United Nations A/CN.9/846

General Assembly

Distr.: General
27 March 2015

Original:
English/French/Russian/Spanish

United Nations Commission on International Trade Law
Forty-eighth session
Vienna, 29 June-16 July 2015

Settlement of commercial disputes

Enforcement of settlement agreements resulting from international commercial conciliation/mediation

Compilation of comments by Governments

Note by the Secretariat

Contents

V.15-02092 (E) 100415 130415

Please recycle

I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1]

2. For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced below in section II. The replies are reproduced below in section III in the form in which they were received.

II. Questionnaire

A. Questions regarding the legislative framework with respect to enforcement of settlement agreements resulting from international commercial conciliation/mediation

3. In August 2014, the Secretariat circulated to States a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation. The questionnaire aimed at collecting information on whether States have already adopted legislation addressing enforcement of settlement agreements. It was circulated a second time in February 2015 in accordance with a request of the Working Group (A/CN.9/832, para. 21). The questionnaire contained the following questions:

(1) Please provide information regarding the legislative framework or other rules in your jurisdiction regarding the enforcement of international commercial settlement agreements arising out of mediation/conciliation[2] proceedings.

In particular, does the law applicable to the enforcement of international commercial settlement agreements include:

i. Specific enforcement procedures if those agreements result from mediation/conciliation proceedings?

ii. Any procedure for expedited enforcement of international commercial settlement agreements? (In the affirmative, what are the conditions for the procedure to apply?)

iii. Any provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal?

---

[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

[2] Please note that in the questions below, the terms “mediation” or “conciliation” are used interchangeably as broad notions both referring to proceedings in which a person or a panel of persons assist parties in their attempt to reach an amicable settlement of their disputes.

In the affirmative, please indicate:

1. Whether arbitral proceedings have to take place (possibly in a simplified form, with the only purpose of recording in an award the terms of the settlement between the parties) or whether the settlement agreement can be treated as an award on agreed terms without involving the actual commencement of any arbitral proceedings;

2. Whether specific conditions are required: for instance, should the settlement agreement result from mediation/conciliation proceedings? Should it be in writing, and signed by the parties/their representatives and the mediator(s)/conciliator(s)?

3. Whether courts in your jurisdiction consider awards on agreed terms enforceable under the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958)?

(2) What are the grounds for refusing enforcement of a commercial settlement agreement in your jurisdiction?

(3) Are there any criteria that international commercial settlement agreements need to meet to be deemed valid? Are there any bases in law for challenging the validity of an agreement to refer a dispute to mediation/conciliation or the validity of the resulting mediated/conciliated settlement agreement?

(4) Please add any comment you may wish to make on the question of enforcement of international mediated/conciliated settlement agreement.

B. Reference to the questionnaire

4. In the remainder of this note and its addenda, the above questions are referred as follows:

Question 1: Information regarding the legislative framework

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Question 3: Validity of international commercial settlement agreements

Question 4: Any other comment

III. Compilation of comments

1. Armenia

[Original: English]
[Date: 5 November 2014]

Question 1: Information regarding the legislative framework

The legal relations subject matter of the questions below are regulated by the Law of the Republic of Armenia on Commercial Arbitration.

(i) The Law does not contain any specific enforcement procedures considering the agreements result from conciliation/mediation proceedings.

(ii) There is not any expedited procedure for enforcement of international commercial agreements.

(iii) There is no provision to the effect that an international commercial settlement agreement can be treated as a final award rendered by an arbitral tribunal.

If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, shall make an award on reconciliation agreement on agreed terms.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The law of the Republic of Armenia on Commercial Arbitration does not settle this issue.

Question 3: Validity of international commercial settlement agreements

The Law of the Republic of Armenia on Commercial Arbitration does not settle this issue.

2. Austria

[Original: English]
[Date: 10 March 2015]

Question 1: Information regarding the legislative framework

Austria has no specific legal regime regarding this kind of enforcement. International commercial settlement agreements arising out of mediation/conciliation proceedings are per se no executory title according to Austrian law. By the way the same is true for national settlement agreements.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As most other laws, Austrian law refuses to immediately enforce any kind of private agreements. If a party wants to enforce a right arising out of a contract (even if the contract was aimed at settling a dispute between the parties), they have to refer to the competent court to gain an executory title in a court proceeding. It is however possible to convert an agreement into a "*vollstreckbarer Notariatsakt*" according to Sec. 3 of our Notarial Code (*Notariatsordnung* — NO) or into a court agreement (*prätorischer Vergleich*) according to Sec. 433 Civil Procedure Code (Zivilprozessordnung — ZPO) and in this manner create a title without recourse to a contentious court proceeding.

