UNCITRAL Instruments on enforcement of international commercial settlement agreements resulting from mediation

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Executive Summary

UNCITRAL has published several instruments in the fields of arbitration and mediation. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is a key instrument in international arbitration. In 2014, the UNCITRAL Commission mandated that Working Group II ("Dispute Settlement") prepare an instrument on the enforcement of international commercial settlement agreements resulting from mediation. Working Group II is preparing two instruments, a new Convention on the Enforcement of International Commercial Agreements resulting from Mediation (inspired by the New York Convention in the field of arbitration), and an amendment to the 2002 Model Law on International Commercial Conciliation. To date, consensus has been reached on many aspects, such as the scope of application of the instruments and the grounds for refusing to grant relief. The preparation of these instruments is ongoing, and therefore, the proposed draft Convention and proposed amended Model Law may differ from the final instruments. These instruments should provide for common standards for the enforcement of international commercial settlement agreements resulting from mediation. This paper provides detail regarding these UNCITRAL initiatives in the field of arbitration and conciliation.

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I. Introduction: Initiatives of UNCITRAL in the fields of arbitration and conciliation

UNCITRAL (United Nations Commission for International Trade Law) issued the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") in 1958. This Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign arbitral awards. In 2016, UNCITRAL published the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Guide analyses how the Convention is interpreted and applied by national courts, and promotes the uniform and effective interpretation and application of the Convention. As part of the preparation of the Guide, the website — http://newyorkconvention1958.org/ — was launched in 2012. A new version of the website was launched in 2016 and provides free access to more than 1,200 cases[2].

UNCITRAL also issued the UNCITRAL Arbitration Rules in 1976. These rules cover most aspects of the arbitral process, from the contents of the arbitration clause to the effect and interpretation of the award, and are especially useful for the administration of ad hoc arbitrations. In order to meet the evolution of the arbitration practice, the UNCITRAL Arbitration Rules have been revised in 2010 and 2013. The UNCITRAL Commission published, in 2012, Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, to inform and assist arbitral institutions and other interested bodies that might use the UNCITRAL Arbitration Rules as revised in 2010. The Arbitration Rules were adapted in 2013 in order to incorporate the UNCITRAL Rules on Transparency for arbitrations initiated pursuant to an investment treaty concluded on or after 1 April 2014.

UNCITRAL also adopted the Model Law on International Commercial Arbitration in 1985 to assist States in modernizing their arbitration laws. This Model Law is the result of an international consensus on main elements of practice and procedure of international arbitration, and was amended in 2006[3].

In 1996, the Commission issued the UNCITRAL Notes on Organising Arbitral Proceedings. These Notes aim to assist arbitration practitioners by providing a list of matters on which an arbitral tribunal may make decisions, if the parties agree, such as the place and language of the arbitration, and were updated in 2016.

In 2014, UNCITRAL issued the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. These rules, effective as of 1 April 2014, apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application; and to disputes arising out of treaties concluded on or after 1 April 2014, when Investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree. The Rules may apply in Investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.

Also in 2014, UNCITRAL issued the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency"), by which Parties to

[2] http://newyorkconvention1958.org/.

[3] As of 1 January 2018, legislation based on the UNCITRAL Model Law has been adopted in 78 States in a total of 109 jurisdictions.

investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency[4].

In 1980, UNCITRAL adopted the UNCITRAL Conciliation Rules, which provide a set of procedural rules that cover many aspects of the conciliation process. To encourage the use of conciliation, UNCITRAL also adopted the Model Law on International Commercial Conciliation in 2002, which provides uniform conciliation rules[5]. However, the Model Law does not contain provisions on enforcement of agreements resulting from conciliation (also referred to as mediation).

