**United Nations Commission on International Trade Law**

**Working Group II (Arbitration and Conciliation)**

**Documents A/CN.9/WG.II/WP.195, A/CN.9/867 Part V**

# International Commercial Conciliation: Enforceability of Settlement Agreements

## Appendix to Questionnaire

The purpose of this questionnaire is to acquire expert views with regard to the validity of settlement agreements for the purposes of the instrument (onward, the Instrument) to be implemented as contemplated by documentA/CN.9/WG.II/WP.195 , deliberations upon which are reported in A/CN.9/867 Part V (¶¶ 90-182).

The geographic scope of the questionnaire is Latin America.

### 1. Theme: Scope of application of the instrument

### 1.1. Topic: Notion of conciliation

#### a) Background

*"At the sixty-third session of the Working Group, broad support was expressed for limiting the scope of the instrument to settlement agreements that resulted from conciliation. Nonetheless,* ***it was suggested that the notion of "conciliation" in the instrument should be broad and inclusive to cover different types of conciliation techniques. It was widely felt that the definition of "conciliation" in article 1(3) of the Model Law provided a useful reference***." (A/CN.9/WG.II/WP.195, para. 22)

*"For drafting purposes, the Working Group may wish to also consider the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192, which provides as follows:*

*'"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 dispute. […]'"* (A/CN.9/WG.II/WP.195, para. 23)

#### b) Analysis

Article 1(3) of the Model Law states: *"**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."* Further, the Guide to Enactment and Use of the Model Law explains that *"**in practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms.** (...) **The Model Law uses the term "conciliation" to encompass all such procedures**. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, **from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person**. (...) In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties."* (Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, para. 7)

Based on the above cited texts, it can be affirmed that the Model Law embraces any dispute resolution means where the parties request a third party to assist them in their attempt to reach an amicable settlement of the dispute. Therefore, when applying the Model Law no distinctions shall be made between conciliation and mediation.

The latter statement is relevant when encompassing Latin American States, provided that within many of their jurisdictions distinctions are made between the notions of conciliation and mediation. That considered, the proposed notion of conciliation contained in paragraph 9 of document A/CN.9/WG.II/WP.192 might not be sufficient to prevent any conflict in the interpretation of the scope of application of the Instrument, unless the notion makes an express reference to the one provided by the Model Law.

**c) <u>Question</u>**

Should the Instrument apply to conciliation only, or to all forms of alternative dispute resolution method where the intervenor participant lacks authority to impose his view (e.g., including mediation)?.

### 1.2. Topic: Settlement agreements resulting from other dispute resolution processes

#### a) Background

*"…**the Working Group may wish to consider whether the instrument should include provisions to ascertain that the settlement agreement actually resulted from conciliation**."* (A/CN.9/WG.II/WP.195, para. 25)

*"Confining the scope of the instrument to settlement agreements resulting from conciliation would generally exclude those resulting from any other dispute resolution methods, including judicial or arbitral proceedings, as reflected in article 1(8) of the Model Law."* (A/CN.9/WG.II/WP.195, para. 26)

*"…**the Working Group may wish to consider whether the instrument should also apply where the parties have reached a settlement agreement in the course of judicial, arbitral or any other proceedings**. Diverging views were expressed at the sixty-third session of the Working Group on that question. One view was that the scope of the instrument should be limited to settlement agreements where the resolution of the dispute was initiated through conciliation and by no other means, in order to avoid overlap with other instruments (for instance, the judgements project of the Hague Conference on Private International Law, as well as the New York Convention). A different view was that the resolution of many commercial disputes did not necessarily begin with a conciliation process and that parties, after submitting a dispute to a court or an arbitral tribunal, might reach an agreement during judicial or arbitral proceedings, in some cases through a conciliation process."* (A/CN.9/WG.II/WP.195, para. 27)

*"**The Working Group may wish to consider** whether the scope of the instrument should be expanded to settlement agreements concluded during judicial or arbitral proceedings and, in the affirmative, **whether to then limit application to situations where there was a conciliation process that led to the settlement agreement and where***

