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Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation — Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

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I. Introduction

1. At its forty-seventh session (New York, 7-18 July 2014), the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1] At its sixty-second session, the Working Group is also expected to continue its consideration of the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.[2]

2. In preparation for the sixty-second session of the Working Group, the Secretariat received comments from States which are reproduced below in the form in which they were received.

II. Comments received from States

A. Enforceability of settlement agreements resulting from international commercial conciliation/mediation

1. Germany

Original: English
Date: 17 November 2014

The fundamental questions when examining the desirability and feasibility of an instrument dealing with cross-border enforcement of "international commercial settlement agreements resulting from international commercial mediation or conciliation" in our view are the following:

(a) Is there a need for such an instrument, given that parties could have recourse to arbitration and make use of the possibility of an "award on agreed terms"?

(b) Is there a substantial difference between an agreement resulting from mere negotiation and an agreement resulting from mediation/conciliation that would justify why such an agreement would be enforceable under different terms and conditions than a "simple" agreement, and if yes: what exactly makes that difference?

The question ad (a) can be answered once it is clearer what exactly can be expected from an instrument dealing specifically with mediated/conciliated settlements.

Concerning the question ad (b), our initial reaction is that there is no fundamental difference between agreements which are the outcome of (simple) negotiation, and agreements resulting from mediation or conciliation. Their legal nature does not change, they remain agreements. Their binding nature derives from

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

[2] Ibid., para. 128.

party autonomy, and they are subject to the rules of contract law. Possible justifications for granting them expedited enforceability could be:

- The promotion of amicable settlement (as they end a dispute between the parties, and enforceability enhances trust in the outcome). We doubt whether this is a convincing justification. The same could be said for agreements reached via simple negotiation.
- The idea that the settlement results from a due ADR process with an independent and impartial neutral, who guarantees a fair and highly reliable/legally impeccable outcome. But is that really true, given the huge differences in ADR processes, qualification of neutrals, procedural standards etc.?

In addition, it seems unclear to us whether the project aims at introducing conditions under which a State has to declare an international commercial settlement agreement resulting out of mediation or conciliation to be enforceable (uniform or model law?), or whether it is about declaring an agreement that has been made enforceable in one State to be enforceable in another State (private international law?), or both. In any event, the conditions for enforceability would have to be spelled out in detail.

Whatever the policy justification and scope may be, we think that the project will face a number of challenges. It is important to be realistic. The following conditions and topics seem to be relevant at first sight (and we do not consider that list to be exhaustive):

(a) The basis of any such instrument is full party autonomy both for the agreement to mediate and for the mediated agreement, including where relevant choice of the applicable law. Consequently, the scope must be limited to commercial agreements between businesses only; e.g. consumer contracts, labour contracts, housing contracts (rents) have to be excluded from scope. Otherwise, serious conflicts will arise out of the need to take account of mandatory laws aimed at protecting the interests of weaker parties. If those problems had to be tackled (and it is unclear whether any solution would be possible), the instrument might become overly complex and difficult to use.

(b) A (functional) definition of “international commercial mediation/conciliation”, both in a negative way (i. e. excluding “arbitration” on the one hand, simple negotiation on the other hand) and in a positive way (as a process that involves a neutral/neutrals; that does not exclude access to court; the outcome of the process being contractually binding on the parties only if they give their consent, etc.). How should the international element be determined? Should there be a right of a party to terminate the process at any time? Could there be processes whereby the neutral is required to make a recommendation, even though one of the parties prefers to stop the process? Which law governs the mediation/conciliation process? Is there a “location” of the procedure? Do we need to address issues of “law or forum shopping”?

(c) The formal and substantive requirements for the mediation/conciliation agreement (that is: the agreement to have recourse to mediation or conciliation for dispute resolution) need to be addressed. If the parties intend the outcome of the mediation/conciliation, i.e. the mediated/conciliated settlement, to be subject to an

expedited enforcement under that new instrument, this intention has to be expressed in the mediation/conciliation agreement at the time parties agree to have recourse to mediation/conciliation. The agreement should be explicit and made in writing (to ensure that it can be proved if need be), and there need to be mechanisms to ensure that parties are aware of (the impacts of) entering into the agreement to submit the possible outcome of the mediation/conciliation process to expedited enforcement.

