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Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015)

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I. Introduction

1. At its forty-seventh session, the Commission had before it a proposal for future work in relation to enforceability of settlement agreements resulting from international commercial conciliation (A/CN.9/822). 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.[1]

2. At its sixty-second session, the Working Group considered that topic on the basis of notes by the Secretariat (A/CN.9/822 and A/CN.9/WG.II/WP.187). After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

3. At its forty-eighth session, the Commission had before it the report of the Working Group on the work of its sixty-second session (A/CN.9/832) as well as comments by States on their legislative framework in relation to enforcement of settlement agreements (A/CN.9/846 and its addenda). 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 possible 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.[2]

4. At its forty-eighth session, the Commission also approved the draft text of the revised UNCITRAL Notes on Organizing Arbitral Proceedings in principle and requested the Secretariat to revise the draft text in accordance with the deliberations and decisions of the Commission. The Commission agreed that the Secretariat could seek input from the Working Group on specific issues, if necessary, during its sixty-fourth session and further requested that the draft revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.[3]

5. Further, at that session, the Commission considered the topic of concurrent proceedings and the preparation of a code of ethics/conduct, in the field of both investor-State and purely commercial arbitration. Regarding concurrent proceedings, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.

[3] Ibid., para. 133.

Regarding the preparation of a code of ethics/conduct, the Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[4]

6. In addition, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reforms had been formulated by a number of organizations.[5]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its sixty-third session in Vienna, from 7-11 September 2015. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Angola, Bangladesh, Belgium, Bolivia (Plurinational State of), Chile, Dominican Republic, Finland, Lebanon, Luxembourg, Netherlands, Niger, Norway, Peru, Portugal, Qatar, Romania, Slovakia, Somalia, South Africa, Sweden and Viet Nam.

9. The session was attended by observers from the European Union.

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

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO);

(b) *Intergovernmental organization*: Central American Court of Justice (CCJ);

(c) *Invited non-governmental organizations*: American Bar Association (ABA), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association Suisse de l'Arbitrage (ASA), Association for the Promotion of Arbitration in Africa (APAA), Belgian Center for Arbitration and Mediation (CEPANI), Center for International Legal Studies (CILS), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC),

[4] Ibid., paras. 143-147.

[5] Ibid., para. 268.

G.C.C. Commercial Arbitration Centre (GCCCAC), German Institution of Arbitration (DIS), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC-UCCI), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Centre (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Pakistan Business Council (PBC), Queen Mary University of London, School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration-Lagos (RCICAL) and Vienna International Arbitral Centre (VIAC).

11. The Working Group elected the following officers:

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

Rapporteur: Ms. Ximena Bustamante (Ecuador)

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.189); (b) notes by the Secretariat, enforceability of settlement agreements (A/CN.9/WG.II/WP.190, A/CN.9/WG.II/WP.191 and A/CN.9/WG.II/WP.192).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Enforceability of settlement agreements.
5. Organization of future work.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group then considered agenda item 4 on the basis of documents prepared by the Secretariat. The deliberations and decisions of the Working Group with respect to agenda item 4 are reflected in chapter IV.

IV. Enforceability of settlement agreements

15. The Working Group recalled that UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002) (the “Model Law on Conciliation” or the “Model Law”), which formed the basis of an international framework for conciliation. The issue of enforcement of agreements settling a dispute (referred to as “settlement agreement(s)”) had been considered when preparing the Model Law on Conciliation resulting in article 14 which provided as follows: “If the parties conclude an agreement settling a dispute, that

settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

16. The Working Group agreed to consider, on a preliminary basis, questions underlying enforceability of settlement agreements as presented in section C of document A/CN.9/WG.II/WP.190.

A. Settlement agreements resulting from conciliation

17. The Working Group considered whether an instrument to be prepared on enforcement of settlement agreements (referred to as the "instrument") should be limited to settlement agreements resulting from conciliation.

18. The Working Group noted that one possible approach would be to address enforcement of settlement agreements, regardless of the procedure that led to their conclusion, as long as their purpose was to settle a dispute. That approach did not receive support because such an approach could over-complicate the enforcement procedure, as the enforcing authority would have to determine whether there existed a dispute in the first instance and whether the purpose of the agreement was to settle that dispute.

19. Broad support was expressed for limiting the scope of the instrument to settlement agreements that resulted from conciliation, as that approach would: (i) be consistent with the mandate given to the Working Group and in line with the proposal considered by the Commission (see above, paras. 1-3); (ii) promote conciliation as an effective means of solving disputes; (iii) bring certainty to the enforcement procedure which would favour settlement agreements over ordinary contracts; and (iv) avoid additional disputes on whether or not a settlement agreement fell within the scope of the instrument.

