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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

Addendum

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V.16-10119 (E)

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

C. Form of the draft instrument

1. As requested by the Working Group at its sixty-fifth session, this section illustrates how the draft uniform provisions presented in document A/CN.9/WG.II/WP.200 would be adjusted depending on whether the instrument would take the form of a convention or of model legislative provisions supplementing the Model Law on Conciliation (A/CN.9/896, paras. 12 and 213). The purpose is to merely facilitate consideration by the Working Group of the form of the instrument (A/CN.9/896, paras. 135-143 and 211-213; see also A/CN.9/WG.II/WP.200, paras. 3 and 14). An annex to this note contains a table of concordance between the provisions of the two possible forms of instrument.

1. Convention

2. Should the Working Group decide that a convention should be prepared, possible provisions might read as follows.

"**Article 1 — Scope of application**

"1. This Convention 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 Convention 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 Convention 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 award.]

Option 2: [This Convention 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 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 the State where the settlement agreement is sought to be relied upon.]

Option 3: [This Convention 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 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 the State where the settlement agreement is sought to be relied upon."]

"**Article 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.

"**Article 3 — Application**

"1. A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of the State where the settlement agreement is sought to be relied upon, and under the conditions laid down in this Convention.

"2. A party relying on a settlement agreement, including for its enforcement, under this Convention 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 the official language(s) of 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.

"**Article 4 — Grounds for refusing to give legal effect to, or to enforce, a settlement agreement**

"1. The competent authority of 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 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 this Convention in accordance with article -] [*Option 2 — opt-in*: The parties to the settlement agreement did not consent to the application of this Convention as provided for in article -].]

"2. The competent authority of 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.

"**Article 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 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.

"**Article 6 — Parties' choice regarding the application of the Convention**

[*Option 1, Opt-out*: "The parties to the settlement agreement may exclude, by agreement in writing, the application of this Convention. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the Convention.]

[*Option 2, Opt-in*: "This Convention shall apply only if the parties to the settlement agreement have consented in writing to its application.]

"**Article 7 — Other laws or treaties**

"This Convention 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.

"**Article 8 — Reservations**

"1. A Party may declare that:

"(a) [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;

"(b) 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];

"(c) [Option 1: 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: It shall apply this Convention unless the parties to the settlement agreement have agreed to exclude the application of the Convention.]

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit."

[**Final provisions**: Depositary — Signature, ratification, acceptance, approval accession — Entry into force — Amendments — Denunciation]

2. Legislative provisions supplementing the Model Law on Conciliation

3. If the Model Law on Conciliation were to be complemented by provisions on enforcement of settlement agreements, the Working Group may wish to consider whether the provisions of the Model Law could possibly be presented in three sections, as follows: Section 1 on General Provisions would contain articles 1 to 3 of the Model Law, as completed by new definitions;[1] Section 2 on Conciliation Procedure would contain articles 4 to 13 of the Model Law; and Section 3 on Legal Effect and Enforcement of Settlement Agreements would contain the new provisions on enforcement of settlement agreements, replacing article 14. The Working Group may wish to note that additional adjustments to the Model Law might be required based on further consideration of issues that remain to be decided, and that the presentation below is not exhaustive regarding the amendments that might need to be made to the Model Law.

4. Section 1, article 1, paragraphs (4) and (5) of the Model Law could be amended as follows:

"1.4 A conciliation or a settlement agreement is international if:

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

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

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

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

[1] Article 1(1) of the Model Law includes a footnote on the term "commercial" (A/CN.9/896, para. 16 and A/CN.9/WG.II/WP.200, para. 28); the word "conciliation" is defined in article 1(3) (A/CN.9/896, paras. 39-47, 164-168, and A/CN.9/WG.II/WP.200, para. 27); and article 1, paragraphs (6) and (7) provide for a opt-in and opt-out for the parties (A/CN.9/WG.II/WP.200, paras. 10 and 44).

"1.5 For the purposes of this article:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

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

5. Section 1, article 1(9) of the Model Law could be supplemented as follows:

"1.9 This Law does not apply to:

"(a) [Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement];[2]

"(b) Settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer);

"(c) Settlement agreement relating to family, inheritance or employment law; and

"[(d) Settlement agreements concluded by a State or any governmental agencies or any person acting on behalf of a governmental agency]."

