United Nations A/CN.9/WG.II/WP.195

General Assembly

Distr.: Limited
2 December 2015

Original: English

United Nations Commission on International Trade Law
Working Group II (Arbitration and Conciliation)
Sixty-fourth session
New York, 1-5 February 2016

Settlement of commercial disputes

International commercial conciliation: enforceability of settlement agreements

Note by the Secretariat

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V.15-08628 (E)

I. Introduction

1. At its forty-seventh session, in 2014, the Commission had before it a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through conciliation (A/CN.9/822).[1] The Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[2]

2. At its sixty-second session, the Working Group considered the topic of enforcement of settlement agreements resulting from international commercial conciliation (A/CN.9/832, paras. 13-59). While a number of questions and concerns were expressed, it was generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

3. At the forty-eighth session of the Commission, in 2015, there was general support to resume work on enforcement of settlement agreements with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on. However, doubts were expressed on whether a harmonized enforcement mechanism would be desirable as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the UNCITRAL Model Law on International Commercial Conciliation ("the Model Law"). Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreements, possibly modelled on

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 123.

[2] Ibid., para. 129.

article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention").[3]

4. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4]

5. At its sixty-third session, the Working Group had preliminary exchange of views on the matter.[5] The present note outlines the issues considered by the Working Group and sets out possible drafting formulations, including those that would be relevant if the Working Group were to prepare a convention (for example, possible reservations or declarations), yet with the understanding that the final form would be decided upon at a later stage (A/CN.9/861, para. 109).

II. Preparation of an instrument on enforcement of settlement agreements: scope of application and enforcement procedure

A. International commercial settlement agreements resulting from conciliation

6. At its sixty-third session, the Working Group considered the scope of application of a possible instrument on enforcement of settlement agreements (referred to below as the "instrument"). There was general agreement that the instrument should apply to the enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/861, paras. 19, 39 and 40).

1. "International" settlement agreements

7. At the sixty-third session of the Working Group, it was generally agreed that the instrument should apply to "international" settlement agreements and that the determination of the "international" character of a settlement agreement should be considered in a broad manner. It was also mentioned that the criteria for such characterization should be objective and relevant to achieving the purpose of the instrument (A/CN.9/861, para. 39).

8. In that context, it was suggested that criteria for determining that a settlement agreement was "international" under the instrument could mirror those under article 1(4)(a) of the Model Law.[6] Accordingly, a settlement agreement would be considered "international" where at least two parties to the settlement agreement

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[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 138-140.

[4] Ibid., para. 142.

[5] The report of the Working Group on the work of its sixty-third session is contained in document A/CN.9/861.

[6] Article 1(4)(a) of the Model Law provides that: "*A conciliation is international if: (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or (b) […]*".

had their places of business in different States at the time of the conclusion of that agreement (A/CN.9/861, para. 37). It was further suggested that elements mentioned in article 1(4)(b) of the Model Law could also be considered for characterizing a settlement agreement as "international" under the instrument (A/CN.9/861, para. 38).[7]

9. The Working Group may wish to consider whether the instrument should also apply to the enforcement of settlement agreements concluded by parties that had their places of business in the same State, provided that its enforcement is sought in another State (A/CN.9/861, para. 38). The purpose would be to ensure that the instrument would apply to cross-border enforcement of a settlement agreement in addition to being applicable to international settlement agreements.

10. For drafting purposes, the Working Group may wish to consider the following draft formulation based on article 1(4) of the Model Law:

"*A settlement agreement is international if:*

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

(b) The State in which the parties have their places of business is different from:

(i) The State in which [a substantial part of] the obligation is to be performed under the settlement agreement;

(ii) The State with which [the subject matter of] the dispute is most closely connected; or

(iii) The State in which [recognition and] enforcement of the settlement agreement is sought."

