model legislative provisions could provide guidance to States in implementing a domestic legislative framework for enforcement of settlement agreements. In that context, it was stated that such model legislative provisions would not aim at harmonizing respective legislative frameworks on conciliation as its focus would be on enforcement aspects.

139. Those in support of preparing model legislative provisions highlighted the fact that there was currently a lack of a harmonized approach to enforcement of settlement agreements, both in legislation and in practice. It was further mentioned that the notion of conciliation, more so the concept of enforcement of settlement agreements resulting from conciliation, was quite new in certain jurisdictions and that providing a uniform regime through the preparation of a convention might not be desirable nor feasible. In short, it was argued that the current divergence and, in some cases, non-existence of practice did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach. It was mentioned that model legislative provisions would be desirable in order to be consistent with the work previously developed by UNCITRAL in the field of conciliation. Further, it was mentioned that the aim should be to identify additional common denominators which would either add substance to article 14 of the Model Law on Conciliation or provide for a stand-alone legislative regime for enforcement.

140. It was said that model legislative provisions would also highlight the usefulness of conciliation in international trade and could effectively lead to harmonization. It was mentioned that a convention could be prepared at a later stage, reflecting how the model legislative provisions were adopted in various jurisdictions and addressing any difficulties that might arise in that practice. It was

also stated that a convention once adopted would be of a normative nature and would be difficult to amend for reflecting possible developments.

141. Differing views were expressed as to whether model legislative provisions would take the form of amendments to the Model Law on Conciliation expanding its article 14 or a stand-alone text dealing with enforcement issues. It was said that if the Working Group were to adopt model legislative provisions, which would not be compatible with the provisions of the Model Law on Conciliation, that might require further confirmation from the Commission.

142. The Working Group also discussed the suggestion to possibly consider preparing two separate but parallel instruments, which would be complementary in nature. While some doubts were expressed about the effectiveness of such an approach, it was noted that there would not be significant difference in those two instruments and that it would be worth pursuing it.

143. After discussion, it was agreed that various options could be explored, including, for example, preparing both types of texts in parallel or preparing model legislative provisions first to be followed by a convention. Recognizing the divergence in views on the form of the instrument, the Working Group agreed to continue its discussion on the substantive provisions of the instrument and to revisit the issue of the form at a later stage of its current session (see paras. 211-213 below).

G. Further consideration of issues

144. After completion of its first reading of document A/CN.9/WG.II/WP.198, the Working Group continued its deliberation on issues left for further consideration.

Draft provision 1 (Scope of application)

Generic term to refer to settlement agreements covered by the instrument

145. The Working Group recalled its decision to possibly introduce a generic term to refer to settlement agreements that would fall under the scope of the instrument and that would include all of the relevant components mentioned in the instrument (see para. 117 above). A suggestion to use the term “covered settlement” did not receive support, as it would be introducing new terminology which would have to be further explained.

146. After discussion, the Working Group agreed that, subject to further consideration on the form of the instrument, draft provision 1 should introduce a generic term “settlement agreement”, which would refer to “an agreement in writing, that is concluded by parties to a commercial dispute, that results from international conciliation, and that resolves all or part of the dispute” (see para. 152 below).

“Treatment as binding”

147. On the use of the term “recognition” in the instrument, there was a suggestion to retain it in the instrument as it would provide for consistency with existing instruments including the New York Convention and as it would be broader than the

term “binding”. The Working Group recalled its discussion on the use of the term “recognition”, and its decision to further consider whether to provide, in line with article 14 of the Model Law on Conciliation, that settlement agreements should be treated as binding, thereby avoiding the use of the term “recognition” (see paras. 77-81 above).

148. The Working Group considered whether draft provision 1 should refer to the notion of treatment of settlement agreements as binding, in addition to enforcement. It was suggested that the instrument should not delve into the conditions for treating settlement agreements as binding, and therefore the scope provision should be limited to enforcement. However, it was said that if such an approach were to be adopted, the instrument would not cover, in certain jurisdictions, situations where settlement agreements were used, for instance, as a defence against a claim.

