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Settlement of commercial disputes

International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation

Note by the Secretariat

Addendum

Contents

V.17-08322 (E)

III. Draft text of the instruments

A. Form and title of the instruments

1. Form

1. The Working Group considered the form of the instrument at its sixty-fifth and sixty-sixth sessions (A/CN.9/896, paras. 135–143 and 211–213, and A/CN.9/901, paras. 52 and 89–93). At the sixty-sixth session of the Working Group, in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions, it was agreed that the Working Group would continue to prepare both a model legislative text complementing the Model Law on International Commercial Conciliation (the "Model Law"), and a convention, on enforcement of international commercial settlement agreements resulting from mediation (A/CN.9/901, para. 93). This suggestion was reflected in the compromise proposal, under issue 5 (A/CN.9/901, para. 52). It was further agreed that a possible approach to address the specific circumstance of preparing both a model legislative text and a convention could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

2. In that context, the Working Group may wish to consider the following wording which would be recommended to the Commission and eventually to the General Assembly for inclusion in the relevant resolution:

3. "*Recalling that the decision of the Commission to prepare a draft [full title of the Convention] and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any preference for the instrument [that interested States may adopt][to be adopted]*."

2. Title of the instruments

4. The Working Group may wish to consider the possible title of the instruments, including the following options:

- *For the draft convention*

"United Nations Convention on International Settlement Agreements [resulting from mediation]"

- *For the draft amended Model Law*

"UNCITRAL Model Law on International Commercial Mediation (2002), With Amendments as adopted in 201*"

"UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements, 201* (*amending the UNCITRAL Model Law on International Commercial Conciliation (2002)*)"

B. Draft convention

5. The draft convention might read as follows:

"**Preamble**

"*The Parties to this Convention*,

"*Recognizing* the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

"*Noting* that such dispute settlement methods, referred to by expressions such as mediation and conciliation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of such dispute settlement methods 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,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from such dispute settlement methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

Title: [United Nations Convention on International Settlement Agreements [resulting from mediation]]

"**Article 1. Scope of application**

"1. This Convention applies to international agreements resulting from mediation 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 in 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 paragraph (1):

"(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. 'Mediation' 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 mediator') 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 mediation, such as:

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

"(ii) A document signed by the mediator indicating that the mediation was carried out;

"(iii) An attestation by the institution that administered the mediation; 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 mediator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator'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] [requirements] of the Convention have been complied with.

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

"**Article 5. Grounds for refusing to grant relief**

"1. The competent authority of the Contracting State where the application under article 4 is made may refuse to grant relief at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where the application under article 4 is made; or the obligations in the settlement agreement have been performed; or

"(c) The settlement agreement:

"(i) Is not binding, or is not final, according to its terms;

"(ii) Has been subsequently modified;

"(iii) 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

"(iv) Is not capable of being enforced because it is not clear and comprehensible; or

"(d) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Contracting State where the application under article 4 is made may also refuse to grant relief if it finds that:

"(a) Granting relief would be contrary to the public policy of that State; or

"(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that State.

"**Article 6. Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect

enforcement of that settlement agreement, the competent authority of the Contracting State where the enforcement of the settlement agreement is sought may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security.

"**Article 7. Other laws or treaties**

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Contracting State where such settlement agreement is sought to be relied upon.

"**Article 8. Reservations**

"1. A Contracting State may declare that:

"(a) [Option 1: It shall apply][Option 2: It shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration;

"(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Contracting State at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Contracting State concerned. Reservations deposited after the entry into force of the Convention for that Contracting State shall take effect [six] months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Contracting State that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect [six] months after deposit.

"**Article 9. Depositary**

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"**Article 10. Signature, ratification, acceptance, approval, accession**

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance, or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval, or accession are to be deposited with the depositary.

“**Article 11. Participation by regional economic integration organizations**

“1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve, or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

“2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval, or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

“3. Any reference to a ‘Contracting State’, ‘Contracting States’, a ‘State’ or ‘States’ in this Convention applies equally to a regional economic integration organization where the context so requires.

“4. This Convention shall not prevail over conflicting rules of a regional economic integration organization if, under article 4, an application is submitted to a competent authority of a State that is a member of such an organization and all the States relevant under article 3(1) are members of any such organization.