11. If the instrument were to take the form of a convention, the Working Group may wish to consider the following draft formulation based on article 1(1) of the United Nations Convention on Contracts for International Sale of Goods (1980) (CISG):

"*This Convention applies to the [recognition and] enforcement of settlement agreements concluded by parties whose places of business are (i) in different States or (ii) in a State different from the State where [recognition and] enforcement of settlement agreements is sought provided that:*

a. The State where [recognition and] enforcement is sought is a Contracting State; or

b. The rules of private international law lead to the application of the law of a Contracting State."

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[7] Article 1(4)(b) of the Model Law provides that: "*A conciliation is international if: (b) The State in which the parties have their places of business is different from either: (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or (ii) The State with which the subject matter of the dispute is most closely connected*.".

12. In both instances, the following draft formulation could be added to provide guidance with regard to the determination of a party's place of business.

> "*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][or any other criteria], having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement. If a party does not have a place of business, reference is to be made to the party's habitual residence.*"

2. "Commercial" settlement agreements

(a) Notion of "commercial"

13. At the sixty-third session of the Working Group, it was generally felt that the instrument should apply generally to the enforcement of "commercial" settlement agreements, without any limitation as to the nature of the remedies or obligations provided under those agreements (A/CN.9/861, paras. 40, 47 and 50). For example, it was agreed that the scope of the instrument should not be limited to pecuniary settlement agreements (A/CN.9/861, para. 47).

14. The Working Group may wish to further consider whether the "commercial" nature of the settlement agreement is to be derived from (i) the parties involved, (ii) the subject matter of the dispute being resolved, (iii) the obligation to be performed under the settlement agreement, or (iv) any of the above. For example, there may be obligations stipulated in the settlement agreement which are commercial in nature, whereas the parties are not necessarily commercial entities and the dispute itself could have arisen from a non-commercial relationship. The Working Group may wish to consider whether the instrument should address such circumstances in conjunction with other possible exclusions (see below, paras. 15-21).

(b) Possible exclusions

15. At the sixty-third session of the Working Group, it was generally considered that it was premature to decide whether the instrument should include an illustrative list of subject matters to be covered or a negative list of those to be excluded. However, it was pointed out that a negative list could run the risk of not being exhaustive (A/CN.9/861, para. 43).[8]

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[8] In that respect, the Working Group may wish to note that footnote 1 of article 1 of the Model Law contains an illustrative list of commercial transaction, which provides that: "*The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.*"

(i) Settlement agreements involving consumers, family and employment law matters

16. At the sixty-third session of the Working Group, there was general agreement that settlement agreements involving consumers should be excluded from the scope of the instrument. For drafting purposes, reference was made to article 2(a) of the CISG[9] as well as article 2 of the Convention on Choice of Courts Agreements (2005)[10] as possible models (A/CN.9/861, para. 41). The Working Group may wish to note that the CISG provision focuses on the purpose of the transaction whereas the Choice of Court Convention provision focuses on the party to the agreement as well as the content of that agreement.

17. The Working Group may wish to determine whether the instrument should expressly exclude from its scope settlement agreements dealing with certain matters, such as family or employment law or whether such exclusions would not be necessary as settlement agreements dealing with those matters would generally not fall within the category of "commercial" settlement agreements (A/CN.9/861, para. 42).

18. For drafting purposes, the Working Group may wish to consider the following draft formulations:

> Option 1 (based on the CISG): *"This [instrument] does not apply to settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; and (b) relating to family or employment law."*
>
> Option 2 (based on the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192): *"A dispute is not "commercial" if it involves employment law or family law, or if a consumer — acting for personal, family, or household purposes — is a party."*

(ii) Settlement agreements involving government entities

19. The view generally shared by the Working Group at its sixty-third session was that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as those entities also engaged in commercial activities and might seek to use conciliation to resolve disputes. It was noted that excluding settlement agreements involving government entities would deprive those entities of the opportunity to enforce such agreements against their commercial partners (A/CN.9/861, para. 46). The Working Group may wish to confirm this understanding.

20. It may be noted that for States that would wish to exclude settlement agreements involving government entities from the scope of the instrument, a model legislative text would provide for such flexibility. In addition, as the currently suggested list of defences to enforcement includes lack of capacity, such ground

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[9] Article 2(a) of the CISG provides as follows: "*This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; [...]*".

