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Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016)

Contents

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I. Introduction

1. 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.[1] The Working Group commenced its consideration of that topic at its sixty-third session (A/CN.9/861).

2. At its forty-eighth session, the Commission considered the work undertaken by the Working Group in relation to the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes"). The Commission approved the revised draft of the Notes in principle (contained in document A/CN.9/844) and requested the Secretariat to provide an updated draft in accordance with the deliberations and decisions of the Commission. The Commission also 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 revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.[2]

3. Further, at that session, the Commission considered items for possible future work, including 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.[3] 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]

4. 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]

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

[2] Ibid., para. 133.

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

[4] Ibid., paras. 148-151.

[5] Ibid., para. 268.

5. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.193, paragraphs 5-7 and 12-15.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its sixty-fourth session in New York, from 1-5 February 2016. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Namibia, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda and United States of America.

7. The session was attended by observers from the following States: Albania, Belgium, Chile, Cyprus, Egypt, Finland, Iraq, Lebanon, Libya, Mozambique, Netherlands, Norway, Qatar, South Africa, Sudan, Sweden and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

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

(a) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arab Association for International Arbitration (AAIA), ArbitralWomen, Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Belgian Center for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Chartered Institute of Arbitrators (CLARB), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Cámara de Comercio de Lima (CCL), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICACIC), G.C.C. Commercial Arbitration Centre (GCCAC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Law Association (ILA), International Mediation Institute (IMI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York City Bar Association (NYCBAR), New York International Arbitration Centre (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL),

Regional Centre for International Commercial Arbitration-Lagos (RCICAL) and Swedish Arbitration Association (SAA).

10. The Working Group elected the following officers:

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

Rapporteur: Mr. Jeremy Shelly (Australia)

11. At the invitation of the Chairperson, Mr. Michael E. Schneider (Vice-Chair of UNCITRAL, Switzerland) presided over the discussion on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (agenda item 4).

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.193); and (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.194) and regarding enforceability of settlement agreements resulting from international commercial conciliation (A/CN.9/WG.II/WP.195 and A/CN.9/WG.II/WP.196).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.
5. International commercial conciliation: enforceability of settlement agreements.
6. Organization of future work.
7. Adoption of the report.

III. Deliberations and decisions

14. The Working Group considered agenda items 4 and 5 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.194, A/CN.9/WG.II/WP.195 and A/CN.9/WG.II/WP.196 and its Addendum). The deliberations and decisions of the Working Group with respect to agenda items 4 and 5 are reflected in chapters IV and V, respectively.

15. At the close of its deliberations, in relation to agenda item 4, the Working Group requested the Secretariat to prepare an updated draft of the UNCITRAL Notes on Organizing Arbitral Proceedings based on its deliberations and discussions for consideration by the Commission at its forty-ninth session. In relation to agenda item 5, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories.

IV. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

16. The Working Group commenced its consideration of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings as contained in paragraph 6 of document A/CN.9/WG.II/WP.194. The Working Group noted that the draft revised Notes had been prepared taking account of the decisions of the Working Group at its sixty-first and sixty-second sessions and of the Commission at its forty-eighth session.

Introduction

Paragraph 5

17. The Working Group agreed that the word “dictate” in paragraph 5 should be replaced by the word “indicate”.

Paragraph 7

18. With respect to the second sentence of paragraph 7, which addressed the benefits of selecting a set of arbitration rules, it was agreed that the advantage of such rules as having been widely interpreted by arbitral tribunals and courts and analysed in detail through a wide range of publications should be highlighted.

Annotations

Note 1 (Consultation for decisions on the organization of arbitral proceedings and procedural meetings)

Paragraph 9

19. While a suggestion was made that the first sentence of paragraph 9 should be elaborated to specifically deal with instances where a decision by the arbitral tribunal would require a subsequent agreement of the parties, it was generally felt that paragraph 9 sufficiently set forth the principle of requiring consultation between parties and the arbitral tribunal and that paragraph 15 also dealt with such circumstances.

Paragraph 10

20. It was agreed that the first sentence of paragraph 10 should make a distinction between the situation where the agreement of the parties affected the organization of the arbitral proceedings, in which case consultation with the arbitral tribunal would be sufficient, and the situation where the agreement of the parties affected the planning of the arbitrators, in which case the parties would be advised to not only consult but also seek the agreement of the arbitral tribunal.

21. It was further agreed that the last sentence of paragraph 10 should be revised to indicate that the parties would “usually” secure the agreement of the arbitral tribunal in addition to that of the arbitral institution when they agreed that an

arbitral institution would administer the arbitration after the arbitral tribunal had been constituted.

Paragraph 13

22. With respect to paragraph 13, it was suggested that the paragraph could include a list of specific issues that might be discussed at the first procedural meeting, for example, bifurcation of the proceedings, possible use of conciliation/mediation, rules on evidence, and possibility of joinder. While there was some support for that suggestion, it was generally felt that retaining a general approach would be adequate as those issues might not necessarily arise in all arbitrations. In that context, reference was made to the last sentence of paragraph 5 which provided guidance on when to raise a matter. After discussion, it was agreed that the first sentence of paragraph 13 should remain unchanged, stating in general terms that a number of issues covered by the Notes would be addressed at the first procedural meeting.

23. Another suggestion with respect to paragraph 13 was that, where relevant, a reference to statutory and/or mandatory time limits imposed on the arbitral tribunal for rendering an arbitral award should be included as an item for consideration in the procedural timetable. Noting that there was a wide range of different approaches to imposing such limits and of practices, it was questioned whether such limits should be discussed at the first procedural meeting and included in the procedural timetable. It was also stated that that issue could be dealt with in paragraph 143 of the Notes. After discussion, it was agreed that paragraph 13 should be revised to indicate that it would be advisable for the parties and the arbitral tribunal to consider any statutory and/or mandatory time limits for rendering an award.

24. It was further agreed that time limits for communication of documentary evidence should also be mentioned in the list of items to be included in the procedural timetable.

Paragraph 14

25. With respect to paragraph 14, it was agreed that the word “regularly” in the last sentence should be replaced by the word “accordingly”.

Paragraph 15

26. With respect to the first sentence of paragraph 15, it was suggested that the words “preferably with the prior consent of the parties” should be inserted after the words “revisited and modified” to highlight the need for the parties’ prior agreement. In response, it was recalled that the Working Group had agreed to include a general statement in the Notes, referring to the need for the arbitral tribunal to consult and where possible, to seek the agreement of the parties (paragraph 9 of the Notes) without repeatedly mentioning that provision throughout the Notes. After discussion, it was agreed that paragraph 15 should not be amended as suggested. It was further agreed to consider revising the heading of Note 1 and restructuring its sections to highlight the general application of paragraph 9.

27. It was further agreed that the last sentence of paragraph 15 should be revised to not rule out the possibility of the arbitral tribunal modifying a procedural arrangement agreed by the parties by seeking their agreement to such modification.

