United Nations A/CN.9/929

General Assembly

Distr.: General
11 October 2017

Original: English

United Nations Commission on International Trade Law
Fifty-first session
New York, 25 June-13 July 2018

Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2-6 October 2017)

Contents

V.17-07279 (E) 171017 181017

I. Introduction

1. At its forty-eighth session, in 2015, the Commission mandated the Working Group to commence work 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 agreed that the mandate of the Working Group 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-ninth session, in 2016, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic.[2]

3. At its fiftieth session, in 2017, the Commission had before it the report of the Working Group on the work of its sixty-fifth and sixty-sixth sessions (A/CN.9/896 and A/CN.9/901, respectively). The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise. The Commission expressed its satisfaction with the progress made by the Working Group and requested the Working Group to complete the work expeditiously.[3]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-seventh session in Vienna, from 2-6 October 2017. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Finland, Luxembourg, Malta, Morocco, Netherlands, Norway, Paraguay, Qatar, Saudi Arabia, Slovakia, South Africa, Sweden, Syrian Arab Republic and Viet Nam.

6. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organization*: Gulf Cooperation Council (GCC);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), Arab Association for International Arbitration (AAIA), Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.
[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162-165.
[3] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236-239.

Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Forum for International Commercial Arbitration (FICA), Hong Kong Mediation Centre (HKMC), International Academy of Mediators (IAM), International Council for Commercial Arbitration (ICCA), International Law Association (ILA), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration (CÁMARA), Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), Russian Arbitration Association (RAA), Singapore International Mediation Institute (SIMI), Swiss Arbitration Association (ASA) and Vienna International Arbitration Centre (VIAC).

8. The Working Group elected the following officers:

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

Rapporteur: Mr. Itai Apter (Israel)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.201); and (b) notes by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/WG.II/WP.202 and addendum as well as A/CN.9/WG.II/WP.203).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 on the basis of the notes by the Secretariat (A/CN.9/WG.II/WP.202 and addendum as well as A/CN.9/WG.II/WP.203). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. At the close of its session, the Working Group requested the Secretariat to prepare revised draft model legislative provisions complementing the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law") and a draft convention, both addressing enforcement of international settlement agreements resulting from conciliation, reflecting the deliberations and decisions of the Working Group.

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

12. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation ("instrument") on the basis of document A/CN.9/WG.II/WP.202 and its addendum.

13. The Working Group recalled that the draft provisions contained in A/CN.9/WG.II/WP.202 reflected the compromise reached by the Working Group at

its sixty-sixth session (the "compromise"), which had received the support of the Commission at its fiftieth session (see, para. 3 above). It was further agreed that texts as agreed in the compromise should be preserved with minimal revisions to clarify the meaning of those texts.

A. Scope

1. Draft provision 1(1)

14. While a suggestion was made to include a reference to "enforcement" in draft provision 1(1), it was widely felt that that provision, which reflected the compromise, should remain unchanged because the instrument did not deal only with enforcement of settlement agreements and the insertion of the word "enforcement" could be misleading.

2. Draft provision 1(2)

15. A suggestion to clarify draft provision 1(2) received support. Accordingly, it was agreed that it could read along the following lines: "2. This [instrument] does not apply to settlement agreements: (a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes; (b) Relating to family, inheritance or employment law."

16. In that context, the Working Group confirmed that draft provision 1 provided an exhaustive list of exclusions, where the instrument would take the form of a convention.

3. Draft provision 1(3)

Purpose and placement

17. With respect to draft provision 1(3), it was reiterated that the purpose of excluding from the scope of the instrument settlement agreements that have been approved by a court or concluded before a court was to avoid possible overlap or gap with other existing or future international instruments (see A/CN.9/901, para. 26). The view was expressed that, due to their different substantive nature, such settlement agreements required a treatment different from that provided under the instrument. Accordingly, it was suggested that draft provision 1(3) should be retained in the scope provision rather than in the provision on grounds for refusing to grant relief. That suggestion received support.

18. The Working Group then considered a number of issues raised in paragraphs 8 to 22 of document A/CN.9/WG.II/WP.202 and reached the following conclusions.

The more-favourable-right provision

19. It was clarified that the more-favourable-right provision that was being contemplated for inclusion in the instrument would not allow States to apply the instrument to settlement agreements excluded in draft provision 1(3), as such settlement agreements would fall outside the scope of the instrument (see para. 8 of document A/CN.9/WG.II/WP.202). After discussion, it was understood that States would have the flexibility to enact domestic legislation, which would include in its scope such settlement agreements and that such an inclusion would not be a breach of their international obligations under the instrument, if it were to be a convention.

Meaning of "approved by a court or concluded before a court"

20. Regarding the notions of a settlement agreement being approved by a court or concluded before a court, it was clarified that if court proceedings began but the parties were able to settle through conciliation without any court assistance, such settlement agreements would fall outside the scope of the instrument as long as the

settlement agreement was enforceable as a judgment in the State where court proceedings began (see para. 11 of document A/CN.9/WG.II/WP.202).

21. The Working Group further clarified that settlement agreements reached during court proceedings but not recorded as judicial decisions would fall outside the scope of the instrument as long as the settlement agreement was enforceable as a judgment in the State where court proceedings took place (see para. 12 of document A/CN.9/WG.II/WP.202). It was noted that this would be different from the Working Group's understanding prior to the compromise (see A/CN.9/867, para. 125, A/CN.9/896, para. 48 and A/CN.9/901, para. 25).