6. An alternative to listing the exclusions would be to provide more generally that: "This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to conciliation or may be submitted to conciliation only according to provisions other than those of this Law". A similar provision can be found in article 1(5) of the UNCITRAL Model Law on International Commercial Arbitration.

7. Section 1, article 1, of the Model Law could be complemented with a definition of "settlement agreements", as follows:

"1.10 A 'settlement agreement' is an international agreement resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement(s)').

"1.11 For the purposes of this article, 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."

[2] Article 1(9)(a) might need to be adjusted to take account of the decision of the Working Group on the matter of settlement agreements concluded in the course of judicial or arbitral proceedings (see A/CN.9/WG.II/WP.200, paras. 6-8, 15 and 20).

8. Article 14 of the Model Law would be replaced by section 3, which could read as follows:

"**Article 14 — General principles**

"14.1 A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this Section.

"14.2 Option 1: [The procedure in this section 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: [The procedure in this section 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 this State; 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 this State.]

Option 3: [The procedure in this section 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 this State]; 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 this State."]

"14.3 The functions referred to in this Section shall be performed by … (referred to as the "competent authority") [Each State enacting the Model Law specifies the court, courts or other competent authorities to perform the functions].

[Footnote to the title of section 3 or to article 14:

"*A State may consider applying this Section to agreements settling a dispute, irrespective of whether they resulted from conciliation.]

"**Article 15 — Application**

"15.1 A party relying on a settlement agreement, including for its enforcement, under this Section 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.

"15.2 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 1(11) above, by itself or together with further evidence.

"15.3 If the settlement agreement is not in the official language(s) of this State, the competent authority may request the party making the application to supply a translation thereof into such language.

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

"**Article 16 — Defences**

"16.1 The competent authority of this State 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 this State; 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 as provided for in article 8; or

["(f) [*Option 1 — opt out*: The parties to the settlement agreement have agreed to exclude the application of this Law in accordance with article 1(7)] [*Option 2 — opt in*: The parties to the settlement agreement did not consent to the application of this Law as provided for in article 1(6)].[3]

[3] It may be noted that article 1(6) of the Model Law aims at permitting application of the Model Law where other criteria for its application are not met, so its purpose and effect are different compared to the opt-in provision under the convention.

"16.2 The competent authority of this State 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 this State; or

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

"16.3 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 this State 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."

Annex

Table of concordance

Draft provisions	*Convention*	*Legislative provisions*
Scope and definition of "settlement agreement"	Article 1(1)	Article 14.1 on scope/purpose (Amendment to article 14 of the Model Law) Article 1.10 for the definition of "settlement agreement" (Amendment to article 1 of the Model Law)
Exclusion of family, employment and consumer law matters	Article 1(2)	Article 1.9 (Amendment to article 1 of the Model Law)
Exclusion of settlement agreements recorded as judicial settlements and arbitral awards	Article 1(3)	Article 14.2 (Amendment to article 14 of the Model Law)
Determination of the competent authority	N/A	Article 14.3 (Amendment to article 14 of the Model Law)
Definitions	Article 2	Article 1
Definition of "international"	Article 2(1)	Article 1(4) (Amendment to article 1 of the Model Law)
Definition of the "written requirement"	Article 2(2)	Article 1(11) (Amendment to article 1 of the Model Law)
Definition of "conciliation"	Article 2(3)	Current article 1(3) of the Model Law
Application	Article 3	Article 15
Grounds for refusing to give legal effect to, or to enforce, a settlement agreement	Article 4	Article 16(1) and (2)
Parallel applications or claims	Article 5	Article 16(3)
Opt-out/opt-in for the parties	Articles 6 (and 8)	Current article 1(6) and (7) of the Model Law
Other laws or treaties	Article 7	N/A
Reservations	Article 8	Article 1.9 on settlement agreements concluded by States/other public entities (Amendment to article 1 of the Model Law) Footnote to article 14 on conciliation process (Amendment to article 14 of the Model Law)