Paragraph 16

28. With respect to paragraph 16, it was agreed that the last sentence should be revised so as not to imply that the production of transcripts might limit open discussion at procedural meetings. It was further agreed that the paragraph may include a cross-reference to paragraph 134 of the Notes dealing with arrangements for a record of hearings.

Paragraph 18

29. With respect to paragraph 18, it was agreed that the words "at all" should be inserted after the words "in a procedural meeting" in the first sentence to clearly indicate that the hypothesis addressed in that paragraph related to the non-participation of a party as well as its representative in a procedural meeting.

Note 2 (Language or languages of the arbitral proceedings)

Paragraph 20

30. While preference for the use of a single language for the arbitral proceedings was suggested in the Notes, it was agreed that the first sentence of paragraph 20 should nevertheless mention "language or languages" in order to indicate that the parties would be free to choose either a single language or multiple languages. Paragraph 20 should then be restructured to deal with the choice of one language by the parties.

Paragraph 21

31. It was clarified that the phrase "a single template translation for similar documents with largely pictorial or numeric content" at the end of paragraph 21 referred more generally to documents that included standard content, and therefore the words "similar documents" should be replaced by the words "documents of similar or standardized content".

Paragraph 26

32. With respect to the second sentence of paragraph 26, it was agreed that, for the sake of clarity, the word "however" should be replaced by words along the lines of "irrespective of who paid the costs when they were incurred".

Note 3 (Place of arbitration)

Paragraph 28

33. With respect to paragraph 28, it was agreed that the second sentence should be revised to clarify that the "determination" of the place of arbitration had legal consequences. It was further agreed that the sentence should mention that such determination would have an impact on the determination of the court competent with respect to the arbitral proceedings. In addition, it was agreed to add the words "and challenges" after the words "appointment".

34. A suggestion that the third sentence of paragraph 28 should be expanded to provide for the need for the parties and the arbitral tribunal to familiarize themselves with not only the "law" but also "practice", and "enforcement" law in

addition to the arbitration law and any other relevant procedural law, did not receive support.

Paragraph 29

35. With respect to paragraph 29, a suggestion was made that certain aspects of subparagraphs (ii)(a) and (iii) might be redundant and should be clarified.

36. Another suggestion was that rules or regulations on confidentiality should be included as one of the prominent legal factors in selecting the place of arbitration. That suggestion did not receive support.

Paragraph 31

37. Recalling the discussions at the forty-eighth session of the Commission (A/70/17, para. 41), the Working Group agreed that paragraph 31 should include an additional sentence providing that the parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions.

Note 4 (Administrative support for the arbitral tribunal)

38. A suggestion to expand Note 4 to address legal support in addition to administrative support was objected to as it fell outside the scope of the Notes.

Paragraph 36

39. The Working Group considered the two options contained at the end of paragraph 36 regarding the role of secretaries in relation to the decision-making of the arbitral tribunal. Preference was expressed for option 2 with the following modifications: (i) the word “typically” should be deleted, so as to clarify that secretaries should not be involved in any decision-making, save in relation to specific types of arbitration or in exceptional circumstances; (ii) concrete examples of such types of arbitration and exceptional circumstances should be provided; (iii) the word “function” should be deleted; (iv) the notion of secretaries performing tasks related to decision-making should be replaced by the notion of secretaries being involved or participating in the decision-making process. After discussion, it was agreed that paragraph 36 should be revised accordingly.

Paragraph 38

40. The suggestion to add the words “particularly if the secretaries carry out substantive tasks”, after the words “performed by the secretary” in the first sentence of paragraph 38 did not receive support. It was said that such an addition would put too much emphasis on the substantive tasks carried out by the secretaries and might raise questions about what constituted a substantive task.

Note 5 (Costs of arbitration)

Paragraph 39

41. It was suggested that the in-house costs of the parties should be included in the list of costs mentioned in paragraph 39, possibly under subparagraph (iv), or as a

separate paragraph providing information on the nature of those costs. It was pointed out that a reference to those costs would be important as the Notes should not mistakenly imply that only the legal fees of external counsel would be recoverable.

42. It was further mentioned that the treatment of in-house costs as part of arbitration costs was a controversial matter and the Notes should indicate the different approaches. After discussion, the Working Group agreed that that matter, which had not been previously discussed, should be brought to the attention of the Commission at its forthcoming session.

Paragraph 40

43. It was agreed to redraft paragraph 40 along the following lines: "It is useful for the arbitral tribunal to identify at the outset of the arbitral proceedings principles in determining the costs of arbitration and the allocation thereof unless the agreement between the parties, the applicable arbitration law or arbitration rules adequately address those matters."

Paragraph 42

44. It was agreed that a reference to paragraph 39 (iii) should be added in the first sentence of paragraph 42, as the fees and expenses of arbitral institutions would usually be included in the deposit for costs.

Paragraph 43

45. It was suggested that paragraph 43 should clarify that the payment by a party of the deposit should not have an impact on that party's ability to challenge the jurisdiction of the arbitral tribunal. That suggestion received support.

Paragraph 46

46. The Working Group agreed to delete the words "portion of the" in the first sentence of paragraph 46 in order to make clear that the decision on costs concerned not only whether costs were recoverable in full or in part, but also whether certain items of the costs claimed were admissible or reasonable.

Paragraph 47

47. It was suggested that more detailed information should be given in paragraph 47 on how the costs should be allocated. It was said that, for instance, a party could be successful on certain claims and unsuccessful on others. After discussion, the Working Group agreed to add the words "in whole or in part" after the words "the costs of the arbitration should be borne by the unsuccessful party or parties" in the third sentence.

48. It was suggested that the last sentence of paragraph 47 should be redrafted along the following lines: "Conduct so considered might include a party's failure to comply with procedural orders of the arbitral tribunal or a party's procedural requests (for example, document requests, procedural applications and cross-examination requests) that are unreasonable, to the extent that any such failure or any unreasonable request actually had a direct impact on the costs of the

arbitration and/or are determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings." That suggestion received support.

49. While a suggestion was made to include a reference to the complexity of the case as an additional element to be taken into consideration by the arbitral tribunal when allocating the costs, that suggestion did not receive support.

Paragraph 48

50. It was suggested that the last sentence of paragraph 48 should be simplified to state that decisions on costs could also be made when proceedings terminated without a final award. That suggestion did not receive support. It was explained that paragraph 48 adequately reflected that a decision on costs could be made at any stage of the arbitral proceedings. After discussion, it was agreed that the last sentence should be retained with additional examples.

Note 6 (Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration)

Paragraph 51

51. With respect to the first sentence of paragraph 51, it was suggested that the duration of the confidentiality obligation (whether it was indefinite or for a set period) was also a matter to be covered in an agreement on confidentiality. With respect to the last sentence of paragraph 51, it was suggested that reference might also be made to all persons associated with the parties during the arbitration proceedings in addition to witnesses and experts. It was further suggested that subsection (iii) in paragraph 51 could be expanded to cover instances where a State that was a party to arbitration might be obliged to disclose certain information under its laws, for example, legislation relating to providing public access to that information.