22. The suggestion that the instrument should also use the term "judicial settlement" found in the Convention on Choice of Court Agreements (2005) and the draft convention on judgments under preparation by The Hague Conference on Private International Law was not supported as that term, though used in some legal systems, was not necessarily known in all jurisdictions.

"in the same manner"

23. The Working Group agreed that the square-bracketed phrase "in the same manner" should be deleted to avoid any uncertainty about its meaning (see para. 13 of document A/CN.9/WG.II/WP.202). It was further clarified that the phrase "enforceable as" in draft provision 1(3) referred to the possibility of enforcement (see para. 14 of document A/CN.9/WG.II/WP.202).

Determination of the enforceability

24. It was widely felt that enforceability should be determined by considering whether settlement agreements approved by a court or concluded before a court were enforceable as a judgment "in the State of that court." It was agreed that the phrase "according to the law of" in the square-bracketed text was not necessary as it might create confusion (see paras. 15 and 16 of document A/CN.9/WG.II/WP.202). A suggestion to align draft provision 1(3)(a) with draft provision 1(3)(b) so that enforceability would be determined according to the law of the State where enforcement was sought did not receive support.

25. It was pointed out that the addition of the phrase "enforceable as an arbitral award [legislative provision: according to the law of this State] [convention: according to the law of the Contracting State where enforcement is sought]" in draft provision 1(3)(b) was intended to address the gap that might arise from non-enforceability of settlement agreements recorded in the form of awards in certain jurisdictions. In that respect, it was clarified that if an arbitral award recording a settlement agreement fell outside the scope of the relevant enforcement regime at the place where enforcement of the settlement agreement was sought, the settlement agreement might still be considered for enforcement under the instrument (see paras. 17 and 18 of document A/CN.9/WG.II/WP.202).

26. However, doubts were expressed with regard to adopting such an approach, which would be distinct from that in draft provision 1(3)(a) (see para. 24 above). It was stated that enforceability of an arbitral award should be determined by reference to the place of arbitration. In that context, reference was made to article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). It was explained that if enforceability were to be determined by reference to the place where enforcement of the settlement agreement was sought, it would provide a party the opportunity to seek enforcement twice (as an award and as a settlement agreement). It was therefore suggested that determining the "enforceability" by reference to the place of arbitration would ensure a similar approach as taken with regard to settlement agreements approved by a court or concluded before a court.

27. After discussion, it was agreed that enforceability of a settlement agreement as an arbitral award would be left to the competent authority and that the square-bracketed texts in draft provision 1(3)(b) would be deleted.

"prior to any application under article 3"

28. The Working Group agreed that the square-bracketed phrase "prior to any application under article 3" would not be necessary. Nonetheless, it was agreed that draft provision 1(3) should not be interpreted to allow a party against whom the enforcement of a settlement agreement was sought to, at that stage, seek a consent award or apply to a court for the approval of a settlement agreement, which would result in the settlement agreement falling outside the scope of the instrument (see para. 22 of document A/CN.9/WG.II/WP.202).

Revised draft provision 1(3)

29. After discussion, the Working Group agreed that draft provision 1(3) should read as follows: "This [instrument] does not apply to: (a) Settlement agreements (i) that have been approved by a court or have been concluded in the course of proceedings before a court; and (ii) that are enforceable as a judgment in the State of that court; (b) Settlement agreements that have been recorded and are enforceable as an arbitral award."

4. Conclusion on draft provision 1

30. Subject to the above-mentioned changes (see paras. 15, 23 and 27 to 29 above), the Working Group approved draft provision 1.

B. Definitions

1. Draft provisions 2(1) and 2(2)

31. The Working Group recalled that draft provisions 2(1) and 2(2) contained a definition of "international" settlement agreements modelled on articles 1(4) and 1(5) of the Model Law on Conciliation. The Working Group also recalled its decision that the "international" nature of settlement agreements should not be derived from the "international" nature of conciliation but from the settlement agreement itself.

Definition of "international"

32. Noting that the place of business of the parties constituted the criteria for determining the "internationality" of settlement agreements, it was questioned whether that definition should be expanded to also cover situations where parties would have their places of business in the same State, but the settlement agreement would nevertheless contain an international element, for instance, where the parties' parent company or shareholders were located in different States. It was suggested that such an expansion would reflect current global business practices as well as complex corporate structures.

33. The Working Group recalled that it had agreed that the instrument should contain a clear and objective criteria for defining "international" settlement agreements (A/CN.9/896, paras. 20 and 21, and A/CN.9/867, paras. 93-101). In that light, it was generally felt that there would be complexities in referring to circumstances mentioned in paragraph 32 above and that providing a comprehensive definition to capture complex corporate structures would be difficult.

34. It was recalled that when preparing the Model Law on International Commercial Arbitration ("Model Law on Arbitration"), that matter was resolved by including article 1(3)(c), which provided that the parties might agree that the "subject matter of the arbitration agreement relates to more than one country". A similar approach was adopted in article 1(6) of the Model Law on Conciliation.

35. After discussion, the Working Group agreed that draft provisions 2(1) and 2(2) would remain unchanged subject to any concrete drafting proposals.

Article 1(6) of the Model Law on Conciliation

36. On whether draft provision 2 should include a provision similar to article 1(6) of the Model Law on Conciliation, the Working Group reaffirmed its understanding that the instrument should not contain a similar provision where it would take the form of a convention.