1. Notion of conciliation

20. The Working Group then considered how the term "conciliation" should be understood in the instrument. In so doing, the Working Group identified a wide range of issues with the understanding that it was premature at that stage to agree on a preferred approach.

Article 1(3) of the Model Law

21. It was widely felt that the broad definition of "conciliation" in article 1(3) of the Model Law provided a useful reference. In that context, it was suggested that the notion of "conciliation" in the instrument should be broad and inclusive to cover different types of conciliation techniques, while the Working Group would be free to exclude certain types at a later stage. It was suggested that the notion should be clear so that it would be understood uniformly in various jurisdictions and provide sufficient certainty regarding the trustworthiness of the conciliation process.

22. It was highlighted that, according to the definition in article 1(3) of the Model Law, a conciliator did not have the authority to impose upon the parties a solution to the dispute. A question was raised whether that characteristic should be retained in the notion of conciliation in the instrument.

Possible additional characteristics

23. It was further suggested that additional characteristics of the conciliation procedure such as the qualifications of conciliators and the professional nature of the procedure might need to be taken into account, either as part of the definition or as separate conditions, reflecting the objective of the instrument and depending on its form.

Origin of the conciliation process and its impact on the scope of the instrument

24. The Working Group noted that a settlement agreement might find its origin in an agreement to submit a dispute to conciliation, or it might be concluded in the course of a dispute resolution process including judicial or arbitral proceedings, which might not necessarily contain a conciliation component. In that context, situations were described where parties might reach an agreement that would resolve their dispute in the course of a judicial or an arbitral proceeding. As a result, that agreement might be recorded in the form of a judicial decision or an arbitral award on agreed terms. It was said that those situations would need to be taken into account when defining the scope of the instrument.

25. In that respect, various views were expressed. One view was that the scope of the instrument should be limited to agreements resulting only from conciliation. It was mentioned that work beyond that scope could overlap with ongoing work by other international organizations with respect to enforcement of court judgements (for instance, the judgements project of the Hague Conference on Private International Law), as well as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") particularly with respect to an award on agreed terms. It was noted that in certain jurisdictions, agreements arising from conciliation processes within courts had the same effect as court judgements and were enforceable as such. It was suggested that a careful assessment should be made whether there would be any overlap that could be problematic.

26. Another view was that the scope of the instrument should include situations where the parties had reached an agreement in the course of judicial or arbitral proceedings. In support of that view, it was noted that 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 at a later stage reach an agreement during the judicial or arbitral proceedings. In that context, attention was drawn to article 1(8) of the Model Law which addressed the basis upon which the conciliation procedure could be undertaken, such as an agreement between the parties, a direction or suggestion of a court, arbitral tribunal or competent authority.

27. In response, it was stated that if such an approach were to be adopted in the instrument, it should be limited to situations where there was a conciliation process during the judicial or arbitral proceedings and where the agreement was not recorded in a judicial decision or an arbitral award. Furthermore, attention was drawn to article 1(9) which excluded from the scope of the Model Law situations where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempted to facilitate a settlement. It was underlined that the judicial process was not consensual, and therefore it was questioned whether agreements reached

following such a procedure would have the same nature as agreements reached as a result of a conciliation process.

28. A view was expressed that agreements reached in the course of judicial or arbitral proceedings should not be considered in relation to the notion of conciliation but rather as possible exclusions from the scope of the instrument.

2. Domestic or international conciliation process

29. The Working Group then considered whether the instrument should address agreements resulting from conciliation generally, regardless of whether the conciliation process was domestic or international.

30. One view was that the scope of the instrument should be limited to settlement agreements arising from an "international" conciliation process, distinct from a domestic process. It was said that the instrument should generally not interfere with domestic regimes. Furthermore, it was stated that it would be difficult or cumbersome for jurisdictions that already had a regime in place for enforcement of settlement agreements resulting from a domestic conciliation process to adopt or opt-in to a regime which would encompass both international and domestic conciliation processes. It was mentioned that flexibility should be provided to permit States to decide whether to adopt a regime applicable to international conciliation processes for domestic conciliation processes, if they so wished.

31. Another view was that there was no need to make a distinction between international and domestic conciliation processes, as the focus of the instrument was not on the conciliation process but rather on the enforcement of settlement agreements, which would involve cross-border or international aspects. It was further mentioned that many jurisdictions did not differentiate between international and domestic conciliation processes. Moreover, it was stated that if the instrument were to deal with both international and domestic conciliation processes, it would have a greater impact on harmonizing the regime for enforcement of settlement agreements in a general manner.