Paragraph 53

52. With respect to paragraph 53 which dealt with certain information or material deemed to be confidential to one of the parties, it was agreed that information relating to national security should also be included as an example, as this would be relevant in arbitration involving a State or a government entity.

Paragraph 54

53. A suggestion was made that the Notes should deal with issues that arose where a State or a government entity was a party to the arbitration in a comprehensive manner (see above, paras. 51 and 52). That suggestion was objected to on the basis that the Notes were intended to be used in a general and universal manner (see paragraph 1 of the Notes) without distinguishing different types of arbitration. It was further stated that paragraph 54 reflected a consensus reached by the Working Group that the issue of transparency in treaty-based investor-State arbitration, a topic worked on by UNCITRAL, deserved a different treatment and did not necessarily imply that it should be expanded to deal with arbitration involving States in a general manner.

54. With respect to the second sentence of paragraph 54, the suggestion to insert the words “and exceptions thereto” at the end of the penultimate sentence did not receive support. It was recalled that the purpose of that paragraph was to highlight that treaty-based investor-State arbitration might be subject to provisions on transparency, by contrast to commercial arbitration where confidentiality was viewed as an inherent characteristic. After discussion, it was agreed that paragraph 54 should remain unchanged.

Note 7 (Means of Communication)

Paragraph 55

55. With respect to paragraph 55, it was suggested that reference could be made under subparagraph (i) to the growing practice of using databases for uploading and sharing documents.

Note 8 (Interim measures)

Paragraph 60

56. With respect to the first sentence of paragraph 60, it was agreed that, for the sake of clarity, the words “for interim relief” should be deleted.

Paragraph 61

57. Recalling the discussion at the forty-eighth session of the Commission (A/70/17, para. 70), the Working Group agreed that the list of issues in paragraph 61 should include the possible conflict between an arbitral tribunal’s decision on an interim measure and a court-ordered interim measure.

Note 11 (Points at issue and relief or remedy sought)

Paragraph 67

58. With respect to paragraph 67, a number of suggestions were made. One suggestion was that the words “and obtain the parties’ approval of the list” should be added at the end of the first sentence. In response, it was said that requiring such approval did not reflect usual practice. A further suggestion was that paragraph 67 should reflect the practice of the parties preparing the list of points at issue. In response, it was state that such practice was not frequent and that such a list was normally prepared by the arbitral tribunal to clarify its understanding of the issues at stake. Yet another suggestion was that the paragraph could illustrate circumstances where the preparation of a list of points at issue might be unhelpful or inconvenient, for example, when the arbitration dealt with a complex case. Those suggestions did not receive support.

59. Furthermore, it was proposed that the list of points at issue should be characterized as being indicative and not exhaustive. It was further said that the list was often prepared in consultation with the parties and explicit reference to such consultation should be included in paragraph 67. It was mentioned that the preparation of such a list might be perceived as being distinct from decisions on the organization of arbitral proceedings, which was generally covered under paragraph 9 of the Notes. To reflect those suggestions, the Working Group agreed that the first sentence of paragraph 67 should be revised along the following lines:

"It is often considered helpful for the arbitral tribunal to prepare, in consultation with the parties, an indicative list of points at issue (…) parties' submission."

Paragraph 69

60. With respect to paragraph 69, the Working Group agreed to add the words "a separate" before "judicial review" in the second sentence to highlight the situation where, under the applicable arbitration law, partial awards were subject to review before the final award was rendered.

Paragraph 70

61. With respect to paragraph 70, the Working Group recalled that, at the forty-eighth session of the Commission, it was mentioned that depending on the circumstances (including the applicable arbitration law), it might not always be appropriate for the arbitral tribunal to inform the parties of its concerns (for instance, if it found that the relief or remedy sought was not sufficiently precise) (A/70/17, para. 78). After discussion, the Working Group agreed that the current text sufficiently covered the views expressed at the Commission.

Note 12 (Amicable Settlement)

Paragraph 71

62. A suggestion was made that the following sentences should be inserted after the first sentence of paragraph 71: "Such initiative by the arbitral tribunal should not be considered a prejudgement of the outcome of the proceedings before the relevant body. No draft or proposal of settlement agreement should limit the rights of any party in any subsequent proceeding." It was further suggested that paragraph 71 could refer to the diversity of practices, in addition to referring to the different legislative approaches. After discussion, the Working Group recalled that the current text of paragraph 71 was the result of a compromise reached by the Working Group reflecting such concerns and agreed that it should remain unchanged.

Note 13 (Documentary evidence)

Paragraph 75

63. A suggestion was made that the words "the reasons for the request" in the second sentence of paragraph 75 should be replaced by more detailed wording along the following lines, which was found in the IBA Rules on the Taking of Evidence in International Arbitration: "a statement as to how the documents requested are relevant to the case and material to its outcome". That suggestion did not receive support as the Notes did not refer to specific standards or guidance texts and as the current formulation of paragraph 75 provided a more general and neutral approach.

Paragraph 77

64. The Working Group agreed that paragraph 77, which highlighted the different approaches to, and practices regarding, disclosure of documents, could be placed before paragraph 75.

65. A suggestion was made to add at the end of paragraph 77 the words “and adverse inferences, if any, resulting from non-disclosure”. While it was agreed that that wording could be added as it reflected common practice, it was suggested that it could be better placed possibly in paragraph 73, as a tribunal would generally not make an advance determination on inferences that it would draw from non-disclosure.

Paragraph 79

66. It was suggested that paragraph 79 should note that certain arbitration rules prevented an arbitral tribunal from taking steps to obtain documentary evidence from a third party without obtaining the consent of the parties. After discussion, the Working Group agreed to insert the words “and permitted by applicable arbitration law and rules” after the words “where necessary”.

Paragraph 81

67. The Working Group agreed that a reference to the “completeness”, in addition to provenance and authenticity, of evidence should be inserted in paragraph 81.

Notes 14 to 18

68. Before the close of the session devoted to the consideration of the Notes, the Working Group heard suggestions with respect to the remaining parts of the Notes, which would be reflected in the updated draft of the Notes for consideration by the Commission.

Note 14 (Witnesses of fact)

69. With respect to paragraph 86, the opening words “Subject to the applicable arbitration laws and arbitration rules” should be deleted.

70. With respect to paragraph 87, the words “sufficient to” should be replaced by the words “that may”, in the first sentence; the second sentence should be placed at the end of that paragraph.

71. With respect to paragraph 89, the first sentence should refer to the party in addition to the persons related to that party and refer to divergent approaches in how a party not eligible to testify as a witness could nevertheless be heard.

72. With respect to paragraph 90, the second sentence should include a reference to contacts made to seek information about the facts of the case, in addition to contacts in relation to the preparation of written witness statements and oral testimony. Paragraph 90 should indicate that international arbitration could differ from domestic court practice in respect of the permissibility of pre-testimony contact, as well as in respect of the nature of such contact. The last sentence of that paragraph should be expanded to reflect the controversial nature and divergent approaches to the preparation of the witness for the hearing.

73. Paragraph 91 should mention that the parties should be informed that the arbitral tribunal might draw inferences from non-appearance of a witness.