As yet there seem to exist no standards for mediation/conciliation proceedings (both on the national and on the international level) that warrant sufficient trust in the proceeding itself, its independence from either party and from negative influence from outside, the quality of mediators/conciliators, the quality of the outcome and the fact that the outcome is not agreed upon by the parties to the detriment of a

third person. Such trust, however, seems indispensable if one considers rendering the result of such a proceeding directly enforceable.

Question 4: Any other comment

Austria is very sceptical towards an attempt to find and regulate sufficient criteria for mediation/conciliation proceedings that could justify immediate enforceability of their results. We also doubt the necessity of such an endeavour as there already exist functioning structures for generating enforceability, in particular international arbitration which allows for converting an agreement into an arbitral award and thereby making it enforceable under the regime of the 1958 New York Convention. A possible parallel structure might have little or no added value. It could even reduce the value of existing structures by enhancing legal complexity in the field and thus confusing market participants. In addition the necessity to formalize mediation/conciliation proceedings in order to create reliable structures for a "product", the outcome of which might warrant immediate enforcement, runs the danger of compromising, if not destroying, one of the most important merits of mediation/conciliation namely its flexibility and the relative absence of red tape.

3. Belarus

[Original: Russian]
[Date: 12 January 2015]

Question 1: Information regarding the legislative framework

The execution of settlement agreements resulting from mediation/conciliation proceedings is governed in the Republic of Belarus by the following basic legislative acts:

- Code of Economic Procedure of the Republic of Belarus (hereinafter "CEP");
- Code of Civil Procedure of the Republic of Belarus (hereinafter "CCP");
- Mediation Act of the Republic of Belarus (hereinafter "Mediation Act"); and
- Act of the Republic of Belarus "On the International Arbitration Court" (hereinafter "Arbitration Act").

Under article 2 of the Mediation Act, mediation/conciliation may be conducted either prior to recourse by the parties to civil or economic court proceedings or subsequent to the commencement of court proceedings.

A mediation/conciliation agreement reached subsequent to the commencement of court proceedings by the parties through mediation/conciliation and approved by the court as an amicable settlement may constitute the final outcome of the proceedings (article 157 of the CEP, article 285(1) of the CCP, and article 39 of the Arbitration Act).

The execution of such agreements is provided for in the general rules on the execution of judicial decisions, including on enforcement (article 461 of the CCP, article 124 of the CEP, and article 39 of the Arbitration Act).

As a general rule, settlement/conciliation/mediation agreements are executable on the basis of the principles of voluntariness and good faith of the parties (article 15 of the Mediation Act, and articles 124 and 157 of the CEP).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The Mediation Act provides for a number of requirements the non-fulfilment of which excludes the possibility of enforcement of a mediation agreement. Thus, under article 15 of the Mediation Act, the following types of mediation agreement are not executable under procedural law, i.e. they are not enforceable:

- Those not approved by the court as settlement agreements for disputes adjudicated in accordance with civil procedural law; (*In the event that the parties conclude a mediation agreement, the court shall establish a time limit for the execution thereof (article 285 of the CCP). In the event that the parties conclude a mediation agreement and that in this connection an application for approval of the settlement agreement is submitted to the court, the court shall resume the suspended proceedings and consider the application for approval of the settlement agreement (article 285(1) of the CCP)*).
- Those not meeting the requirements of the economic procedural law on settlement agreements; (*The settlement agreement must be approved by the court (article 123 of the CEP) in form and substance (article 122 of the CEP)*).
- Those concluded with the participation of a mediator not included in the Register of Mediators.

Enforcement of mediation agreements:

Under article 461 of the CCP, settlement agreements approved by the court shall be executed in accordance with the provisions of the CCP. Under article 462 of the CCP, court orders include the writ of execution, which is issued by the court pursuant to international agreements approved by the court in order to ensure the execution, including where necessary the enforcement, thereof.

Under article 40(1) of the CEP, in the event of non-execution of a voluntary mediation agreement meeting the requirements of the CEP for settlement agreements, a court order for the enforcement of the mediation agreement shall be issued by the economic court in accordance with the rules established by articles 262(1) to 262(3) of the CEP.