(d) Requirements of due process that must be respected if the settlement agreement resulting from the international commercial mediation/conciliation is to enjoy expedited enforcement. The difficulty is that mediation/conciliation are relatively informal processes. Nevertheless there can be a number of requirements that can be regulated such as the impartiality and independence of the mediator(s)/conciliator(s), the equal treatment of the parties, and in particular in case of an evaluative process: the right to be heard on any fact or circumstance on which the mediator/conciliator bases his or her evaluation (which raises the question of conditions for using techniques such as a *caucus*). Violation of substantial procedural rights should in principle be a ground for refusing enforceability of the agreement. Violation of *ordre public* should also be a ground for refusal of enforceability. In addition, an agreement that is (partially) invalid under the relevant applicable law should not be granted enforceability (see the following point). There need to be mechanisms that ensure that each party can obtain protection against enforceability of settlements that do not fulfil the conditions a set out in the instrument.

(e) Interaction with contract law: A mediated or conciliated settlement agreement is not an award, or an award on agreed terms. There is no arbitration procedure, nor does the recourse to mediation or conciliation exclude access to court. The outcome of the mediation or conciliation remains an agreement between the parties and thus is subject to the rules of substantive contract law (see above). If it enjoys enforceability, the terms of the agreement can be enforced in an expedited way. However, it is not excluded that the agreement as such could be invalid under the applicable substantive law. The agreement is not final, i.e. the parties remain free to modify their agreement etc. The question needs to be addressed what will be the interaction between the content and the validity of the agreement and its enforceability. In other words, if the agreement is (partially) invalid under substantive law, or if the parties decide to modify it, what effect should this have on the enforceability, and by which mechanisms can these effects be implemented? Our view is that a State cannot be required to grant enforceability to an agreement which, under its law, including the choice of law rules, would be invalid or contrary to public policy or otherwise incapable of being enforced. And if enforceability has (erroneously) been granted, the other party must have an opportunity to contest the decision to grant enforceability in court.

We also draw attention to the work of the Hague Conference on the enforcement of mediated agreements in the context of international family conflicts. The analyses given in the working documents of the group of experts dealing with that project might be of assistance when examining the feasibility of a possible instrument on cross-border enforcement of mediated/conciliated settlements.

2. Canada

Original: English, French
Date: 8 December 2014

A fundamental question raised by this project is what policy rationale justifies giving expedited recognition and enforcement to one type of contracts over all the others (i.e., expedited recognition and enforcement of settlement agreements is available while a similar expedited treatment is not available for a sale agreement). If the scope of the project were restricted to settlement agreements providing liquidated damages, it would be more akin to a judgment or an award and expedited enforcement procedures could more easily be justified. To the extent the settlement agreement covers aspects other than pecuniary settlements, it will be subject to a larger number of exclusions under domestic law with respect to specific performance, making the enforcement less likely. It will also be subject to interpretation by the parties and potentially by a court of law. For these reasons, the project should contemplate a convention on the recognition and enforcement of pecuniary settlements.

Formalistic requirements should be limited to the maximum extent possible in order to limit grounds for setting aside the settlement agreement, solely for reasons of form, at the time enforcement is sought. In that context, the signature of the mediator or the parties' representatives (counsel) should not be a requirement for the enforcement of the settlement agreement.

Given the adoption of the UNCITRAL Model Law on International Commercial Conciliation by a number of jurisdictions, the current project should build on principles found in the Model Law and promote an approach consistent with the Model Law.

3. United States of America

Original: English
Date: 23 December 2014

At the Commission session in July 2014, the United States submitted a proposal, A/CN.9/822, suggesting that UNCITRAL develop a convention on the enforceability of conciliated settlement agreements that resolve international commercial disputes.[3] The Commission decided that Working Group II should consider this proposal at its February 2015 session and report to the Commission on the feasibility of work on the topic.[4] The United States greatly appreciates the work that the Secretariat has done to prepare a paper[5] to provide background on the topic,

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[3] In this paper, as in existing UNCITRAL instruments, the term "conciliation" refers to "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." UNCITRAL Model Law on International Commercial Conciliation, art. 1.3. Thus, this paper does not intend to differentiate conciliation from mediation.

[4] Report of the United Nations Commission on International Trade Law, Forty-seventh Session (7-18 July 2014), A/69/17, para. 130.

[5] A/CN.9/WG.II/WP.187.

and we hope that the Working Group will endorse the proposal. This paper is intended to provide further explanation of the issues raised in A/CN.9/822, in light of questions that were raised at the Commission session and in other consultations.