149. It was pointed out that article 14 of the Model Law on Conciliation already referred to settlement agreements being “binding and enforceable” and if the instrument were to take the form of model legislative provisions, it would not need to repeat those terms. However, it was pointed out that article 14 merely expressed that a contractual obligation, “binding” on the parties, should be “enforceable” by State courts, and only represented the smallest common denominator among States.

150. A suggestion was made to avoid referring to the notions of “recognition”, “treatment as binding”, or “enforcement” in draft provision 1 and to deal with those notions in a separate provision. It was suggested that that provision would state that a party might apply to have a settlement agreement enforced or treated as binding between the parties in accordance with the instrument.

151. However, it was felt that the purpose of the instrument would need to be clearly spelled out, preferably in draft provision 1. Further, it was pointed out that the notion of an agreement being binding between the parties would not necessarily mean that parties could use the agreement as a defence, as the term “binding” merely referred to a characteristic of a settlement agreement. A suggestion was made to refer to the legal effect of settlement agreements that could be used in defence against a claim to the same extent as in enforcement proceedings.

152. Accordingly, it was suggested draft provision 1 could read along the following lines: “(1) The [instrument] applies to an agreement in writing that is concluded by parties to a commercial dispute, that results from international conciliation and resolves all or part of the dispute (“settlement agreement”). (2) A settlement agreement shall be enforced in accordance with the rules of procedure of [this State][the State where enforcement is sought] and shall be given effect in defence against any claim to the same extent as in enforcement proceedings”.

153. It was pointed out that a settlement agreement could be raised as a defence in different procedural contexts, which would be addressed differently in various jurisdictions, and that draft provision 1(2) was not comprehensive enough to cover all such possibilities. Therefore, it was suggested to indicate in draft provision 1(2) that the use of settlement agreements in defence against a claim should be in accordance with the national procedural framework of the State where the claim was brought, so as to comprehensively cover the various national procedural frameworks in relation thereto. In addition, as draft provision 1(2) addressed the modalities for enforcement, it was questioned whether draft provision 1(2) would be better placed under draft provision 7, which dealt with the applications for enforcement.

154. A different proposal was made to address the issue more generally, if the form of the instrument were to be a convention, by introducing text similar to article VII (1) of the New York Convention with relevant adjustments. It was said that such a provision would retain the reference to national procedural frameworks, with the added benefit of allowing States that would have more favourable conditions in their national legislation for enforcement than those provided under the instrument to apply such more favourable legislation.

155. After having heard a number of suggestions, the Working Group considered the following proposal in relation to draft provision 1(2): "A settlement agreement shall be enforced and shall be given effect in defence against any claim made by either party to the settlement agreement [as far as the defence is available in national law] to the same extent as in enforcement proceedings [in accordance with the rules of procedure of the State where enforcement is sought and subject to (the provisions on defences in the instrument)]."

156. The Working Group also considered the proposal to add a new provision in the instrument along the following lines: "The [instrument] shall not deprive any interested party of any right it may have to avail itself to a settlement agreement in the manner and to the extent allowed by the law or the treaties of the State where such settlement agreement is sought to be relied upon."

157. The Working Group agreed to further consider those two proposals at a later stage of its current session (see paras. 200-204 below).

Draft provision 2 (international)

158. The Working Group considered the suggestion that the definition of "international" should apply to the conciliation process, rather than to the settlement agreement (see para. 19 above). It was said that the internationality of the settlement agreement would be derived from the international nature of the conciliation process. In support of that suggestion, it was said that that approach would be consistent with the Model Law on Conciliation.