32. During that discussion, it was also suggested that the form of the instrument would determine whether there was a need to distinguish an international conciliation process from a domestic one. It was mentioned that, for example, if a convention were to be prepared, settlement agreements arising from a domestic conciliation process should be excluded from its scope. The Working Group agreed to further consider the matter in light of its deliberations on the international aspect of settlement agreements (see below, paras. 33-39).

3. Domestic, foreign and international settlement agreements

33. The Working Group then considered whether a distinction should be drawn between "international" and "domestic" settlement agreements and whether to focus its work on "foreign" settlement agreements as opposed to "international" settlement agreements.

Foreign settlement agreements

34. One view was that the approach adopted under the New York Convention should be followed, and the instrument should address enforcement of foreign

settlement agreements. For example, the instrument could apply to the enforcement of a settlement agreement made in the territory of a State other than the State where the enforcement of such settlement agreement was sought; it would also apply to settlement agreements not considered as domestic settlement agreements in the State where the enforcement was sought. It was explained that that would simplify the implementation of the instrument as a practice had already developed on those matters under the New York Convention. In support, it was said that the objective of the instrument should be to facilitate cross-border enforcement rather than to provide a regime for enforcement of settlement agreements in general.

35. However, it was pointed out that settlement agreements could not be treated in a similar fashion as arbitral awards as it was not always easy to identify the factor connecting settlement agreements to a specific place or legal seat of conciliation, whereas arbitral awards usually had a place of issuance which determined their "foreign" nature.

International settlement agreements

36. In that context, attention was drawn to article 35 of the Model Law on International Commercial Arbitration ("Model Law on Arbitration") that treated awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made. The Model Law on Arbitration distinguished between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. It was suggested that a similar approach could be considered for the instrument.

37. Along the same lines, a suggestion was made that "international" settlement agreements could be defined following the approach adopted in article 1(4)(a) of the Model Law on Conciliation. Consequently, a settlement agreement would be considered international where at least two parties to the settlement agreement had their places of business in different States at the time of the conclusion of the settlement agreement.

38. On whether to limit international elements to the places of business being in different States, it was suggested that they should be expanded to consider other elements mentioned in article 1(4)(b) of the Model Law on Conciliation. It was mentioned that the enforcement of a settlement agreement between parties having their places of business in the same State might also have an international element, for example, if one of the parties had to enforce that agreement in another State where assets were located. It was further mentioned that other criteria might need to be considered, including the law applicable to the conciliation process and the nationality of the conciliator.

39. In conclusion, it was generally agreed that the instrument should focus on international settlement agreements as distinct from domestic settlement agreements. It was said that States should be given the flexibility to apply the regime designed for international settlement agreements to domestic settlement agreements, if they so wished. It was also suggested that the determination of the international element of settlement agreements should be considered in a broad manner taking into account the views expressed above and other possible approaches such as a territorial or a personal approach as well as private

international law criteria. It was mentioned that such criteria should be objective and relevant to achieving the purpose of the instrument.

4. Content of and parties to the settlement agreements

Commercial settlement agreements

40. It was generally felt that the scope of the instrument should be limited to the enforcement of "commercial" settlement agreements. In that context, it was suggested that the definition of "commercial" in the Model Law as well as other UNCITRAL texts provided a useful reference.

41. There was general agreement to exclude settlement agreements involving consumers from the scope of the instrument and reference was made to article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (1980) as well as article 2 of the Convention on Choice of Court Agreements (2005) as possible models of formulation.

42. It was generally felt that settlement agreements dealing with family and labour law matters and other areas where party autonomy was limited due to overriding mandatory rules or public policy should also be excluded from the scope of the instrument. However, it was noted that if the scope of the instrument were to be limited to "commercial" settlement agreements, such exclusions would not be necessary as they would generally not fall within the scope of the instrument.

43. While it was generally considered that it was premature to decide whether the instrument should have an illustrative list of subject matters to be covered or a negative list of those excluded, it was pointed out that a negative list could run the risk of not being exhaustive.

Agreements involving government entities

44. As regards settlement agreements involving government entities, it was suggested that those agreements should be excluded from the scope of the instrument as, in some jurisdictions, government entities were not authorized to conclude them. In response, it was said that, in those jurisdictions, that situation could be addressed under the defences to enforcement through wording that might be extrapolated from article V(1)(a) of the New York Convention (see below, section E), instead of excluding settlement agreements involving government entities entirely from the instrument.

