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Settlement of commercial disputes

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

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group at its sixty-second session (A/CN.9/832, paras. 13-59)[3] and agreed that the Working Group should commence work at its sixty-third session 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] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5]

2. Accordingly, at its sixty-third to sixty-fifth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[6]

3. This note, which consists of document A/CN.9/WG.II/WP.200 and its addendum, reflects the deliberations of the Working Group at its sixty-fifth session. Document A/CN.9/WG.II/WP.200 outlines the issues considered so far by the Working Group and sets out draft provisions to be included in a possible instrument on enforcement of international settlement agreements resulting from conciliation (referred to in this note as the "instrument"). The draft provisions have been prepared without prejudice to the final form of the instrument (A/CN.9/896, paras. 12 and 213). Document A/CN.9/WG.II/WP.200/Add.1 illustrates how the draft provisions could be adjusted if the instrument were to take the form of a convention or of model legislative provisions supplementing the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law").

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

A. General remarks

1. Legal effect of settlement agreements

4. The Working Group considered how the instrument would express that settlement agreements could or should be given legal effect, for instance, as a prerequisite for enforcement or in defence against a claim, without using the expression "recognition" which, in certain jurisdictions, might be understood to confer *res judicata* or preclusive effect (A/CN.9/896, paras. 77-81, 147-155 and 200-203). In further considering this matter, the Working Group may wish to take into account that: (i) parties may rely on a settlement agreement in different procedural contexts;

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123-125.
[2] Ibid., para. 129.
[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-141.
[4] Ibid., para. 142.
[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162-165.
[6] The reports of the Working Group on the work of its sixty-third, sixty-fourth and sixty-fifth sessions are contained in documents A/CN.9/861, A/CN.9/867 and A/CN.9/896, respectively.

(ii) the legal effect given to a settlement agreement varies depending on the national procedural framework; and (iii) any provision on that matter should not result in precluding a competent authority's consideration of the grounds for refusing enforcement (A/CN.9/896, para. 202).

5. Draft provisions 1 (1) and 3 (1) below address that issue by referring to the "legal effect between the parties" of a settlement agreement, and to a party "seeking to rely upon a settlement agreement" (see paras. 15, 29 and 30 below; see also A/CN.9/896, paras. 155 and 203).

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

6. The Working Group confirmed its understanding that: (i) settlement agreements reached during judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/867, para. 125 and A/CN.9/896, para. 48); and (ii) the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument (A/CN.9/867, para. 131 and A/CN.9/896, para. 54).

7. The Working Group may wish to further consider whether settlement agreements concluded in the course of judicial or arbitral proceedings, and recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/896, paras. 49-52, 169-176, 205-210). The objective of any provision on the matter would be to avoid any overlap and gap between possible applicable regimes (A/CN.9/896, paras. 49 and 210). The Working Group, at its sixty-fifth session, considered two possible formulations to address this matter (A/CN.9/896, paras. 176 and 205-209). While both formulations exclude from the scope of the instrument settlement agreements recorded as judicial decisions or arbitral awards, one difference is the treatment of settlement agreements when the conversion (as court decisions or arbitral awards) does not have effect or is not acceptable in the State where enforcement is sought (A/CN.9/896, para. 209). Draft provision 1 (3) contains those two formulations as options 1 and 2 (see paras. 15 and 20 below).

8. A further matter that the Working Group may wish to consider is whether settlement agreements not concluded in the course of judicial or arbitral proceedings but afterwards recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/896, paras. 53 and 169).

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

9. The Working Group may wish to further consider whether the application of the instrument would depend on the consent of the parties to the settlement agreement (A/CN.9/896, paras. 126-134 and 195-199). At its sixty-fifth session, a wide range of views were expressed. 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 (A/CN.9/896, para. 127). A different view was that parties should be given the choice to decide whether the instrument would apply, and that this could be achieved by providing for an opt-out or opt-in mechanism in the instrument (A/CN.9/896, para. 128).

