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UNCITRAL work on enforcement of settlement agreements

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Since 2015, UNCITRAL has been working on the topic of enforcement of settlement agreements resulting from conciliation. In that context, its Working Group II is tasked with preparing a convention and a supplement to the UNCITRAL Model Law on International Commercial Conciliation (hereinafter, jointly referred to as “instruments”). In addition to “enforcement” of settlement agreements, the instruments provide that if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party shall be allowed to invoke the settlement agreement in order to prove that the matter has been already resolved (in accordance with the rules of procedure of the State and under the conditions laid down in the instruments).

It is currently expected that the instruments could be considered for adoption in 2018. The supplement to the Model Law would be adopted by the Commission at its annual session (scheduled for 25 June – 13 July 2018) and the convention eventually by the United Nations General Assembly at the end of 2018. Excerpts of the draft convention as currently being considered by the Working Group can be found in the annex to this Note.

With regard to the scope of the instruments, the Working Group agreed as follows:

This [instrument] 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.

Purpose

The purpose of the exclusion in subparagraph (a) is to avoid possible overlap or gap mainly with the draft Judgments convention. The exclusion in subparagraph (b) aims at avoiding overlap with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, the “New York Convention”) and to address the gap that might arise from non-enforceability of settlement agreements recorded in the form of awards (also referred to as consent awards) in certain jurisdictions.

The Working Group agreed that subparagraph (a) would avoid overlap with the draft Judgments convention. However, subparagraph (a) could create a gap in the cross-border enforcement regime of settlement agreements until a significant number of States become party to the draft Judgments convention. For example, if a party applies for enforcement in State B of a settlement agreement which was approved by a court (or concluded before a court) in State A, the competent authority in State B would examine whether the approved settlement agreement is enforceable in the same manner as a judgment in State A. If so, the competent authority would determine that the underlying settlement agreement does not fall within the scope of the instrument and would not proceed with the enforcement of the settlement agreement under the instrument. This would be regardless of whether State B is a party to the draft Judgments convention. Therefore, even if State B is not a party to the draft Judgments convention and there is no enforcement regime for foreign judgments, the settlement agreement would not be enforceable as it was outside the scope of the instrument, possibly creating a gap until State B becomes a party to the draft Judgments convention.

Placement

The provision would be contained in the scope provision of the instruments (as opposed to in the defence provision on resisting enforcement). Nonetheless, States would have the flexibility to enact domestic legislation on enforcement of settlement agreements, which would include such settlement agreements in its scope. Such legislation would not be a breach of the State's international obligations under the instrument, if it were to be a convention.

Terminology

A suggestion that the instruments should also use the term "judicial settlement" found in the Convention on Choice of Court Agreements (2005) and the draft Judgments convention was not supported as that term, though used in some legal systems, was not necessarily known in all jurisdictions.

Meaning of "approved by a court or concluded before a court"

Subparagraph (a) is meant to refer to situations where parties would proceed with out-of-court conciliation and then seize a court to have the settlement approved, or where parties would start court proceedings and settle out of court. For instance, if court proceedings began but the parties were then able to settle through conciliation without any court assistance, such settlement agreements would fall outside the scope of the instrument as long as the settlement agreement was enforceable as a judgment in the State where court proceedings began. Similarly, settlement agreements reached during court proceedings, but not recorded as judicial decisions, would fall outside the scope of the instrument as long as the settlement agreement was enforceable as a judgment in the State where court proceedings took place.

During the discussion, it was clarified that the subparagraph (a) should not be interpreted to allow a party against whom the enforcement of a settlement agreement was sought to, at that stage, apply to a court for the approval of a settlement agreement, which would result in the settlement agreement falling outside the scope of the instrument. It was further suggested that enforcement of a settlement agreement by a court in accordance with the instrument would not be an instance where the settlement was "approved by a court" under subparagraph (a).

Meaning of "enforceable as"

The phrase "enforceable as" referred to the possibility of being enforced.

Determination of the enforceability

Enforceability as a judgement and as an arbitral award is to be determined by the competent authority where enforcement of the settlement agreement is sought.

Enforceability should be determined by considering whether settlement agreements approved by a court or concluded before a court were enforceable as a judgment "in the State of that court." The phrase "according to the law of the State of that court" was replaced with the above phrase to add clarity, but essentially have the same meaning.

With respect to subparagraph (b), the Working Group considered whether enforceability should be determined according to the law of the State where enforcement was sought (this had been the preferred approach at previous sessions) or according to the law of the place of arbitration. After discussion in October 2017, the Working Group agreed that the determination of the enforceability of a settlement agreement as an arbitral award would be left to the competent authority and that the provision would not indicate on which basis.

On a practical note, it was cautioned that the need for the enforcing authority to inquire about enforceability in the State of the court where the settlement agreement was approved or court proceedings took place or at the place of arbitration could be costly and potentially lead to complications and delays. It was highlighted that such a procedure would be an additional burden on the enforcing authority.

Annex

The following provides an illustration of how the draft provisions as approved by the Working Group in October 2017 could be presented in a draft convention. It is available as an annex to the report of Working Group II of its sixty-seventh session, which will be soon available on the UNCITRAL website.

Title: *[to be determined]*

Article 1. Scope of application

1. This Convention applies to international agreements resulting from conciliation 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 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 this article:

(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. “Conciliation” 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 conciliator”) 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 conciliation, such as:

(i) The conciliator’s signature on the settlement agreement;

(ii) A document signed by the conciliator indicating that the conciliation was carried out;

(iii) An attestation by an institution that administered the conciliation process; 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 conciliator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the conciliator and to indicate the parties' or conciliator'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 of the Convention have been complied with.

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

Additional provisions to be considered.