Under article 262(1) of the CEP, an application for the issuance of a court order for the enforcement of a mediation agreement shall be filed by the interested party to the mediation agreement with the economic court that has jurisdiction over the location or place of residence (place of stay) of the debtor or that has jurisdiction over the location of the debtor’s property if the debtor’s location or place of residence (place of stay) is unknown.

Article 262(1) of the CEP also defines the content of the application for the issuance of a court order for the enforcement of a mediation agreement and the list of documents to be attached thereto. The said article also provides for the possibility of filing an application and attached documents electronically. An application for the issuance of a court order for the enforcement of a mediation agreement may be submitted within six months of the date of expiry of the period for voluntary execution of the mediation agreement.

4. Brunei Darussalam

[Original: English]
[Date: 6 January 2015]

Question 1: Information regarding the legislative framework

Brunei Darussalam has in force the International Arbitration Order 2009 (IAO 2009) which came into force on 23 February 2010. Part III of the IAO 2009 deals with foreign awards. The IAO 2009 is limited to arbitral award resulting from an arbitration, and it does not cover mediation/conciliation. Brunei Darussalam currently does not have laws and regulations governing mediation or conciliation.

However, the following are responses to some of the questions relating to agreements arising out of an arbitration proceeding.

Question 1 (iii): An international commercial settlement agreement arising out of an arbitration proceeding may be treated as a final award (See sections 42(2) and 31(1) of the IAO 2009).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of international commercial settlement agreements arising out of an arbitration proceeding are provided under section 44 of the IAO 2009.

Question 3: Validity of international commercial settlement agreements

An international commercial settlement agreement arising out of an arbitration proceeding is valid where (Section 42(1) of the IAO 2009) the said agreement is from a country which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and which recognizes and will enforce awards made in Brunei Darussalam.

In a court proceeding, the parties must produce: (i) the duly authenticated original award or a duly certified copy thereof; (ii) the original arbitration agreement or a duly certified copy thereof, and (iii) where the agreement is in a foreign language, a translation of it in the English language.

5. Canada

[Original: English/French]
[Date: 8 December 2014]

Question 1: Information regarding the legislative framework

(i) In Canada, the enforcement of mediation agreements, except agreements involving the federal Crown or relative to subject matters falling under federal legislative powers, are generally governed by provincial contract law. A settlement agreement resulting from conciliation or mediation proceedings can be presented in a court of law for enforcement if a party to the agreement refuses to comply with the terms of the settlement. In that situation, the settlement agreement would need to be

presented according to normal rules on presenting documentary evidence in a court of law. Two Canadian provinces, Ontario and Nova Scotia, have adopted legislation based on the UNCITRAL Model Law on International Commercial Conciliation, which provides a framework for the enforcement of commercial conciliation agreements. In Quebec, a mediated agreement can constitute a settlement (called transaction) which is *res judicata* between the parties (sec. 2631 to 2637 and 2848 Code civil (« C.c.Q. »; see also new sec. 613 Nouveau Code de procédure civile (« N.C.p.c. »)). Transactions enforceable at their places of origin are recognized and, where applicable, declared to be enforceable in Québec, on the same conditions as judicial decisions, to the extent that those conditions apply to the transactions (sec. 3163 C.c.Q.). These conditions are provided for by articles 3155 and following.

(ii) Under Ontario law, a party to a commercial conciliation settlement may apply to the Superior Court of Justice for an order authorizing the registration of the agreement with the court. On the filing of a true copy of the settlement agreement with the registrar pursuant to an order authorizing the registration of the agreement, the settlement agreement is registered with the court and has the same force and effect as if it were a judgement obtained and entered in the Superior Court of Justice on the date of the registration (see Commercial Mediation Act, 2010 S.O. 2010, Chapter 16, Schedule 3, s. 13).

In Nova Scotia, a settlement agreement is binding on the parties. On application to the Supreme Court of Nova Scotia with notice to all parties, the agreement may be filed with the Court. Once filed, the agreement is enforceable as if it were a judgement of that court (see Commercial Mediation Act, S.N.S. 2005, c. 36, s. 15).

In Quebec, in order for a settlement to be subject to compulsory execution, it must be homologated by a court (sec. 2633 C.c.Q. according to the process detailed in section 885 a) of the Code de procédure civile (« C.p.c. »)).