74. With respect to paragraph 92, the words “or to lend support to the efforts of parties by inviting the appearance of a witness” should be added at the end of that paragraph.

Note 15 (Experts)

75. With respect to paragraph 94, the words “or otherwise assisting it in matters requiring specialized knowledge or skills” should be added at the end of that paragraph.

76. With respect to paragraph 97, the words “, factual assumptions” should be inserted before the words “and issues to be covered” in the first sentence.

77. As the parties would always be entitled to comment on a single joint report of the experts, the last sentence of paragraph 100 should be amended accordingly. Further, the question of whether the parties would be bound by the conclusions of the joint report by experts should be addressed.

78. Paragraph 104 should reflect that parties would usually be given an opportunity to comment on the expert’s mandate, in addition to expert’s qualification, impartiality and independence.

79. Paragraph 106 should expand on the question of ex-parte communication between an expert and a party and clarify how an expert’s ex-parte communication would be treated.

80. Paragraph 107 should clarify the meaning of “formal and informal submissions” including the possibility for the parties to comment on the tribunal-appointed expert’s report through their own expert’s report.

Note 16 (Inspection of a site, property or goods)

81. The words “and the manner” should be inserted after the words “time schedule” in paragraph 111.

Note 17 (Hearings)

82. With respect to paragraph 118, the words “before or during the hearings” should be added at the beginning of the first sentence. The last sentence of paragraph 118 should state that the parties would be able to provide a summary of the case as it presented itself at the end of the proceedings.

83. With respect to paragraph 122, the manner in which time should be kept throughout the proceedings should be mentioned in a general fashion.

84. With respect to paragraph 125, cross-reference should be made to paragraph 132 of the Notes, which illustrated the order of questioning witnesses. The last sentence of paragraph 125 could be deleted as it did not reflect current practice.

85. With respect to paragraph 126, the second sentence should refer not only to “experts” but also to “witnesses”.

86. With respect to paragraph 128, the Notes should indicate the flexibility given to the arbitral tribunal to not examine or cross-examine a witness even when requested by a party as a means to effectively manage the proceedings. In response, it was mentioned that such flexibility could raise concerns about due process and would require further consideration.

87. With respect to paragraph 129, reference to "managing directors or executives" should be included in addition to the example of "in-house legal counsel".

88. With respect to paragraph 131, the words "or when no arbitration rules apply" in the last sentence should be deleted.

Note 18 (Multiparty arbitration)

89. With respect to the second sentence of paragraph 137, the following could be added: "for example, if all the parties do not have an equal say in the appointment of the arbitral tribunal, it may raise concerns about the fairness of the proceedings".

V. International commercial conciliation: enforceability of settlement agreements

90. Upon completing its deliberation of the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, the Working Group considered the topic of enforceability of settlement agreements on the basis of document A/CN.9/WG.II/WP.195. It was agreed that section B on validity and content of settlement agreements would be considered in conjunction with section D on enforcement procedure and defences to enforcement. Furthermore, the Working Group agreed to consider the formulations of possible provisions contained in document A/CN.9/WG.II/WP.195 with the aim of delineating the various issues and focusing the discussion. Paragraphs referred to in the sections below are those contained in document A/CN.9/WG.II/WP.195.

91. A comment was made that the Working Group should be mindful of the need to ensure that the work on enforceability of settlement agreements would not result in duplication of efforts with work undertaken by the Hague Conference on Private International Law (the Convention on the Choice of Court Agreements (2005) and the Judgments Project). Further, it was said that the scope of a possible instrument on enforcement of settlement agreements (referred to below as the "instrument") should be limited to apply to settlement agreements resulting from conciliation and should preserve the flexible nature of conciliation. It was generally felt that those matters could be dealt with as the Working Group made progress.

A. International commercial settlement agreements resulting from conciliation

92. Recalling the understanding of the Working Group at its sixty-third session that the instrument should apply to enforcement of international commercial settlement agreements resulting from conciliation, the Working Group engaged in discussion on the different aspects to be considered.

"International" settlement agreements

93. Recalling the discussions during the preparation of the UNCITRAL Model Law on International Commercial Conciliation (referred to below as the "Model Law"), which only provided a definition of an international conciliation process, a

suggestion was made that there was no need to limit the scope of the instrument to international settlement agreements and that the aim should be to provide an enforcement mechanism regardless of whether the settlement agreement was international or not. It was stated that such an approach would increase the usefulness of the instrument and take into account the evolving and global business practices. That suggestion did not receive support.

94. It was widely felt that the scope of the instrument should be limited to "international" settlement agreements and that the instrument should provide clear and simple criteria for determining whether or not a settlement agreement fell under the scope of the instrument. It was further noted that subjective elements should not form the basis of such criteria.

95. In that context, it was pointed out that the formulations in paragraphs 10 and 11 provided for a useful basis. However, it was noted that they were slightly distinct as the formulation in paragraph 11 not only defined what an "international" settlement agreement was but also provided the scope of application of a possible convention, thus elaborating the conditions for its application (i.e. that the State where enforcement was sought would need to be a Contracting State).

96. The Working Group then considered the formulation in paragraph 10. It was widely felt that subparagraph (a) as contained in paragraph 10 provided clear and objective criteria, which would be sufficient for the purposes of the instrument.

97. In that context, a suggestion was made that the instrument might provide a more detailed explanation of what was meant by a "party", taking into account the current global business practices as well as complex corporate structures. For instance, it was suggested that consideration be given to the shareholding of the parties. It was stated that such an approach could effectively broaden the scope of the instrument.

98. With respect to subparagraph (b) as contained in paragraph 10, a number of concerns were expressed: (i) that it introduced unnecessary complexities, (ii) that it might touch upon certain aspects of domestic law or laws governing domestic settlement agreements, and (iii) that it would be difficult to ascertain whether a settlement agreement fell within that category. While there was some support for retaining subparagraphs (b)(i) and (ii) in paragraph 10, doubts were expressed with regard to subparagraph (b)(iii). It was generally felt that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that had their places of business in the same State, even if the enforcement was sought in another State. Accordingly, there was general support to delete subparagraph (b)(iii) in paragraph 10 and subparagraph (ii) in paragraph 11. Nonetheless, there was some support to retain subparagraph (b)(iii) in paragraph 10.

99. Another suggestion was that reference could be made to article 1(3)(c) of the UNCITRAL Model Law on International Commercial Arbitration, which provided that an arbitration was also international if the parties expressly agreed that the subject matter of the arbitration agreement related to more than one country.

100. With respect to the formulation in paragraph 12, a number of suggestions were made. One was that the last sentence could be deleted as the scope of the instrument would be limited to "commercial" settlement agreements, which presupposed that parties would usually have a place of business. In response, it was pointed out that

non-business entities and natural persons might also engage in commercial activities and conclude settlement agreements, which would require a reference to their habitual residence. It was further pointed out that there existed sufficient guidance on the notion of place of business. Another view was that the notion of "place of business" should be defined in the instrument.

