United Nations A/CN.9/WG.II/WP.190

General Assembly

Distr.: Limited
13 July 2015

Original: English

United Nations Commission on International Trade Law
Working Group II (Arbitration and Conciliation)
Sixty-third session
Vienna, 7-11 September 2015

Settlement of commercial disputes International commercial conciliation: enforceability of settlement agreements

Note by the Secretariat

Contents

V.15-04988 (E)

Please recycle

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 international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1]

2. At that session, the Commission had before it a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through conciliation (A/CN.9/822). In support of that proposal, it was said that one obstacle to greater use of conciliation was that settlement agreements reached through conciliation might be more difficult to enforce than arbitral awards. In general, it was said that settlement agreements reached through conciliation were already enforceable as contracts between the parties but that enforcement under contract law cross-border could be burdensome and time-consuming. It was further said that the lack of easy enforceability of such contracts was a disincentive to commercial parties to mediate. Consequently, it was proposed that the Working Group develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") had facilitated the growth of arbitration.[2]

3. Support was expressed for possible work in that area on many of the bases expressed above. Doubts were also expressed as to the feasibility of the proposal and questions were raised in relation to that possible topic of work, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements; (c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.[3]

4. It was furthermore observed that UNCITRAL had previously considered that issue when preparing the UNCITRAL Model Law on International Commercial Conciliation (2002) ("Model Law on Conciliation"),[4] and particular reference was

---

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

[2] Ibid., para. 123.

[3] Ibid., para. 124.

[4] Discussions by UNCITRAL on enforcement of settlement agreements resulting from conciliation when it prepared of the Model Law on Conciliation may be found in the following documents: Notes by the Secretariat: A/CN.9/460, paragraphs 16-18; A/CN.9/WG.II/WP.108, paragraphs 34-42; A/CN.9/WG.II/WP.110, paragraphs 105-112; A/CN.9/WG.II/WP.113/Add.1, footnote 39; A/CN.9/WG.II/WP.115, paragraphs 45-49; A/CN.9/WG.II/WP.116, paragraphs 66-71; A/CN.9/514, paragraphs 77-81; Reports of Working Group II (Arbitration and Conciliation): thirty-second session (A/CN.9/468, paras. 38-40);

made to article 14 of the Model Law on Conciliation and paragraphs 90 and 91 of the Guide to Enactment and Use of that text.[5]

5. At its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission noted that the Working Group considered the topic of enforcement of settlement agreements resulting from international commercial conciliation at its sixty-second session (A/CN.9/832, paras. 13-59). At that session of the Working Group, while a number of questions and concerns were expressed, it was generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

6. At the forty-eighth session of the Commission, there was general support to resume work in that area with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on. However, doubts were expressed on whether it would be desirable to have a harmonized enforcement mechanism as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the Model Law on Conciliation. Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreements, possibly modelled on article III of the New York Convention.[6]

7. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The

---

thirty-fourth session (A/CN.9/487, paras. 153-159); thirty-fifth session (A/CN.9/506, paras. 38-48; 133-139; 160 and 161); Report of the Commission on the work of its thirty-fifth session: *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 119-126 and 172.

[5] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 125.

[6] Report of the Commission on the work of its forty-eighth session, under preparation.

Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[7]

8. To facilitate discussions of the Working Group, the present note seeks to identify the existing legal frameworks under which settlement agreements can be enforced, the issues underlying the enforceability of settlement agreements as well as the possible forms of work.

II. Enforceability of settlement agreements[8]

A. General remarks

9. UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation/mediation:[9] the Conciliation Rules, in 1980, and the Model Law on Conciliation, in 2002, which form the basis of an international framework for conciliation. The Conciliation Rules were the first international step taken in harmonizing that field. Upon their adoption, the United Nations General Assembly recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[10]

10. Since the adoption of the two instruments, the use of conciliation for settling commercial disputes has increased considerably. Legislation on conciliation has been enacted in a growing number of jurisdictions;[11] conciliation and mediation institutes have proliferated, as well as trainings for conciliators and mediators (see A/CN.9/WG.II/WP.187, paras. 16-18 and Annex I).