(iii) In general, no provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

1. In Quebec, the Code of Civil Procedure provides that if the parties settle the dispute, the arbitrators shall record the agreement in an arbitration award (sec. 945.1 C.p.c.; sec. 642(4) par. N.C.p.c.). In that case, the arbitral process shall take place. The New Code of Civil Procedure, scheduled to come into force in 2015, provides that the arbitrator's mission also includes attempting to reconcile the parties, if they so request and circumstances permit, and continuing the arbitration process, with the parties' express consent, if the conciliation attempt fails (sec. 620(2) N.C.p.c.).

   In situations where no arbitration proceeding took place, the agreement can constitute a settlement (called transaction) which is res judicata between the parties (sec. 2631 to 2637 and 2848 Code civil; sec. 613 N.C.p.c.).

2. In Quebec, an award must be in writing and signed by the arbitrators (sec. 945.2 C.p.c.; sec. 642(1) N.C.p.c.). Settlement agreements are not subject to any particular form requirements (sec. 2811 and 2827 C.c.Q.).

3. In Quebec, the legislation does not distinguish between arbitral awards and awards on agreed terms, which means that both should be enforceable

under the New York Convention. There is no reported case law confirming this interpretation.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing the enforcement of a commercial settlement agreement depend on whether there is a specific framework on enforcement of settlement agreements or enforcement is achieved by application of contract law.

Where enforcement is done under contract law, enforcement of the contract can be denied on the basis of existing grounds such as duress, unconscionability, illegality, undue influence, misrepresentation, mistake or fraud.

Specific legislation in Ontario, mentioned under 1 above, provides that no judgement or order shall be granted or made if it is shown to the court that, a party to the mediation against whom the applicant is seeking to enforce the settlement agreement did not sign the agreement or otherwise consent to the terms of the agreement that the applicant is seeking to enforce; the settlement agreement was obtained by fraud; or the settlement agreement does not accurately reflect the terms agreed to by the parties in settlement of the dispute to which the agreement relates (see Commercial Mediation Act, *S.O. 2010*, Chapter 16, Schedule 3, s. 13 (6)).

The legislation in Nova Scotia is silent on this issue.

In Quebec, the homologating court only examines the legality of the act and as a general rule it cannot rule on its advisability or merits (sec. 527 and 528 N.C.p.c.).

Question 3: Validity of international commercial settlement agreements

Under contract law, there are no rules specific to commercial settlement agreements. The general contract law rules govern the validity of the agreement.

Where a legislative framework exists, a commercial settlement agreement needs to address commercial disputes, that is, the subject matter does not cover family or household disputes. The settlement agreement must be signed by more than one party to the mediation, or minutes of settlement signed by more than one of the parties, that disposes of one or more issues in dispute in the mediation. There is no need for the agreement to be signed by an accredited mediator or conciliator in order to be valid (see Commercial Mediation Act, *S.O.* 2010, Chapter 16, Schedule 3, ss 2, 3, 12 and 13).

The legislation in Nova Scotia is silent on this issue.

In Quebec, the Civil Code provides specific ground for annulling a settlement agreement as well as a number of exceptions to the general contract law rules (sec. 1398, 1399, 1411, 1413, 2631 to 2637 C.c.Q.).

Question 4: Any other comment

See document A/CN.9/WG.II/WP.188.

6. Colombia

[Original: Spanish]
[Date: 30 December 2014]

Question 1: Information regarding the legislative framework

The legislative framework of Colombia does not contain any specific laws governing the cross-border enforcement of commercial settlements.

Colombia has a General Code of Procedure (Act 1564 of 2012), which contains, at articles 605 to 607, rules for the recognition and enforcement of foreign judgements, and the Arbitration Statute (Act 1563 of 2012), which regulates, at articles 111 to 116, the procedure for recognition and enforcement of foreign awards with the same requirements as those of the New York Convention.