(i) The Need for a New Convention

One question that has been raised in response to the proposal is whether commercial parties' willingness to enter into conciliation is affected by the legal regime that would apply to the enforcement of any resulting settlement. UNCITRAL's previous work on conciliation suggests that enforceability does matter: "Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award."[6] A recently-conducted international survey also supports the view that a convention that facilitated enforcement would encourage conciliation. In that survey, only 14 per cent of respondents (including private practitioners, mediators, academics, and others)believed that, under the current legal framework in their home jurisdiction, it would be easy to enforce an international commercial settlement agreement arising from a conciliation that took place elsewhere.[7] Furthermore, 74 per cent of the respondents believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation (with another 18 per cent believing that it could possibly do so).[8] Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93 per cent of respondents would be more likely (either "much more likely" or "probably") to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements.[9] Over 87 per cent of respondents thought a widely-ratified convention could "definitely" or "possibly" make it easier for commercial parties to come to mediation in the first place, and over 90 per cent thought that the absence of an international enforcement mechanism presents an impediment to the growth of mediation for resolving cross-border disputes.[10] Additionally, the U.S. Council for International Business — i.e., the U.S. branch of the International Chamber of Commerce (ICC) — sought input on the subject from its membership, which expressed the view that a convention would be useful.

Thus, the United States believes that a convention as outlined in the proposal would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement could be relied on and easily enforced. (In particular, when a commercial dispute arises from a contractual relationship, conciliation may not be an attractive option if even a successful conciliation would result in a settlement that would merely have the same legal

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[6] UNCITRAL Model Law on International Commercial Conciliation, Guide to Enactment, para. 87.

[7] S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, at 44, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

[8] Id. at 45.

[9] www.imimediation.org/un-convention-on-mediation.

[10] Id.

status as the original contract and would have to be the subject of litigation under contract law.)

Some who have questioned why a convention is needed have noted that many sets of arbitration rules permit parties who settle during an arbitration to have the settlement turned into a "consent award" (or an "award on agreed terms"). The settlement is treated as if it were an award, even though the parties themselves (rather than an arbitral panel) determine the outcome. However, adapting this feature of international arbitration to the enforcement of conciliated settlements would be difficult. First of all, if a dispute is settled through conciliation and subsequently submitted to arbitration solely in order to obtain a consent award, questions persist as to whether such award would be enforceable under the New York Convention, as it might not arise from "differences between the parties."[11] Furthermore, even if arbitrators could be persuaded to serve in an arbitration whose only function is to rubber-stamp an agreement that has already been reached between the parties, parties should not have to initiate arbitration — with the attendant costs and delays — merely in order to bless a settlement. Many parties would likely not be willing to do so at the end of a successful conciliation, at a time when the parties presumably expect compliance and thus would see extra formalities as an unnecessary cost. (Even if they were willing to initiate arbitration merely to have the settlement blessed, it may not be appropriate in all situations, such as if court proceedings have already commenced.)

Moreover, the problems identified in the survey responses noted above persist even to the extent it is possible to convert conciliated settlements into consent awards. Assuming parties are able to enforce settlements under contract law or transform them into consent awards, enforcement of conciliated settlements is still seen as too difficult in the cross-border context. Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

(ii) Status of Settlements under a Convention

At the UNCITRAL Commission session in July 2014, several questions about the operation and effect of a convention were raised with respect to the proposal, including whether a convention would merely convert conciliated settlements into arbitral awards, and "whether the new regime of enforcement envisaged would be optional in nature."[12]

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[11] See, e.g., Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 UCLA L. Rev. 1385, 1402 (2007) ("It has been argued that a successful mediation resolves all differences. Therefore, if parties agree to arbitrate after a mediation agreement is reached, this is not a valid agreement to resolve differences."); Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation — Worldwide*, 80 Notre Dame L. Rev. 553, 589 n.174 (2005) ("The Convention applies to awards 'arising out of differences between persons, whether physical or legal.'… When the parties reach a mediated agreement before invoking arbitration, there is then arguably no dispute and no 'differences' to give rise to the arbitration.").

[12] Report of UNCITRAL, supra note 2, at para. 124.

The proposal does not envision that a convention would transform conciliated settlements into arbitral awards. Rather, although the convention would give conciliated settlements an enforcement regime similar to that provided under the New York Convention, conciliated settlements would remain a separate legal concept, entirely distinct from (though coequal to) arbitral awards. The basis for a conciliated settlement would still be the voluntary agreement by the parties, rather than a decision of an arbitral panel. The settlement would simply be more easily enforceable internationally than it would be if it remained merely a contractual agreement. Given that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them).