11. Enforcement of settlement agreements is often cited as one crucial aspect that would make conciliation a more efficient tool for resolving disputes. In preparing the Model Law on Conciliation, the Commission was generally in agreement with the general policy that "easy and fast enforcement of settlement agreements should be promoted".[12] Accordingly, the Model Law on Conciliation includes a provision on enforcement of settlement agreements stating the principle that settlement agreements should be enforceable, without attempting to specify the method by which such settlement agreements may actually be enforced, a matter that is left to

---

[7] Ibid.

[8] The term "settlement agreement" is used to generally refer to an agreement that resolves a dispute, in all or in part and is to be differentiated from the "agreement to submit a dispute to conciliation".

[9] The terms "conciliation" and "mediation" are used in this note as broad notions referring to proceedings in which a third person or persons assists the parties in their attempt to reach an amicable settlement of their dispute (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[10] Resolution 57/18 of 19 November 2002.

[11] Policy Research Working Paper, Arbitrating and Mediating Disputes, Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment, The World Bank, Financial and Private sector Development Network, Global Indicators and Analysis Department, October 2013, at p. 9.

[12] Guide to Enactment of the Model Law on Conciliation, para. 88.

each enacting State. Article 14 of the Model Law on Conciliation (Enforceability of settlement agreement) reads as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

B. Existing legal frameworks on enforcement of settlement agreements

12. Replies to the questionnaire circulated by the Secretariat to collect information regarding the legislative framework and practices with respect to enforcement of settlement agreements were published in document A/CN.9/846 and its addenda. An overview of the current legislative trends is contained in document A/CN.9/WG.II/WP.187, paras. 20 to 30.

13. Replies to the questionnaire illustrate that some jurisdictions have no specific legislation on enforcement of settlement agreements, which are treated as commercial agreements between private parties, and enforced accordingly. In jurisdictions that have provided for a method of enforcing settlement agreements, the purpose of such legislation is generally to ensure that settlement agreements should benefit from some form of expedited recognition of their enforceability. In that respect, three main approaches have been identified.

14. One approach is that a settlement agreement can be enforced through a court procedure, which usually requires compliance with formalities (for example, deposition or registration of the settlement agreement before the competent court). Another approach is that a settlement agreement can be enforced once it has been notarized according to the regime applicable to notarized documents. Yet another approach is that a settlement agreement can be enforced through an arbitration procedure where an arbitral tribunal is appointed for the purpose of issuing a consent award based on the settlement agreement. Some jurisdictions have adopted more than one of the approaches mentioned above.

15. In most jurisdictions, no distinction is made between international and domestic settlement agreements in relation to the enforcement procedure. However, a few jurisdictions have legislative provisions specific to cross-border enforcement of international settlement agreements.

16. In one jurisdiction, an international settlement agreement is enforceable as long as it is enforceable in the State where it was concluded; no particular form or procedural steps are required. Nevertheless, the enforcement court in that jurisdiction may refuse enforcement, if the parties lacked capacity, if the subject matter of the dispute could not be subject to conciliation, or if the settlement agreement would contradict public policy, general principles of law or good faith. In another jurisdiction, an international settlement agreement is enforceable through a judicial ruling confirming the validity of the agreement. In a few jurisdictions, an international settlement agreement can be enforced if recorded in the form of a notarized document in the State where the settlement agreement was concluded, provided that the agreement is not contrary to public policy of the jurisdiction where enforcement is sought.

17. There is currently no uniform international or regional instrument addressing enforceability of settlement agreements. However, it might be possible to utilize existing international or regional instruments, such as conventions on recognition and enforcement of arbitral awards, and judgements.

18. For example, the New York Convention can be used in countries where parties who have settled a dispute through conciliation may appoint an arbitrator to issue an award based on the settlement agreement. When settlement of a dispute is reached during an arbitration procedure, the arbitral tribunal may record the settlement agreement in the form of an arbitral award on agreed terms, if requested by the parties.

19. It should be noted that the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. The travaux préparatoires of the New York Convention show that the issue of the application of the New York Convention to consent awards was raised during its deliberations, while no decision was made.[13] There is no reported case law on this issue.[14]

20. A settlement agreement which is recorded as a court judgement could be recognized and enforced under the conventions on enforcement of foreign judgements.

C. Questions underlying enforceability of settlement agreements

21. In accordance with the mandate of the Commission (see above, para. 7), this section seeks to outline issues that the Working Group may wish to address in considering the preparation of an instrument (convention, model legislative provisions or guidance texts) for the enforcement of settlement agreements, with the objective being that settlement agreements would be granted enhanced enforceability compared to ordinary contracts.