II. UNCITRAL preparation of instruments for the enforcement of international commercial settlement agreements resulting from mediation[6]

At its 47th session, in 2014, the Commission of UNCITRAL agreed that Working Group II: Arbitration and Conciliation/Dispute Settlement[7] ("WGII") should consider the issue of enforcement of international settlement agreements resulting from conciliation (mediation) proceedings[8]. At its 48th session, in 2015, the Commission agreed that WGII should commence the possible preparation of a convention, model provisions or "*guidance texts*" on the topic[9].

Since February 2015[10], WGII has dedicated several sessions to the topic. During these sessions, consensus has been reached on important aspects: the scope of application of the instruments, the type of instruments, the terminology and the grounds for refusing to grant relief.

At the 63rd session of WGII, in September 2015, there was a consensus that the scope of the instrument should be limited to the enforcement of "commercial" settlement agreements[11]. As a consequence, the proposed draft excludes personal, family, inheritance and employment matters from the scope of the instruments, as well as settlement agreements that would otherwise be enforceable as a judgment or as an arbitral award[12]. There was also a consensus that it would not be desirable to exclude settlement agreements involving government entities because some of these entities are engaged in commercial activities and might seek to use mediation to resolve disputes in the context of those activities[13]. At its 65th session, in

[4] The Convention entered into force on 18 October 2017, following the ratification by three signatory States.

[5] As of 1 January 2018, legislation based on the UNCITRAL Model Law has been adopted in 16 States in a total of 28 jurisdictions.

[6] The process of preparation of the instruments for the enforcement of international commercial settlement agreements resulting from mediation is ongoing. These proposed instruments will be further discussed at the 68th session of Working Group II in February 2018 in New York. This paper reflects the current status of the instruments as of January 2018, which might differ from the final instruments.

[7] Working Group II of UNCITRAL: until the beginning of 2016, Working Group II was named "Arbitration and Conciliation"; since late 2016, the name has been changed to "Dispute Settlement".

[8] UNCITRAL Commission Report, 47th session, 7-18 July 2014, New York, A/69/17, para. 123.

[9] UNCITRAL Commission Report, 48th session, 29 June-16 July 2015, Vienna, A/70/17, para. 142.

[10] Working Group II, 62nd session, 2-6 February 2015, New York.

[11] Report of Working Group II on the work of its 63rd session, 7-11 September 2015, Vienna, A/CN.9/861, para. 40.

[12] Article 1 of the draft Convention on the Scope of application.

[13] Report of Working Group II on the work of its 63rd session, 7-11 September 2015, Vienna, A/CN.9/861, para. 46.

September 2016, WGII confirmed that settlement agreements involving States and other public entities should not be automatically excluded from the scope of the instrument[14].

At its 66th session, in February 2017**,** a consensus was reached that WGII would further proceed, at the same time, with the elaboration of an additional provision for the UNCITRAL Model Law on Conciliation as well as the drafting of a Convention on the enforcement of international commercial settlement agreements resulting from mediation[15]. In that regard, it has also been agreed to suggest to the General Assembly of the United Nations, when adopting a resolution for the approval of these instruments, not to express a preference as to which of the two instruments should be adopted by the Member States[16].

At its 67th session, in October 2017, there was a consensus that the instruments should refer to "mediation" instead of "conciliation", as "mediation" is a more widely used term[17]. The proposed amended Model Law adds a footnote to define mediation as "*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*"[18].

WGII discussed and decided on the grounds for refusing to enforce or to invoke the settlement agreement in Article 5 of the draft Convention and Article 18 of the amended Model Law[19]. It may confirm that such grounds apply also to situations where a party invoked a settlement agreement as a defence against a claim[20].

III. Proposed draft Convention

At this stage[21], the proposed draft Convention provides a preamble and 15 articles. It is structured as follows:

Preamble
Article 1. Scope of Application
Article 2. General principles
Article 3. Definitions
Article 4. Application
Article 5. Grounds for refusing to grant relief
Article 6. Parallel applications or claims
Article 7. Other laws or treaties

[14] Report of Working Group II on the work of its 65th session, 12-23 September 2016, Vienna, A/CN.9/896, para. 62.