[10] Article 2(1) of the Choice of Court Convention provides as follows: "*This Convention shall not apply to exclusive choice of court agreements: a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements.*".

could be invoked by government entities in jurisdictions where those entities are not authorized to conclude settlement agreements (A/CN.9/861, para. 44) (see below, paras. 55 and 56).

21. If the instrument were to take the form of a convention, States may be allowed to formulate a reservation or a declaration for that purpose (A/CN.9/861, para. 46). Depending on the scope of the instrument, the Working Group may wish to consider the following formulations:

> Option 1: "*A Party to this Convention may declare that it shall not apply this Convention to settlement agreements to which a government, a governmental agency or any person acting for a State is a party, unless otherwise indicated in the declaration*."
>
> Option 2 (based on the proposed text in paragraph 11 of document A/CN.9/WG.II/WP.192): "*A Party to this Convention may declare that it shall apply this Convention to settlement agreements to which a government, a governmental agency or any person acting for a State is a party only to the extent specified in a declaration*."

3. Settlement agreements resulting from "conciliation"

(a) Notion of "conciliation"

22. At the sixty-third session of the Working Group, broad support was expressed for limiting the scope of the instrument to settlement agreements that resulted from conciliation (A/CN.9/861, para. 19). Nonetheless, it was suggested that the notion of "conciliation" in the instrument should be broad and inclusive to cover different types of conciliation techniques. It was widely felt that the definition of "conciliation" in article 1(3) of the Model Law provided a useful reference (A/CN.9/861, para. 21).[11]

23. For drafting purposes, the Working Group may wish to also consider the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192,which provides as follows:

> "*'Conciliation' is a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute. [...]*"

24. The Working Group may wish to note that both article 1(3) of the Model Law and the proposed text (see above, para. 23) underline that the conciliator would "lack the authority to impose a solution upon the parties to the dispute".

25. In addition, the Working Group may wish to consider whether the instrument should include provisions to ascertain that the settlement agreement actually resulted from conciliation (see below, paras. 42-43).

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[11] Article 1(3) of the Model Law provides as follows: "*'Conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute*.".

(b) Settlement agreements reached during judicial or arbitral proceedings

26. Confining the scope of the instrument to settlement agreements resulting from conciliation would generally exclude those resulting from any other dispute resolution methods, including judicial or arbitral proceedings. However, settlement agreements may be concluded in the course of such proceedings, as reflected in article 1(8) of the Model Law.[12] By way of illustration, the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192 provides as follows: "*'Conciliation' is a process […]. This definition includes cases in which parties to a dispute reached a settlement agreement in the course of arbitration proceedings.*"

27. Therefore, the Working Group may wish to consider whether the instrument should also apply where the parties have reached a settlement agreement in the course of judicial, arbitral or any other proceedings (A/CN.9/861, paras. 24-28). Diverging views were expressed at the sixty-third session of the Working Group on that question. One view was that the scope of the instrument should be limited to settlement agreements where the resolution of the dispute was initiated through conciliation and by no other means, in order to avoid overlap with other instruments (for instance, the judgements project of the Hague Conference on Private International Law, as well as the New York Convention) (A/CN.9/861, para. 25). A different view was that the resolution of many commercial disputes did not necessarily begin with a conciliation process and that parties, after submitting a dispute to a court or an arbitral tribunal, might reach an agreement during judicial or arbitral proceedings, in some cases through a conciliation process (A/CN.9/861, para. 26).

28. The Working Group may wish to consider whether the scope of the instrument should be expanded to settlement agreements concluded during judicial or arbitral proceedings and, in the affirmative, whether to then limit application to situations where there was a conciliation process that led to the settlement agreement and where the agreement was not recorded in a judicial decision or an arbitral award (A/CN.9/861, para. 27).