1. Settlement agreements

(a) Relevance of the procedure

22. The Model Law on Conciliation does not include provisions concerning the formation of settlement agreements, their definition or their enforcement procedure, and leaves those matters to be determined in accordance with the applicable domestic law.

---

[13] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, at 7, 10; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.26. See also *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General, E/CONF.26/4, at 26.

[14] UNCITRAL Secretariat Guide on the New York Convention, Article I, para. 37, available on the Internet at www.newyorkconvention1958.org.

23. The term "settlement agreement" generally refers to an agreement between the parties to resolve a dispute, in all or in part. It may find its origin in an agreement to submit a dispute to conciliation, or it may be concluded in the course of a dispute resolution process including arbitral or court proceedings. In considering the scope of its work, the Working Group may wish to consider whether to use the term "settlement agreement" in a broad manner or to limit it as the result of a conciliation procedure.

- *Any agreement settling a dispute regardless of the procedure*

24. One possible approach would be to address enforcement of settlement agreements, regardless of the procedure that led to their conclusion, as long as their purpose is to settle a dispute. Such an approach would make it possible to include settlement agreements resulting from mere negotiation between the parties (see A/CN.9/832, para. 42). However, in considering the enforcement procedure, the question would arise whether the competent authority for the enforcement of the settlement agreement would then have to determine whether there existed a dispute in the first instance and whether the purpose of the agreement was to settle that dispute.

- *Settlement agreements resulting from a process with a neutral assisting the parties*

25. Another possible approach would be to limit the scope of work to enforcement of settlement agreements resulting from conciliation, i.e., a process in which a third-party intermediary assisted the parties with the settlement. This approach would make it necessary to define the procedure under which the settlement agreement was concluded.

26. For instance, article 1(3) of the Model Law on Conciliation provides a broad definition of "conciliation"[15] aimed at clarifying the procedural features in generic terms, as follows: "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."

27. It may be noted that the various techniques, that lead to settlement agreements referred to under the terms "conciliation", "mediation", "neutral evaluation", may be subject to different legal regimes depending on the jurisdiction. Therefore, any definition of the process that led to the settlement agreement would need to be either wide enough to include the numerous forms of alternative dispute resolutions known under different terminology (following the approach adopted under the Model Law on Conciliation) and ensure that such definition would be understood in the same manner in various jurisdictions, or distinctive enough to exclude certain forms of alternative dispute resolution.

28. The Working Group may wish to consider whether an instrument on enforcement of settlement agreements would address certain characteristics or

[15] See also para. 5 of its Guide to Enactment and Use.

requirements with respect to the conciliation procedure (for instance, that the third-party neutral assisting the parties fulfil certain qualifications). If such requirements are to be included, the Working Group may wish to consider how to ascertain that the procedure that led to the conclusion of the settlement agreement has been followed, without adopting too formalistic an approach (such as requiring that the settlement agreement bears certain mentions, or is signed by the conciliator or parties' counsels).

- *Whether the process would need to be international*

29. In addition, the Working Group may wish to consider whether the scope of its work should focus on conciliation procedures that are international. In that respect, it may be noted that the Model Law on Conciliation refers to "international commercial conciliation", whereas a vast majority of jurisdictions do not differentiate between international and domestic commercial conciliation, generally applying the same procedure for both (see above, para. 15). Therefore, the Working Group may wish to consider whether an instrument on enforcement of settlement agreements should address generally settlement agreements resulting from conciliation, regardless whether the procedure is domestic or international.

- *The basis upon which the process is initiated*

30. Furthermore, the Working Group may wish to consider whether the basis upon which the conciliation procedure started would have any relevance. In that respect, it should be noted that article 1(8) of the Model Law on Conciliation provides as follows: "This Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity".

(b) International and domestic settlement agreements

31. The Working Group may wish to consider whether to (i) distinguish between "international" and "domestic" settlement agreements; (ii) deal with "foreign" as opposed to "international" settlement agreements (A/CN.9/832, para. 26); or (iii) only address settlement agreements that need to be enforced cross-border, without any distinction. Consideration of that question might differ based on the instrument to be developed.