10. During these discussions, it was suggested that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement need not necessarily be dealt with in the instrument, but could be left to States when adopting or implementing the instrument. For example, if the instrument were to be a convention, a State could be given the flexibility to declare

that it would require the parties' agreement to the application of the convention (A/CN.9/896, paras. 130 and 196). If the instrument were to take the form of model legislative provisions, an opt-in mechanism could be included as an option for States to consider when enacting such legislative provisions (A/CN.9/896, para. 196). On this last point, it may be noted that article 1 (6) of the Model Law on Conciliation provides that the parties may "agree to the applicability of this Law", as a means to widen the scope of application of the Model Law; article 1 (7) of the Model Law provides that "the parties are free to agree to exclude the applicability of this law".

11. In relation to the suggestion referred to in paragraph 10 above, it was pointed out that: (i) 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; and (ii) the application of such a mechanism 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 (A/CN.9/896, para. 197).

12. With a view to reflect the various views expressed, draft provision 4 (1)(f) deals with the question of opt-out or opt-in by the parties to the settlement agreement as a ground for refusing enforcement (see paras. 37, 43 and 44 below). The suggestion of a possible declaration by States if the instrument were to take the form of a convention (see para. 10 above) is addressed at paras. 50 to 52 below.

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

13. The Working Group may wish to further consider whether to include, as separate grounds for refusing enforcement, failure to maintain fair treatment of the parties as well as failure to disclose circumstances likely to give rise to justifiable doubts as to the impartiality and independence of the conciliator (A/CN.9/896, paras. 103-109 and 191-194). Draft provision 4 (1)(d) and (e) deals with that matter (see paras. 37, 41 and 42 below).

5. Form of the instrument

14. The Working Group had a preliminary discussion about the form of the instrument (A/CN.9/896, paras. 135-143 and 211-213). While support was expressed for preparing either a convention or model legislative provisions, there was little support for preparing a guidance text (A/CN.9/896, para. 135). 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 (A/CN.9/896, para. 213). Document A/CN.9/WG.II/WP.200/Add.1 shows how the draft provisions in section B below would appear if the instrument were to take the form of a convention or of model legislative provisions supplementing the Model Law.

B. Annotated draft provisions

1. Scope of the instrument

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

Draft provision 1 (Scope of application)

"1. This [instrument] applies to the legal effect between the parties, and to the enforcement, of international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement(s)').

"2. This [instrument] does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

"3. Option 1: [*This [instrument] does not apply to settlement agreements which have been:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards.]

Option 2: [*This [instrument] applies to settlement agreements:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements, to the extent that they cannot be relied upon, including for enforcement, as judgments or judicial settlements under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*; or*

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards, to the extent that they cannot be relied upon, including for enforcement, as arbitral awards under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*].]

Option 3: [*This [instrument] does not apply to settlement agreements which have been:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements if they can be relied upon, including for enforcement, as judgments or judicial settlements under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*; or*

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards if they can be relied upon, including for enforcement, as arbitral awards under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*."*]

Comments on draft provision 1

16. Draft provision 1 sets forth the scope of the instrument. Paragraph 1 reflects the discussion of the Working Group that the purpose of the instrument would need to be clearly spelled out, preferably in draft provision 1 (A/CN.9/896, paras. 151-155 and 200-203). It also provides a definition of the term "settlement agreement" (see A/CN.9/896, paras. 32, 64, 117, 145, 146 and 152). The different elements of such agreement are further elaborated in draft provision 2. The formal requirement that the settlement agreement shall be in writing is contained in draft provision 1 (1), with draft provision 2 (2) defining how that requirement is met, in particular in relation to electronic communications (see A/CN.9/896, paras. 64 and 66).

17. The Working Group may wish to note that the definition of settlement agreements in paragraph 1 no longer refers to the resolution of "all or part of" a dispute. As one of the grounds for refusing enforcement is the non-finality of the settlement agreement, a settlement agreement resolving part of a dispute would not be enforceable (for the reason that it is not a final resolution of the dispute). Moreover, it would be difficult for a competent authority to assess whether the dispute resolved by the settlement agreement is part of a wider range of disputes. Therefore, it is suggested to refer to "a dispute" or to the notion of "a dispute covered by the settlement agreement" (see also draft provisions 4 (1)(b) in para. 37 below).