B. Validity and content of settlement agreements

29. The term "settlement agreement" is generally used to refer to an agreement that resolves a dispute, in all or in part and is to be distinguished from the agreement to submit a dispute to conciliation. The Working Group may wish to consider whether the instrument would need to provide a definition of the term "settlement agreement". In this context, it should be noted that the New York Convention does not define the term "award".

1. Validity of settlement agreements

30. The Working Group may wish to consider whether, and in the affirmative, at what stage of the procedure, the validity of settlement agreements should be

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[12] Article 1(8) of the Model Law provides as follows: "*This Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity*".

considered under the instrument (A/CN.9/861, paras. 82-83). At the sixty-third session of the Working Group, it was suggested that a possible model to address that issue could be found in article II(3) of the New York Convention and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which referred to an arbitration agreement being deprived of effect when found to be "null and void, inoperative or incapable of being performed". It was suggested that those terms had been interpreted by courts in a number of jurisdictions in a harmonized fashion and therefore could be used if the instrument were to include a provision on the assessment of the validity of settlement agreements (A/CN.9/861, para. 92).

31. In this context, the Working Group may wish to consider whether the enforcing authority would be responsible for assessing the validity of the settlement agreement, the law applicable to that determination, and the possible legal consequences of that determination.

32. The Working Group may also wish to consider whether to address the possible impact of the conciliation process on the validity of the settlement agreement, for example, if the conciliation procedure was not in accordance with the law of the State where the conciliation took place.

2. Partial resolution of the dispute, finality of the settlement agreement, conditional provisions, set-off

33. As mentioned above, a settlement agreement may resolve a dispute in all or in part (see above, para. 29). The Working Group may wish to confirm that the instrument would apply to settlement agreement which partially resolve a dispute (A/CN.9/861, para. 64).

34. Settlement agreements are not necessarily final: they may be modified, amended or terminated by the parties, and such process may not necessarily involve conciliation. The Working Group may wish to consider whether such situations should be addressed under the instrument and in the affirmative, whether they could be treated as possible defences.

35. Another related question is whether and how the instrument would deal with situations where the obligations to be performed under the settlement agreement are conditional or have been partially performed by the parties and where the settlement agreement may be used for set-off purposes in a procedure. The Working Group may wish to consider whether the instrument should address those matters. At the sixty-third session of the Working Group, one view was that those circumstances could constitute possible defences, which could be handled by the enforcing authority in a flexible manner (A/CN.9/861, para. 91).

3. Dispute resolution clause in settlement agreements and party autonomy

36. Party autonomy plays a central role in conciliation. Parties may decide to enforce their settlement agreement under contract law or by any other means. They may provide for an arbitration clause in their settlement agreement as a means to resolve any dispute that could arise therefrom. In such circumstances, the Working Group may wish to consider whether the instrument should provide that the enforcing authority should refer the parties to arbitration (in accordance with

article II of the New York Convention or the applicable arbitration law), or whether it should proceed with enforcement in accordance with the instrument.

37. Parties can also include a choice of court provision in the settlement agreement to determine the court competent to hear any dispute in relation to that agreement. In that respect, the Working Group may wish to consider how to ensure that the instrument would effectively operate with the Choice of Court Convention.[13]

38. The Working Group may wish to consider whether the application of the instrument would depend on party autonomy, in particular if the instrument were to take the form of a convention (A/CN.9/861, paras. 61-63). Along those lines, the enforcement mechanism could be provided on an opt-in basis whereby the parties to the settlement agreement would agree to its application or on an opt-out basis whereby the parties would be free to exclude its application by agreement (see below, para. 42). If the Working Group considers that such a mechanism should be included in the instrument, it may wish to consider whether that mechanism would be optional for States Parties to the convention, and could be adopted or withdrawn through a declaration.

C. Form and other requirements of settlement agreements

1. A written agreement concluded by the parties

39. At its sixty-third session, the Working Group agreed that the instrument should provide certain form requirements of settlement agreements that would distinguish them from other agreements. Only those fulfilling such form requirements would be granted expedited enforcement under the instrument (A/CN.9/861, para. 51).