***the agreement was not recorded in a judicial decision or an arbitral award**."* (A/CN.9/WG.II/WP.195, para. 28)

**b) <u>Analysis</u>**

When considering the question of whether the Instrument should include in its scope of application settlement agreements that resulted from other dispute resolution methods different than conciliation, such as judicial or arbitral proceedings; it should be noted that the end of the Instrument will pursue the fulfillment of a necessity, such as the lack of proper recognition and enforcement of certain legal instruments. In that sense, recipients should evaluate which needs could be engaged by the Instrument with respect to settlement agreements that emerge from dispute resolution methods different than conciliation. In that consideration, recipients should differentiate between settlement agreements that have and have not been recorded in the form of a judicial decision or an arbitral award.

Notwithstanding that there is no pretense to influence the answer of recipients, they should consider that while the recognition and enforcement of foreign arbitral awards has been somehow "granted" by international treaties (for instance, the New York Convention), the same scenario has not been developed in the case of enforcement and execution of foreign judicial decisions. On contrary, it should be noted that the work undertaken by the Hague Conference with regard to the "Judgements Project" has not reached a final solution which grants certainty to the recognition and enforcement of foreign judicial decisions.

Finally, recipients should consider the question of whether the arrival to settlement agreements within the context of judicial or arbitral proceedings, alters the nature of conciliation in such a degree as to exclude such agreements from the scope of the Instrument. In this regard, recipients should remember the main role that the autonomy of the parties occupies in conciliation.

**c) <u>Question</u>**

Should the Instrument apply also to settlement agreements achieved in the context of another dispute resolution method, such as judicial or arbitral proceedings? If so, should the Instrument apply only to situations where the settlement agreement has not

been recorded in a judicial decision or an arbitral award? Please explain why (or why not).

### 1.3. Topic: Commercial nature of the settlement agreement

#### a) Background

*"The Working Group may wish to further consider* ***whether the "commercial" nature of the settlement agreement is to be derived from (i) the parties involved, (ii) the subject matter of the dispute being resolved, (iii) the obligation to be performed under the settlement agreement, or (iv) any of the above****."* (A/CN.9/WG.II/WP.195, para. 14)

#### b) Analysis

National laws usually provide a determination of what should be considered to have a "commercial nature" based on various criteria. Therefore, if the Instrument were to include a characterization of the commercial nature of the settlement agreement, the question of whether that characterization would be applied without considering the national criteria should be addressed.

For instance, recipients should consider the hypothetical situation of a settlement agreement which, in spite of being considered as to hold a "commercial nature" by the relevant national law –this is, the one applicable in accordance with the parties' choice of law or, in absence of such, with the conflict-of-law rules-, is not recognized by the Instrument.

#### c) Question

Should the Instrument provide criteria to determine the commercial nature of settlement agreements, and if so, which of the recommended criteria (parties, subject matter, character of the obligation) should predominate? Or should such determination should be determined wholly by applicable national (domestic) law?

## Theme: Validity and content of settlement agreements

### 1.4. Topic: Inclusion of a definition of the term "settlement agreement"

#### a) Background

*"The Working Group may wish to consider* ***whether the instrument would need to provide a definition of the term "settlement agreement"****. In this context, it should be noted that the New York Convention does not define the term "award"."* (A/CN.9/WG.II/WP.195, para. 29)

**b) <u>Analysis</u>**

It should be noted that even thought the New York Convention does not provide a definition of the term "arbitral award", it does provide a definition of the term "arbitration agreement", as stated in its article II(1). As important doctrinaires have considered, the aim of the latter regulation is not to settle a set of requirements that the arbitration agreement must fulfill in order to be considered as one, but to grant a "minimum degree of recognition" that would bind the States Parties and their judicatures[1].

In accordance with the described context, recipients should contemplate the possibility that a definition of the term "settlement agreement" provided by the Instrument may not necessarily set up validity requirements, but grant a degree of certainty in the recognition of a settlement agreement as one.