At the same time, because the conciliated settlement has its basis in the parties' voluntary agreement, any enforcement regime should respect the contours of that agreement, including any limitations that the parties establish. For example, if the parties include a forum selection clause specifying that enforcement could only occur in a particular jurisdiction, the convention should not override that clause. Similarly, if the parties include in the settlement other limitations on remedies, such as requiring any disputes to be brought back to the conciliator before enforcement is sought, enforcement under the convention should only be available to the degree specified. By extension, parties could opt out of the convention's framework entirely by specifying in the settlement that enforcement under the convention is unavailable. By including limitations of this nature, the convention would respect the voluntary nature of conciliated settlements and would not diminish the ability of the conciliation process to bring disputing parties to mutually-agreeable resolutions.

(iii) Complex Settlements and Other Possible Exceptions

Another question raised in response to the proposal is whether complex conciliated settlements (e.g., those containing complicated non-monetary elements, such as long-term obligations) would be suitable for enforcement under the convention. However, in general, arbitral awards also have the potential to include similarly complex elements, depending on the issues the arbitrators are asked to resolve. Thus, courts enforcing arbitral awards under the New York Convention could already be confronted by a need to enforce such complex elements and order various forms of non-monetary relief. A new convention providing a similar enforcement mechanism for conciliated settlements thus should not present courts with a qualitatively different set of problems. At the same time, conciliated settlements may include complex obligations more frequently than arbitral awards do; the proposed convention could thus require courts to enforce such complex obligations more often. Providing for the possibility of limiting the convention's application when a conciliated settlement includes non-monetary obligations may therefore be prudent. The simplest approach may be to permit states to make a reservation limiting the extent to which the convention applies to non-monetary elements of conciliated settlements. Under this approach, the default rule would be full coverage of both monetary and non-monetary elements of conciliated settlements, but if a state believes that its courts would struggle to enforce certain

types of non-monetary elements of settlements, it could limit its obligations in those respects.

A related question is which other exceptions should apply to a state's obligation to enforce conciliated settlement agreements. Some of the exceptions in Article V of the New York Convention would likely need to be retained, while others could be modified or replaced by other exceptions more appropriate for the context of conciliation, as discussed below.

(iv) Technical Feasibility

An additional question that has been raised about the proposal is whether the New York Convention is the appropriate model on which to base a new convention. Using the New York Convention as the model for work on enforcement of conciliated settlements — a model that sets forth a broad obligation to recognize and enforce, and provides a set of exceptions to that obligation — would have the benefit of simplicity, focusing on the result (i.e., recognition and enforcement) rather than dictating particular procedures to reach that goal. Thus, a new convention would not need to be long and complex.

Only a few articles would be needed to set forth the central content of a convention. The main obligation, to recognize and enforce conciliated settlements, could be based on Article III of the New York Convention. This article could also require that Parties to the convention not impose substantially more onerous conditions on the recognition and enforcement of international conciliated settlements than are imposed on either domestic conciliated settlements or on arbitral awards.

Next, a set of definitions would be needed. A definition of "conciliation" could be based on Article 1.3 of the Model Law.[13] Similarly, a definition of "international" could be based on Article 1.4(a) of the Model Law, which addresses parties that have their places of business in different states.[14] The definition of "commercial" in the Model Law may not be as well suited for a convention, as it only provides a non-exhaustive list of examples. Instead, this definition could be drawn from other instruments, such as the draft Hague Principles of Choice of Law in International Commercial Contracts, which in Article 1 state that they apply to contracts "where each party is acting in the exercise of its trade or profession" but not to consumer or employment disputes. Similarly, a definition would be needed for a conciliated settlement agreement, specifying that the agreement should be in writing, that it should be signed by the parties to an international commercial dispute, and that the parties should have used conciliation.

The other key provisions of a convention, in addition to the definitions and the obligation to recognize and enforce conciliated settlements, would be the exceptions to that obligation. Some of these issues could be addressed as exceptions similar to those in Article V of the New York Convention, while for other issues a reservation

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[13] See footnote 1, supra.