159. However, it was noted that article 1(4) of the Model Law on Conciliation referred to the parties to "an agreement to conciliate", whereas the definition of "international" in draft provision 2 referred to the parties to "a settlement agreement". Support was expressed to refer to the parties to a "settlement agreement", as that approach would be more appropriate in light of the purpose of the instrument. It was further said that: (i) there were situations where a settlement agreement would be reached without necessarily an agreement to conciliate in the first place; (ii) the parties to the agreement to conciliate might be different from the parties to the settlement agreement; and (iii) places of business of parties might differ at the time of conclusion of the agreement to conciliate and at the time of conclusion of the settlement agreement. After discussion, it was agreed to address the internationality of "settlement agreements" and not of the "conciliation process", which shall be determined by reference to mainly the place of business of parties at the time of conclusion of the settlement agreement (see para. 161 below).

160. In that context, it was mentioned that the place where a substantial part of the obligation under the settlement agreement was to be performed (see draft provision 2(2)(a)) might not be known at the time of conclusion of the settlement

agreement and therefore, it might raise uncertainty as to whether the instrument would apply.

161. With respect to internationality, the Working Group agreed to further consider draft provision 2 along the following lines: "A settlement agreement is international if: (1) At least two parties to a settlement agreement resulting from the conciliation have, at the time of the conclusion of that agreement, their places of business in different States; or (2) One of the following places is situated outside the State in which the parties have their places of business: (a) The place where a substantial part of the obligation under the settlement agreement is to be performed; or (b) The place with which the subject matter of the settlement agreement is most closely connected. 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."

162. As a result of the discussion, it was agreed that draft provision 1(1) (see para. 152 above) should be adjusted along the following lines: "The [instrument] applies to an agreement in writing, that is international, that is concluded by parties to a commercial dispute, that results from conciliation and that resolves all or part of the dispute ("settlement agreement")."

163. At the close of the discussion, a suggestion was made that even if the instrument were to refer to the internationality of "settlement agreements", there was a need to qualify that the conciliation process was also international in accordance with article 1(4) of the Model Law on Conciliation, as the time when the parties agreed to or began conciliation would be of great significance and there was a need to consider the process that eventually led to the settlement agreement. It was further reiterated that internationality of the settlement agreement should derive from the international nature of the conciliation process.

Draft provision 4 (Conciliation)

164. The Working Group recalled its discussion on whether "conciliation" should be qualified as a "structured/organized" process (see paras. 42-44 above). A suggestion was made that the word "organized" might be an appropriate term to qualify the process to distinguish it from a purely informal process (see para. 42 above).

165. It was mentioned that if the term "organized" were to be included, its meaning would need to be further clarified in the instrument, as it was not a legal term and would be open to interpretation. In that context, suggestions were made to qualify the word "organized" with additional words such as "formal or informal" or "ad hoc or institutional".

166. However, doubts were expressed about qualifying the process as "organized" as that term: (i) was ambiguous; (ii) could be subject to interpretation by the enforcing authority possibly imposing domestic standards on conciliation during the enforcement procedure; (iii) could make it burdensome for the enforcing authority to determine whether the process was organized or not; (iv) could be used by parties as an additional ground to resist enforcement; and (v) would be a departure from the

definition of "conciliation" in the Model Law on Conciliation (see para. 43 above). It was generally felt that such inclusion would unduly complicate the enforcement procedure and there was strong support for not including any term to qualify the process.

167. Recalling its discussion at the sixty-fourth session on the same issue (see A/CN.9/867, paras. 117 and 121), the Working Group agreed not to add any qualification to the word "process" in draft provision 4 and to revisit the issue once it had considered the form requirements of settlement agreements, including whether the need to qualify the process might be sufficiently handled in those requirements.

168. During that discussion, it was suggested that the independence and qualifications of the conciliator should also be highlighted in the definition of the conciliation process (see also para. 45 above). That suggestion did not receive support.

Settlement agreements concluded in the course of judicial or arbitral proceedings

169. The Working Group continued its consideration on whether to exclude from the scope of the instrument settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards and how it should be formulated in the instrument (see also paras. 48-52 above). Further, the Working Group was also invited to consider whether settlement agreements not concluded in the course of judicial or arbitral proceedings but recorded as court judgments or arbitral awards should fall within the scope of the instrument (see also para. 53 above).