101. Another suggestion was that the concept of "habitual residence" could be further developed based on the statutory seat, the law of incorporation, the place of central administration, or the principal place of business.

"Commercial" settlement agreements

Notion of "commercial"

102. The Working Group recalled that, at its sixty-third session, it was generally felt that the instrument should apply generally to the enforcement of "commercial" settlement agreements. The Working Group reiterated its understanding that the instrument should apply to enforcement of settlement agreements of a commercial nature. The Working Group considered how to define the commercial nature of the settlement agreement.

103. Preference was generally expressed for stating in general terms that the instrument would apply to commercial settlement agreements, without providing for an illustrative list or definition of the term "commercial" as suggested in footnote 8.

104. It was suggested that, depending on the form of the instrument, the notion of commercial could be considered through the scope provisions of the instrument. In that respect, the following drafting suggestion was made: "The instrument shall apply in commercial matters".

105. Suggestions were made that the definition of "commercial" should be considered in conjunction with the grounds for refusing enforcement particularly in relation to grounds indicated in subparagraphs A and B in paragraph 55. It was further suggested that the definition of the term "commercial" should be considered in light of its possible impact on the enforcement of settlement agreements.

Exclusions and reservations

106. It was generally felt that consumers, family and employment law matters should be explicitly excluded. It was also generally felt that there were no other exclusions to be mentioned in the instrument. A suggestion was made that the instrument should refer to family or employment "matters" instead of "law". In response, it was stated that family "matters" could encompass commercial disputes involving family member even without family law aspects, such as divorce or custody, and such disputes would actually be best suited for resolution by conciliation.

107. It was suggested that the use of the term "consumer" in option 2 in paragraph 18 should be avoided as it was too generic, and understood differently in various jurisdictions. As a drafting suggestion, reference was made to "settlement agreements concluded by one of the parties for personal or household purposes".

108. It was mentioned that the scope of family law matters was different in various jurisdictions and that clarification might be necessary possibly with examples (for example, religious bequests, inheritance and guardianship).

109. The Working Group reiterated its understanding that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as those entities also engaged in commercial activities and might seek to use conciliation to resolve disputes.

110. It was suggested that if the instrument applied to commercial settlement agreements and a settlement agreement between a government entity and an investor was considered to be of a commercial nature under the applicable law, such an agreement should fall under the scope of the instrument.

111. It was suggested that if the instrument were to take the form of a convention, option 1 of paragraph 21 should be amended to only permit a State to declare that it would not apply the instrument to settlement agreements to which its government or governmental entities or agencies were a party.

112. It was suggested that the words "including their exclusion from the applicability of the instrument" could be inserted in option 2 of paragraph 21.

113. It was suggested that the instrument should not apply to liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*). It was suggested that the instrument should not refer to notions of State immunity.

114. After discussion, the Working Group agreed to further consider options 1 and 2 in paragraph 21 as well as the option provided above (see above, para. 113).

Settlement agreements resulting from "conciliation"

115. A suggestion was made that the instrument should apply to settlement agreements regardless whether they resulted from conciliation or not, as long as the parties to the settlement agreement expressly agreed to the application of the instrument. Although it was mentioned that the objective should be to promote all types of alternative dispute resolution methods without favouring conciliation over other means, that suggestion did not receive support. The Working Group reiterated its understanding that the instrument should apply to settlement agreements resulting only from conciliation.

116. With respect to the possible definition of the term "conciliation", it was reiterated that it should be broad and inclusive to cover different types of conciliation techniques. There was general support that the definition contained in article 1(3) of the Model Law as well as the formulation provided in paragraph 23, which built on article 1(3) of the Model Law with some minor adjustments, provided a good basis for discussion.

117. A suggestion was made that "conciliation" should be defined as a "structured" process to emphasize that the process involved a third person that facilitated the settlement agreement and to differentiate settlement agreements resulting from conciliation and those resulting from mere negotiation. While there was some support for that insertion, it was noted that it would constitute a departure from the definition contained in the Model Law and the purported aim of that insertion was already sufficiently highlighted in that definition. It was further mentioned that the

term “structured” was not commonly used to qualify the conciliation process and could be understood differently, possibly introducing domestic requirements on conciliation into the instrument.

118. Another proposal was that the definition in article 1(3) of the Model Law should be supplemented by words along the following lines: “This definition excludes settlement agreements approved by a court or concluded before a court in the course of proceedings, as well as those formalized as awards on agreed terms issued by arbitral tribunals.” The possible implication of that proposal in situations where an agreement would be enforced in more than one jurisdiction and could be approved by one of the courts as part of that process was questioned. In response, it was clarified that that exclusion should not apply in such circumstances. It was generally felt that it would not be appropriate to place such text within the definition of “conciliation”. It was agreed that the proposed text would be considered when the Working Group discussed issues relating to settlement agreements reached during judicial or arbitral proceedings (see below, paras. 122-131).

119. A question was raised whether the term “conciliation” as defined in the instrument would cover conciliation administered by, or undertaken under, the auspices of an institution. In response, it was widely felt that the two formulations mentioned above (see para. 116) were broad enough to cover such type of conciliation and that it would not be necessary to include an explicit reference.

120. A view was expressed that the instrument should refer to “mediation” instead of “conciliation”, as it was a more widely used term.

121. After discussion, it was widely felt that the definition of “conciliation” should not be overly prescriptive and should illustrate the key features of the process (i.e. that a third person assisted the parties to reach an amicable settlement of their dispute) irrespective of the terminology used to refer to that process. In that context, general support was expressed for using the definition in article 1(3) of the Model Law as a basis for future work, possibly incorporating the adjustments provided in the formulation in paragraph 23.

Settlement agreements reached during judicial or arbitral proceedings

122. The Working Group then considered whether settlement agreements reached during judicial or arbitral proceedings should fall within the scope of the instrument. It was mentioned that such settlement agreements could be broadly categorized into those that were recorded in a judicial decision or an arbitral award (on agreed terms) and those that were not recorded as such.

123. With respect to those that were recorded in a judicial decision or an arbitral award, it was mentioned that inclusion of such settlement agreements within the scope of the instrument could lead to overlap or conflict with the Convention on Choice of Court Agreements and the Judgements Project of the Hague Conference on Private International Law as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (referred to below as the ‘‘New York Convention’’). It was cautioned that their inclusion could result in unnecessary complications in the implementation of the instrument and possibly open doors to abuse by parties. It was further stated that a single legal text should not be subject to different enforcement regimes. Along the same line, it was mentioned that even if a judicial decision or an arbitral award recorded the terms of

a settlement agreement, it deserved a different treatment and should be duly enforced under the relevant regime. Accordingly, it was generally felt that a settlement agreement recorded in a judicial decision or an arbitral award should not fall within the scope of the instrument.

124. Nonetheless, views were expressed that such exclusion would result in depriving the parties of the opportunity to utilize the enforcement regime envisaged by the instrument. It was also noted that possible complications resulting from multiple enforcement regimes should be left to be addressed by courts where enforcement was sought. A concern was expressed with respect to the possibility of an award on agreed terms not being subject to court enforcement, for example, if the court found such an award to not fall within the scope of the New York Convention. It was stated that in such a scenario, in addition to not being able to enforce the award, the affected party would be deprived of the opportunity to resort to the enforcement mechanism envisaged by the instrument.