32. If the Working Group would consider it necessary to determine the notion of "international" or "foreign" and the relevant criteria for such determination, it may wish to consider how those notions have been defined in UNCITRAL texts.

33. For example, the notion of "foreign" settlement agreement could be determined based on a territorial approach (place where the conciliation took place, place of conclusion of the settlement agreement), a personal approach (parties' place of business), the law applicable to the settlement agreement, or any other private international law criteria (A/CN.9/832, para. 27).

34. In its consideration of the matter, the Working Group may wish to refer to article 1(4), (5) and (6) of the Model Law on Conciliation which provides as follows: "4. 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 (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. 5. For the purposes of this article: (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the 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. 6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law."

35. As a further illustration, article 35 of the Model Law on International Commercial Arbitration ("Model Law on Arbitration") treats awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made. The Model Law on Arbitration distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. A similar approach could be considered for an instrument on enforcement of settlement agreements, delineating application based on substantive grounds rather than territorial borders, which may be inappropriate in view of the difficulty to determine the place where the settlement is concluded, in certain instances.

(c) Parties to the settlement agreement

36. UNCITRAL instruments usually apply to commercial matters, defined in a broad manner. In that context, the Working Group may wish to consider whether the scope of its work should exclude settlement agreements involving consumers (A/CN.9/832, para. 43). The Working Group may also wish to consider how to take account of settlement agreements concluded by government entities.

(d) Content of the settlement agreement

37. The Working Group may wish to consider whether its work should take into account the substantive contents of settlement agreements. For example, it might be envisaged to limit the scope of work to enforcement of pecuniary settlement agreements. Another approach would be to cover all types of settlement agreements, without limitations as to the remedies or nature of obligations that are provided under those agreements (A/CN.9/832, para. 41).

38. The obligations stipulated in a settlement agreement might be broad. The Working Group may wish to consider elements of complexities pertaining to settlement agreements, such as reciprocal or conditional obligations and conditions for the implementation of obligations and their impact on enforcement of settlement agreements. Further, the Working Group may wish to consider whether and, in the affirmative, how to address enforcement of settlement agreements that are conditional on certain future events.

(e) Form of the settlement agreement

39. The Working Group may wish to consider whether to address form requirement with respect to settlement agreements (for example, agreements in writing, containing all relevant terms and conditions of the settlement, signed by the

parties, or their representatives and, if relevant, the conciliator). In so doing, the Working Group may wish to consider article 31 of the Model Law on Arbitration, which addresses form and contents of an award, and requires that an award shall be made in writing, and shall be signed by the arbitrators. Furthermore, the Working Group may wish to keep in mind that form requirements should not undermine the flexibility that characterizes conciliation.

2. Agreement to submit a dispute to conciliation

40. At the sixty-second session of the Working Group, a question was raised whether the agreement to submit a dispute to conciliation should also be included in the scope of work on the matter. That question was considered in light of a proposal to develop a convention on enforcement of settlement agreements modelled on the New York Convention. It was said that, in the field of arbitration, the exclusive nature of an arbitration agreement (referring a dispute to arbitration) created the need for its recognition, which did not necessarily arise with respect to conciliation (A/CN.9/832, para. 25). Article II (1) of the New York Convention provides: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II (3) of the New York Convention and article 8(1) of the Model Law on Arbitration provide for the obligation of courts to refer the parties to arbitration.

41. It should be noted that the basis upon which conciliation is carried out may be diverse, which may include the agreement of the parties, a mandatory provision under law or an order by the court (see above, para. 30). While the arbitration agreement is the basis for the arbitration procedure representing the agreement of the parties to be bound by the decision of the arbitral tribunal, the outcome of conciliation is fully consensual. Therefore, addressing recognition of the agreement to submit a dispute to conciliation may be superfluous.

3. Enforcement procedure

(a) Recognition

42. The Working Group may wish to consider whether a distinction should be made between recognition and enforcement of a settlement agreement and whether its work would need to address recognition in addition to enforcement.

(b) Direct enforcement or a review mechanism as a prerequisite for enforcement

43. The Working Group may wish to recall its discussions at its sixty-second session on whether an instrument on enforcement of settlement agreements would make settlement agreements directly enforceable, incorporate a review mechanism in the jurisdiction where the settlement agreement is originating from or include a combination of the two options (A/CN.9/832, paras. 50-55).