18. Paragraphs 2 and 3 deal with exclusions from the scope of the instrument.

19. Paragraph 2 contains draft formulation on exclusion of settlement agreements dealing with consumer, family and employment law matters, in accordance with the discussion of the Working Group (see A/CN.9/896, paras. 55-60).

20. Paragraph 3 deals with the exclusion from the scope of the instrument of agreements concluded in the course of judicial or arbitral proceedings (A/CN.9/896, paras. 48-54, 169-176, 205-210; see also above, paras. 6-8). Options 1 and 2 reflect draft suggestions made at the sixty-fifth session of the Working Group (A/CN.9/896, paras. 176 and 208). According to option 1, the effectiveness of settlement agreements would be extinguished once they are converted, whereas their effectiveness would be preserved under certain circumstances in option 2. The Working Group generally felt that option 1 would be preferable, although elements of option 2 might deserve further consideration (A/CN.9/896, para. 210). Option 3 seeks to take elements from both options. The term "judicial settlement" is used in these options together with the word "judgment" in order to align the language with that of article 12 of the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention") (see A/CN.9/896, para. 52). Options 2 and 3 mention "the law of the State" so as to refer to enforcement of foreign judgments and arbitral awards on the basis of both conventions to which the State concerned is party and applicable domestic law (A/CN.9/896, para. 208).

Additional matter — Settlement agreements involving States and other public entities

21. Regarding settlement agreements involving States and other public entities, the Working Group reaffirmed its decision that such agreements should not be automatically excluded from the scope of the instrument (see A/CN.9/896, paras. 61 and 62), and could be addressed through a declaration if the instrument were to take the form of a convention (see para. 48 below). If the instrument were to take the form of model legislative provisions, it would be for each State enacting legislation to decide the extent to which such agreements would fall under the enacting legislation.

2. Definitions

22. The Working Group may wish to consider the following formulation regarding the definitions:

Draft provision 2 (Definitions)

"1. A settlement agreement is 'international' if:

"(a) 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 to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"(c) For the purposes of this article:

"(i) 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;

"(ii) If a party does not have a place of business, reference is to be made to the party's habitual residence;

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

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

Comments on draft provision 2

23. Paragraph 1 contains a definition of "international" settlement agreement. Upon considering whether the international nature of a settlement agreement should be derived from the international nature of the conciliation (as defined in article 1 (4) of the Model Law on Conciliation), the Working Group agreed that the instrument should instead refer to the internationality of "settlement agreements" (A/CN.9/896, paras. 19 and 158-163). The Working Group may wish to consider whether to maintain the definition of "international" in relation to both the conciliation as provided in the Model Law and the settlement agreement as provided in draft provision 2 (1) if the instrument were to take the form of legislative provisions supplementing the Model Law (see document A/CN.9/WG.II/WP.200/Add.1, para. 4). The Working Group may wish to consider whether the international character of the conciliation could be derived from the internationality of the settlement agreement.

24. Paragraph 1 is modelled on article 1 (4) of the Model Law on Conciliation (A/CN.9/896, paras. 17-31 and 161). Subparagraph (b) has been closely aligned with article 1 (4)(b) of the Model Law (A/CN.9/896, para. 22).

25. Paragraph 1 does not include a provision similar to that found in article 1 (6) of the Model Law on Conciliation that "*This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law*". The Working Group agreed that the instrument should not contain a similar provision if it were to take the form of a convention, but that the matter might need to be considered further if the instrument were to take the form of model legislative provisions supplementing the Model Law (A/CN.9/896, para. 26). This matter might need to be considered also in light of the question of opt-out or opt-in mechanism for the parties (see para. 10 above).