When assessing the necessity of "granting a degree of certainty" for the recognition of settlement agreements as such, recipients may need to take into account the existence of national jurisdictions and legislations that remain unfriendly to some alternative dispute resolution methods or, in any case, have not legally recognized their value.

**c) <u>Question</u>**

Should the Instrument include a definition of the term "settlement agreement"? If so, (i) what is the extent and purpose of that definition (to "grant a degree of recognition", establish validity requirements, or both?), citing authorities; (ii) would "an agreement in writing that is concluded by the parties to a commercial dispute, that resolves all or part of the dispute" be an acceptable definition?

**1.5.<u>Topic: Establishment of requirements for settlement agreements</u>**

[1] GONZÁLEZ DE COSSÍO, Francisco. "*La nueva forma del acuerdo arbitral: otra victoria del consensualismo*". In: SOTO COAGUILA, Carlos (Dir.). Arbitraje en el Perú y el Mundo. Tomo I. Magna Ediciones, Lima, 2009 (pp. 209-223), p. 220.

**a) <u>Background</u>**

*"At its sixty-third session,* ***the Working Group agreed that the instrument should provide certain form requirements of settlement agreements that would distinguish them from other agreements. Only those fulfilling such form requirements would be granted expedited enforcement under the instrument****."* (A/CN.9/WG.II/WP.195, para. 39)

*"It was generally felt that* ***those requirements should not be prescriptive*** *and should be set out in a brief manner to preserve the flexible nature of the conciliation process. It was further noted that* ***it would be preferable for the instrument to set minimum form requirements****, providing States with the flexibility to introduce any other requirements if they so wished."* (A/CN.9/WG.II/WP.195, para. 40)

*"For example, the instrument may require that a settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement (by signing or by concluding the agreement). In that respect,* ***the Working Group may wish to consider how to formulate such requirements in the instrument****, taking into account the use of electronic means of communication."* (A/CN.9/WG.II/WP.195, para. 41)

*"****The Working Group may wish to consider whether the requirements referred to above would be the only or minimum requirements and whether the instrument should require additional elements****. By way of illustration, other elements might include an indication that: (i) a conciliator was involved in the process (...); (ii) the settlement agreement resulted from conciliation (...); (iii) the parties to the settlement agreement were informed of the enforceability of the settlement agreement before or upon its conclusion; or (iv) the parties opted into the enforcement mechanism envisaged by the instrument (...)."* (A/CN.9/WG.II/WP.195, para. 42)

**b) <u>Analysis</u>**

As explained in a previous analysis, even though article II of the New York Convention includes a definition of the term "arbitration agreement", such provision does not constitute in any way a set of validity requirements. That considered, it should be now noted that article II of the said Convention makes also mention to the "written form" of the arbitration agreement (subsection 1), and expressly includes under that scope of

recognition *"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams"* (subsection 2).

The inclusion of such a reference to the written form of the arbitration agreement in the New York Convention, led to various interpretations in the sense that the Convention was establishing a validity requirement for the arbitration agreement[2]. Under that consideration, in the past many arbitration agreements were not considered to be enforceable under the New York Convention for the sole reason that they lacked a written form[3] –even though they might have presented some method of verification of the parties' consent.

In order to counter such misinterpretation of the New York Convention, in 2006 the UNCITRAL issued a recommendation regarding the interpretation of article II paragraph 2 (issued in Official Records of the General Assembly, Sixty-first Session, Supplement No. 17(A/61/17), annex II), recommending that article II(2) *"be applied recognizing that the circumstances described therein are not exhaustive"*. Since then, article II of the New York Convention could no longer be considered as to establish validity requirements for the arbitration agreement. Therefore, if an arbitration agreement does not comply with the definition considered by the Convention, but does meet the validity requirements established by a national law; it may be subject of recognition and enforcement under the latter and without contradicting the Convention.