37. Therefore, the discussion focused on how article 1(6) would operate when the Model Law on Conciliation would be complemented by draft provisions on settlement agreement (referred to as the "amended Model Law"). One view was that article 1(6) should also apply to those provisions. It was stated that article 1(6) currently applied to article 14 of the Model Law, which dealt with enforceability of settlement agreements. In addition, it was said that the Model Law had already been enacted in a number of States, and that deleting that provision in the amended Model Law would be problematic. In line with the understanding that the existing provisions of the Model Law should not be modified to the extent possible as States had already enacted legislation based on it, it was suggested that article 1(6) should apply also to the draft provisions on settlement agreements. Another view was that article 1(6) should either be deleted entirely from the amended Model Law or not be applicable to provisions on settlement agreements for the sake of consistency with the approach in the draft convention (see para. 36 above).

"at the time of the conclusion of that agreement"

38. To ensure consistency of the temporal determination between subparagraphs (a) and (b) in draft provision 2(1), the Working Group agreed to move the words "at the time of the conclusion of that agreement" in subparagraph (a) to the chapeau of draft provision 2(1).

Definition of "internationality" of the "conciliation" and "settlement agreement" under the amended Model Law on Conciliation

39. The Working Group considered whether the amended Model Law should contain a single definition of "internationality", which would apply to both conciliation and settlement agreements as provided for in document A/CN.9/WG.II/WP.202/Add.1, paragraph 6. It was noted that the draft contained in that document defined the internationality of conciliation by reference to the place of business of the parties at the time of the conclusion of the settlement agreement. However, it was stated that the applicability of the law would need to be determined when the conciliation was initiated and not at a later stage when a settlement agreement was concluded. It was further said that parties might not necessarily conclude a settlement agreement. It was therefore suggested to define separately the internationality of the conciliation and the internationality of the settlement agreement by reference to the agreement to conciliate in accordance with article 1(4) of the Model Law. However, it was suggested that a reference to the agreement to conciliate might not always be feasible, as there might not be such an agreement concluded by the parties as a basis for the conciliation process.

Additional definitions

40. A suggestion was made to include a definition of "parties", which would clarify that reference to "parties" in the instrument would include their authorized representatives. In response, it was said that including a reference to authorized representatives in the definition of "parties" would be problematic. For example, the "internationality" of a settlement agreement was determined in accordance with the parties' places of business.

41. As an alternative, it was suggested that draft provision 3(3)(a) could include a reference to "authorized representatives of the parties". It was also mentioned that

reference to the authorized representatives of the parties might be implicit in the instrument (as is the case with other UNCITRAL texts), which could be clarified in any material accompanying the instrument. After discussion, the Working Group agreed to consider that matter further when discussing draft provision 3(3)(a) (see paras. 49 and 50 below).

2. Draft provisions 2(3) and 2(4)

42. There was general support for draft provisions 2(3) and 2(4). In that light, the Working Group agreed to consider in the context of draft provision 3(3)(a) whether draft provision 2(3) would include a reference to parties' authorized representatives (see paras. 40 and 41 above, and paras. 49 and 50 below). In response to a question whether the instrument would apply to settlement agreements whether or not they resulted from conciliation, the Working Group agreed to consider that question in conjunction with matters raised in paragraphs 37 and 38 of document A/CN.9/WG.II/WP.202 (see paras. 68-72 below).

3. Conclusion on draft provision 2

43. Subject to the above-mentioned change (see para. 38 above) and subject to further consideration of the remaining issues pertaining to how article 1(6) and other related provisions would operate in the amended Model Law (see paras. 36 and 37 above), the Working Group approved draft provision 2.

C. Application

1. Draft provisions 3(1) and 3(2)

Placement and heading

44. With regard to the placement of draft provisions 3(1) and 3(2), the Working Group agreed that they should be placed under a separate article in the instrument following draft provision 1, possibly entitled "General principles". In response to a question about the meaning of the draft provision 3(2), an explanation from the sixty-sixth session was reiterated, namely that by meeting all the conditions laid down in the instrument, the party seeking relief would thereby be able to prove that the dispute had been settled.

"in order to conclusively prove that the matter has been already resolved"

45. With regard to the square-bracketed text at the end of draft provision 3(2), a number of suggestions were made. The suggestion to delete that text as it could narrow the scope of application of the draft provision did not receive support. It was widely felt that the text, which was part of the compromise, should be retained outside square brackets. It was said that that phrase removed the ambiguity regarding the consequences of invoking the settlement agreement as a defence and clarified that the settlement agreement could prove that the dispute had been resolved.

46. Nonetheless, concerns were expressed regarding the inclusion of the word "conclusively". It was said that the inclusion could affect the application of the rules of procedure of the State. In response, it was said that the word "conclusively" would not affect the application of rules of procedure but that that deletion would be acceptable as it would not alter the meaning of the provision. It was generally felt that the inclusion did not have much merit and therefore, it was agreed that the word "conclusively" should be deleted.

47. In addition, the Working Group agreed that draft provision 3(2) with the above-mentioned changes (see paras. 45 and 46 above) was broad enough to cover set-off claims and that there was no need to make a specific reference to such claims in that provision.

48. After discussion, the Working Group agreed that draft provision 3(2) should read as follows: [Legislative provision] "If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law, in order to prove that the matter has been already resolved." [Convention] "If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved."

2. Draft provision 3(3)(a)

49. The Working Group considered whether draft provision 3(3)(a) should provide that settlement agreements might be signed by the parties "or their authorized representatives" (see paras. 40-42 above). It was pointed out that it was common for representatives of parties to sign settlement agreements on their behalf and referring only to the parties in draft provision 3(3)(a) could unduly restrict the application requirement. However, it was mentioned that the notion of parties' representatives might be understood differently in different jurisdictions and in different contexts. It was further mentioned that including the words "or their authorized representatives" in draft provision 3(3)(a) might create complexities and discrepancies, as there were other instances where the instrument referred to "parties". It was suggested that the matter should be left to be addressed in relevant applicable domestic legislation.