45. It was said that issues relating to sovereign immunity would need to be considered in light of existing standards and reference was made to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), yet to enter into force. It was said that the instrument would not need to delve into issues of state immunity. It was further said that such questions should be left to be decided by the enforcing authority on the basis of the applicable rules on foreign state immunity.

46. The view generally shared by the Working Group was that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as there were government entities that engaged in commercial activities and that might seek to use conciliation to resolve disputes in the context of those activities. 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. It was suggested that a possible manner to address that issue would be to allow States wishing to exclude such agreements to formulate a reservation or a declaration, if the instrument were to be a convention.

Pecuniary and non-pecuniary as well as conditional obligations

47. As to obligations covered by settlement agreements, it was generally felt that the instrument should apply to settlement agreements in their entirety regardless of whether they included pecuniary or non-pecuniary obligations. It was said that settlement agreements might contain both types of obligations, and therefore the enforcement of only pecuniary obligations would be overly limitative and create an imbalance between the parties. It was also noted that any issues that might arise in enforcing non-pecuniary obligations could be handled by the enforcing authority in accordance with the applicable law. In that context, it was stated that domestic enforcement systems had developed to address the enforcement of such obligations.

48. It was noted that the flexible nature of settlement agreements, which allowed for conditional obligations, was a key feature of conciliation that made it attractive to parties and thus, the need to preserve such a feature was highlighted. It was said that the instrument could include as a defence to enforcement the non-fulfilment of certain conditions in the settlement agreement.

49. A suggestion was made that settlement agreements stating declarations of intent should be excluded from the scope of the instrument. In response, it was said that such agreements would generally not include enforceable obligations.

50. After discussion, it was generally agreed that the scope of the instrument should not be limited to pecuniary settlement agreements but rather cover all types of settlement agreements without any limitation as to the nature of the remedies or obligations provided under those agreements.

5. Form requirements of the settlement agreements

51. The Working Group considered the requirements that a settlement agreement would need to meet for it to be enforceable under the regime envisaged by the instrument. It was said that the purpose of determining requirements was to give the necessary level of certainty to the enforcing authority faced with a request for enforcing an agreement and to determine the elements that would need to be considered by the enforcing authority with regard to the settlement agreement. It was underlined that the instrument should clearly and objectively differentiate settlement agreements from other agreements so as to avoid enforcement of agreements other than those reached through conciliation under the regime envisaged by the instrument.

Writing requirement

52. It was suggested that settlement agreements should be in writing to be enforceable under the regime envisaged by the instrument. The Working Group recalled its works on the writing requirement in relation to arbitration agreements, including article 7 of the Model Law on Arbitration and the 2006 recommendation on the interpretation of article II(2) of the New York Convention. It was generally

agreed that any writing requirement would need to be determined in a flexible manner reflecting current practices, including the use of other means that would be considered equivalent.

Parties' signature

53. It was said that the consensual nature of conciliation and the settlement agreement resulting from that process made the signature of the parties significant. Therefore, it was suggested that the settlement agreement should be signed by the parties or that at least, it should be clearly established that the parties concluded the agreement. The need to take into account current practices, including the use of electronic signatures, was mentioned.

Requirements to ascertain the involvement of the conciliator in the process

54. The Working Group considered various means to indicate the involvement of a conciliator in the procedure that led to the conclusion of the settlement agreement.

55. In relation to the suggestion that the settlement agreement should be signed by the conciliator, it was said that in certain jurisdictions, signature by the conciliator was not common practice, for example, due to potential liability issues. In response, it was pointed out that if conciliators signed the settlement agreement, it would generally be for the purpose of certifying that he or she was involved in the conciliation, which would be unlikely to give rise to liability issues.

56. In that context, it was explained that conciliators were usually not involved in the drafting or preparation of settlement agreements so as to respect party autonomy and to avoid any complications that might arise (for example, a conciliator by signing the settlement agreement might be called as a witness in a dispute involving the agreement).

57. It was suggested that the settlement agreement could include information about the identity of the conciliator. However, it was pointed out that in practice, information about the conciliator would usually not be included in the settlement agreement.

58. It was suggested that the conciliator could be required to prepare a declaration separate from the settlement agreement stating that he or she acted as a conciliator in relation to the dispute concerned.

59. In response to a suggestion that the settlement agreement should include a reference to the qualifications of the conciliator, it was said that not all jurisdictions required such qualifications, and that, in principle, requirements in domestic legislation should not result in limiting the enforceability of settlement agreements under the regime envisaged by the instrument.