However, the Arbitration Statute contains a specific article on settlements in international arbitration as a form of terminating arbitral proceedings and provides that, if the parties agree and the tribunal does not object, the agreements reached may be included in an award, and the award shall have the same effects as an award rendered on the merits of the claim. As mentioned, this situation is regulated within the arbitration process conducted in accordance with the Statute, but it is not intended specifically for commercial settlements concluded abroad. (*"Article 103. Settlements. If during arbitral proceedings the parties reach a settlement or conciliation/mediation agreement resolving the dispute, the tribunal shall terminate the proceedings. If requested by both parties and the tribunal does not object, the tribunal shall include in an award the terms agreed by the parties. The award shall have the same effects as any other award rendered on the merits of the claim."*)

In Colombia, a settlement agreement may be understood as an enforceable title, that is to say, clear, express, due and payable obligations contained in documents coming from the debtor or from the originator of the documents evidencing those obligations, or obligations arising from a judgement or decision issued by a judge or tribunal of any jurisdiction, or from another legal source (article 422 of the General Code of Procedure). This category could include commercial settlement agreements, which would be enforced pursuant to the provisions on enforcement in Section II, Title I of the aforementioned Code.

7. Cyprus

[Original: English]
[Date: 11 November 2014]

It is recalled that the Republic of Cyprus is a Member State of the European Union where the principles of the Single Market apply. It is thus clarified that the information below concerns only commercial settlements between Cyprus and non-EU Member States.

Question 1: Information regarding the legislative framework

International commercial arbitration in the Republic of Cyprus is governed by two laws: "*The International Commercial Arbitration Law of 1987*" and "*The*

Arbitration Law". None of these two laws makes reference to international commercial mediation/conciliation proceedings.

The Republic of Cyprus is a contracting State to the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958) since 29 December 1980. Declaration made upon accession: "*The Republic of Cyprus will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; furthermore it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.*"

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Please see answer (1) above.

Question 3: Validity of international commercial settlement agreements

Please see answer (1) above.

8. Ecuador

[Original: Spanish]
[Date: 2 March 2015]

Question 1: Information regarding the legislative framework

In Ecuador, the mediation instrument (*acta de mediación*), which contains the agreement, has the effect of an enforceable ruling and of res judicata. It is therefore enforced in the same way as a final ruling, through a court order, and the judge who enforces it may accept no challenges other than those brought after the mediation instrument is signed.

In order for the mediation instrument to have that effect, it must be signed by the parties and the mediator as part of mediation proceedings conducted in accordance with the Arbitration and Mediation Act of Ecuador. That is, even if the matter involves an international commercial settlement, the mediation proceedings from which the settlement arises must be conducted at a mediation centre registered with the Council of the Judiciary, in accordance with Ecuadorian law.

There is no legislation regulating the effect of mediation instruments resulting from proceedings in other States. The National Assembly is currently considering a proposal which, if adopted, would give mediation instruments concluded in other States and recognized in Ecuador the same force as international treaties and agreements currently in force; in the absence of such treaties, such mediation instruments would be enforced as a ruling, without the possibility of review of the substance of the matter.

It should be noted that a settlement agreement has the effect of res judicata under the Civil Code of Ecuador. Moreover, under the Code of Civil Procedure, settlement instruments have the effect of an enforceable instrument and are therefore enforced by means of a court order. In such cases there are no prior mediation proceedings.

(i) As mentioned above, as in the case of final rulings, a mediation instrument that has been signed as part of domestic proceedings is enforced by court order even if it contains an international commercial settlement agreement.

Thus, once a request to enforce a mediation instrument has been submitted, the judge's first step is to issue an enforcement order whereby: (1) the debtor is ordered to pay or deliver goods within 24 hours; (2) the debtor is compelled to deliver the good; (3) the action is performed at the expense of the debtor; or (4) the debtor is ordered to pay compensation for failure to deliver the good or perform the action.

Upon the issue of the enforcement order, the debtor must comply with the order or apply for extinction or modification of the obligation, provided that that application is made after the instrument has been signed. If the debtor fails to comply or to raise an objection, the debtor's assets are confiscated and auctioned and the proceeds of their sale paid to the creditor.

There is no legislation regulating the effect of mediation instruments signed as part of proceedings in another State; consequently, the issue of enforcement of such instruments is unclear.

(ii) The issuing of court orders as described above is a procedure for the expedited enforcement of mediation instruments signed as part of mediation proceedings conducted in Ecuador. In order for the procedure to apply, a mediation instrument concluded in accordance with the Arbitration and Mediation Act is required. There are no other requirements or procedures.

There is no procedure for the enforcement of mediation instruments concluded in another State.

(iii) In accordance with the Arbitration and Mediation Act, once arbitration proceedings have begun, such proceedings may end in a settlement agreement that has the same effect as an arbitral award, i.e., the effect of an enforceable final ruling and of res judicata, and that is enforced by means of a court order.