50. After discussion, the Working Group agreed that the instrument should not include a reference to "authorized representatives" of the parties with the understanding that that notion was implicit in the text of the instrument.

51. During the discussion on draft provision 3(3)(a), a proposal was made that the instrument should require that the settlement agreement should set out in a clear and comprehensible manner its enforceable content. It was explained that the purpose of adding such a requirement would mean that only settlement agreements with enforceable obligations and which clearly set out the content of the settlement, would be accepted for enforcement under the instrument. After hearing the suggestion that such a requirement might be better placed in the draft provision on grounds for refusing enforcement, the Working Group agreed to consider the matter in conjunction with draft provision 4 (see para. 88 below).

3. Draft provision 3(3)(b)

52. The Working Group agreed to retain the word "evidence" as it was considered more appropriate than the word "indication" for the purpose of draft provision 3.

53. Various suggestions were made regarding subparagraph (b). It was suggested that the list of examples contained in subparagraph (b) should be deleted, as draft provisions 1 and 2(4) required that the settlement agreement resulted from conciliation, and defined conciliation as requiring the involvement of a third party; and as it would be preferable to leave it to the competent authority to determine the evidence required to prove that the settlement agreement resulted from conciliation.

54. As a matter of drafting, it was suggested that the phrase "attesting to the involvement of the conciliator in the conciliation process," should be replaced by the words "to that effect". It was explained that subparagraph (b) should make it clear that the attestation to be produced should be to the effect that the settlement agreement resulted from conciliation, and not refer to a mere involvement of the conciliator.

55. In relation to the example that an attestation could be provided by an institution that administered the conciliation process, it was said that institutions were generally not involved in conciliation processes; therefore, that example would not necessarily constitute an appropriate means to prove that the settlement agreement resulted from conciliation.

56. A question was raised whether the list in subparagraph (b) should be illustrative (open) (as currently drafted with the words “such as”) or exhaustive (closed). On a practical note, it was suggested that an illustrative list would be preferable as it would not necessarily be feasible to reach out to the conciliator in various circumstances, including when the settlement agreement would need to be raised as a defence against a claim, a procedure which might take place a number of years after the conciliation. It was also highlighted that there might be costs involved, or conciliators might be hesitant, in providing attestations or signing settlement agreements.

57. A proposal was made to amend subparagraph (b) to the effect that it would establish a hierarchy among the means for evidencing that a settlement agreement resulted from conciliation, along the following lines: “(b) Evidence that the settlement agreement resulted from conciliation either by including the conciliator’s signature on the settlement agreement or by providing a separate statement by the conciliator attesting to the involvement of the conciliator in the conciliation process; the competent authority can accept any other form of evidence that the settlement agreement resulted from conciliation only if the party has shown that it has made an attempt to receive either of the above.”

58. Some support was expressed for that proposal, as it provided a middle ground between an open-list and a close-list approach. However, it was widely felt that a flexible approach as provided in the current draft provision 3(3)(b) (see document A/CN.9/WG.II/WP.202, para. 29) was preferable. It was pointed out that it would be difficult to provide a hierarchy, particularly when the list was open-ended. It was further said that prescribing a hierarchy would give prevalence to certain practices to the detriment of others and could run contrary to existing laws and practices. Further, it was suggested that the proposal would be difficult to implement, for instance when the conciliation involved multiple conciliators, and might give rise to legal disputes particularly with regard to the party being obliged to demonstrate that it had made such attempts.

59. After consideration of various drafting suggestions, the Working Group agreed that draft provision 3(3)(b) should read as follows: “(b) Evidence that the settlement agreement resulted from conciliation, such as: (i) the conciliator’s signature on the settlement agreement; (ii) a document signed by the conciliator indicating that the conciliation was carried out; (iii) an attestation by an institution that administered the conciliation process; or (iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.”

4. Draft provision 3(3)(c)

60. The Working Group then considered a number of suggestions with respect to draft provision 3(3)(c).

61. One view was that draft provision 3(3)(c) should remain unchanged. In support, it was noted that the competent authority should be provided flexibility in requiring documents as necessary in the enforcement process. In that context, it was noted that draft provision 3(3)(c) should be read in conjunction with draft provision 3(6) requiring the competent authority to act expeditiously. Another view was that draft provision 3(3)(c) should be qualified with additional wording along the following lines: “to demonstrate that the requirements of this [instrument] are met.” It was further mentioned that the requirements were those found in draft provisions 3(3)(a) and 3(3)(b). During the discussion, a suggestion was made that the word “necessary” could be replaced by “relevant”. Yet another view was that draft provision 3(3)(c) could be deleted as it might invite the competent authority to require parties to supply documents not required in the instrument, which would make it burdensome for parties seeking enforcement. It was further pointed out that the rules of procedure of a given State would generally allow the competent authority to require such necessary documents.

62. Considering the revised draft provision 3(3)(b) (see para. 59 above), a proposal was made that draft provision 3(3)(c) should be deleted and that a separate paragraph

should be added in draft provision 3. It was said that article 13(2) of the Convention on Choice of Court Agreements (also reproduced in the draft convention on judgments, under preparation by The Hague Conference on Private International Law) could provide a useful model for drafting that new paragraph, which would allow the competent authority to require necessary documents to verify that the conditions of the instrument have been complied with.