40. It was generally felt that those requirements should not be prescriptive and should be set out in a brief manner to preserve the flexible nature of the conciliation process (A/CN.9/861, para. 67). It was further noted that it would be preferable for the instrument to set minimum form requirements, providing States with the flexibility to introduce any other requirements if they so wished (A/CN.9/861, para. 65).

41. For example, the instrument may require that a settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement (by signing or by concluding the agreement) (A/CN.9/861, paras. 52, 53 and 67). In that respect, the Working Group may wish to consider how to formulate such requirements in the instrument, taking into account the use of electronic means of communication.

2. Other requirements

42. The Working Group may wish to consider whether the requirements referred to above (paras. 40-41) would be the only or minimum requirements and whether the

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[13] Article 5(1) of the Convention reads as follows: "*The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*.".

instrument should require additional elements (A/CN.9/861, para. 67). By way of illustration, other elements might include an indication that: (i) a conciliator was involved in the process (for example, by him/her signing the settlement agreement, indicating his/her identity in the settlement agreement or submitting a separate statement to that purpose) (A/CN.9/861, paras. 54-58); (ii) the settlement agreement resulted from conciliation (see above, para. 25); (iii) the parties to the settlement agreement were informed of the enforceability of the settlement agreement before or upon its conclusion; or (iv) the parties opted into the enforcement mechanism envisaged by the instrument (A/CN.9/861, paras. 61-63 and 67; see also above, para. 38).

43. The Working Group may wish to consider whether the instrument would require these elements to be indicated in the settlement agreement. The Working Group may also wish to consider whether some of these elements could be taken into account in the definition of settlement agreements, if any. Alternatively, the instrument could provide that parties applying for the enforcement of settlement agreements are required to supply proof of these elements following article IV of the New York Convention (see below, para. 45).

D. Enforcement procedure and defences to enforcement

1. Direct enforcement mechanism

44. At its sixty-third session, the Working Group generally agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek enforcement directly at the State of enforcement (referred to as "direct enforcement") without incorporating a review or control mechanism in the State where the settlement agreement was originating from (referred to as "originating State") as a pre-condition (A/CN.9/861, para. 80). In support of that approach, it was stated that (i) it could be very difficult to determine the originating State as the connecting factor might be subject to different determinations, and (ii) a review or control mechanism was likely to result in double exequatur, which would be at odd with the purpose of the instrument to provide an efficient and simplified enforcement mechanism. It was further noted that concerns raised by direct enforcement could be addressed in the context of possible defences to enforcement (A/CN.9/861, para. 84).

45. For drafting purposes, the Working Group may wish to consider the following formulation based on articles III and IV of the New York Convention:

> "*1. Settlement agreements shall be enforced in accordance with the rules of procedures of the [territory][place][State] where enforcement is sought, under the conditions laid down in [the instrument].*
>
> *2. To obtain enforcement of a settlement agreement, the party applying for enforcement shall, at the time of application, supply* [form and other requirements mentioned above, in paras. 39-42]."

2. Notion of recognition

46. At its sixty-third session, the Working Group considered whether the instrument would need to provide for "recognition" of the settlement agreement

by a court or competent authority at the place of enforcement (A/CN.9/861, paras. 71-79).

47. Diverging views were expressed regarding the need for the instrument to provide for the recognition of settlement agreements by a court or competent authority. This resulted from different understandings of the notions of "recognition" and "settlement agreements" as the subject of such recognition (as contracts between private parties or acts of a particular nature resulting from a dispute resolution procedure) (A/CN.9/861, para. 72).

48. By way of background on the reference to "recognition" in international texts, the concept of recognition of non-judicial/State action appears as early as the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927). Those conventions call for the recognition of arbitration agreements "as valid" and the recognition of arbitral awards "as binding". The notion of "recognition" of a non-judicial/State action absent any qualifier (e.g., "as binding" or "as valid") appears to have originated with the New York Convention with regards to recognition of arbitration agreements (article II (1)) and arbitral awards (article III which requires that they be recognized "as binding").