Inclusion of information about the dispute in the settlement agreement

60. A suggestion was made that settlement agreements should include various information on the dispute (such as a brief description of the basis on which the dispute arose) and whether the dispute was settled in whole or in part. In response, it was said that the conciliation process usually focused on solutions, and requiring the parties to provide information about their disputes might inadvertently exacerbate the differences.

Indication by the parties that they agreed to enforcement under the instrument

61. It was suggested that the parties should indicate in their settlement agreement their willingness to subject the agreement to the enforcement regime envisaged by the instrument. It was further underlined that, as conciliation was fully consensual, the enforcement regime envisaged by the instrument should apply only where the parties consented to it.

62. Views were expressed that it would be cumbersome to require such an opt-in mechanism and that it might result in an instrument, which would be less commonly used. It was suggested that further consultations with the users of conciliation on the possible effects in practice of such an opt-in mechanism might be useful.

63. It was suggested that an alternative approach would be for the parties to expressly exclude the enforcement regime envisaged by the instrument in their settlement agreement.

Non bis in idem

64. It was suggested that settlement agreements did not always resolve a dispute in its entirety, and therefore a question was raised whether the *non bis in idem* principle should be considered under the instrument. In response, it was said that that question should be left to be addressed by the enforcing authority depending on the applicable law and the circumstances of the case.

Treatment of different requirements

65. As to form requirements in general, it was said that the requirements should not be overly prescriptive nor too detailed, as that could complicate the enforcement procedure, possibly by resulting in additional claims about whether the requirements were met. Reference was made to paragraph 9 of document A/CN.9/WG.II/WP.192, which contained a proposed definition of "settlement agreement". It was stated that a stricter form requirement could harm the informal nature and amicable atmosphere of the conciliation process and that the variance in conciliation practice would need to be considered. It was further noted that as the purpose of the instrument should not be to harmonize domestic legislative framework or the manner in which conciliation was carried out in many jurisdictions but rather to focus on enforcement of international settlement agreements resulting from conciliation, it would be preferable to simply set minimum requirements, providing States with the flexibility to introduce any other requirements if they so wished. In that context, it was mentioned that the New York Convention did not include any form requirements of arbitral awards and that article 31 of the Model Law on Arbitration included minimum form requirements, some of which might not necessarily be applicable to settlement agreements (for example, the reasons upon which the settlement agreement was based).

66. Furthermore, it was suggested that the issue of form requirements could be left to the enforcing authority as it would need to determine whether those requirements were met. It was also mentioned that certain form requirements or elements might be better considered in the context of the enforcement or review mechanism, where the party applying for enforcement would need to furnish certain proof of those elements and the party against whom the settlement agreement was being invoked could object to the enforcement by furnishing proof to support its defence. Lastly, it

was mentioned that if the instrument were to be a convention, States should be given flexibility to formulate a reservation or declaration regarding those form requirements.

67. After discussion, the Working Group agreed that there was a need to provide for form requirements that would allow settlement agreements to be distinguished from other agreements, which would facilitate their expedited enforcement. It was generally felt that those requirements should not be prescriptive and should be set out in a brief manner or as minimum requirements, to preserve the flexible nature of the conciliation process. It was widely felt that settlement agreements to be enforceable under the regime envisaged by the instrument should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement (for example, by signing or by concluding the agreement). There were diverging views on whether those requirements would be the only or minimum requirements, or whether additional elements would need to be provided for in the instrument, for example indications 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); (ii) the settlement agreement resulted from a conciliation process; (iii) the parties to the settlement agreement were informed of the enforceability of the agreement upon its conclusion; or (iv) the parties opted in to the regime envisaged by the instrument.

B. Agreement to submit a dispute to conciliation

68. It was generally agreed that the instrument would not need to address the agreement to submit a dispute to conciliation, as the bases upon which conciliation might be carried out were diverse including not only the agreement between the parties, but also mandatory provisions of the law or an order by a competent authority. It was underlined that the outcome of the conciliation procedure, i.e., the settlement agreement, should be the focus of the instrument. It was, however, noted that the agreement to submit a dispute to conciliation could be produced in the enforcement procedure as possible evidence that conciliation took place and that it resulted in the settlement agreement.

69. During that discussion, it was pointed out that settlement agreements might resolve matters not contemplated when the conciliation started or matters not discussed during the conciliation. Whether such practice could have an impact on the enforcement procedure was questioned. It was suggested that settlement agreements could be defined as those “resulting from” conciliation so as to avoid issues at the enforcement stage.

70. While a suggestion was made that the Working Group should consider streamlining certain aspects of the conciliation procedure, it was agreed that that was outside of the mandate of the Working Group.