63. While views were expressed that there was no need for such a provision in light of the inclusion of subparagraph (iv) in draft provision 3(3)(b) (see para. 59 above), general support was expressed for inclusion of a new paragraph. In that context, it was highlighted that draft provisions 3(3)(a) and 3(3)(b) dealt with what a party would need to supply to the competent authority upon submitting an application, whereas the new paragraph could address the power of the competent authority to require documents necessary for considering an application. It was further mentioned that the new paragraph would provide broader flexibility to the competent authority as subparagraph (iv) in draft provision 3(3)(b) was limited to any other evidence acceptable to the competent authority to prove that the settlement agreement resulted from conciliation.

64. Concerns were expressed that the new paragraph could result in the competent authority introducing additional application requirements, which would unduly burden the party seeking enforcement. In response, it was stated that such concerns could be addressed by providing that the competent authority would be able to require any necessary document "only to verify that the conditions of this instrument are met." In that context, it was suggested that the new paragraph could indicate what those conditions were, for example, by stating that request of additional documents by the competent authority should be limited to verifying that the requirements in draft provisions 3(3)(a) and 3(3)(b) were met. That suggestion did not receive support, as it would restrict the powers of the competent authority. As illustrations, it was mentioned that the competent authority might require (i) proof of authority of parties' representatives where they signed the settlement agreement on the parties' behalf, or (ii) proof of the internationality of a settlement agreement, which was not covered under draft provisions 3(3)(a) and 3(3)(b). It was pointed out that limiting the power of the competent authority to require documents as necessary in light of the conditions of the instrument constituted an acceptable safeguard.

65. After discussion, the Working Group agreed that a new paragraph replacing paragraph (3)(c) would be included in draft provision 3 along the following lines: "The competent authority may require any necessary document in order to verify that the conditions of this [instrument] have been complied with."

5. Draft provision 3(4)

66. The Working Group approved draft provision 3(4) without any modification.

6. Draft provisions 3(5) and 3(6)

67. While a suggestion was made that draft provision 3(5) would be superfluous if a new paragraph were to be included in draft provision 3 (see para. 65 above), the Working Group agreed to retain draft provision 3(5) unchanged. While a suggestion was made that an element of "reasonableness" should qualify the relative notion of "expeditiously" in draft provision 3(6), the Working Group agreed to retain draft provision 3(6) unchanged.

7. Informal processes

68. The Working Group then considered whether the instrument should provide flexibility to States to broaden the scope of the instrument to agreements settling disputes between parties not reached through conciliation (see para. 42 above). The discussion took into account drafting proposals for a reservation or declaration (where the instrument would take the form of a convention) and a footnote (where the

instrument would take the form of the amended Model Law) (see document A/CN.9/WG.II/WP.202, para. 38).

69. One view was that flexibility should be provided to States that wished to provide agreements settling disputes not reached through conciliation a similar enforcement mechanism as envisaged by the instrument for settlement agreements resulting from conciliation. In support, it was suggested that the instrument could include a reservation or a footnote to that effect, which would afford such flexibility to States and encourage States adopting the instrument to consider such options. It was further mentioned that there would be no detriment in allowing States to expand the scope of the instrument, as it would actually be beneficial to parties wishing to enforce such agreements.

70. Another view was that States should not be given the flexibility to overstep the scope of the instrument. In support, it was stated that providing such flexibility would defeat not only the purpose of the instrument but also the carefully drafted scope and definitions provisions therein. Concerns were also expressed about the possible negative consequences such provisions could have on the overall credibility of the enforcement mechanism envisaged by the instrument. Furthermore, it was stated that a reservation to that effect would be considered not permissible under article 19 of the Vienna Convention on the Law of Treaties, as it would be incompatible with the object and purpose of the convention. It was further mentioned that the mandate given to the Working Group was limited to preparing an instrument on enforcement of international settlement agreements "resulting from conciliation". While there was less hesitation about including a footnote in the amended Model Law, it was indicated that it would not be appropriate for an instrument on enforcement of settlement agreements to encourage States to consider expanding the regime to agreements not reached through conciliation.

71. With respect to a suggestion that a more-favourable-right provision contemplated for inclusion in the instrument could allow States to apply the enforcement regime to agreements not reached through conciliation, it was stated that a more-favourable-right provision presupposed that the agreement in question fell within the scope of the instrument and would not allow the State to extend the scope of the instrument. In that context, it was emphasized that States, in any case, would be free to enact legislation that would grant agreements not reached through conciliation a treatment similar to that granted to settlement agreements under the instrument, which need not be mentioned in the instrument. In contrast, it was stated that this possibility needed to be highlighted in the instrument as a footnote in the amended Model Law, which would encourage States to consider that approach.

72. After discussion, it was agreed that the instrument in the form of a convention would not include a provision that would allow a State to declare that it would apply the convention to agreements not reached through conciliation. The Working Group decided to further consider whether the instrument in the form of an amended Model Law could include a footnote indicating that States may consider applying the instrument to such agreements. It was also agreed that explanatory material accompanying the instrument, if any, could outline relevant considerations.

8. Conclusion on draft provision 3

73. Subject to the above-mentioned modifications (see paras. 44, 48, 52, 59 and 65 above) and decision (see para. 72 above), the Working Group approved draft provision 3.