170. Views were expressed that it was not necessary for the instrument to provide for such exclusions and that the matter could be left to practice. Nevertheless, there was willingness to accommodate concerns about possible overlaps, or gaps, between the instrument and other conventions. In that context, it was noted that article 26 (4) of the Choice of Court Convention allowed for more favourable recognition and enforcement to be pursued under another treaty.

171. A number of drafting suggestions were made, taking into account that the provision should be clear and simple, possibly providing enforcing authorities with some degree of flexibility.

172. Some support was expressed for providing that the instrument would not apply to settlement agreements concluded in the course of judicial or arbitral proceedings that were approved by a judicial authority or recorded as an arbitral award.

173. Another approach was to provide that the instrument would apply to settlement agreements concluded in the course of judicial or arbitral proceedings, as long as they were not recorded as court judgments or arbitral awards but that were capable of enforcement under the draft convention on the recognition and enforcement of foreign judgments currently being prepared by the Hague Conference or the New York Convention, respectively.

174. With respect to that approach, it was suggested that reference to specific conventions should be avoided in the instrument as a matter of simplification and to take into consideration other bilateral or regional instruments. Along that line, it was suggested that the instrument could provide that it would apply to settlement

agreements concluded in the course of judicial or arbitral proceedings, as long as these were not enforceable as court judgments or arbitral awards. It was said that such an approach would take account of whether the State where enforcement was sought was a party to any other convention that provided for enforcement of court judgments or arbitral awards. It was further mentioned that that approach would allow a party to resort to multiple remedies in case the settlement agreement would not be enforceable as court judgments or arbitral awards.

175. Yet another approach was that the instrument would not apply to settlement agreements approved by a court or which had been concluded before a court, in the course of proceedings, and which were enforceable in the same manner as a judgment at the State of origin, or concluded in the course of arbitral proceedings and recorded as an arbitral award. While it was suggested that such an approach would clarify the scope of application of the instrument, providing clear guidance to the enforcing authority, it was also stated that the interpretation of such a provision could be complex. As a matter of drafting, it was suggested to delete the reference to "State of origin".

176. After discussion, the Working Group heard two drafting suggestions. The first formulation read as follows: "This instrument does not apply to settlement agreements approved by a court or which have been concluded before a court in the course of proceedings and which are enforceable in the same manner as a judgment, or concluded in the course of arbitral proceeding and recorded as an arbitral award." The second formulation read as follows: "This instrument also applies to settlement agreements concluded in the course of judicial or arbitral proceedings, as long as these are not enforceable as judgments or arbitral awards in the State where enforcement is sought". The Working Group agreed to consider those drafting suggestions at a later stage of its current session (see paras. 205-210 below).

Draft provision 5 (Form requirements)

A single document

177. The Working Group recalled its discussion on whether settlement agreements, to benefit from the enforcement procedure envisaged under the instrument, should be in the form of a complete set of documents (see paras. 67-69 above). A wide range of views were expressed about introducing such a requirement, including some doubts about the meaning of the words "a complete set of documents".

178. In that context, the suggestion that the settlement agreement should be in the form of a "single" document (rather than "a complete set of documents") was reiterated (see paras. 67-68 above). It was explained that such a requirement would make the enforcement easier from the perspective of the enforcing authority and would expedite enforcement, as it would avoid the procedure turning into one where parties would dispute the substantive contents of the settlement agreement. It was further mentioned that an analogy with contracts would not necessarily be appropriate given that the instrument addressed enforcement of settlement agreements.