Accordingly, article 28 of the Arbitration and Mediation Act provides that "Where arbitration ends in a settlement, that settlement shall be of the same nature and have the same effect as an arbitral award and shall be in writing and in accordance with article 26 of this Act."

However, an award rendered as part of foreign arbitral proceedings that includes an international commercial settlement agreement is considered an award in Ecuador in accordance with Ecuadorian legislation on arbitration. Such an award would therefore be enforced in Ecuador in the same way as an award rendered in Ecuador, that is, by means of a court order.

A draft general code of procedure that would establish a procedure for the recognition of foreign arbitral awards, following which the awards would be enforced in the same way as domestic awards, is currently under discussion.

1. Arbitral proceedings may end in a settlement but must begin with an actual dispute. The law does not provide for arbitral proceedings of which the sole purpose is to enable a settlement between the parties to be treated as an award. In particular, given that a settlement instrument (which does not result from mediation proceedings) has the effect of res judicata, and that a mediation instrument (resulting from mediation proceedings) has the same effect as an

award, i.e. the effect of an enforceable ruling and of res judicata, and is enforceable by means of a court order, the parties may not, by agreement, give a settlement agreement the effect of an award.

2. Even if the mediation instrument contains an international commercial settlement agreement, in order for that instrument to have the effect of an enforceable ruling and of res judicata, it must result from mediation proceedings with the participation of a mediator accredited by a mediation centre registered with the Council of the Judiciary.

   The mediation instrument must be in writing and contain, at a minimum, an account of the facts that led to the dispute, a clear description of the obligations of each party and the electronic fingerprints or signatures of the parties and of the mediator, as provided for in article 47 of the Arbitration and Mediation Act.

3. If awards on agreed terms are treated as awards under arbitration law, they are enforceable in Ecuador on the basis of the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

During enforcement proceedings, the only objections that may be raised with respect to a mediation instrument signed as part of domestic proceedings are those arising after that instrument is signed. Such objections relate to the extinction or modification of the obligation set forth in the instrument.

Question 3: Validity of international commercial settlement agreements

In order for an international commercial settlement agreement to be considered valid, it must fulfil the same validity requirements as those that apply to contracts (capacity, consent free of defect, lawful purpose, legitimate cause and the formalities required). In addition, it should deal with a matter on which settlement can be reached in accordance with Ecuadorian law.

There is no legal basis for challenging the validity of a mediation agreement (an agreement whereby a dispute is referred to mediation). In accordance with article 46, paragraph (a), of the Arbitration and Mediation Act, where a mediation agreement has been concluded, judges must refrain from considering petitions concerning the dispute that is the subject of the agreement unless there is no possibility of settlement being reached or there is an express or implied waiver by the parties. In any case, in Ecuador, mediation is voluntary; consequently, even if such proceedings have been initiated, the defendant may withdraw from those proceedings without being compelled to continue to participate.

The validity of the mediation instrument (settlement agreement resulting from mediation) may be challenged on the basis of defects in the contracts between the parties (lack of capacity, defect of consent, unlawful purpose, illegal cause or lack of formalities); on the ground that it does not relate to a matter on which settlement can be reached; on the basis of failure to summons or notify the Counsel-General of the State in cases involving public entities, in accordance with article 6 of the Act on the Office of the Counsel-General of the State; on the basis of lack of

authorization or delegation by the Counsel-General of its signature in cases involving public sector entities, in accordance with article 12 of the Act on the Office of the Counsel-General of the State; or if the mediator is not accredited by a mediation centre, or if the centre that has accredited the mediator is not registered with the Council of the Judiciary, in accordance with articles 48 and 52 of the Arbitration and Mediation Act.

It should be noted that there is no specific procedure for challenging the validity of a mediation instrument.

Question 4: Any other comment

Ecuador has detailed legislation relating to mediation that gives mediation instruments the effect of enforceable rulings and of res judicata and permits their enforcement in the same way that rulings are enforced. This provision, contained in article 47 of the Arbitration and Mediation Act, has raised concerns with regard to its application in a civil-law system, but those concerns have been dispelled by practice.

Clarity is needed with regard to the effect that mediation instruments resulting from foreign mediation proceedings should have.

9. Egypt

[Original: English]
[Date: 11 November 2014]

Question 1: Information regarding the legislative framework

According to the Egyptian law, international commercial agreements do not benefit from special nor expedited enforcement procedures.