49. The Working Group may wish to consider whether a settlement agreement would need to be given effect through a procedure akin to recognition and which legal value such a procedure would give to settlement agreements. As an alternative, the Working Group may wish to consider clarifying the meaning of "recognition" in the context of the instrument, and refer, for instance, to the need to give legal effect to the settlement agreements.

50. If the recognition of settlement agreements is dealt with under the instrument, the Working Group may also wish to consider whether and how recognition would relate to the assessment of the validity of the settlement agreement (see above, paras. 30-32).

3. Defences to enforcement and applicable law

51. At its sixty-third session, the Working Group considered the question of defences to enforcement of settlement agreements with the assumption that the instrument would provide direct enforcement (see above, paras. 44 and 45). The Working Group exchanged preliminary views on defences that should be included in the instrument, how they should be presented, and how to determine the law applicable to defences (A/CN.9/861, para. 85).

52. The Working Group agreed that defences in the instrument should be limited and not cumbersome for the enforcing authority to implement allowing for a simple and efficient verification of the grounds for refusing enforcement. It was widely felt that defences in the instrument should be exhaustive and stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation (A/CN.9/861, para. 93). It was suggested that defences in the instrument should be broadly categorized and set out in general terms. As to the possible categories of defences, reference was made to those pertaining to: (i) the genuineness of the settlement agreement (reflecting the parties' consent, not being fraudulent), (ii) the readiness or validity of the settlement agreement to be enforced (being final, not having been modified or performed, binding on the parties) and (iii) international

public policy. As to who could raise these defences, it was said that some categories of defences might also be considered by the enforcing authority at its own initiative (A/CN.9/861, para. 97).

53. At its sixty-third session, the Working Group considered some possible grounds for resisting enforcement of settlement agreements. There was general support that existence of fraud, violation of public policy and the subject matter not capable of being conciliated could be raised as defences (A/CN.9/861, para. 88). In addition, it was suggested that the instrument should provide that enforcement should be denied if a party to the settlement agreement did not sign, or consent to, the agreement (see above, paras. 39-41), and the settlement agreement did not reflect the terms agreed to by the parties.

54. At its sixty-third session, the Working Group also considered the question of the law or laws applicable to defences in the enforcement procedure and how it should be addressed. After discussion, it was generally felt that the instrument should not address the laws applicable with respect to defences in the enforcement procedure, with the assumption that the enforcing authority or the court seized with the matter would usually apply the conflict-of-law rules at the place of enforcement and where relevant, consideration of the parties' choice of law in the settlement agreement. It was stated that the instrument could state that principle in broad terms and provide unambiguous guidance regarding the laws applicable to defences to the extent possible (A/CN.9/861, paras. 100-102). The Working Group may wish to consider that for certain defences, the law applicable at the place of enforcement may be relevant and should be mentioned (for instance, public policy).

55. For drafting purposes, the Working Group may wish to consider the proposed text in paragraph 18 of document A/CN.9/WG.II/WP.192, which provides as follows:

> "*Recognition and enforcement of an International Settlement Agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> > *A. The party against whom the International Settlement Agreement is invoked was, under the law applicable to it, under some incapacity or concluded the International Settlement Agreement due to coercion or fraud; or*
> >
> > *B. The subject matter of the International Settlement Agreement is not capable of settlement under the law of the country where recognition and enforcement is sought; or*
> >
> > *C. The recognition or enforcement of the International Settlement Agreement would be contrary to the public policy of the country where recognition and enforcement is sought; or*
> >
> > *D. Recognition or enforcement would be contrary to the terms of the International Settlement Agreement itself; or […]*"

56. As an alternative, the Working Group may wish to consider the following draft formulation based on article V of the New York Convention and discussions at the sixty-third session of the Working Group:

"*1. Enforcement of a settlement agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where enforcement is sought, proof that:*

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

(b) The enforcement of the settlement agreement would be contrary to its terms and conditions (including the agreement by the parties that [the instrument] would not be applicable); or

(c) The settlement agreement was [null and void, inoperative or incapable of being enforced][not valid] under the law to which the parties have subjected it or failing any indication thereon, under the law deemed applicable by the competent authority; or

(d) The settlement agreement is not binding on the parties, is not a final resolution of the dispute, has been subsequently modified by the parties or the obligations therein have been performed; or

(e) Enforcement of the settlement agreement would be contrary to a decision of another court or competent authority.