44. If an instrument on enforcement of settlement agreements were to promote the approach that settlement agreements should be directly enforceable, it would set out the minimum requirements that a settlement agreement would need to meet to be enforceable (A/CN.9/832, para. 51). Emphasis would also be on the procedure that led to the settlement agreement and the guarantees required to make the agreement

resulting from that procedure directly enforceable (for example, the obligation stipulated in the agreement should be capable of being enforced in that State and the conciliation procedure should comply with due process). That matter is closely related to the question whether all settlement agreements or only those resulting from a conciliation procedure would be included within the scope of an instrument on enforcement.

45. An instrument on enforcement of settlement agreements incorporating a review mechanism in the jurisdiction where the settlement agreement is originating from would provide that, to be enforceable, a settlement agreement would need to be first authenticated or endorsed by a competent authority and some formal requirements would have to be met in order for the agreement to benefit from an enforcement procedure in another State. If the Working Group considers that that approach should be further explored, it may wish to consider how to determine the jurisdiction competent to review the settlement agreement in the first place for it to be enforceable abroad and whether a minimum standard should be established to give international effect to domestic enforcement procedures (A/CN.9/832, para. 54). For instance, if a settlement agreement would need to be authenticated to benefit from any enforcement procedure, questions such as the competent authority (the conciliator, an institution or a court) and the procedure for obtaining authentication would need to be further addressed (A/CN.9/832, para. 50). The efficiency of such an approach compared to existing available enforcement mechanisms would also need to be considered.

4. Defences to enforcement of settlement agreements

46. The Working Group may wish to consider whether, and in the affirmative, how, to determine the defences to enforcement of settlement agreements. When enforcing settlement agreements, the following issues may become relevant: (i) in relation to the parties, their capacity, their consent, and existence of duress, unconscionability, undue influence, misrepresentation, mistake or fraud; (ii) in relation to the agreement, its purpose, cause, validity, formalities required, non-contradiction with public policy and compliance with mandatory provisions.

47. Various questions would need consideration, such as:

- Whether a competent authority considering the enforcement of a settlement agreement:
    - Would have jurisdiction to also consider the validity of that agreement (A/CN.9/832, para. 44);
    - Should limit itself to examining the legality of that agreement, without considering the merits;
    - Would give effect to a determination in a different jurisdiction that the settlement agreement is invalid or otherwise not enforceable;
- What law would be relevant to the consideration of the settlement agreement, in particular its validity;
- How to address parallel proceedings, for instance, a proceeding on the validity of the agreement in one jurisdiction and an enforcement procedure in another jurisdiction; on that matter, the Working Group may wish to note article VI of

the New York Convention, which addresses the situation where a party seeks to set aside an award in the country where it was issued, while the other party seeks to enforce it elsewhere; article VI achieves a compromise between the concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of contracting States the discretion to decide whether or not to adjourn enforcement proceedings;

- How to address the interrelation between an instrument on enforcement of settlement agreements and existing mechanisms (for example, if parties decide to enforce their settlement agreement under contract law or by any other means);

- Whether and, in the affirmative, how, an enforcement mechanism should address possible subsequent procedure on rectification if unforeseen circumstances arise in the course of enforcement;

- How to address the interrelation between a contractual claim based on the breach of a settlement agreement and the enforcement of the settlement agreement itself (A/CN.9/832, para. 38); and

- Whether and to what extent dispute settlement clauses usually contained in settlement agreements would have an impact on enforcement (A/CN.9/832, para. 34).

D. Possible forms of work

1. Convention

48. A its forty-seventh session, the Commission had before it, a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements resulting from conciliation (A/CN.9/822). At the sixty-second session of the Working Group, it was noted that a convention could provide a clear and uniform framework for facilitating enforcement of settlement agreements in different jurisdictions (A/CN.9/832, para. 18). To the contrary, another view was that an international regime created by a convention might result in a more cumbersome review of settlement agreements than under domestic mechanisms, as currently settlement agreements could circulate as contracts without any formalities or control in any State, the situation being different for foreign judgements and arbitral awards (A/CN.9/832, para. 21). Paragraphs 49 to 56 below provide a summary of that proposal with comments made during the sixty-second session of the Working Group.

