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**United Nations Commission  
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**Working Group II (Arbitration and Conciliation)**  
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### **Settlement of commercial disputes: Enforceability of settlement agreements**

**Comments by Israel and the United States of America**

#### **Note by the Secretariat**

In preparation for the sixty-third session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to consider the question of the enforceability of settlement agreements, the Governments of Israel and the United States of America, on 31 July 2015, submitted comments for consideration by the Working Group. The text of the comments is reproduced as an annex to this note in the form in which it was received by the Secretariat.



## Annex

### Comments by Israel and the United States of America

1. Israel and the United States would like to thank the Secretariat for the paper, A/CN.9/WG.II/WP.190, that has been prepared for the sixty-third session of Working Group II. The paper concisely sets forth many of the issues that the Working Group may need to address in developing an instrument on the recognition and enforcement of conciliated settlement agreements, and very helpfully identifies key questions that the Working Group will need to address.
2. In advance of the Working Group's session, Israel and the United States would like to provide the following comments on some of the issues identified in sections C and D of the Secretariat's paper.
3. In our view, the intended goal of the project by the Working Group should not be to harmonize domestic legislation on conciliation. The aim is merely to facilitate, and increase, the use of conciliation and settlement agreements to support international trade, by providing them with the appropriate international legal framework which is currently lacking.
4. As a general note, the draft provisions proposed below are not necessarily intended to reflect the specific positions of Israel and the United States, but rather are meant to provide initial drafting language for the Working Group's consideration and as illustration of potential text.

#### Section C.1 — Settlement agreements

5. The Secretariat raises several questions regarding the scope of the instrument that the Working Group will develop. At this stage, we believe that several restrictions on the scope would be prudent, particularly if the Working Group determines that the instrument should be a convention.
6. First, the instrument should be restricted to settlement agreements resulting from conciliation. A primary purpose of this project is to promote the use of conciliation as a means of settling cross-border commercial disputes; developing an instrument specific to conciliation would ensure that conciliation is not disadvantaged relative to other forms of dispute resolution such as arbitration or litigation (which are addressed, respectively, by the New York Convention and by the in-progress Hague Conference work on judgements). Broadening the scope beyond such settlements would make reaching consensus on rules regarding recognition and enforcement much more difficult.
7. Second, the instrument should only apply to "international" settlement agreements — i.e., those in which the parties to the dispute had their places of business in different States at the time of the settlement.
8. Third, not only should consumer disputes be excluded, as suggested in paragraph 36 of the Secretariat paper, but the instrument should restrict its scope to "commercial" settlements (excluding settlements in areas such as employment law or family law).

9. The following draft definitions illustrate how some of these issues might be addressed:

“Conciliation” is a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute. This definition includes cases in which parties to a dispute reached a settlement agreement in the course of arbitration proceedings.<sup>1</sup>

A dispute is not “Commercial” if it involves employment law or family law, or if a consumer — acting for personal, family, or household purposes — is a party.<sup>2</sup>

A “Settlement Agreement” is an agreement in writing (a) that is concluded by the parties to a Commercial dispute, (b) that results from Conciliation, and (c) that resolves all or part of the dispute.

A Settlement Agreement is “International” if at least two parties to the Settlement Agreement had their places of business in different States at the time of the conclusion of the Settlement Agreement. If a party has more than one place of business, the place of business is that which has the closest relationship to the dispute resolved by the Settlement Agreement, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the Settlement Agreement.<sup>3</sup>

10. The recognition and enforcement regime would then apply only to “International Settlement Agreements.” In addition, the instrument could allow a State to tailor its scope of application, such as by a declaration mechanism if the instrument takes the form of a convention. For example, paragraphs 37 and 38 of the Secretariat paper note a number of questions regarding the content of settlement agreements, such as non-monetary elements of settlements and other complex obligations that may be included. While creative approaches to settling disputes can be one of the main advantages of conciliation, not all legal systems may deem expedited recognition and enforcement appropriate for all types of obligations. Thus, a declaration mechanism could allow States to decline to apply the instrument to certain classes or types of settlements, including limiting them solely to monetary settlements. Similarly, paragraph 36 notes the issue of settlements concluded by government entities; this issue, too, may be one for which States should be able to tailor the extent of the instrument’s application. Another useful option would be to allow States to declare whether the instrument would apply by default (allowing parties to a settlement to opt out of its application, as discussed below) or only apply when parties specifically invoke the instrument in the settlement itself.