Egyptian law does not treat an international commercial settlement as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Requests for enforcement of commercial settlement agreements can be denied if its provisions contradict with Egyptian public order.

Question 3: Validity of international commercial settlement agreements

Only officially authenticated international agreement can be directly enforced according to the Egyptian law.

An ordinary international settlement agreement may be enforced through a judicial ruling confirming its validity.

10. Germany

[Original: English]
[Date: 17 November 2014]

Question 1: Information regarding the legislative framework

(i) Under German law, agreements resulting from mediation/conciliation are governed by the rules that apply to agreements resulting from negotiations between parties. They are regarded as contracts and thus subject to the applicable general rules of contract law. There are different ways of having such agreements/contracts declared enforceable in Germany. No specific enforcement procedures exist for foreign commercial settlement agreements.

Agreements/contracts can be made enforceable as follows:

(A) Action in court

- Internal: First, an action can be brought before a German court requesting the other party to comply with the contract/agreement; subsequently, the German court decision must be enforced.
- International: If mediation/conciliation agreements have been confirmed by court decisions in other States, such court decisions may be recognized and declared enforceable in Germany.

1. Court decisions from an EU Member State are declared enforceable under a simplified procedure (Article 38 et seqq. of Regulation (EC) No. 44/2001). As of 10 January 2015, the procedure for declaring the enforceability of court decisions from EU Member States will be done away completely (Article 39 et seqq. of Regulation (EU) No. 1215/2012). Recognition of the decision can, on the application of the person against whom enforcement is sought, in general be refused especially if certain procedural errors have occurred in the original proceedings or if the result of compulsory enforcement would violate the German *ordre public*.
2. Court decisions from a Contracting State of the Lugano Convention are declared enforceable under a simplified procedure (Article 38 et seqq. of the Lugano Convention of 30 October 2007).
3. Decisions by courts of other States have to be declared enforceable under the German procedure to obtain a declaration of enforceability. The preconditions for recognition and enforcement are governed by German international civil procedure law (sections 328, 722 and 733 of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO)).

(B) Submission to immediate enforcement in a public document drawn up by a German notary

- Internal: Second, parties may include the agreement in a public document drawn up by a German notary or a German court and add a declaration by the party concerned, in which he or she accepts to submit to immediate enforcement in relation to an obligation resulting from that agreement.

- International: If such a document has been drawn up abroad by a civil law notary (notaries public are not included) and if it is enforceable under the law of the State of origin (the State in which it has been drawn up), it can be declared enforceable under the Lugano Convention or under Regulation (EC) No. 44/2001, or under a bilateral agreement with another State if such an agreement exists. It is a matter of dispute in German legal literature as to whether foreign documents which include a declaration of submission to enforcement may be recognized or not in the absence of such an agreement between States.

(C) Court settlement

- Internal: Third, the settlement agreement (mediation/conciliation agreements generally represent settlement agreements between the parties) may be declared enforceable by a German court or a German notary; this is subject to the proviso that one of the parties has its habitual residence in Germany and the agreement has been negotiated by attorneys representing the parties to the settlement and lodged with the competent court in Germany. Enforcement of an out-of-court settlement concluded by attorneys will be refused if the settlement agreement is void or invalid, or if its recognition would be contrary to the German *ordre public*.

- International: If the settlement agreement has been concluded between foreign parties abroad, it can also be declared enforceable under the Lugano Convention or under Regulation (EC) No. 44/2001, or under a bilateral agreement with another State if such an agreement exists. In respect of these cases as well, it is a matter of dispute in German legal literature as to whether foreign documents which include a declaration of submission to enforcement may be recognized or not.

The compulsory enforcement of German court decisions, German enforceable public documents and German settlement agreements is subject to German law governing compulsory enforcement, as is the compulsory enforcement of foreign decisions, foreign enforceable documents and foreign settlement agreements which have been declared enforceable in Germany. In other words, compulsory enforcement as such follows identical rules once the foreign decision or public document or settlement has been declared enforceable.

(ii) There is no special procedure guaranteeing the expedited enforcement of international commercial settlement agreements in German law (see answer re (i)).

(iii) German law does not contain any provisions in which international commercial settlements are regarded as arbitral awards. In view of the distinct procedures that lead either to this type of settlement on the one hand, or to arbitral awards on the other, Germany does not see any possibility of automatic legal conversion or equal treatment and will therefore oppose any endeavours to this effect at international level.