26. Paragraph 2 addresses the requirement found in draft provision 1 (1) that settlement agreements should be in writing (A/CN.9/896, paras. 33-38 and 64-66). As the purpose of the instrument is to facilitate enforcement of settlement agreements, it was stated during the fifty-fifth session of the Working Group that it would be essential for the competent authority to be presented with a settlement agreement in writing in order to proceed with the enforcement process (A/CN.9/896, para. 36). It may be recalled that the definition of the written requirement incorporates the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce.

27. Paragraph 3 contains a definition of "conciliation", based on article 1, paragraphs (3) and (8) of the Model Law (A/CN.9/896, paras. 39-47 and 164-168). If the instrument were to take the form of model legislative provisions supplementing the Model Law, that definition would not be necessary (see A/CN.9/WG.II/WP.200/Add.1, para. 3).

Additional matter — Commercial

28. 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 (see A/CN.9/896, para. 16). As to the formulation, the Working Group considered that the instrument should apply to settlement agreements concluded by parties to a "commercial" dispute (see A/CN.9/896, paras. 146 and 152). It may be noted that the Model Law on Conciliation already includes, in footnote 2, an illustrative list of the interpretation to be given to the term "commercial" (see A/CN.9/WG.II/WP.200/Add.1, para. 3).

3. Application requirements

29. The Working Group may wish to consider the following formulation regarding the application to the competent authority:

Draft provision 3 (Application)

> *"1. A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of* [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*], *and under the conditions laid down in this [instrument].*
>
> *"2. A party relying on a settlement agreement, including for its enforcement, under this [instrument] shall supply:*
>
> > *"(a) The settlement agreement signed by the parties;*

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to its involvement in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"3. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate that parties' or conciliator's intention in respect of the information contained in the electronic communication; and

"(b) The method used is either:

"(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

"(ii) Proven in fact to have fulfilled the functions described in article 2 (2) above, by itself or together with further evidence.

"4. If the settlement agreement is not in an official language of [option 1, legislative provision: *this* State][option 2, convention: *the State where the application is made], the competent authority may request the party making the application to supply a translation thereof into such language.*

"5. When considering the application, the competent authority shall act expeditiously."

Comments on draft provision 3

30. Paragraph 1 reflects the principle that the instrument should provide a mechanism whereby 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 pre-condition (see A/CN.9/896, para. 83). The Working Group may wish to consider whether paragraph 1 sufficiently clarifies that settlement agreements could be relied upon by a party in any procedure, whether akin to, for example, homologation before enforcement or in defence proceedings, and would produce effect between the parties (A/CN.9/896, paras. 155 and 203; see also paras. 4 and 5 above).

31. Paragraphs 2 and 3 deal with the requirements for an application under the instrument. Paragraph 2 (a) provides that a settlement agreement shall be signed by the parties (A/CN.9/896, para. 64), and paragraph 3 determines how that requirement could be met in relation to a settlement agreement concluded through electronic communication, in line with UNCITRAL texts on electronic commerce.

32. Paragraph 2 (b) corresponds to the understanding of the Working Group 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 (A/CN.9/896, paras. 70-75 and 186-190). It was generally felt by the Working Group 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, should be kept simple to

the extent possible (see A/CN.9/896, paras. 40 and 70) and that the means of proving that a conciliator was involved should not be construed as an exhaustive list (A/CN.9/896, para. 188).

33. Paragraphs 2 (c) and 5 correspond to suggestions that the competent authority should have the ability to require additional documents that would be necessary and should act expeditiously (A/CN.9/896, paras. 82 and 183). By way of background, the Working Group considered whether the instrument should provide that the settlement agreement should be in one single document, or in a complete set of documents. After discussion, there was general support for not including such a requirement in the instrument, but instead providing that the competent authority should have, at the stage of the application, the ability to require from the parties documents that would be strictly necessary (A/CN.9/896, paras. 67-69 and 177-185).

34. The Working Group may wish to note that the consequences of non-compliance with the application requirements are to be assessed in relation to the acceptability of the application for enforcement (A/CN.9/896, para. 190).

Additional matter — Informal processes

35. The Working Group may wish to consider whether the form requirements of settlement agreements in draft provisions 1 (1) and 2, as well as the application process in draft provision 3, sufficiently ensures that settlement agreements resulting from informal processes are excluded (A/CN.9/867, paras. 117 and 121; A/CN.9/896, paras. 42-44 and 164-167).