49. Under the proposal, the scope of a convention could provide that it would apply to “international” settlement agreements (such as when the parties have their principal places of business in different States) and settlement agreements resolving “commercial” disputes (excluding agreements involving consumers). As to the substance, it could include provisions on the form of settlement agreements (for example, agreements in writing, signed by the parties and the conciliator) and stating that settlement agreements falling within the scope of the convention are binding and enforceable.

50. It could also include certain limited exceptions similar, but not identical, to those provided in article V of the New York Convention. For example, the fact that a party to the settlement agreement was coerced to conclude such an agreement could be an additional reason for refusing enforcement. On the other hand, the conciliation procedure not being in accordance with the agreement of the parties or the applicable law (mirroring article V 1(d) of the New York Convention) might not be so relevant.

51. A convention would, in any case, need to build on existing domestic legislation. Modelled on the New York Convention, a convention could set forth that States would need to provide through their domestic legal systems a mechanism to enforce settlement agreements, without trying to harmonize the specific procedure for reaching that goal. Therefore, it would not address the procedural aspects dealt with in domestic legislation and would only introduce a mechanism to enforce international settlement agreements (A/CN.9/832, para. 22). It would also not seek to harmonize rules on the conciliation process nor address matters related to the attachment or execution of assets, both of which are not dealt with under the New York Convention. Article III of the New York Convention does not provide specific rules with respect to the procedure (formalities) for enforcement (such as filing of the agreement with a court or homologation by a court) nor with respect to the competent authority, both of which are left to domestic legislation.

52. If a convention were to be prepared, the interaction of the regime created by a convention with the principle of party autonomy might need to be addressed (for example, whether the regime under a convention would be optional in nature and allow parties to a settlement agreement to either opt-in or out of that regime). In relation to party autonomy, the Working Group may also wish to consider whether consent of the parties to the enforceability of a settlement agreement would be required to make that agreement enforceable. The Working Group may also wish to take note of the view expressed at its sixty-second session that a convention should not deprive the parties of any contractual remedies they might have under the applicable contract law (A/CN.9/832, para. 36).

53. If a convention were to be prepared, the Working Group may also wish to consider the flexibility to be given to States, more specifically the issue of possible declarations or reservations. One example would be a declaration whereby a State could exclude settlement agreements involving government entities from the scope of the convention (A/CN.9/832, para. 55).

2. Model legislative provisions

54. During the sixty-second session of the Working Group, it was mentioned that a more gradual approach to harmonize the regime of enforcement of settlement agreements could be preferable, starting from the harmonization of domestic legislation (A/CN.9/832, para. 19). In line with that suggestion, another possible form of work may be the preparation of model legislative provisions, which would be proposed for enactment by States in their domestic legislation.

55. Such work would generally build upon article 14 of the Model Law on Conciliation, which leaves the method of enforcement to each enacting State. Provisions along the lines of articles 28 to 36 of the Model Law on Arbitration could be considered (for example, the form and contents of the settlement

agreement, corrections and interpretation of the settlement agreement, recourse against the settlement agreement and recognition and enforcement of the settlement agreement). Alternatively, work could be limited to recognition and enforcement of the settlement agreement (including a minimum uniform rule on defences to enforcement), which could complement article 14 of the Model Law on Conciliation. As mentioned above in relation to preparation of a convention (see above, para. 51), one approach would be to not reopen procedural issues addressed by domestic legislation.

56. In this respect, the footnote to article 14 recommends to States that they consider whether the enforcement procedure should be mandatory or not. Further, the Guide to Enactment encourages States to adopt expedited or simplified enforcement procedures. These aspects could also be reflected in the model legislative provisions.

57. Work on model legislative provisions might necessitate revising other articles of the Model Law on Conciliation (and possibly the Conciliation Rules) to ensure consistency (for example, including a definition of "settlement agreement", possible form requirements and issues that could be addressed in the settlement agreement).

3. Guidance text

58. Another possible form of work could be to expand paragraphs 87 to 92 of the Guide to Enactment of the Model Law on Conciliation or to prepare a legislative guide with relevant recommendations and commentary. Such a text could set out information about various approaches taken in different jurisdictions based on replies received by the Secretariat in that respect and presented in document A/CN.9/846 and addenda. It could also include specific legislative recommendations including, for example, a recommendation on the application of the New York Convention to consent awards.