11. To provide these options (as well the possibility for States to apply the instrument only on the basis of reciprocity) without limiting other potential

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<sup>1</sup> This definition would be based on Article 1.3 of the UNCITRAL Model Law on International Commercial Conciliation. Additional consideration may need to be given to the applicability of the convention to consent awards.

<sup>2</sup> The description of “consumer” matters draws on Article 2(a) the United Nations Convention on Contracts for the International Sale of Goods (CISG).

<sup>3</sup> This definition draws on Article 1.4(a) of the Model Law on International Commercial Conciliation as well as Article 10 of the CISG.

reservations and declarations that may be provided for, text such as the following might be appropriate, if the instrument takes the form of a convention:

A Party to this Convention may make declarations providing for any or all of the following:

1. It shall apply this Convention to International Settlement Agreements to which a government or government entity is a party only to the extent specified in a declaration, including their exclusion from the applicability of this Convention.
2. A party to an International Settlement Agreement shall not be eligible to seek recognition and enforcement of an International Settlement Agreement under this Convention if that party has its place of business in a State that is not a Party to this Convention.<sup>4</sup>
3. It shall not apply this Convention to certain classes or forms of International Settlement Agreements specified in a declaration.<sup>5</sup>
4. It shall only apply this Convention to International Settlement Agreements in which the parties to the International Settlement Agreement have explicitly agreed that the Convention would apply.

### **Section C.3 — Enforcement procedure**

12. The core of the instrument should be an obligation similar to Article III of the New York Convention, requiring recognition and enforcement of International Settlement Agreements but not dictating a particular procedure for domestic use. Nor should the instrument require a “review mechanism” as a prerequisite for recognition and enforcement of a conciliated settlement. Requiring such a review in some country deemed the “competent” jurisdiction, as described in paragraph 45 of the Secretariat paper, would be equivalent to the “double exequatur” procedures required for arbitral awards prior to the New York Convention.

13. A question that has been raised is whether a conciliated settlement is sufficiently “trustworthy” to be recognized and enforced without a review mechanism. The experience of the New York Convention has demonstrated that even without judicial review of arbitral awards in the State of origin, courts in other jurisdictions are adequately able to determine whether recognition and enforcement should be denied under the New York Convention. The exceptions in Article V provide a sufficient basis for denying recognition and enforcement of arbitral awards that are not sufficiently “trustworthy,” even though that Convention neither requires double exequatur nor dictates the use of particular arbitration rules to ensure the adequacy of the arbitration process.

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<sup>4</sup> Such a declaration would be similar to that permitted by Article I(3) of the New York Convention.

<sup>5</sup> Such a declaration would be similar to that permitted by Article 25(4) of the ICSID Convention. It would permit limits on enforcement under the Convention for Settlement Agreements that pose particular problems under a State’s domestic legal system. For example, a State could exclude Settlement Agreements with long-term or complex obligations (other than an obligation by one party to pay a sum to another party) if it considers that its courts may not be able to evaluate them in a streamlined enforcement process and that those International Settlement Agreements may be more appropriately addressed under contract law.

