UNCITRAL – WORKING GROUP II

OBSERVATIONS ON ASPECTS OF THE PROPOSED INSTRUMENT FOR THE ENFORCEMENT OF INTERNATIONAL COMMERCIAL SETTLEMENT AGREEMENTS RESULTING FROM CONCILIATION

Following completion of the Sixty-Fifth Session of Working Group II, held in Vienna from 12-23 September 2016, certain non-governmental Observer Groups thought it would be useful to provide their observations for the consideration by the various States Members, Observer States, and other observer groups prior to the Sixty-Sixth Session of Working Group II on certain issues and topics which had been raised and discussed in Vienna. (A list of the Observer Groups that participated in the preparation of this paper or who support the positions outlined ("the Observer Groups") appears at the end of this document.)

The Observer Groups desire to express their observations on several important aspects of the proposed Instrument for consideration at the next session. The Observer Groups' observations are presented from a practical point of view based on their day-by-day experience with users. The Observer Groups, which comprise practitioners with significant experience in international mediation and conciliation[1], desire to assist in developing an Instrument that has the widest possible implementation and usefulness to the international community.

IN SUMMARY, THE OPINIONS OF THE OBSERVERS GROUPS ARE AS FOLLOWS:

1. **The form of the Instrument should be a convention.**
2. **Application of the Instrument should be mandatory.**
3. **The Instrument should apply if a settlement is invoked as a defence.**
4. **The general scope of defences against recognition/enforcement should be limited.**

Each of these topics is considered further below. These considerations should not be considered exhaustive. The Observer Groups believe that these are salient outstanding topics for discussion, resolution of which would significantly impact the practical implementation, application, and usefulness of the proposed Instrument.

1. <u>The form of the Instrument should be a convention</u>.

In the Report of Working Group II[2], the question of the form of the Instrument was left open for discussion. The Observer Groups' view is that the proposed Instrument should be in the form of a convention rather than a model law. A convention would provide certainty and consistency from state to state. Further, it would contribute to the promotion, development, use, and harmonization of conciliation. Moreover, judicial decisions interpreting and applying the Instrument would have greater trans-national influence and would lead to a more uniform interpretation and application. The success of the New York Convention as a means to harmonize and promote international arbitration, acceded to by more 140 states, illustrates the benefits of a convention as the form of Instrument.

2. <u>Application of the Instrument should be mandatory</u>.[3]

The Observer Groups' view is that application of the Instrument should be mandatory, in order to encourage its universal application among States that adopt it. The proposed Instrument relates to enforcement and recognition of international conciliated

[1] Throughout this document, "mediation" and "conciliation" are used interchangeably. No distinction is intended.

[2] A/CN.9/896, dated 30 September 2016 (hereafter "Report"), ¶s 135-143.

[3] Report, ¶s 126-134.

agreements and is therefore more akin to the New York Convention than the Convention on the International Sale of Goods. Whether to "opt-in" or "opt-out" creates an additional issue on which two contentious parties may not agree, thereby reducing the usefulness of the Instrument. If not mandatory, the Instrument at most should allow the parties to "opt-out", provided such agreement is evidenced in a writing signed by the parties *before* the conciliation process begins.

3. <u>The Instrument should apply if a settlement is invoked as a defence</u>.

The Working Group did not reach a consensus on whether a settlement, which would otherwise within the scope of the Instrument, could be invoked as a defence in another proceeding.[4] The experiences of those who have mediated thousands of international commercial disputes over decades is that international settlements should provide for a full and final resolution of all the disputes the parties wish to include within the settlement agreement in any jurisdiction. The Observer Groups' view is that the Instrument should apply in situations where the procedural posture is negative rather than an affirmative effort at enforcement or recognition. A significant gap as to the usefulness of the Instrument would exist if a settlement could not be invoked as a defence in another proceeding. Any suggestion that this would not be sufficient to prevent parties from re-litigating the issues in any other forum would discourage the use of conciliation and promote the use of litigation. Maximum applicability of the Instrument will promote use of conciliation. Deferring the question to each State's national laws would reduce the Instrument's effectiveness and likely impede adoption of conciliation.

4. <u>The scope of defences against recognition/enforcement should be limited</u>.

The Observer Groups are of the view that in order to best promote the effectiveness and applicability of the Instrument, any defences to enforcement and recognition should be limited, objective in nature, and not place form over substance.[5] For example, many settlement agreements are concluded in a simple hand-written document. Such apparent informality should not affect application of the proposed Instrument. Whether enacted as a model law or convention, limiting the grounds for refusing to enforce a settlement agreement, or for excluding a settlement agreement from the scope of the Instrument, should be guided by those defences recognized under the New York Convention.

One question discussed by the Working Group was whether the conciliator should be required to sign regarding the fairness or terms of the agreement.[6] A conciliated agreement is one reached between the parties, and it is not the conciliator's role to interfere with that party autonomy. Hence, it is not the conciliator's role to impose their views regarding the fairness or terms of the agreement.[7] Impartiality and neutrality of the mediator are the main pillars of the conciliation process. If a conciliator were required to opine on fairness or an agreement's terms, those pillars (or at least their perception), would be seriously undermined.

In our experience as mediators, mediation institutions, and users, parties attend a mediation almost always assisted by their attorneys. If the proposed Instrument requires an indication that the agreement was the result of a process involving a conciliator, that requirement can be met either by a signed statement by the conciliator simply to that effect, or by a statement to that effect in the resulting agreement between the parties. When the mediation process is managed by a mediation institution, it could be the institution that certifies the mediation occurred.

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[4] Report, ¶s 148-157.

[5] Report, ¶ 84-118.

[6] Report, ¶s 70-75.

[7] See, for example, IMI Code of Professional Conduct.

The draft Instrument includes a proposed defence based on the failure of the conciliator to "maintain fair treatment of the parties" or a perceived lack of impartiality or independence.[8] The Observer Groups are strongly of the view that inclusion of the proposed "fairness and impartiality" provision would doom the Instrument from a practical standpoint. Certainty and finality are benefits of conciliated agreements and are important to parties to the process. Any defences to enforcement or recognition of a settlement agreement under the Instrument should be based on objective criteria. "Fairness and impartiality" are subjective criteria, application of which would generate considerable litigation and undermine the finality and effectiveness of conciliation. Further, a defence "limited" to "instances where the conciliator's misconduct had a direct impact on the settlement agreement" is no better, because responding to any defence based on "fairness and impartiality" grounds would inevitably involve breaking the confidentiality of any conciliation process.[9] 'Why a particular party might settle on the terms they do is not a matter for a mediator, as the mediator does not dictate the terms of settlement. In the sort of international commercial settlement agreements with which the Instrument is concerned, the parties are invariably accompanied by a full team of lawyers and sometimes experts to advise them throughout the process. This is a more satisfactory safeguard for the parties against any potential 'pressure,' 'interference', or 'misconduct' by the conciliator/mediator. The experience of those who have mediated thousands of international commercial disputes over decades is that any suggestion that the confidentiality of the process might be open to scrutiny in subsequent litigation invariably drives parties away from conciliation.

[8] Note, ¶s 35, 40; Report, ¶s 103-109.N

[9] See, for example, the IMI Code of Professional Conduct, available at: https://imimediation.org/imi-code-of-professional-conduct.

As of 3 January 2017, the following Observer Groups endorse the content of this Paper:

Florence International Mediation Chamber (FIMC)

Forum for International Conciliation and Arbitration (FICA)

Independent Mediators Limited (IML)

International Mediation Institute (IMI)