[15] Report of Working Group II on the work of its 66th session, 6-10 February 2017, New York, A/CN.9/901, para. 93.

[16] *Ibid*.

[17] Report of Working Group II, 67th session, 2-6 October 2017, Vienna, A/CN.9/929, para. 104. It has been proposed that this change of terminology should also apply to the UNCITRAL Conciliation Rules (1980), A/CN.9/WG.II/WP.205, para. 4 (23 November 2017) (WGII 68th session, 5-9 February 2018).

[18] A/CN.9/WG.II/WP.205, para. 5 (23 November 2017) (WGII 68th session, 5-9 February 2018); footnote 3 in document A/CN.9/WG.II/WP.205/Add.1 (23 November 2017) (WG II 68th session, 5-9 February 2018).

[19] A/CN.9/WG.II/WP.205, para. 21 (23 November 2017) (WGII 68th session, 5-9 February 2018).

[20] A/CN.9/WG.II/WP.205, para. 24 (23 November 2017) (WGII 68th session, 5-9 February 2018).

[21] A/CN.9/WG.II/WP.205/Add. 1 (23 November 2017) (68th session, 5-9 February 2018).

Article 8. Reservations
Article 9. Depositary
Article 10. Signature, ratification, acceptance, approval, accession
Article 11. Participation by regional economic integration organizations
Article 12. [Effect in domestic territorial units] [Non-unified legal systems]
Article 13. Entry into force
Article 14. Amendment
Article 15. Denunciations

One of the key issues is how to prove that the settlement agreement was reached through mediation[22]. Article 4(1)(b) of the draft Convention and Article 17(1)(b) of the proposed amended Model Law provide a list of means to evidence that the settlement agreement resulted from mediation.

IV. Proposed amendment to the 2002 Model Law

As for the Model Law on International Commercial Conciliation, which would be renamed as the Model Law on International Commercial *Mediation*, the draft is divided in three sections, namely General Provisions, Mediation and Enforcement of international settlement agreements. It adds some additional provisions to the 2002 Model Law, specifically to the new section about the enforcement of international settlement agreements, such as the new Article 16, which determines the general principles about the enforcement, the new Article 17 about formal requirements, and the new Article 18, which lists grounds for refusing to grant relief.

An Article (provisionally numbered) "aa" has been added, in the new Section 2 – Mediation, on the scope and definitions.

At this stage, the draft amended Model Law provides three sections and 18 articles, which means that it would contain four articles more than the 2002 Model Law on International Commercial Conciliation. It is structured as follows:

Section 1. General Provisions
Article 1. Scope of application and definitions
Article 2. Interpretation
Article 3. Variation by agreement [*placement to be determined*]
Section 2. Mediation
Article aa. Scope and definitions
[*Articles 4 to 13 of the Model Law would remain unchanged*]
Article 14. [*title to be determined*]
Section 3. Enforcement of international settlement agreements
Article 15. Scope and definitions
Article 16. General Principles
Article 17. Application
Article 18. Grounds for refusing to grant relief

These articles follow the themes of the draft Convention (scope of application, general principles, definitions…). The articles in the amended Model Law essentially remain the same as in the 2002 Model Law, especially for the first two sections (Articles 1 to 14), except for the

[22] Report of Working Group II, 67th session, 2-6 October 2017, Vienna, A/CN.9/929, paras. 52-59.

proposed Article “aa”. However, if Article 14 of the 2002 Model Law about enforceability remains unchanged, an entire new section (Section 3) is dedicated to the enforcement of international settlement agreements.

V. Conclusion

After four years of preparation, much progress has been made towards the preparation of a draft Convention on the Enforcement of International Commercial Agreements resulting from Mediation and towards an amendment of the Model Law on International Commercial Conciliation. The final form and content of these instruments will determine the impact of these instruments on the enforcement of international commercial settlement agreements resulting from mediation.