179. In response, a parallel was drawn with developments regarding form requirements of arbitration agreements. It was said that the New York Convention and the 1985 version of the Model Law on Arbitration provided for strict form requirements of arbitration agreements or clauses, which had the unintended effect

of preventing their enforcement due to non-conformity with form requirements. It was further explained that the Commission had adopted amendments to the Model Law on Arbitration in 2006, responding to calls of the international business community to ensure that where the willingness of parties to arbitrate was not in question, the validity of the agreement would be recognized. The Working Group was cautioned not to follow the same pattern for settlement agreements and to provide relaxed form requirements in line with business practices. In line with that suggestion, views were expressed that the instrument should not include any such form requirement.

180. In response, it was mentioned that a comparison between arbitration and conciliation, as well as between an arbitration agreement and a settlement agreement had its limits as, first, the process of arbitration was adjudicative with an award being the result of that process, whereas the process of conciliation was facilitative with the settlement agreement recording the terms and conditions agreed by the parties and, second, the subject of enforcement in the context of the arbitration would be an arbitral award, of which form requirements had not been amended in 2006.

181. It was pointed out that agreements were usually formed by an exchange of offer and acceptance, and such meeting of the minds would not necessarily be materialized in a single document. Furthermore, it was said that requiring settlement agreements to be in a single document would be burdensome for the parties and contrary not only to business practices, but also to the flexibility that characterized conciliation. However, in response, it was noted that as the instrument would be introducing a novel mechanism for enforcing settlement agreements, it could suggest new practice as a condition for enforcement.

182. It was generally felt that the issue underlying the proposal that the settlement agreement be in a single document was the need for clarity of what the terms of the settlement agreement were, so that they could be expeditiously enforced by the competent authority. To accommodate such concerns without referring to a single document, it was suggested that the instrument could provide that the settlement agreement should include all the terms and conditions of the settlement, irrespective of whether those terms would be in a single document or multiple documents. It was also suggested that an appropriate placement for such a provision might be in draft provision 7 on application for enforcement. However, it was pointed out that those requirements were usually set out in the procedural rules of the State where enforcement was sought and requiring such elements in the instrument might have an inadvertent impact on domestic rules governing enforcement. It was suggested that a simple reference in the relevant provision to "the rules of procedure at the State where enforcement was sought" would be sufficient.

183. As a drafting matter, it was suggested that the provision on form requirements should not include any reference to a "single" document or a "complete set of documents" but alternatively the provision dealing with the application for enforcement (draft provision 7) could read as follows: "A party […] shall, at the time of application, supply the settlement agreement, subject to requirements of (provision on form requirements), together with any necessary document that the competent enforcing authority may require" (see also para. 82 above). There was general support for including such wording. It was suggested that the language

could be adjusted to ensure that the competent authority would only require from the parties documents that were strictly necessary.

184. During the deliberation, it was reiterated that if the instrument were to provide for opt-in by the parties, there would be no need for such strict formal requirements (see also para. 131 above).

185. After discussion, it was generally felt that no additional form requirement would need to be included in draft provision 5(1) other than that the settlement agreement should be in writing and signed by the parties. The Working Group agreed to further consider the proposal in paragraph 183 above in the context of its deliberations on application for enforcement (draft provision 7).

Paragraph 2, Indication that the settlement agreement resulted from conciliation

186. The Working Group then considered the question of how the settlement agreement would indicate that it resulted from conciliation (see paras. 70-75 above).

187. As a drafting suggestion, the following was proposed: "A settlement agreement shall indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation, either by (1) including the conciliator's signature on the settlement agreement or (2) including a separate statement by the conciliator attesting to his or her involvement in the conciliation process." It was explained that such drafting aimed at accommodating diverse practices. In that context, a suggestion to simplify the chapeau by replacing the words "a conciliator was involved in the process and that the settlement agreement" by the word "it" received support.