This last interpretation –provided by the UNCITRAL's recommendation- is in accordance with article V(1)(a) of the New York Convention, when considering that this article provides for the determination that the arbitration agreement is not valid *"under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"*. In other words, no reference is made to the text of the Convention when considering the determination of the validity of an arbitration agreement.

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[2] REDFERN, Alan; HUNTER, Martín; BLACKABY, Negel y PARTASIDES, Constantine. *Teoría y Práctica del Arbitraje Comercial Internacional*. Thomson, Navarra, 2006, p. 65.
KAPLAN, Neil. "*Novedades relativas a la forma escrita*". In: *La ejecución de las sentencias arbitrales en virtud de la Convención de Nueva York, Experiencia y perspectivas*. United Nations, New York, 1999, (pp. 17-19) p. 17.

[3] Such reasoning can be found, for instance, in the cases "Armada Holland BV Schiedam Denmark Vs. Inter Fruit S.A." of Argentina (CNCivComFed, Sala II, 8/5/2007), and "Oleaginosa Moreno Hnos Vs. Moinho Paulista Ltda." (Tribunal Superior de Justicia, 17/5/2006) and "Indutech SpA Vs. Algocentro Armazéns Gerais Ltda." of Brasil (Tribunal Superior de Justicia, 17/12/2008).

All that considered, before answering the question of whether the Instrument should provide certain form requirements for settlement agreements, recipients should address the question of which would be the legal implications of such provision. It will be necessary to whether such a mention to form requirements would constitute a "minimum degree of certain recognition" for settlement agreements, or a set of validity requirements.

### c) Question

What minimum form requirements for a settlement agreement should the Instrument require (e.g., recitation that the settlement agreement is the product of a conciliation process)? What additional form requirements do you recommend to qualify a settlement agreement for expedited enforcement (if any such expedited enforcement were available)? What are the legal implications of a settlement agreement's failure to conform to the requirements of form?

## 1.6. Topic: Determination of the validity of settlement agreements

### a) Background

*"The Working Group may wish to consider* ***whether, and in the affirmative, at what stage of the procedure, the validity of settlement agreements should be considered under the instrument****. At the sixty-third session of the Working Group,* ***it was suggested that a possible model to address that issue could be found in article II(3) of the New York Convention and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which referred to an arbitration agreement being deprived of effect when found to be "null and void, inoperative or incapable of being performed"****. It was suggested that those terms had been interpreted by courts in a number of jurisdictions in a harmonized fashion and therefore could be used if the instrument were to include a provision on the assessment of the validity of settlement agreements."* (A/CN.9/WG.II/WP.195, para. 30)

*"In this context,* ***the Working Group may wish to consider whether the enforcing authority would be responsible for assessing the validity of the settlement agreement, the law applicable to that determination, and the possible legal consequences of that determination****."* (A/CN.9/WG.II/WP.195, para. 31).

*"The Working Group may also wish to consider* ***whether to address the possible impact of the conciliation process on the validity of the settlement agreement****, for example, if the conciliation procedure was not in accordance with the law of the State where the conciliation took place."* (A/CN.9/WG.II/WP.195, para. 32).

*"****The Working Group may wish to confirm that the instrument would apply to settlement agreements which partially resolve a dispute****."* (A/CN.9/WG.II/WP.195, para. 33)

*"****Settlement agreements*** *are not necessarily final: they* ***may be modified, amended or terminated by the parties****, and such process may not necessarily involve conciliation.* ***The Working Group may wish to consider whether such situations should be addressed under the instrument and in the affirmative, whether they could be treated as possible defences****."* (A/CN.9/WG.II/WP.195, para. 34)

*"****Another related question is whether and how the instrument would deal with situations where the obligations to be performed under the settlement agreement are conditional or have been partially performed by the parties and where the settlement agreement may be used for set-off purposes in a procedure****. The Working Group may wish to consider whether the instrument should address those matters. At the sixty-third session of the Working Group, one view was that those circumstances could constitute possible defences, which could be handled by the enforcing authority in a flexible manner."* (Para. 35)

**b) <u>Analysis</u>**

With regard to the validity of settlement agreements, two questions may need to be answered: first, whether the Instrument should consider the question of the validity of agreements; and, second, at what stage of the procedure such validity should be examined.