36. The Working Group may wish to consider further the suggestion that flexibility should be provided to States to broaden the scope of the instrument to include agreements between the parties not necessarily reached through conciliation. For example, a reservation (if the instrument were to take the form of a convention), or a footnote (if it were to take the form of model legislative provisions) could indicate that the application of the instrument extends to agreements settling a dispute reached without the assistance of a third person (A/CN.9/896, paras. 40 and 41; see also para. 49 below).

4. Defences

37. The Working Group may wish to consider the following formulation regarding the defences:

Draft provision 4 (Grounds for refusing to give legal effect to, or to enforce, a settlement agreement)

> "*1. The competent authority of [*option 1, legislative provision: *this State][*option 2, convention*: the State where the application under draft provision 3 is made] may refuse to give legal effect to, or to enforce, a settlement agreement at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:*
>
> *"(a) A party to the settlement agreement was under some incapacity; or*
>
> *"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked, and therefore, have not yet given rise to the obligations of that party; or*

*"(c) The settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the State where the application under draft provision 3 was made]; or*

"(d) A manifest failure by the conciliator to maintain a fair treatment of the parties had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement; or

"(e) The conciliator did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence; or

"[(f) [Option 1 - opt-out*: The parties to the settlement agreement have agreed to exclude the application of the [instrument] in accordance with article* -] [Option 2 - opt-in*: The parties to the settlement agreement did not consent to the application of the [instrument] as provided for in article* -].]

*"2. The competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the State where the application under draft provision 3 was made] may also refuse to give legal effect to, or to enforce, a settlement agreement if it finds that:*

"(a) Giving legal effect to, or enforcing, the settlement agreement would be contrary to the public policy of that State; or

"(b) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of that State."

Comments on draft provision 4

- *Paragraph 1, subparagraph (a)*

38. Subparagraph (a) reflects the agreement in substance by the Working Group (A/CN.9/896, para. 85).

- *Paragraph 1, subparagraph (b)*

39. Subparagraph (b) contains various grounds for resisting enforcement that relate to the settlement agreement. Regarding the ground that the settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement, the Working Group agreed to retain that ground, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be a final resolution between the parties of the dispute (A/CN.9/896, paras. 88 and 89). Regarding the ground that the settlement agreement had been subsequently modified by the parties, the Working Group generally agreed that that ground should be retained, and could possibly be merged with the ground that the obligations in the settlement agreement have been performed (A/CN.9/896, paras. 90 and 98). Regarding the ground that the settlement agreement contained conditional or reciprocal obligations, it is clarified that the ground would apply only if the conditions stipulated in the agreement were not met or if the obligations had not been performed or complied with by the applicant (A/CN.9/896, paras. 91 and 98).

- *Paragraph 1, subparagraph (c)*

40. Subparagraph (c) is based on article II (3) and article V (1)(a) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). It seeks to reflect the understanding of the Working Group that the instrument should not give the competent 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 competent authority should not extend to form requirements (A/CN.9/896, paras. 99-102).

- *Paragraph 1, subparagraph (d)*

41. Subparagraph (d) addresses the impact of serious misconduct by the conciliator at the enforcement stage (A/CN.9/896, paras. 103-109 and 191-194), in line with the decision of the Working Group that the scope of that subparagraph should be limited to instances where the conciliator's misconduct had a direct impact on the settlement agreement (A/CN.9/896, paras. 107 and 194). The Working Group agreed to further consider the matter in light of the fact that maintaining fair treatment of the parties relates to the conduct of the conciliation process (which is not addressed in the instrument) and does not apply to the content of the settlement agreement (see above, para. 13).

- *Paragraph 1, subparagraph (e)*

42. Subparagraph (e) addresses failure by the conciliator to disclose information on circumstances likely to give rise to justifiable doubts regarding impartiality or independence (A/CN.9/896, paras. 104, 105, 108 and 194).