125. With respect to settlement agreements reached during judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award, it was widely felt that they should fall within the scope of the instrument. It was mentioned that even if the parties initially sought to resolve their dispute through judicial or arbitral proceedings, that should not result in excluding the settlement agreement from the scope of the instrument, as long as the agreement resulted from conciliation and was not recorded in a judicial decision or an arbitral award.

126. A number of different approaches to address issues relating to settlement agreements reached during judicial or arbitral proceedings were suggested.

127. One approach was that the definition of “conciliation” would expressly carve out settlement agreements recorded in a judicial decision or an arbitral award from the scope of the instrument (see above, para. 118).

128. Another approach was to address the issues in the scope provisions of the instrument along the following lines: “The instrument applies to settlement agreements, which were made in the course of judicial or arbitral proceedings but not recorded as a judgement or an arbitral award”.

129. Yet another approach was to provide States with the flexibility in addressing issues relating to settlement agreements reached during judicial or arbitral proceedings, possibly through a declaration or a reservation, if the instrument were to be a convention. It was noted that such an approach would avoid blanket exclusions in the instrument, which would carve out settlement agreements reached during judicial or arbitral proceedings entirely, and provide States that wished to do so the option to apply the instrument to such settlement agreements. It was, however, cautioned that such an approach could result in multiple regimes complicating the enforcement procedure and possibly in forum shopping by parties seeking enforcement.

130. A fourth approach was that there would be no need to specify or highlight those issues in the instrument, as it should be left to the courts to determine whether the instrument would apply to settlement agreements reached during judicial or arbitral proceedings.

131. In that context, the Working Group also considered the possible impact that the involvement of a judge or an arbitrator in the conciliation process could have on the

applicability of the instrument to settlement agreements resulting from that process. It was mentioned that there could be instances where a judge or an arbitrator might initiate the conciliation process with a third party acting as a conciliator and where the judge or the arbitrator might itself facilitate an amicable settlement, if permitted to do so. It was felt that a settlement agreement resulting from both scenarios would fall under the scope of the instrument and that mere involvement of a judge or an arbitrator should not result in excluding the settlement agreement from the scope of the instrument.

Definition of "settlement agreement"

132. It was suggested that a definition of "settlement agreement" could read as follows: "A settlement agreement is an agreement in writing that is concluded by the parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute." It was mentioned that the elements therein could be included either in the definition or formulated as form requirements. The Working Group agreed to further consider the issue at a later stage.

B. Form and other requirements of settlement agreements

A written agreement concluded by the parties

133. With respect to form requirements of settlement agreements, it was reiterated that those requirements should not be prescriptive and should be set out in a brief manner preserving the flexible nature of the conciliation process. It was generally agreed that the instrument should require that the settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement. It was also widely felt that the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce could be reflected in the instrument, allowing for the use of electronic and other means of communication to meet the form requirements therein.

134. A suggestion was made that the instrument should require that the settlement agreement be in a "single document" as distinct from mere exchange of communication between the parties. While there was some support for that suggestion, it was questioned whether the notion of "single document" was clear and whether it would be feasible to implement such a requirement considering that settlement agreements varied greatly in form and in content. It was also cautioned that such a requirement might result in excluding certain documents explicitly mentioned in the single document. In that context, attention was drawn to a wide range of contract formulation practices, including incorporation by reference.

135. Another suggestion was that there should be an indication in the settlement agreement that it superseded all previous relevant agreements between the parties. Yet another suggestion was that the instrument should require that a settlement agreement be recorded or deposited with a public or supervisory body so that its performance could be monitored. Those suggestions did not receive support.

Other requirements

136. The Working Group considered possible additional requirements in paragraph 42, which would be an indication: (i) that a conciliator was involved in the process; (ii) that the settlement agreement resulted from conciliation; (iii) that the parties to the settlement agreement were informed of the enforceability of the settlement agreement before or upon its conclusion; and (iv) that the parties opted into the enforcement mechanism envisaged by the instrument.

137. In relation to requirements (i) and (ii) in paragraph 42, it was widely felt that they were relevant, and could be retained, in particular following the understanding of the Working Group that the instrument should cover settlement agreements resulting from conciliation (see above, para. 92).

138. However, diverging views were expressed on how to formulate such additional requirements. A view was that specific form requirements should be provided for (such as that the conciliator should sign the settlement agreement certifying that a conciliation took place, or that he or she should indicate his/her identity in the settlement agreement or submit a separate document for that purpose). One advantage of such form requirements, it was said, would be to avoid uncertainty about the applicability of the instrument. Those favouring that approach expressed different views on whether such requirements should be recorded in the settlement agreement itself or in a separate document.

139. A different view was that formulating such form requirements would run contrary to the objective of providing a simple and straightforward enforcement mechanism, aimed at promoting conciliation. In addition, formalities required in the conciliation process and its outcome varied among jurisdictions and such specific requirements would add another layer of complexity. It was said that form requirements in the instrument would bring more rigidity, without improving certainty. Further it was said that a number of States did not have legislation on conciliation and that requiring formalities might be detrimental to the development of conciliation in those States not familiar with conciliation.

140. Therefore, it was suggested that a preferable approach would be to avoid detailed form requirements which would be an impediment to the use of the instrument and that the instrument should only include those requirements necessary to ascertain that a settlement agreement fell within its scope. As an illustration of such an approach, a proposal was made that the parties could be required to show through appropriate means that conciliation took place. It was said that such an approach would take into account the context in which the conciliation took place, promote flexibility, while giving the necessary level of certainty as to the process that led to the settlement agreement. It was suggested that that proposal should be elaborated for further consideration.

141. The requirement (iii) in paragraph 42 was generally considered to be superfluous, particularly if the requirement (iv) were to be retained.

142. Diverging views were expressed in relation to the requirement (iv) in paragraph 42 (see also below, paras. 180-182). In favour of including that requirement in the instrument, it was said that an opt-in mechanism would ensure that parties would be aware of the expedited enforcement mechanism envisaged by the instrument. It was highlighted that the requirement for express consent would

avoid the situation where the parties to conciliation would find a strengthen regime imposed upon them, which they might not find desirable. Contrary views were expressed that such an opt-in mechanism would limit the application of the instrument and should thus be avoided. In addition, it was observed that the New York Convention did not require parties to opt-in. From a practical perspective, it was said that, in most cases, it would be unlikely for the parties to agree to an expedited enforcement at the final stages of the conciliation process.

143. It was pointed out that form requirements in domestic laws governing conciliation were diverse and a possible approach for including form requirements in the instrument would be to permit States to make declarations, yet on a limited number of requirements. A further suggestion was that the instrument should focus on the requirements necessary to enforce "international" settlement agreements, thereby avoiding any application of requirements found in domestic legislation.