When addressing the first question, recipients should note that the Instrument could set criteria to determine whether settlement agreements are valid, or it could derive such determination to the national law that would result applicable in accordance with the parties' choice of law or with the conflict-of-law rules. Recipients should take into account that the New York Convention derives the determination of the validity of

arbitral agreements to the national law that results applicable, as explained in a previous analysis.

When addressing the second question, recipients should note that the validity of the settlement agreement could be questioned not only at the procedure of enforcement or recognition, but also whenever an action is brought to courts with regard to the matter that was addressed by the agreement. However, since the Instrument would be enacted to address the matter of recognition and enforcement of settlement agreements, recipients might consider that the discussion should focus only in the determination of validity that may take place within a recognition or enforcement procedure. In this scenario, recipients should consider whether the enforcing authority would be responsible for assessing the validity of the settlement agreement.

In the case that recipients consider that the enforcing authority should be competent to assess the validity of settlement agreements, other questions must be answer: (i) whether the authority would assess the validity only due to a defence of the other party, (ii) which would be the law applicable to that assessment, and (iii) which would be the legal consequences of the determination.

Only when having provided an answer to the second question –that is, which would be the law applicable to the assessment of the validity of the agreements-, recipients may consider the grounds for declaring that a settlement agreement fails to be valid. When arriving to that situation, recipients may be able to consider the suggestion of the Working Group to regard the provisions of article II(3) of the New York Convention and of article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, both of which consider the possibility of declaring that the agreement *"is null and void, inoperative or incapable of being performed"*.

**c) <u>Question</u>**

Should the Instrument address the validity of settlement agreements?

If so: (i) Which authority would assess validity?

(ii) What is required to trigger inquiry into validity (e.g., only if raised as a defense)?

(iii)What is the extent of such authority's competence?

(iv) Which law should determine validity?

(v) What are the legal consequences of the determination?

(vi)Which law governs the determination of validity?

(vii) What grounds are required to invalidate a settlement agreement?

### 1.7.Theme: Inclusion of dispute resolution clauses in settlement agreements

#### a) Background

*"... Parties may decide to enforce their settlement agreement under contract law or by any other means. They may provide for an arbitration clause in their settlement agreement as means to resolve any dispute that could arise therefrom. In such circumstances,* ***the Working Group may wish to consider whether the instrument should provide that the enforcing authority should refer the parties to arbitration*** *(in accordance with article II of the New York Convention or the applicable arbitration law),* ***or whether it should proceed with enforcement in accordance with the instrument****."* (A/CN.9/WG.II/WP.195, para. 36; A/CN.9/867 ,para. 177-178)

*"Parties can also include a choice of court provision in the settlement agreement to determine the court competent to hear any dispute in relation to that agreement. In that respect,* ***the Working Group may wish to consider how to ensure that the instrument would effectively operate with the Choice of Court Convention****."* (A/CN.9/WG.II/WP.195, para. 37)

#### b) Analysis

Recipients may consider that the inclusion of any dispute resolution clause in settlement agreements would be aimed to determine the authority that will be competent in the case of disputes arising from the settlement agreements; however, such dispute resolution clauses should not affect the mandate of the authority that would be competent for the recognition and enforcement of the settlement agreements.

Following the above mentioned, it could be noted that even though a settlement agreement may have an arbitration clause, the enforcement authority could not refer the parties to arbitration if no action has been brought before an arbitral tribunal.

The same consideration could be made with respect to a choice of court provision in the settlement agreement. As article 3 of the Choice of Court Convention states, an *"«exclusive choice of court agreement» means an agreement concluded by two or more parties that (...) designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts"*. Therefore, the choice of court provision included in a settlement agreement, would determine the authority that is competent to decide any dispute arisen from the agreement; however, it would not affect the mandate of the authority responsible of the enforcement and recognition of the said agreement.