188. During the discussion, the need to address circumstances where the conciliator might not be available to sign or provide a separate statement was mentioned. In that context, it was suggested that the two options in the drafting suggestion in paragraph 187 above should not be construed as an exhaustive list. The possibility of an attestation by an institution that administered the conciliation process (or by a witness) was mentioned. Therefore, it was suggested that if specific examples were to be provided in draft provision 5(2), a third subparagraph should be added, which would be broad enough to encompass any other method that a party could use to demonstrate that the settlement agreement resulted from conciliation, particularly when the conciliator was not available to sign the settlement agreement. It was further mentioned that the questions regarding acceptability should be left to the discretion of the enforcing authority. The following drafting suggestion was made: "A settlement agreement shall indicate that it resulted from conciliation, by including the conciliator's signature on the settlement agreement or if not possible, by any other evidence, for example, a separate statement by the conciliator or an institution attesting to its involvement in the conciliation process."

189. Another suggestion was to simply require an indication by the parties that a conciliator had been involved, unless the domestic legislation where enforcement was sought required otherwise. It was mentioned that such a provision would only be acceptable if the instrument were to take the form of a convention and similar comments were made that the instrument should not make reference to domestic laws of States concerning substantive matters as the aim of the instrument was to provide uniform rules.

190. During the discussion, a question was raised about the possible legal consequences of non-compliance with the form requirements in draft provision 5(2). It was said that there was no sanction in case of non-compliance with those conditions on form and that the consequence of non-compliance with such conditions should rather be assessed in relation to the acceptability of the application for enforcement (see also para. 73 above). It was mentioned that the enforcing authority could have flexibility in determining such acceptability as long as the parties were able to show that the settlement agreement resulted from conciliation. In that context, it was suggested that the requirement as set out in paragraph 188 above might be better placed in the provision on application for enforcement.

Draft provision 8 (Grounds for refusing enforcement)

Paragraph 1, subparagraph (e) (conciliation process and conduct of conciliators)

191. The Working Group turned its attention to draft provision 8, paragraph 1 (e), which addressed the possible impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure. It was recalled that divergent views were expressed on whether to include that subparagraph and whether the grounds mentioned therein were covered by other defences in draft provision 8 (see paras. 103-109 above). Views both in support of (see para. 104 above) and against (see para. 106 above) retaining that subparagraph were reiterated.

192. During that discussion, the differences between conciliation and arbitration process were underlined and a wide range of examples of practices and conduct of conciliators, such as confidential ex parte communication, were given to highlight how difficult it would be to assess whether the parties were treated fairly. It was also noted that compared to arbitration, there were a limited number of procedural rules that governed conciliation providing a basis for assessing “fair treatment”. It was said that subparagraph (e) would be superfluous as conciliators were already subject to terms of the agreement to conciliate and codes of conduct. It was further stated that inclusion of such a defence might inadvertently restrict the selection process of a conciliator and the manner in which conciliation was conducted.

193. In response, it was said that, as the settlement agreement resulted from conciliation, the significant role of the conciliator in the conclusion of the settlement agreement needed to be acknowledged, and that that defence needed to be retained, even if it might be difficult to prove that a party had been treated unfairly in the process. It was stated that parties should be informed of any conflict of interest and if the parties were not fully informed or there had been some misconduct by a conciliator, it should have some legal consequences, particularly at the enforcement stage. Unlike arbitration, there was no means to challenge the process or the conduct of the conciliator, particularly if the misconduct or unfair treatment was not known to the parties. It was also stated that parties might not necessarily be in a situation to withdraw from the process.

194. To find a compromise solution, the suggestion to limit the scope of subparagraph (e) to instances where the conciliator’s misconduct had a direct impact on the settlement agreement was reiterated (see para. 107 above). It was also suggested that any revised draft of subparagraph (e) should separate the questions of fair treatment and disclosure. Further, it was said that the language of

subparagraph (e) would need to be adjusted, for instance, to highlight the exceptional circumstances in which the defence could be raised, or to refer to notions such as impropriety of, or severe misconduct by, the conciliator, which had a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

Parties' choice regarding the application of the instrument

195. The Working Group recalled its discussion on whether the application of the instrument would depend on the consent of the parties, during which a wide range of views were expressed (see paras. 126-134 above). Similarly, views were reiterated regarding opt-in (requiring parties' express consent for the application of the instrument) and opt-out (providing that parties may exclude the application of the instrument) approaches. As an alternative, it was suggested that the instrument could be silent on the matter as it would be counter-intuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Reservations were expressed that the appropriate approach would depend on the form of the instrument.