144. During the discussion on possible additional requirements, the need to find a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from conciliation and, on the other, the need for the instrument to preserve the flexible nature of the conciliation process, was underlined. As a general comment, it was said that such additional requirements could be formulated as a pre-condition for applying for enforcement or as defences for resisting enforcement.

C. Enforcement procedure and defences to enforcement

Direct enforcement

145. With respect to the formulation in paragraph 45, it was suggested that reference should be made to "recognition" in both paragraphs therein (see also below para. 146). It was further suggested that the placement of that formulation in the instrument would need to be reconsidered as it dealt with the procedural aspects of obtaining enforcement and should follow the provisions on conditions for enforceability.

Notion of recognition

146. The Working Group considered whether a settlement agreement would need to be given effect through a procedure akin to recognition and what legal value such a procedure would give to settlement agreements. Different views were expressed. One was to adopt the approach of the New York Convention and refer to both recognition and enforcement. Another was that it would be preferable to avoid referring to the notion of "recognition". It was explained that the term "recognition" was understood in certain jurisdictions to have res judicata effect and the application of that principle might bear different consequences depending on the jurisdiction. Another view was that the notion of recognition should be qualified or its meaning elaborated in the instrument. The Working Group agreed to consider that matter further at a future session.

Defences to enforcement and applicable law

147. The Working Group considered the possible defences to enforcement, based on the assumption that the instrument would provide direct enforcement. It was reiterated that the defences in the instrument should be limited and not cumbersome for the enforcement authority to implement.

148. As a general comment, it was said that the standard for enforcement, including the defences to be provided in the instrument should not be lower than those provided for enforcement of arbitral awards under the New York Convention. Further, a preferable approach would be to differentiate between defences that could be raised by the parties and those that might be raised by the enforcing authority at its own initiative (ex officio), as provided in the formulation in paragraph 56.

149. A suggestion was made to determine, for the purposes of the discussion, whether settlement agreements were to be treated as contracts between private parties or acts of a particular nature resulting from a specific dispute resolution procedure.

150. The Working Group proceeded to consider the list of defences contained in paragraphs 55 and 56 as a basis for substantive discussion and not for drafting purposes.

Incapacity, coercion and fraud (subparagraph A in paragraph 55 and subparagraph 1(a) in paragraph 56)

151. A suggestion was made that incapacity should not be included as a defence as that matter would normally have been raised by the parties during the conciliation process or at the time of the conclusion of the settlement agreement. The example of institutional rules addressing the parties' capacity or authority to conclude the settlement agreement at the outset of the conciliation process was given.

152. In response, it was said that lack of capacity, as a ground for refusing enforcement, covered a wide range of situations (for instance, incapacity in the context of bankruptcy) and was commonly found in international instruments as well as domestic legislation. After discussion, it was generally felt that incapacity should be retained in the list of defences.

153. Support was also expressed for retaining "coercion" and "fraud" as defences, with the suggestion that alternative or more general wording might be preferable. For instance, it was suggested that paragraph 1(c) of the formulation in paragraph 56 could constitute a general provision that would also cover matters relating to coercion and fraud (see below, para. 159). It was further suggested that it might be desirable to provide that that defence would only apply when the party enforcing the settlement agreement was involved in the coercion or fraud.

Subject matter of the settlement agreement not capable of settlement (subparagraph B in paragraph 55 and subparagraph 2 (a) in paragraph 56)

154. There was general agreement to retain "the subject matter of the agreement not capable of settlement by conciliation" as a defence, which could also be considered by the enforcing authority ex officio, as proposed in the formulation in paragraph 56.

Subject matter of the settlement agreement contrary to public policy (subparagraph C in paragraph 55 and subparagraph 2 (b) in paragraph 56)

155. There was general agreement to retain public policy in the list of defences, which could also be considered by the enforcing authority ex officio.

156. It was noted that public policy covered both substantive and procedural aspects. It was said that the flexible nature of conciliation could be easily used by parties to resist enforcement using the procedural public policy defence. In response, it was said that the enforcing authority would duly take into account the characteristics of conciliation in assessing such defence.

157. It was proposed that reference should be made to "international" public policy, as that notion would be more restrictive. In response, it was said that there was an established trend in case law that interpreted "public policy" more narrowly when there was an element of extraneity. It was suggested that the notion of international public policy might be understood as public policy shared by a number of States, which would make it more difficult for States to adopt the instrument.

Contrary to the terms and conditions of the settlement agreement (subparagraph 1 (b) in paragraph 56)

158. No comments were made with respect to subparagraph 1 (b) in paragraph 56.

Validity of the settlement agreement (subparagraph 1 (c) in paragraph 56)

159. It was suggested that subparagraph 1(c) in paragraph 56 could constitute a provision that would address matters relating to the validity of the settlement agreement in general terms. It was suggested that the words in square brackets could be retained for further consideration.

160. Concerns were expressed that subparagraph 1(c) would open the possibility of refusing enforcement in a wide range of circumstances, and result in the application of domestic legislation requirements, that might be too broad and include formal requirements thereby increasing the complexity and uncertainty of the outcome of enforcement under the instrument. In response, it was said that the inclusion of a provision in the instrument that the standard for enforcement would not be lower than those provided for enforcement of arbitral awards under the New York Convention (see above, para. 148) could accommodate those concerns on the understanding that such a provision would also apply to form requirements. It was suggested that following the decision of the Working Group at its sixty-third session that there should be no review mechanism as a pre-requisite to enforcement (A/CN.9/861, paras. 80-84), the instrument should not give the enforcement authority the ability to interpret the validity defence to impose requirements in domestic law. Suggestions were made to either omit validity in the list of defences, or to limit it to the validity of the settlement agreement, determined in accordance with the law deemed applicable to it by the enforcing authority. In that context, it was pointed out that it might be useful to differentiate the grounds for resisting enforcement and the grounds for challenging the validity of the settlement agreement, which might not necessarily fall under the competence of the enforcing authority. After discussion, there was a general understanding that consideration of the validity of the settlement agreement by the enforcing authority should not extend to form requirements.

161. Views were expressed that the terms "[not valid]" should be deleted from subparagraph 1(c), so that the provision would only refer to the settlement agreement being "null and void, (…) enforced" following wording used in article II of the New York Convention and article 8 of the Model Law on International Commercial Arbitration.

The settlement agreement is not binding, is not final, has been subsequently modified or the obligations therein have been performed (subparagraph 1 (d) in paragraph 56)

162. It was generally felt that the provisions of subparagraph 1(d) in paragraph 56 could be retained and encompass other situations, such as when the settlement agreement contained conditional or reciprocal obligations and when certain obligations in the settlement agreement had been breached.

Enforcement of the settlement agreement would be contrary to a decision of another court or competent authority (subparagraph 1(e) in paragraph 56)

163. With respect to subparagraph 1(e), in paragraph 56, a few questions were raised. One was with regard to the meaning of "another court or competent authority". To avoid ambiguity, it was suggested that reference should be made to "the competent court or authority at the place where the settlement agreement was concluded or the place chosen by the parties". In response, it was noted that such a provision would be at odds with certain instruments or approaches, for example, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano, 2007). It was generally felt that there was no need to provide for such specificity in the instrument, particularly as it would be difficult to determine the place where the settlement agreement was concluded.