D. Defences

1. Draft provision 4 — title and chapeau

74. To clarify that draft provision 4 applied to both enforcement dealt with in draft provision 3(1) and the procedure dealt with in draft provision 3(2), a suggestion was made to revise the heading of draft provision 4 along the following lines: "Grounds

for refusing to enforce or to invoke the settlement agreement". In that context, some concerns were expressed whether draft provision 4 applied to both enforcement dealt with in draft provision 3(1) and the procedure dealt with in draft provision 3(2). It was said that draft provision 4 would not be applicable to certain procedures, for example, declaratory procedures.

75. With regard to the chapeau of draft provision 4(1), the Working Group agreed to delete the square-bracketed text "under article 3" where it appeared after the word "relief".

2. Draft provision 4(1)(a)

76. Recalling its previous consideration of subparagraph (a) (A/CN.9/896, para. 85), the Working Group agreed to retain that subparagraph unchanged.

3. Draft provision 4(1)(b)

77. With respect to subparagraph (b), a suggestion was made to delete the first clause, which read: "The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement." In support, it was said that the clause was redundant as the binding nature of a settlement agreement would be derived from complying with the requirements in draft provisions 1(1) and 3(3)(a). It was also said that the "final" nature of a settlement agreement was addressed in the second clause of subparagraph (b) as well as draft provision 3(3)(a). In addition, it was stated that other subparagraphs of draft provision 4 sufficiently addressed those points.

78. A contrary view was that the first clause ought to be retained as it served an important purpose to ensure that only final and binding agreements would be enforced. It was stated that such a defence needed to be provided at the stage of enforcement, and was not covered by other provisions in the instrument, which served different purposes. In addition, it was suggested that the first clause could be supplemented by the following words: "in accordance with the law of the State where relief is sought, including the law designated by its private international law".

79. With respect to the second clause of subparagraph (b) that "the obligations in the settlement agreement have been subsequently modified by the parties or have been performed", a suggestion was made to delete the words "by the parties" as there might be instances where the settlement agreement might be modified without the involvement of the parties. In addition, it was mentioned that the clause should be clarified in order to avoid situations where enforcement of a settlement agreement would be denied because the parties subsequently modified certain terms of that agreement.

80. With respect to the phrase "other than a failure by the party" in the third clause of subparagraph (b), it was suggested to clarify its meaning using the following phrase: "other than the non-performance by the party".

81. From a practical perspective, concerns were expressed that including too detailed as well as broad grounds to refuse enforcement would run contrary to the expectations of the parties that the instrument would provide for an efficient mechanism to enforce or invoke settlement agreements. It was mentioned that detailed or ambiguous provisions could lead the competent authority to question a number of issues at the enforcement stage and provide parties not willing to comply with the settlement agreement tools to impede enforcement. It was emphasized that such a result could eventually weaken the usefulness of the instrument. While acknowledging the need to reflect the perspectives of the practitioners, it was underlined that the instruments being prepared were texts for adoption or enactment by States and that if their concerns were not adequately addressed in the instruments, they were not likely to be adopted. Therefore, the need to balance both aspects was emphasized.

82. The Working Group considered a number of proposals in relation to draft provision 4(1)(b).

83. One proposal was to replace subparagraph (b) with the following text: "(i) The obligations in the settlement agreement have been subsequently modified, except where those subsequent modifications have been reflected in the settlement agreement, or have been performed; or (ii) the settlement agreement is not a final resolution of the dispute covered by the settlement agreement because the conditions set forth in the settlement agreement have not been met other than for the non-performance of the party against whom the settlement agreement was invoked and, therefore, have not yet given rise to the obligations of that party". It was further suggested that the *travaux préparatoires* should explain that while not explicitly mentioned in subparagraph (b), a party would be able to argue that the settlement agreement was not binding or to present evidence of the non-binding nature of the settlement agreement (for instance, a party could argue that the person who signed the settlement agreement was not authorized to do so).

84. While there was some support for that proposal, it was felt that it was complicated and could lead to difficulties in interpretation. It was pointed out that the conditions of the settlement agreement not being met could mean that the settlement agreement would be enforceable at a later stage, and not necessarily that it was not the final resolution of the dispute. With respect to the additional language suggested for the *travaux préparatoires*, it was cautioned that the grounds for resisting enforcement should be exhaustive, as indicated by the word "only" in the chapeau of draft provision 4(1).

85. With a view to provide a simpler text, the following proposal was made: "The settlement agreement is not binding, or is not final, or is conditional, or the obligations in the settlement agreement have been modified or have been performed." While there was support for that proposal, a number of drafting suggestions were made.

86. First, it was suggested to replace the word "modified" by the words "subsequently modified without consent". While there was support for the inclusion of the word "subsequently", there was hesitation about including the words "without consent" as the purpose of the clause was to ensure that only the latest version of the settlement agreement "concluded by the parties" should be enforced.

87. Second, it was suggested that the meaning of the terms "binding" and "final" should be set out, by providing that a settlement agreement would be binding under the terms of the instrument and would be final in light of whether conditions therein have been met or modified. A further suggestion was to replace the word "final" by explanatory language, along the following lines: "or the obligation that is sought for enforcement was not meant to be enforced by the parties independently of the other parts of the settlement agreement". It was noted, however, that it might be cumbersome to agree on a definition of the terms "binding" and "final" which had already been interpreted in a variety of manners under various instruments, including the New York Convention.

88. Third, it was suggested to include an additional ground for refusing enforcement along the following lines: "the settlement agreement is not clear or comprehensible rendering it not capable of being enforced" (see para. 51 above). As an alternative, the following text was suggested: "the settlement agreement is not capable of being enforced". Concerns were expressed that those suggestions would introduce ambiguity and provide too wide a discretionary power to the competent authority. It was further suggested that such text would be redundant as only a clear and comprehensible settlement agreement would be binding and enforceable.