(1) A settlement agreement can on no account be regarded as an award on agreed terms without an arbitral tribunal having reviewed the conclusion of the settlement (including, at least, the procedure, the applicable law and the result). It is conceivable, however, that a settlement agreement from another State — upon the joint request of both parties, or upon the request of one party

provided that this party is able to produce an arbitration agreement — could be followed by simplified arbitral proceedings in the State of origin or in the State of enforcement, which may then result in an award on agreed terms. In the case of foreign arbitral awards, the State of enforcement must retain a general possibility of review and at least the ordre public exception. Whether it is necessary to convert a settlement agreement into an arbitral award in order to improve the enforcement of such settlements at international level still needs to be examined in detail.

(2) Subsequent simplified arbitral proceedings should only be opened for international commercial settlement agreements. A precondition for this is, of course, that such a settlement (including the claimed content) has been concluded effectively between the parties. The minimum requirements for this are that the document is available in written form (which may include a secured electronic form), that it is signed, and that it contains comprehensible statements which can form the basis of an award and a declaration of enforceability.

(3) An award on agreed terms can be recognized and declared enforceable in Germany under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 if no grounds exist for refusing recognition.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

If and insofar as an international commercial settlement can be converted into a German enforceable instrument in Germany by using the procedure available for internal settlement agreements, no additional declaration of enforceability is required before compulsory enforcement can commence.

If a settlement agreement concluded abroad and enforceable under its law of origin is intended to be enforced in Germany without being converted, in general this first requires a declaration of enforceability (see answer to question 1). The grounds for refusing enforcement are laid down in the applicable European or international law instruments governing enforcement procedure (Regulation (EC) No. 44/2001 and Article 38 et seqq. of the Lugano Convention of 30 October 2007; bilateral agreements with other States). If no such instrument is applicable, there is no explicit provision on enforceability, and it is disputed whether such agreements concluded abroad and enforceable under their law of origin can be declared enforceable. However, in any event, even if they were capable of being declared enforceable, as for internal settlements (see above), enforcement will be refused if the settlement agreement is void or invalid, or if its recognition would be contrary to the German *ordre public*.

Question 3: Validity of international commercial settlement agreements

Since mediation/conciliation agreements are regarded as contracts in Germany, the question as to their validity is governed by the contract law applicable under the conflict of laws provisions. Agreements to mediate/conciliate as well as agreements resulting from mediation/conciliation are regarded as contracts subject to the applicable contract law rules.

Under German law, an international commercial settlement agreement may be invalid in particular if it has been challenged due to an error made by a party to the contract, or due to a threat made against the other party to the contract, or due to the intentional deception of the latter. The same applies if the international commercial settlement agreement violates a statutory prohibition applicable in Germany or is *contra bonos mores*. Beyond that, German law does not contain any special requirements for the validity of such an agreement.

Question 4: Any other comment

See document A/CN.9/WG.II/WP.188.

11. Hungary

[Original: English]
[Date: 2 December 2014]

Question 1: Information regarding the legislative framework

(i) Hungary has not enacted special provisions on the enforceability of mediation settlement agreements. Therefore, mediation settlement agreements are only enforceable in the same way as any other contract between the parties.

(ii) There is no procedure for expedited enforcement of international commercial settlement agreements.

(iii) (1) According to Section 39(2) of the Act LXXI of 1994 on Arbitration if requested by the parties, the arbitration tribunal shall fix the settlement in the form of an award under the agreed terms, provided that it finds the settlement in compliance with the law. Arbitral proceedings have to take place in this case.

(2) No other specific conditions are required.

(3) According to Section 39(3) of the Act LXXI of 1994 on Arbitration, an award on agreed terms has the same effect as that of any other award made by the arbitration tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of a commercial settlement agreement as an award on agreed terms are the same as in case of the arbitral awards according to Section 59 of the Act on Arbitration. The court shall refuse to execute the award of the arbitration tribunal if, in its judgement: (a) the subject matter of the dispute is not subject to arbitration under Hungarian law; or (b) the award is contrary to Hungarian public policy.

Question 3: Validity of international commercial settlement agreements

The Hungarian Act on Conciliation has no provisions on enforceability of a mediation settlement agreement; according to the Act on Arbitration, the criteria of the award on agreed terms is the same as the criteria of the arbitral award.