C. Recognition of settlement agreements

71. The Working Group considered whether a distinction should be made between recognition and enforcement of settlement agreements and whether the instrument would need to address recognition in addition to enforcement. It was recalled that

the New York Convention provided for the recognition of arbitration agreements as well as arbitral awards. It was said that under the New York Convention, "recognition" of arbitral awards referred to the process of considering an arbitral award as binding but not necessarily enforceable, while "enforcement" referred to the process of giving effect to the award.

72. Diverging views were expressed regarding the need for the instrument to provide for the recognition of settlement agreements, due to a wide range of domestic recognition procedures as well as different understandings regarding the notions of both recognition and settlement agreements (as private contracts or special instruments resulting from a dispute resolution procedure). A suggestion was to avoid using the term "recognition" in the instrument as that term might carry different meanings depending on the jurisdictions and to first describe the envisaged procedure and its legal effects.

Addressing recognition in the instrument

73. Views were expressed in favour of addressing recognition of settlement agreements in the instrument on the basis that recognition would give legal effect to the settlement agreement and was, in certain jurisdictions, a necessary procedural step triggering the enforcement procedure. It was suggested that the recognition procedure could be straightforward and expedited, allowing the defendant to raise defences against recognition. The practical effect would be that settlement agreements would be given legal value before being considered for enforcement. It was further mentioned that there might be instances where parties might require recognition of settlement agreements containing non-pecuniary obligations without necessarily pursuing enforcement.

74. It was pointed out that settlement agreements might be recognized by courts in a variety of situations, such as, for dismissing a claim as the dispute had already been resolved by the settlement agreement and for the purposes of set-off. It was stated that in such circumstances, courts could use other processes to recognize or take account of settlement agreements.

Addressing only enforcement in the instrument

75. Views were expressed in support of the instrument only addressing enforcement as recognition of settlement agreements would be inappropriate and superfluous. It was said that recognition was a procedure usually applied to give legal effect to a public act emanating from another State, such as court decisions, whereas settlement agreements were of a private nature.

76. In addition, it was said that recognition would not have any practical effect. It was also said that the recognition procedure could have a negative impact on the expeditious enforcement of settlement agreements as, at the recognition stage, the validity of the conciliation procedure and its outcome might be examined. It was further said that settlement agreements might become void, be terminated or amended by the parties at any time including after the recognition of the agreement by a court, which could raise legal difficulties. It was pointed out that inclusion of a recognition procedure would generally require formalities in relation to settlement agreements, which were usually not required in relation to ordinary contracts.

Recognition and enforcement — proposals

77. It was proposed that the instrument should not seek to provide specific rules on the recognition procedure (such as filing of the settlement agreement with a court or homologation by a court). It was suggested that article III of the New York Convention could provide a useful model. Another suggestion was that it might be worthwhile to consider the instrument explicitly requiring that settlement agreements be treated at least as favourably as arbitral awards under the New York Convention.

78. During the discussion, reference was made to the recognition of foreign proceedings and reliefs as dealt with in the UNCITRAL Model Law on Cross-border Insolvency as possible guidance.

79. It was suggested that the instrument could refer to both recognition and enforcement of settlement agreements, without providing details on the recognition procedure, leaving that matter to domestic regimes which, in any case, could not easily be harmonized. It was further suggested that that matter should be revisited after consideration of issues relating to enforcement.

D. Direct enforcement or review mechanism as a prerequisite for enforcement

80. The Working Group then considered whether the instrument would provide an enforcement mechanism where a party to a settlement agreement would be able to seek enforcement directly at the place of enforcement (referred to as "direct enforcement") or incorporate a review or control mechanism in the State where the settlement agreement was originating from (referred to as "originating state") as a precondition for enforcement.

81. A number of concerns were raised with regard to requiring or establishing a review or control mechanism in the originating state. One was that unlike court judgements and arbitral awards, it could be very difficult to determine the originating state of settlement agreements as the connecting factor might be subject to different determinations. It was also mentioned that a review mechanism was likely to result in double exequatur, which would be at odds with the purpose of the instrument to provide an efficient and simplified enforcement mechanism. Furthermore, it was stated that any defences to enforcement could be raised at the court where enforcement was sought, making any review by a court at the originating state superfluous.

82. It was further mentioned that direct enforcement would not deprive courts at the originating state to review the validity of the settlement agreement. In that context, questions were raised on the consequences of concurrent court proceedings on enforcement and on the validity of the settlement agreement.