89. During the discussion, a number of other drafting proposals to replace or clarify subparagraph (b) were made.

90. A drafting proposal was made with the aim of retaining a simple drafting approach, while clarifying certain elements, along the following lines: "The settlement agreement: (i) is not binding or not final [under the conditions of this

instrument]; (ii) is conditional or the settlement agreement has been [subsequently] modified [without consent] so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; (iii) the obligations in the settlement agreement have been performed; or (iv) is not clear or comprehensible rendering it not capable of being enforced."

91. Another drafting proposal read along the following lines: "the settlement agreement is not final and binding; or the obligations of the settlement agreement have been fully performed; or it is impossible to enforce the settlement agreement because significant modifications have been made by the parties in the absence of a conciliator, or because reciprocal obligations of the other party have not been performed. For the purpose of this [instrument], 'final' means that the implementation of the agreement shall not be dependent on a condition that has not yet been achieved, or a specific date that has not yet been reached; ''obligation' means that the subject matter of the agreement is clear, understandable and final, and can be settled by applicable law."

92. Yet another proposal was made aimed at avoiding the notions of binding and final, and focusing on the time of performance of obligations. It read: "Under the terms of the settlement agreement, the obligations sought to be enforced were not agreed to be performed by the time of enforcement."

93. After discussion, the Working Group agreed that the following text would form the basis of its future discussion on subparagraph (b), not disregarding the above-mentioned proposals and suggestions, and acknowledging that there could be further improvements of the text: "The settlement agreement: (i) obligations have been performed; (ii) is not binding, or is not final, according to its terms; (iii) has been subsequently modified; (iv) is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; or (v) is not capable of being enforced because it is not clear and comprehensible."

4. Draft provision 4(1)(c)

94. With respect to draft provision 4(1)(c), it was suggested that the phrase "under the law to which the parties have subjected it, or failing any indication thereon," should be deleted because party autonomy should operate within the limits of mandatory laws and public policy. The Working Group recalled that the matter had already been addressed at a previous session (see A/CN.9/896, para. 101). However, to clarify the meaning of draft provision 4(1)(c), the Working Group agreed to insert the word "validly" between the words "have" and "subjected" in subparagraph (c). It was explained that the addition would highlight that the competent authority could assess the validity of the choice of law made by the parties in the settlement agreement in accordance with applicable mandatory laws and public policy.

95. The Working Group heard a suggestion that subparagraph (c) should be placed before subparagraph (b) and requested the Secretariat to make the necessary drafting adjustments.

5. Draft provisions 4(1)(d) and 4(1)(e)

96. With respect to a suggestion to replace the word "standards" by the word "requirements" or to add the word "requirements" in subparagraph (d), the Working Group recalled its previous discussion on the topic mainly that subparagraph (d) would allow the competent authority to determine the standards applicable, which could take different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations (see A/CN.9/901, para. 87). It was further confirmed that the text accompanying the instrument would provide an illustrative list of examples of such standards. In response, it was also suggested that there would be merit in including a definition of "standards" in the instrument, possibly based on article 6(3) of the Model Law, as that would prevent

legal disputes in relation to the interpretation of subparagraph (d). That suggestion did not receive support.

97. With respect to the suggestion that subparagraphs (d) and (e) should be merged (also considering the repetition of words to the end of the subparagraphs), or their sequence changed considering the importance of the standard in subparagraph (e), the Working Group recalled that the substance of both subparagraphs had been already agreed upon by the Working Group subject only to drafting improvements. There was strong support to retain the subparagraphs as separate subparagraphs.

98. After discussion, the Working Group agreed to retain subparagraphs (d) and (e) without any modifications.

6. Draft provision 4(2)

99. With regard to the chapeau of draft provision 4(2), the Working Group agreed to delete the square-bracketed text “under article 3” where it appeared after the word “relief”.

7. Draft provision 4(2)(a)

100. With regard to the suggestions to add the word “manifestly” before the word “contrary” along the lines of the Convention on Choice of Court Agreements and to add the words “including the national security or national interest of the State” in subparagraph (a), it was agreed that the subparagraph should remain unchanged mirroring the phrase in the New York Convention and the Model Law on Arbitration, which have already been broadly interpreted. It was cautioned that departure from such language could raise more confusion for the competent authority, which would be tasked with determining what the public policy of that State was. During the discussion, it was also mentioned that public policy could, in any case, include issues relating to national security or national interest.

8. Conclusion on draft provision 4

101. Subject to the above-mentioned modifications (see paras. 94, 95 and 99 above) and subject to further consideration of subparagraph (1)(b) (see para. 93 above) and issues that may arise on subparagraph (1)(c) from the revision of subparagraph (1)(b), the Working Group approved draft provision 4.

E. Terminology and presentation of draft provisions

1. Terminology

102. The Working Group considered the possibility of replacing the terms “conciliation” and “conciliator” in the instrument as well as other UNCITRAL texts on conciliation with the terms “mediation” and “mediator”. Some hesitation was expressed about changing the terminology historically used in UNCITRAL texts. It was also mentioned that a cautious approach should be taken in making any such change as there could be substantive change in meaning (for example, the term “mediation” included not only facilitative but also evaluative conciliation).