164. In response to a question on what types of decisions by another court or competent authority would be taken into account by the enforcing authority, it was mentioned that they could be decisions on the validity of the settlement agreement as well as those in relation to the recognition and enforcement of the settlement agreement in another State. In that context, a suggestion was made to limit the types of decisions to those that found a settlement agreement null and void. However, it was also suggested that decisions by another court or competent authority which found, for example, that an obligation had been performed or performed in part, might also be a valid ground on which an enforcement authority might wish to rely for refusing enforcement.

165. Diverging views were expressed with respect to whether subparagraph 1(e) should be retained in the instrument. One view was that there was merit in retaining the defence, as it was presented in a permissive manner ("may be refused") and it could accommodate the interest of States that might have obligations under certain treaties regarding recognition of decisions by foreign courts. It was highlighted that the enforcing authority would, in any case, have the final word in the enforcement process.

166. Another view was that there was no need to retain the defence in the instrument. It was pointed out that the provision as currently drafted could invite forum shopping by parties as it was not clear which would be the competent court or authority making the decision, possibly hindering the enforcement stage. It was also noted that the provision might inadvertently expand the principle of *res judicata* to

those decisions that did not have such effect. In addition, it was stated that a refusal of enforcement by a court or competent authority in another State should not have an impact on the decision to be made by an enforcing authority.

Additional defences

167. In addition to the defences provided in the formulations in paragraphs 55 and 56, the following were suggested as possible defences: non-compliance with the form requirements contained in the instrument, mistake or misrepresentation in the settlement agreement and that the settlement agreement was obtained by duress or deceit.

Relationship of enforcement proceedings with judicial or arbitral proceedings

168. The Working Group then considered whether the instrument should include a provision on the impact judicial or arbitral proceedings with respect to settlement agreements could have on their enforcement process. Acknowledging the benefits of and the need for the enforcing authority to duly respect decisions by a court or an arbitral tribunal, it was suggested that the instrument could provide for a non-mandatory rule that the enforcing authority might adjourn the enforcement process in such circumstances.

169. After discussion, it was widely felt that the instrument could include a provision based on article VI of the New York Convention, for example, providing that the enforcing authority might, if it considered proper, adjourn the enforcement process when there existed an application for a judicial or arbitral proceedings about the settlement agreement, in accordance with the rules of procedure of the enforcing State.

D. Conciliation process and content of settlement agreements

Impact of the conciliation process and the conduct of conciliators

170. The Working Group then engaged in a discussion on whether the conciliation process or the conduct of a conciliator could have an impact on the validity of the settlement agreement and its enforceability.

171. One view was that non-compliance by conciliators with standards of conduct or relevant domestic legislation (for example, misconduct or lack of impartiality), should have an impact on the settlement agreement and that the instrument should include a provision along the lines of article V(1)(d) of the New York Convention. It was mentioned that if a party furnished proof to the enforcing authority that the conciliation process had been tainted, the enforcing authority might refuse the enforcement of the settlement agreement. It was also noted that serious non-compliance would fall under the public policy defence.

172. In response, the voluntary nature of the conciliation process was highlighted. It was emphasized that parties were free to withdraw from the process at any time, that the conciliator lacked the authority to impose a settlement and that a settlement was a result reached voluntarily between the parties. It was also mentioned that conciliators were not subject to the same impartiality requirements as arbitrators or judges and as such, the breach of impartiality by a conciliator should not amount to

a defence for refusing enforcement. It was reiterated that it was the parties themselves that concluded the final settlement agreement. In that context, a question was posed whether a different approach would be required if one of the parties became aware of the misconduct of the conciliator or of the other party only after the conclusion of the settlement agreement. After discussion, it was generally felt that such misconduct would usually qualify as one of the defences provided in the formulation in paragraph 56 (see above, paras. 153 and 167).

173. In that context, it was noted that there were existing resources that provided information about issues which arose at the stage of enforcement of settlement agreements. Delegations were invited to provide information to the Secretariat so as to assess current practice.

174. During the discussion, a suggestion was made that, while the instrument need not deal with the impact of the conciliator's conduct on the enforceability of the settlement agreement, it might be necessary to ensure consistency of the instrument with the Model Law which included a mandatory provision, article 6 (3), which required the conciliator to maintain fair treatment of the parties.

175. After discussion, there was an emerging view that serious misconduct during the conciliation process, which had an impact on its outcome, would probably be covered by the other defences to be provided for in the instrument. Delegates were encouraged to review the experience of those jurisdictions where the enforcement of settlement agreements had been the subject of litigation. It was suggested that that experience might be of assistance in confirming the emerging view of the Working Group.

Set-off

176. A suggestion was made that the instrument should not deal with instances where the settlement agreement might be used for set-off purposes based on the same reasons that it would be inappropriate for the instrument to deal with the recognition of settlement agreements. That issue was left for further discussion by the Working Group.

Dispute resolution clause in settlement agreements and party autonomy

177. Acknowledging that a settlement agreement might include a dispute resolution clause (for example, an arbitration clause or a choice of court provision), the Working Group considered whether it would be necessary for the instrument to deal with those issues. It was generally felt that the instrument would not need to include any provisions on the matter, as the treatment of such dispute resolution clauses were dealt with in other texts (for example, the New York Convention or the Convention on Choice of Court Agreements) and as the objective of the instrument was to facilitate enforcement.

178. In that context, the following example was provided: if a party were to seek enforcement of a settlement agreement which included an arbitration clause without engaging in arbitration, the party against whom the enforcement was invoked could raise a defence under subparagraph 1(b) in paragraph 56, as it would be contrary to the terms and conditions of the settlement agreement. If the enforcing authority were to be a court, it would also refer the parties to arbitration in accordance with article II(3) of the New York Convention.

179. It was generally felt that the parties' choice of dispute resolution included in the settlement agreement should be respected. It was noted that a distinction should be made between the dispute in merit and the enforcement process. However, it was also noted that such a distinction might not be practical.

Parties' agreement to apply the instrument (opt-in)

180. While the issue of whether the application of the instrument would depend on the parties' agreement to its application would remain under discussion at a future session, diverging view were expressed (see also above, para. 142).

181. There was support for the opt-in mechanism so as to provide parties with that option, to highlight the voluntary nature of the conciliation process and to raise the parties' awareness on the enforceability. However, it was also mentioned that requiring an opt-in by the parties might run contrary to the instrument having a broad scope, raise complexities if the instrument were to be a convention, which allowed for declaration by the States, and might not be practical at the conclusion of the settlement agreement. It was further pointed out that the opt-in by the parties should be distinguished from the possible options provided to States in the instrument (if it were to be a convention) to make a separate declaration requiring the parties' agreement to apply the enforcement mechanism envisaged by the instrument.

182. Although there was support for the opt-in requirement for the parties, it was felt that it was premature to make a decision, as it would largely depend on the form of the instrument and the mechanism envisaged therein.