**c) Question**

Would a forum selection clause (either arbitral or judicial) to resolve disputes arising under a settlement agreement impact the effective operation of the Instrument with regard to the recognition and enforcement of the settlement agreement?

### 1.8. Topic: Notion of recognition

**a) Background**

*"At its sixty-third session, the Working Group considered whether the instrument would need to provide for "recognition" of the settlement agreement by a court or competent authority at the place of enforcement."* (A/CN.9/WG.II/WP.195, para. 46; A/CN.9/867 para. 146 )

*"Diverging views were expressed regarding the need for the instrument to provide for the recognition of settlement agreements by a court or competent authority. This resulted from different understandings of the notions of "recognition" and "settlement agreements" as the subject of such recognition (as contracts between parties or acts of a particular nature resulting from a dispute resolution procedure)."* (A/CN.9/WG.II/WP.195, para. 47)

*"By way of background on the reference to "recognition" in international texts, the concept of recognition of non-judicial/State action appears as early as the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of*

*Foreign Arbitral Awards (1927). Those conventions call for the recognition of arbitration agreements "as valid" and the recognition of arbitral awards "as binding". The notion of "recognition" of a non-judicial/State action absent any qualifier (e.g. "as binging" or "as valid") appears to have originated with the New York Convention with regards to recognition of arbitration agreements (article II (1)) and arbitral awards (article III which requires that they be recognized "as binding").* (A/CN.9/WG.II/WP.195, para. 48)

*"**The Working Group may wish to consider whether a settlement agreement would need to be given effect through a procedure akin to recognition and which legal value such a procedure would give to settlement agreements**. As an alternative, the Working Group may wish to consider clarifying the meaning of "recognition" in the context of the instrument, and refer, for instance, to the need to give legal effect to the settlement agreements."* (A/CN.9/WG.II/WP.195, para. 49)

*"**If the recognition of settlement agreements is dealt with under the instrument, the Working Group may also wish to consider whether and how recognition would relate to the assessment of the validity of the settlement agreement** (see above paras. 30-32)."* (A/CN.9/WG.II/WP.195, para. 50)

**b) <u>Analysis</u>**

Recipients should note that while the procedure of enforcement is designed to grant the accomplishment of an arbitral award or a judicial decision, the procedure of recognition is aimed to recognize such decisions as valid and, therefore, binding for the parties of the dispute[4]. In that sense, it could be said that the recognition constitutes a previous step for the enforcement of arbitral awards or judicial decisions that have not been issued within the national jurisdiction.

In the said context, recipients should take into account that many Latin American countries regulate special judicial procedures for the enforcement of judicial decisions, arbitral awards and many other instruments that are considered to be "enforceable titles" ("títulos de ejecución"). In fact, many of these countries consider settlement agreements under the notion of "enforceable titles", granting them with an expeditious enforcement

[4] REDFERN, Alan; HUNTER, Martín; BLACKABY, Negel y PARTASIDES, Constantine. *Teoría y Práctica del Arbitraje Comercial Internacional*. La Ley, Buenos Aires, 2007, p. 597.

procedure. In sum, the advantages of a special enforcement procedure, in comparison to a normal procedure, are its speed and the limited number of defences that can be opposed by the "enforced party".

If the Instrument were to observe only the procedure of enforcement of settlement agreements, without considering the necessity of a procedure of recognition, many Latin American countries would have to adapt their enforcement procedure to consider all the provisions of the Instrument, especially those with regard to the determination of the validity of the settlement agreement and the right of the "enforced party" to present defences. In that scenario, two things could happen: (i) the enforcement procedure would lose its expeditious nature, or (ii) in the case the enforcement procedure is not adapted, it would not address all the provisions set by the Instrument.

**c) <u>Question</u>**

Should the Instrument address a "recognition" procedure (presumably expedited) as a prerequisite for enforcement of the settlement agreement?