14. We believe the same approach would work for recognition and enforcement of conciliated settlements, with some adaptations. For both arbitration and conciliation, the trustworthiness of the award or settlement agreement will depend on the specifics of the process used to resolve the particular dispute. In either type of process, problems can arise that would caution against recognizing or enforcing the result. But just as the exceptions in Article V of the New York Convention suffice to address these situations in the context of arbitration, an analogous set of exceptions should suffice for conciliation, to ensure that only sufficiently “trustworthy” settlements are recognized and enforced.

15. Thus, rather than simply copying Article III of the New York Convention, it might be worthwhile to consider that the instrument also explicitly require that International Settlement Agreements be treated at least as favourably as international arbitral awards under the New York Convention. For example, if the instrument takes the form of a convention, it could require that States “not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of International Settlement Agreements to which they apply this Convention than they impose on the recognition or enforcement of arbitral awards or of other Settlement Agreements.”

#### **Section C.4 — Defences**

16. If the instrument requires recognition and enforcement of International Settlement Agreements as suggested above, it would then need to include a range of exceptions, similar to Article V of the New York Convention. Courts should be able to refuse recognition and enforcement in instances when a party lacked the capacity to conclude the settlement or concluded it due to coercion or fraud. In this context, it may be worthwhile to consider providing additional defences surrounding the unique circumstances of the concluding an International Settlement Agreement.

17. The instrument should also include equivalents to Articles V(2)(a) and (b) of the New York Convention, permitting a refusal to recognize or enforce due to a subject matter not capable of settlement or due to incompatibility with public policy of the State where recognition and enforcement is sought. Finally, and without prejudice to other potential exceptions that might be agreed by the Working Group, recognition and enforcement should not be required when it would be contrary to the terms of the International Settlement Agreement itself. Such an exception could apply when the International Settlement Agreement includes a forum selection clause specifying that recognition and enforcement could only occur in a different jurisdiction, or when the International Settlement Agreement includes other limitations on remedies (e.g., requiring any disputes to be brought back to the conciliator before recognition and enforcement is sought, requiring disputes to be settled by arbitration rather than recognition and enforcement in court, or providing that recognition and enforcement under the convention is unavailable). Such an exception would, in effect, allow parties to an International Settlement Agreement to opt out of the recognition and enforcement regime in whole or in part (while other States might use the declaration mechanism described above to require parties to affirmatively opt into the recognition and enforcement regime).

18. Again, for the purpose of illustration, these exceptions could be provided through text such as the following:

Recognition and enforcement of an International Settlement Agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

A. The party against whom the International Settlement Agreement is invoked was, under the law applicable to it, under some incapacity or concluded the International Settlement Agreement due to coercion or fraud; or

B. The subject matter of the International Settlement Agreement is not capable of settlement under the law of the country where recognition and enforcement is sought; or

C. The recognition or enforcement of the International Settlement Agreement would be contrary to the public policy of the country where recognition and enforcement is sought; or

D. Recognition or enforcement would be contrary to the terms of the International Settlement Agreement itself; or

E. [...]

#### **Section D — Possible forms of work**

19. Given the number of substantive issues to be discussed, the Working Group does not need to decide at this session what form the instrument should take.

20. In considering these issues preliminarily, however, the development of a convention would seem to have several advantages. As noted in paragraph 51 of the Secretariat paper, using certain aspects of the New York Convention as a model would enable the Working Group to avoid some particularly difficult issues, such as “trying to harmonize the specific procedure for reaching [the] goal” of recognition and enforcement, as noted at the outset — issues that could be harder to avoid if drafting model legislative provisions. Additionally, in choosing the form of an instrument, the technical elements are not the only relevant considerations. As noted above, other forms of dispute resolution are already the subject of treaties — existing or in-progress — establishing frameworks for cross-border recognition and enforcement. By developing an analogous convention for conciliation, UNCITRAL would underscore that conciliation should be seen as an important form of dispute resolution. This type of endorsement, in combination with the creation of a cross-border framework that would provide greater confidence in the ability to obtain recognition and enforcement of a settlement in another jurisdiction, could help to encourage the use of conciliation around the globe.