103. Nonetheless, it was stated that there was merit in considering the replacement, as the terms “mediation” and “mediator” were more widely used and it would make it easier to promote the instrument giving it more visibility. It was mentioned that this would not entail any substantive change. To ensure that there was no confusion or misunderstanding about the replacement, it was suggested that the text accompanying the instrument (or a footnote therein) could explain the historical developments of the terminology in UNCITRAL texts and emphasize that the term “mediation” was intended to cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used. That text would also stress that the replacement was not aimed at promoting a notion known to a specific legal system or tradition. It was also stated that if the replacement

were to be made, it should be done consistently throughout UNCITRAL texts along with accompanying explanations as discussed above.

104. After discussion, the Working Group confirmed its shared understanding that the replacement of the term “conciliation” by the term “mediation” could be implemented as a basis for further consideration by the Working Group.

2. Presentation of the draft provisions in the draft convention and the amended Model Law

105. The Working Group then considered how the draft provisions as approved at its current session could be presented in a draft convention and in an amended Model Law (see annex). There was general support for the presentation provided in the annex.

106. With regard to the annex, the following suggestions were made, but not discussed:

- There should be a consistent definition of “conciliation” in the convention and in the amended Model Law (reference was made to draft article 3(4) of the draft convention and article 1(3) of the Model Law);
- The title of the amended Model Law should include the notion of international settlement agreements;
- Draft article 1(1) of the amended Model Law should read, along with the footnotes in article 1 of the Model Law: “This Law applies to international commercial conciliation or to international settlement agreements.”;
- Article 1(8) of the Model Law should be placed in section 1 of the amended Model Law, and should be subject to (i) article 1(9) of the Model Law, which, if retained, should be placed in section 2 of the amended Model Law and (ii) draft articles 15(2) and 15(3) of the amended Model Law;
- Article 1(8) of the Model Law should be amended taking into account decisions reached by the Working Group;
- Article 3 of the Model Law should be placed in section 2 of the amended Model Law;
- Section 2 of the amended Model Law should be titled “international conciliation” and section 3 should be titled “international settlement agreement”; and
- Noting that article 14 of the Model Law also used the term “settlement agreement”, the interaction between that article and article 15 of the amended Model Law, which addressed international settlement agreements, should be considered.

Annex

Draft convention and draft amended Model Law on International Commercial Conciliation

The texts below illustrate how draft provisions 1 to 3, as revised by the Working Group (see paras. 14-73), could possibly appear in the draft convention and in the amended Model Law.

1. Draft convention

Title: [*to be determined*]

Article 1. Scope of application

1. This Convention applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes;

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

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. General principles

1. Each Contracting State shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Contracting State shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved.

Article 3. Definitions

[For the purposes of this Convention:]

1. A settlement agreement is "international" if, at the time of the conclusion of that agreement:

(a) At least two parties to the settlement agreement have 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.

2. For the purposes of this article:

(a) 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;

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

3. 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.

4. "Conciliation" means a process, regardless of the expression used and irrespective of the basis upon which the process 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 4. Application

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Contracting State where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from conciliation, such as:

(i) The conciliator's signature on the settlement agreement;

(ii) A document signed by the conciliator indicating that the conciliation was carried out;

(iii) An attestation by an institution that administered the conciliation process; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

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 the 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 subparagraph (a) above, by itself or together with further evidence.

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

4. The competent authority may require any necessary document in order to verify that the conditions of the Convention have been complied with.

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

[...]

2. Draft amended Model Law on International Commercial Conciliation

Title: UNCITRAL Model Law on International Commercial Conciliation (2002) With amendments as adopted in 201*

Section 1 — General provisions

Article 1. Scope of application and definitions

1. This Law applies to […].

2. For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be. [*Article 1(2) of the Model Law*]

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

[*Placement of Article 1 (6) to (9) of the Model Law to be determined*]

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement [*placement to be determined*]

Except for the provisions of [*article 2, article 6, paragraph 3 - numbering to be adjusted and consideration whether any other articles to be included*] the parties may agree to exclude or vary any of the provisions of this Law.

Section 2 — Conciliation

Article aa. Scope and definitions

1. This section applies to international[4] commercial[5] conciliation. [*Article 1(1) of the Model Law*]

2. A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

[4] Footnote 1 in the Model Law.

[5] Footnote 2 in the Model Law.

(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. [*Article 1(4) of the Model Law*]

3. 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 agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence. [*Article 1(5) of the Model Law*]

Articles 4 to 13 of the Model Law would remain unchanged.

Article 14. [*title to be determined*]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

[*Footnote 4 in the Model Law to be considered in conjunction with articles 1(7) and 3*]

Section 3 — Enforcement of international settlement agreements[6]

Article 15. Scope and definitions

1. This section applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged by one of the parties (a consumer) for personal, family or household purposes;

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

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or have been concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is international if, at the time of conclusion of the settlement agreement [*or at the time of the conclusion of the agreement to conciliate*]:

(a) At least two parties to the settlement agreement have 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

[6] *Footnote to be considered.* [A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from conciliation. Adjustments would then have to be made to relevant articles.]

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

5. For the purposes of this article:

(a) 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;

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

6. 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.

Article 16. General Principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State and under the conditions laid down in this Law.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State and under the conditions laid down in this Law in order to prove that the matter has been already resolved.

Article 17. Application

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from conciliation, such as:

(i) The conciliator's signature on the settlement agreement;

(ii) A document signed by the conciliator indicating that the conciliation was carried out;

(iii) An attestation by an institution that administered the conciliation process; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

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 the 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 subparagraph (a) above, by itself or together with further evidence.

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.

4. The competent authority may require any necessary document in order to verify that the conditions of this law have been complied with.

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

[...]