196. The suggestion was reiterated to include in the instrument a declaration to the effect that each State would treat settlement agreements as binding and enforce them to the extent that the party applying for enforcement indicated the parties' agreement to enforcement under the instrument (see para. 130 above). It was explained that if the instrument were to take the form of model legislative provisions, it would also be possible to include such an opt-in mechanism as an option for States to consider when enacting such legislative provisions. In response to concerns expressed, it was stated that such a provision would not necessarily lead to forum shopping as parties to the settlement agreement would, in any case, apply for enforcement at the place where assets were located.

197. Noting that it might be difficult to reach a consensus on the topic, some interest was expressed for that suggestion. However, it was pointed out that it would be preferable to set out the opt-in or opt-out rule in the instrument and subsequently allow States to deviate or to make a declaration. It was also mentioned that the application of such a declaration could become complex, might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between jurisdictions as a settlement agreement might be enforceable in one but not in another. With respect to the last point, it was suggested that a solution could be to provide for a reciprocal application of such a declaration.

198. During the discussion, some preliminary suggestions were made that: (i) with regard to the means to record the opt-in or opt-out by the parties, it should be in writing; (ii) with regard to the time when opt-in or opt-out would be expressed, it could be at any time including after the conclusion of the settlement agreement; (iii) with regard to the placement in the instrument, the provision on defences would be appropriate; and (iv) to assist the parties, a standard form should be prepared for parties to use to indicate their consent to the application of the instrument as an accompanying document.

199. After discussion, the Working Group agreed to further discuss the various options, taking account of the impact of the form of the instrument on the possible formulations.

Draft provision 1 (Scope of application)

Treatment as binding

200. The Working Group recalled its discussion on the possible use of the term "binding" to replace the notion of "recognition" of settlement agreements in the instrument, as the use of that notion could pose problems in a number of jurisdictions (see paras. 77-81 and 147-157 above).

201. The suggestion that the term "recognition" should be retained in the instrument as it would provide for consistency with existing treaties including the New York Convention was reiterated. However, it was recalled that the Working Group considered at length the issues that could be raised by the use of the term "recognition" and had decided to consider a different formulation (see para. 155). In relation to the first square bracketed text in that formulation, it was questioned which law was being referred to, and whether that reference would have the effect of limiting the application of defences in draft provision 8.

202. In response to a suggestion to delete the reference to national law or to clarify which national law would apply, it was recalled that a settlement agreement could be raised as a defence in different procedural contexts and that the first square bracketed text sought to indicate that the use of settlement agreements in defence against a claim should be in accordance with the national procedural framework so as to cover the various national procedural frameworks. It was further said that the provision should not result in precluding the enforcing authority to consider the grounds for refusing enforcement in draft provision 8.

203. After discussion, it was generally felt that the formulation contained in paragraph 155 above should be considered further, in conjunction with draft provision 8 on defences. It was agreed that the text should be revised to better express the idea that a settlement agreement could be used as a defence, and would produce effects between the parties.

204. In relation to the formulation in paragraph 156 above, it was recalled that it was inspired by article VII(1) of the New York Convention, and would permit application of more favourable national legislation to enforcement. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed.

Settlement agreements concluded in the course of judicial or arbitral proceedings

205. The Working Group resumed its deliberation on the treatment of settlement agreements concluded in the course of judicial or arbitral proceedings (see paras. 48-52 and 169-176 above), on the basis of the two formulations contained in paragraph 176 above.