[14] Article 10 of the Convention on Contracts for the International Sale of Goods (CISG) provides further guidance on this point, stating that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."

mechanism might be more appropriate. Generally-available exceptions might include the following:

- Conciliated settlements invoked against parties that were, under the law applicable to them, under some incapacity or that were coerced into signing the conciliated settlements;[15]
- Conciliated settlements that are not valid under the law to which the parties have subjected them or, failing any indication thereon, under the law of the country in which they were made;[16]
- Conciliated settlements the subject matter of which is not capable of settlement through conciliation under the law of the country where recognition and enforcement is sought;[17]
- Conciliated settlements that would be contrary to public policy to recognize or enforce;[18] and
- Conciliated settlements whose own terms would preclude enforcement as requested.[19]

Other issues may be more properly addressed by permitting Parties to the convention to take a reservation limiting the convention's application when needed in order to allow implementation in a particular legal system:

- Applying the convention to conciliated settlements to which a government is a party only to the extent specified in the declaration;[20]
- Providing that a party to a conciliated settlement shall not be eligible to seek recognition and enforcement under the convention if that party has its place of business in a state that is not a Party to the convention;[21]

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[15] This exception would be drawn in part from article V(1)(a) of the NY Convention. A reference to coercion would be useful to ensure that a court can refuse to enforce a conciliated settlement if a party did not sign it voluntarily. Article 3.2.6 of the UNIDROIT Principles of International Commercial Contracts provides guidance on the level of coercion relevant for this context — i.e., an "unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion" of the conciliated settlement.

[16] Such an exception would be based on Article V(1)(a) of the New York Convention.

[17] Such an exception would be based on Article V(2)(a) of the New York Convention.

[18] Such an exception would be based on Article V(2)(b) of the New York Convention.

[19] As discussed earlier in this paper, such an exception would apply when, for example, the conciliated settlement includes a forum selection clause specifying that enforcement could only occur in a different jurisdiction, or when the conciliated settlement includes other limitations on remedies (e.g., requiring any disputes to be brought back to the conciliator before enforcement is sought, requiring disputes to be settled by arbitration rather than enforcement in court, or providing that enforcement under the convention is unavailable).

[20] Such a reservation would be intended to permit Parties to limit the application of the convention to address issues such as sovereign immunity, limitations on the remedies available against government entities, or lack of authority for certain government entities to enter into conciliated settlements.

[21] Such a reservation would provide Parties with the option of requiring reciprocity from other states in order for those other states' businesses to benefit from the convention (similar to article I (3) of the New York Convention).

- Applying the convention to non-monetary elements of conciliated settlements only to the extent specified in the reservation;[22] or
- Applying the convention only to conciliated settlements in which the parties to the conciliated settlement have explicitly agreed that the convention would apply.[23]

Beyond provisions such as these, not many additional substantive rules would be needed in a new convention. Analogues to Articles IV (procedures for enforcement) and VI (suspension of proceedings) of the New York Convention could be included, as could a provision limiting application of the convention to conciliated settlements signed after the convention's entry into force. Otherwise, only a standard set of final provisions would be needed.

Thus, the United States continues to believe that developing a new convention along the lines set out in the earlier proposal would be not only a useful project, but a feasible one that the Working Group could accomplish in a relatively short period of time. We look forward to discussing these issues with other delegations.

B. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

1. Austria

Original: English
Date: 15 December 2014

The possibility of an arbitral tribunal to embark on efforts aimed at reaching a friendly settlement between the parties should be stressed in the text of paragraph 47 of the UNCITRAL Notes which currently reads as follows:

> "12. Possible settlement negotiations and their effect on scheduling proceedings
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> 47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations."

Austria would like to present the following proposal for a possible revision:

The second sentence of paragraph 47 could be replaced by "Where appropriate the arbitral tribunal may suggest and facilitate settlement negotiations and — if

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[22] As discussed above, such a reservation would permit limits on enforcement under the convention for conciliated settlements that include long-term or complex obligations (other than an obligation by one party to pay a sum to another party) that courts may not necessarily be able to evaluate in a streamlined enforcement process and that may be more appropriately addressed under contract law.

[23] Such a reservation would permit a Party to apply the convention only when parties to a conciliated settlement opt in to the enforcement regime.

asked to do so by the parties — guide or assist them in their negotiations." The third sentence should then begin with "In any case" rather than with "However".

This version reflects the common practice (which is considered efficient and time- and cost-saving for the parties) of amicable settlements directly within the arbitration proceedings, without the involvement of mediators.