“**Article 12. [Effect in domestic territorial units][Non-unified legal systems]**

“1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval, or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

“2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

“3. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

“(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

“(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

“(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

“4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

“**Article 13. Entry into force**

“1. This Convention enters into force on the first day of the month following the expiration of [six] months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

“2. When a State ratifies, accepts, approves, or accedes to this Convention after the deposit of the [third] instrument of ratification, acceptance, approval, or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of [six] months after the date of the deposit of its instrument of ratification, acceptance, approval, or accession. The Convention enters into force for a territorial unit to which this Convention has been extended in accordance with article 12 on the first day of the month following the expiration of [six] months after the notification of the declaration referred to in that article.

“**Article 14. Amendment**

“1. Any Contracting State may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting States to this Convention with a request that they indicate whether they favour a conference of Contracting States for the purpose of considering and voting upon the proposal. In the event that within [four] months from the date of such communication at least one third of the Contracting States favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

“2. The conference of Contracting States shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting States present and voting at the conference.

“3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting States for ratification, acceptance, or approval.

“4. An adopted amendment enters into force [six] months after the date of deposit of the third instrument of ratification, acceptance, or approval. When an amendment enters into force, it shall be binding on those Contracting States that have expressed consent to be bound by it.

“5. When a State ratifies, accepts, or approves an amendment that has already entered into force, the amendment enters into force in respect of that State [six] months after the date of the deposit of its instrument of ratification, acceptance, or approval.

“6. Any State that becomes a Contracting State after the entry into force of the amendment shall be considered as a Contracting State to the Convention as amended.

“**Article 15. Denunciations**

“1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

“2. The denunciation takes effect on the first day of the month following the expiration of [twelve] months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall

continue to apply to applications under article 4 that have already been made before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic."

C. Draft amended Model Law

6. The Working Group may wish to note that additional adjustments to the draft amended Model Law might be required based on further consideration of issues that remain to be decided. At this stage, the draft amended Model Law might read as follows.

Title: [UNCITRAL Model Law on International Commercial Mediation (2002) With amendments as adopted in 201*]
[UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements, 201*,
(amending the Model Law on International Commercial Conciliation (2002)]

"**Section 1 — General provisions**

"**Article 1. Scope of application and definitions**

"1. This Law applies to international[1] commercial[2] mediation[3] and to international settlement agreements.

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

"3. For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') 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 mediator does not have the authority to impose upon the parties a solution to the dispute. [*Article 1(3) of the Model Law*]

[***Placement of articles 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.

[1] Footnote 1 in the Model Law.

[2] Footnote 2 in the Model Law.

[3] "Mediation" is a widely used term for a process where parties request a third person or persons 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. In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing the amendment to the Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

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

"Except for the provisions of [*article 2, article 6, paragraph 3 (numbering to be adjusted) — reference to other articles to be considered*] the parties may agree to exclude or vary any of the provisions of this Law.

"**Section 2 — Mediation**

"**Article aa. Scope and definitions**

"1. This section applies to international commercial mediation. [*Article 1(1) of the Model Law, without the footnotes*]

"2. A mediation is 'international' if:

"(a) The parties to an agreement to mediate 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. [*Article 1(4) of the Model Law*]

"3. For the purposes of paragraph (2):

"(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 mediate;

"(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**[4]

"**Article 15. Scope and definitions**

"1. This section applies to international agreements resulting from mediation 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 in 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:

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

"(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 the conclusion of the settlement agreement [or at the time of the conclusion of the agreement to mediate]:

"(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.

"5. For the purposes of paragraph 4:

"(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 [or at the time of the conclusion of the agreement to mediate];

"(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 section.

"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 section, 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 mediation, such as:

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

"(ii) A document signed by the mediator indicating that the mediation was carried out;

"(iii) An attestation by the institution that administered the mediation; 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 mediator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator'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] [requirements] of this section have been complied with.

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

"**Article 18. Grounds for refusing to grant relief**

"1. The competent authority of this State may refuse to grant relief at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of this State; or the obligations in the settlement agreement have been performed; or

"(c) The settlement agreement:

"(i) Is not binding, or is not final, according to its terms;

"(ii) Has been subsequently modified;

"(iii) 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

"(iv) Is not capable of being enforced because it is not clear and comprehensible; or

"(d) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

"(e) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or

independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of this State may also refuse to grant relief if it finds that:

"(a) Granting relief would be contrary to the public policy of this State; or

"(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

"3. If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of this State may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."