2. Enforcement of a settlement agreement may also be refused by [the competent authority where enforcement is sought] if it finds that:

(a) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of the State where enforcement is sought; or

(b) The enforcement of the settlement agreement would be contrary to the public policy of the State where enforcement is sought."

4. Relationship of enforcement proceedings with judicial or arbitral proceedings

57. At the sixty-third session of the Working Group, it was widely felt that the instrument would need to address the possible impact that other related judicial or arbitral proceedings could have on the enforcement procedure (A/CN.9/861, para. 107). It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. For instance, the instrument might provide that the enforcing authority might, if it considers proper, adjourn its decision on the enforcement of the settlement agreement when there exists an application for a judicial or arbitral proceeding about the settlement agreement.

III. Possible form of instrument

58. At its sixty-third session, the Working Group had a preliminary discussion on the possible form of the instrument, which could be a convention, model legislative provisions or a guidance text. The prevailing view was that there were a number of

issues that would require further consideration before a decision could be made on the final form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as it could more efficiently contribute to the promotion and harmonization of conciliation (A/CN.9/861, para. 108).

A. Convention

59. The proposal considered by the Commission (A/CN.9/822, see above, para. 1) was based on the preparation of a convention modelled on the New York Convention. One key feature of the proposal was that the proposed convention would provide the framework for the enforcement of international settlement agreements without seeking to harmonize the domestic legislation. Therefore, it would not address the procedural aspects dealt with in the domestic legislation and would only introduce a cross-border mechanism to enforce international settlement agreements (A/CN.9/832, para. 22). It would also not seek to harmonize rules governing the conciliation process nor address matters related to the attachment or execution of assets, both of which are not dealt with under the New York Convention.

60. If a convention were to be prepared, the Working Group may wish to consider the flexibility to be given to States possibly through reservations or declarations (for example, see above, para. 21).

61. The Working Group may wish to note that the proposal further suggests that settlement agreements under the proposed convention should be treated at least as favourably as foreign arbitral awards under the New York Convention (see A/CN.9/WG.II/WP.192, para. 15 and A/CN.9/861, para. 77, see also Guide to Enactment of the Model Law, para. 87).Thus, if the instrument were to takes the form of a convention, it would require that States "*not impose substantially more onerous conditions or higher fees or charges on the [recognition or] enforcement of settlement agreements to which they apply this Convention than they impose on the recognition or enforcement of arbitral awards or of other settlement agreements.*"

B. Model legislative provisions

62. During the sixty-second session of the Working Group, it was mentioned that a more gradual approach to harmonize the regime of enforcement of settlement agreements could be preferable, starting from the harmonization of domestic legislation (A/CN.9/832, para. 19). In line with that suggestion, another possible form of work may be the preparation of model legislative provisions, which would be adopted and enacted by States in their domestic legislation. Such an instrument would likely build upon article 14 of the Model Law, which leaves the method of enforcement to each enacting State.

63. Some of the aspects that could be addressed in the model legislative provisions would be whether the enforcement procedure would be mandatory (see footnote to article 14 of the Model Law) and whether the procedure should provide for expedited or simplified enforcement.

C. Guidance text

64. Another possible form of work could be to expand paragraphs 87 to 92 of the Guide to Enactment on article 14 of the Model Law and to prepare a legislative guide with relevant recommendations and commentary. Such a guidance text could set out information about various approaches taken in different jurisdictions based on replies received by the Secretariat (see document A/CN.9/846 and addenda as well as document A/CN.9/WG.II/WP.193 and A/CN.9/WG.II/WP.196). It could also include specific legislative recommendations including, for example, a recommendation on the application of the New York Convention to consent awards.