83. The view was expressed that providing for a simple review mechanism at the originating State could facilitate the overall enforcement procedure. It was noted that courts at the originating state would be better placed to determine prima facie certain questions, such as the validity of the settlement agreement and fulfilment of procedural requirements pertaining to the conciliation process. It was suggested that such a simple review mechanism would not amount to double exequatur, as it would

only ascertain matters such as the validity of the settlement agreement before such an agreement could be enforced in other jurisdictions. Under that approach, the grounds for refusing enforcement would be limited.

84. After discussion, it was generally agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek direct enforcement (at the place of enforcement) without imposing a requirement for a review of the settlement agreement at the originating state. It was further noted that the concerns raised about such an approach could be further considered in the context of defences to enforcement and reference was made to article V(1)(e) of the New York Convention as a possible model.

E. Defences to enforcement of settlement agreements

85. The Working Group considered the question of defences to enforcement of settlement agreements with the assumption that a party to the settlement agreements subject to the regime envisaged by the instrument would be able to seek direct enforcement (at the place of enforcement) without review or control at the originating State (see above, para. 84). 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.

Possible defences to enforcement

86. The Working Group considered defences as listed under paragraph 46 of document A/CN.9/WG.II/WP.190 and paragraph 18 of document A/CN.9/WG.II/WP.192. In the discussion, reference was made to defences contained in legislation of certain jurisdictions (see document A/CN.9/846 and its addenda) as well as to articles II(3) and V of the New York Convention.

87. Document A/CN.9/WG.II/WP.190 listed defences in relation to the capacity of the parties, their consent, and existence of duress, unconscionability, undue influence, misrepresentation, mistake or fraud, defences in relation to the purpose of the agreement, its cause, validity, formalities, public policy and non-compliance with mandatory provisions, and defences in relation to whether the subject matter of the dispute was capable of being resolved by conciliation.

88. While there was general support for the inclusion of fraud, public policy and the subject matter not capable of being conciliated as defences, diverging views were expressed on other possible defences and how they should be presented (see below, paras. 93-97).

89. A suggestion was made that the enforcement process should include some scrutiny over the conciliation procedure. It was pointed out that certain legislations on conciliation imposed homologation procedures or formal requirements which could constitute a ground for refusing enforcement when those mandatory procedures or requirements were not complied with. In response, it was pointed out that importing specific requirements of domestic legislation into the contemplated international enforcement regime might be detrimental to the enforcement process, and run contrary to the objective of the instrument. It was further pointed out that the instrument should take into account the various techniques of conciliation.

90. It was suggested that lack of due process in conciliation should be considered as a specific defence and that any settlement agreement that disregarded due process should not be enforced. In support of that view, it was stated that elements of due process in conciliation would be, for example, impartiality and neutrality of the conciliator, confidentiality of the proceedings and equal treatment of the parties. In response, it was said that the outcome of conciliation was an agreement and not a binding decision imposed by a third party, and therefore, due process in conciliation could not be equated to that in judicial or arbitral proceedings. In addition, it was said that due process was usually considered in the broader context of procedural public policy, and thus need not constitute a separate defence under the instrument.

91. During the discussion on possible defences, questions were raised with regard to situations where the settlement agreement might not necessarily be the final resolution of the dispute, as it was modified, amended or terminated by the parties, as it was found to be null and void by a competent authority or where the obligations therein were partially or fully performed by the parties, or were conditional. One view was that those issues could constitute possible defences, which could be handled by the enforcing authority in a flexible manner. Another suggestion was that those issues could be resolved by including a finality aspect in the definition of settlement agreements and as a consequence, excluding from the scope of the instrument any settlement agreement that had been modified or amended.

92. It was suggested that a possible model to address those issues could be found in article II(3) of the New York Convention and article 8(1) of the Model Law on Arbitration, which referred to arbitration agreements 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 in the instrument.

Presentation of defences in the instrument

93. It was generally agreed that defences to be provided in the instrument should be limited and not cumbersome to implement in order to allow for a simple and efficient verification by the enforcing authority of the grounds for refusing enforcement. It was widely felt that the grounds for refusing enforcement under the instrument should also be exhaustive and stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation.

94. It was suggested that the draft provision in paragraph 18 of document A/CN.9/WG.II/WP.192 provided a useful basis. As a further illustration of a simplified approach to enforcement, it was suggested that the instrument could provide that enforcement should be denied if a party to conciliation did not sign, or consent to, the agreement; the settlement agreement was obtained by fraud; or the settlement agreement did not accurately reflect the terms agreed to by the parties. It was further mentioned that the enforcement procedure should not be detrimental to the rights of the parties involved.

95. The possibility of the instrument setting out limited defences and giving flexibility to States to incorporate other defences was mentioned as a possible approach.