206. With respect to the first formulation, it was explained that it was based on the fact that settlement agreements were private agreements and deserved a different treatment than court judgments (including judicial settlements) and arbitral awards. It was further explained that that formulation would clarify the scope of the instrument and avoid any overlap with other instruments. In support, it was stated that: (i) the grounds for refusing enforcement in the instrument were not appropriate for application to court judgments or arbitral awards; (ii) it would be inappropriate for the instrument to deal with issues on how such judgments and arbitral awards

were to be treated; and (iii) the formulation expressed that once a court judgment or an arbitral award was rendered with regard to a settlement agreement, it should not be enforceable under the instrument. In that context, the need to take into account the existence of treaties giving cross-border effect to court judgments and the fact that a court judgment could be appealed was mentioned.

207. It was said that if the instrument were to include a provision along the lines provided in paragraph 156 above, States would be able to apply a more favourable treatment to settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards.

208. It was mentioned that the second formulation could be further developed to take into account concerns about possible overlap. A suggestion was made to amend that formulation as follows: "This instrument applies to settlement agreements concluded in the course of judicial or arbitral proceedings, or which are approved as an order of court, as long as they are not enforceable as judgments or awards in the State where enforcement is sought [under an applicable instrument to which the State is a party]." It was suggested that the phrase "under an applicable instrument to which the State is a party" could be omitted so as to refer to all cases of enforcement of foreign judgments and arbitral awards including enforcement on the basis of applicable domestic law. A further suggestion was made to add the words ", recorded as court judgments or arbitral awards," after the words "arbitral proceedings."

209. In comparing the two formulations, it was said that both excluded from the scope of the instrument a settlement agreement that had been converted into a court judgment or an arbitral award. One of the differences between them arose when the conversion did not have effect or was not acceptable in the State where enforcement was sought. It was said that, according to the first formulation, the effectiveness of settlement agreements would be extinguished once they were converted, whereas the effectiveness of settlement agreements would be preserved under certain circumstances in the second formulation.

210. After discussion, it was reiterated that the objective of any provision on the matter should be to avoid any overlap and gap. It was noted that the first formulation in paragraph 176 above could achieve that objective, while the second formulation in paragraph 208 above provided multiple opportunities for parties to seek enforcement of settlement agreements under certain circumstances at the State where enforcement was sought. It was generally felt that the first formulation was preferable, although elements of the second formulation might deserve further consideration. The Working Group agreed to further consider the provision, including how to express inclusions and exclusions in the scope provision.

Form of the instrument

211. Recalling its previous discussion on the form of the instrument, the Working Group then considered how to proceed with the various options considered (see paras. 135-143 above). Views were reiterated in support of preparing a convention or model legislative provisions.

212. One alternative was to prepare a convention and model legislative provisions in parallel to preserve flexibility, with a decision on the form to be made at a later stage. It was suggested that a document that set out how each of the provisions

would be reflected in a convention and in model legislative provisions would make it possible to discuss the issues simultaneously. There was support for that suggestion. However, it was mentioned that such an approach had practical drawbacks because without a decision on the form, it would be difficult to resolve some of the outstanding issues. Therefore, it was suggested that model legislative provisions could be prepared first, which would form a basis for preparing a convention at a later stage. There was also support for that suggestion.

213. After discussion, it was generally felt that it would be premature for the Working Group to make a decision on the final form of the instrument, as well as whether work should commence first on a convention or on model legislative provisions. To accommodate the divergence in views, it was agreed that work would proceed with the aim of preparing a uniform text on the topic of enforcement of international commercial settlement agreements resulting from conciliation. The Secretariat was requested to prepare draft provisions showing how they would be adjusted depending on whether the instrument would take the form of a convention or model legislative provisions. It was reaffirmed that such work should be without any prejudice to the final form of the instrument. In that context, it was generally agreed that, for the next session, in respect of model legislative provisions, the aim was to prepare provisions to supplement the Model Law on Conciliation and therefore, the need to align relevant provisions was highlighted.