- *Paragraph 1, subparagraph (f)*

43. Subparagraph (f) is dealing with possible opt-in or opt-out by the parties (see paras. 9-12 above). Preliminary suggestions were made that the provision on defences would be the right place for dealing with that question (A/CN.9/896, para. 198). Subparagraph (f) also aims at clarifying a ground in the previous version of the draft which stated that "*the enforcement of the settlement agreement would be contrary to its terms and conditions*" (see A/CN.9/WG.II/WP.198, para. 34) with more clear and specific wording (A/CN.9/896, paras. 92-98; 126-134; and 195-199).

44. If paragraph 1 (f) is retained, the Working Group may wish to consider whether to include a provision addressing the possibility of opt-out or opt-in by the parties to the settlement agreement. In that respect, the Working Group may wish to consider article 1, paragraphs (6) and (7) of the Model Law, as well as the following possible formulations: (i) for an opt-out by the parties: *"The parties to the settlement agreement may exclude, by agreement in writing, the application of this [instrument]. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the [instrument]."*; (ii) for an opt-in by the parties: "*This [instrument] shall apply only if the parties to the settlement agreement have consented in writing to its application*.". The Working Group may wish to consider how to ensure that such provisions would not be interpreted as a waiver or exclusion by parties of recourse regarding the settlement agreement.

- *Paragraph 2*

45. Paragraph 2 covers situations where the competent authority would consider the defences on its own initiative, and reflects the agreement in substance by the Working Group (A/CN.9/896, paras. 110-112).

5. Relationship of the enforcement process to judicial or arbitral proceedings

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

Draft provision 5 (Parallel applications or claims)

> *"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of*

*[*option 1, legislative provision*: this State][*option 2, convention*: the State where the enforcement of the settlement agreement is sought] may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."*

Comments on draft provision 5

47. Draft provision 5 addresses how a competent authority would treat a situation where an application (or claim), which might impact the enforcement, has been made to a court, an arbitral tribunal or any other competent authority. The Working Group generally agreed that it would be appropriate for the competent 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 (A/CN.9/896, paras. 122-125). It may be noted that draft provision 5 does not deal with applications that would affect procedures for giving legal effect to the settlement agreement.

6. Other matters

(a) "More-favourable-right" provision

48. The proposal for a provision mirroring article VII(1) of the New York Convention, which would permit application of more favourable national legislation or treaties to enforcement, was considered by the Working Group. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed (A/CN.9/896, paras. 154, 156, and 204). The Working Group may wish to consider the following draft formulation: *"This [instrument] shall not deprive any interested party of any right it may have to avail itself of 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."*

(b) States and other public entities

49. The Working Group may wish to consider the following formulation for a declaration on the application of the instrument to settlement agreements concluded by States and other public entities if the instrument were to take the form of a convention (see para. 21 above; see also A/CN.9/862, para. 62): *"A Party may declare that [*option 1: *it shall apply][*option 2: *it shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration."*

(c) Conciliation process; involvement of a third person

50. The possibility of providing some flexibility to States who may wish to apply the instrument to agreements settling a dispute, regardless whether they resulted from conciliation, was considered by the Working Group (A/CN.9/896, paras. 40 and 41; see also para. 36 above). It was suggested that 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 extend its application to settlement agreements reached without the assistance of a third person. Such a reservation could read as follows: "*A Party may declare that it shall apply this Convention to agreements settling a dispute regardless of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation].*" If the instrument were to take the form of

model legislative provisions, that possibility could be indicated, for instance, in a footnote (A/CN.9/896, para. 41).

(d) Declaration by States regarding the effect of an opt-in by the parties

51. The Working Group may wish to consider further the suggestion 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 (A/CN.9/896, paras. 130, 196 and 197; see also para. 10 above).

52. If the instrument were to take the form of a convention, it may be envisaged that States that wish to incorporate such a mechanism could make a declaration to that effect. The Working Group may wish to consider the following formulations:

Option 1: "*A Party may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.*"

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

53. The Working Group may wish to consider the impact of such reservation (see para. 11 above).