96. It was noted that when considering defences to enforcement, the consensual nature of settlement agreements needed to be highlighted.

97. It was suggested that possible defences identified should be broadly categorized and set out in general terms. As to the possible categories of defences, reference was made to those pertaining to the genuineness of the settlement agreement (reflecting the parties' consent, not being fraudulent), those pertaining to the readiness or validity of the settlement agreement to be enforced (being final, not having been modified or performed, binding on the parties) and those pertaining to international public policy. Another category identified was where the subject matter of the settlement agreement was not capable of being settled through a conciliation process and the obligations contained in the settlement agreement were not capable of being enforced at the place of enforcement. In that context, it was said that some categories of defences might also be considered by the enforcing authority at its own initiative.

98. During the discussion, a view was expressed that a court of the originating state might be better suited to review some of the defences mentioned above for procedural efficiency, and it was suggested that a review mechanism should be incorporated at the originating state. In response, the difficulties in determining the originating state were reiterated.

99. With respect to defences to be included in the instrument, it was mentioned that it was important to consider whether they could increase forum shopping.

Applicable law

100. The Working Group considered how the law applicable with respect to defences in the enforcement procedure should be addressed in the instrument. It was generally felt that that raised complex issues, particularly as different laws might be applicable depending on the defences. For example, the competent authority might need to consider the law applicable to the parties (in relation to capacity), to the enforcement procedure, to the settlement agreement and to the conciliation process. Doubts were expressed whether the place of conciliation and the place of conclusion of the settlement agreement would have any relevance to the determination of the applicable law.

101. It was noted that while parties might have chosen the law applicable to the settlement agreement, that would not necessarily have any bearing on the determination of the law applicable to defences nor exclude application of other laws in the enforcement procedure. Another illustration was that the law governing the underlying contract under which the dispute arose might be different from the law governing the settlement agreement, which might create uncertainty regarding the applicable law.

102. 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. It was further suggested that the instrument should seek to provide unambiguous guidance regarding the laws applicable to defences to the extent possible.

Possible impact of judicial or arbitral proceedings

103. The Working Group then considered the possible impact that other judicial or arbitral proceedings relating to the settlement agreement could have on the enforcement procedure. A question was raised whether the enforcing authority would need to adjourn its procedure in such circumstances. It was said that that question would be treated differently, depending on whether the proceedings were taking place in the same jurisdiction, or in another jurisdiction. In the former case, lis pendens rules would provide clear rules while in the latter case, there was a risk that the courts would not coordinate.

104. One view was that there was no need to establish a link between the judicial or arbitral proceedings and the enforcement procedure as they dealt with issues of a different nature. Another view was that the instrument should require the enforcing authority to take into account court decisions. It was also mentioned that evidence of the absence of review of the settlement agreement by the court at the originating state could be a precondition for the enforcement.

105. It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. Accordingly, it was suggested that the enforcing authority might, if it considered proper, adjourn its decision on the enforcement when a judicial proceeding was pending or refuse enforcement if that settlement agreement had been found to be null and void by a competent court. It was further suggested to refer to court decisions that were capable of being recognized by the court of the State where enforcement would be sought instead of generally referring to decisions made by a competent authority, thereby providing that the enforcing authority should only take account of judicial decisions that could be recognized in the State where enforcement would be sought, be it through a treaty or through the operation of the private international law rules. In response, it was said that that suggestion might complicate the procedure, and in certain instances, be too limitative. It was suggested that the approach in the instrument should mirror that of the New York Convention and should provide discretion to the enforcing authority.

106. In that context, a question was raised whether court decisions that considered the validity of the settlement agreement as a precondition for the relief sought should also be taken into account or only those decisions that would be declaratory, for example, nullifying the settlement agreement.

107. After discussion, while it was widely felt that the instrument would need to indicate the possible impact judicial or arbitral proceedings could have on the enforcement procedure, it was said that it was premature to make a decision on how that question should be addressed.

F. Possible form of the instrument

108. The Working Group recalled the mandate given by the Commission that the Working Group should consider developing possible solutions to address enforcement of settlement agreements, including a convention, model provisions or guidance texts. The Working Group had a preliminary discussion on the possible form that the instrument could take. The prevailing view was that there were a

number of issues that would require further consideration before a decision could be made on the form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as a convention could more efficiently contribute to the promotion and harmonization of conciliation.

109. After discussion, it was agreed that progress could be made based on draft provisions without prejudging the final outcome. In order to facilitate further consideration, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out possible draft provisions, including those that would be relevant if the instrument were to be a convention (for example, possible reservations or declarations). It was generally felt that the final form would be decided upon at a later stage.