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European Union

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Subject: Draft Council Decision authorising the Commission to negotiate instruments on the enforcement of international commercial settlement agreements resulting from conciliation in the framework of the United Nations Commission on the International Trade Law (UNCITRAL)
- Adoption

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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European Union

Brussels, 15 September 2017
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NOTE

From: General Secretariat of the Council

To: Permanent Representatives Committee/Council

Subject: Draft Council Decision authorising the Commission to negotiate instruments on the enforcement of international commercial settlement agreements resulting from conciliation in the framework of the United Nations Commission on the International Trade Law (UNCITRAL)

- Adoption

DECLASSIFIED

ANNEX

to the

COUNCIL DECISION

authorising the Commission to negotiate instruments on the enforcement of international commercial settlement agreements resulting from conciliation in the framework of the United Nations Commission on International Trade Law (UNCITRAL)

DIRECTIVES FOR THE NEGOTIATION OF A CONVENTION AND A PARALLEL MODEL LAW (FURTHER REFERRED TO AS "THE (FUTURE) INSTRUMENTS") ON THE ENFORCEMENT OF INTERNATIONAL COMMERCIAL SETTLEMENT AGREEMENTS RESULTING FROM CONCILIATION IN THE FRAMEWORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

1. General principles

In general, the Union should support that the future instruments provide for the enforcement of international commercial agreements resulting from conciliation and for a system of (...) enforcement, where no control takes place in the country of origin and where the enforcing authority has recourse to a number of defences in order to refuse enforcement - *see further under point 5 "The enforcement mechanism"*).

The instruments should provide for clear and precise rules, guaranteeing adequate legal certainty and predictability for the parties to a settlement agreement. In addition, the instruments should ensure that Member States where enforcement of such agreements is sought should have the necessary tools to refuse the enforcement if the parties' rights were not upheld during the conciliation process or if the settlement agreement violates basic principles of the law or the public policy of that State, including those of EU law.

2. Form of the instruments

In the light of the doubts of several Member States towards this project and the general preference for a non-binding text, the Union should support the drafting of (...) model legislative provisions supplementing the 2002 UNCITRAL Model Law on Conciliation. At the same time, by way of compromise, the drafting of two parallel instruments on this subject-matter, a Convention as well as a Model Law, can be supported. However, it should be clarified that the EU and its Member States cannot be expected to adopt any of these instruments.

These two instruments should have similar provisions, adapted to the extent necessary for their specific form.

In so far as the Convention is concerned, the Union should deploy its best efforts to ensure that its text is in line with these negotiating directives, so as to leave open for the future the possibility for the Union, if appropriate, to sign such a Convention. The Union should support the inclusion of a text (in a preamble or similar) that would allow States the necessary freedom to sign and ratify/accede to it, without creating any expectations in that regard.

3. Scope of application

The future instruments should apply to the enforcement of international commercial settlement agreements, with the express exclusion of consumers, family and employment law matters. A settlement agreement should be considered to be international when the parties having concluded it have their place of business in different States. The instruments should further provide for a definition of the term "place of business" and include a reference to the party's habitual residence if the place of business cannot be determined.

It should be ensured that the instruments will not extend to the recognition of international commercial settlement agreements, so as to preserve the right of access to courts of EU companies and citizens. It should be clarified that this would not prevent the parties from using the settlement agreement as defence.

The instruments should apply to settlement agreements resulting only from conciliation. The definition of "conciliation" should be based on the text of Article 1(3) of the 2002 UNCITRAL Model Law and should thus illustrate the key features of the process, in particular the assistance of a third person or persons ("the conciliator") who does not have the authority to impose a solution on the parties.

It should be ensured that express language is included in the instruments as to the total exclusion from the scope of application of judicial settlements and of those settlement agreements formalised as awards on agreed terms issued by arbitral tribunals.

Best efforts should be deployed in order to ensure that the instruments exclude settlement agreements concluded by government entities only to the extent that such entities act in the exercise of State authority (*acta iure imperii*).

The instruments should apply only to final and unconditional settlement agreements.

4. The form of the settlement agreement

The instruments should require that the settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement by way of signature. In addition, the settlement agreement should indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation either through the signature of the conciliator or a declaration attesting of his/her participation in the process. Moreover, the settlement agreement shall set out its enforceable content in a clear and comprehensible manner.

5. The enforcement mechanism

The instruments should include a system of enforcement, where the control of the settlement agreement takes place only in the State where enforcement is sought by giving the enforcing authority recourse to a number of defences, to be raised *ex officio* or by the party opposing enforcement, allowing enforcement to be refused (a system that in the UNCITRAL terminology is referred to as 'direct enforcement', as no control takes place in the country of origin).

It should be ensured that nothing in the future instruments could be interpreted as preventing the State where enforcement is sought from implementing them in a manner which allows that State to require that the settlement agreement must (first) be made enforceable by a competent authority in that State before it is/can be enforced.

6. Defences to enforcement

The instruments should include defences to enforcement that would be invoked either by the party resisting enforcement or that could be looked at *ex officio* by the enforcing authority. In any case, having regard in particular to the system of 'direct enforcement', the defences should be designed in such a way so as to ensure that inappropriate settlement agreements would be barred from entering the EU.

For instance, the instruments should include a defence related to the public policy of the State where enforcement is sought, as well as one allowing refusal of enforcement where the subject-matter of the settlement agreement cannot be settled by conciliation under the law of that State.

7. Party autonomy in the application of the instruments

It should be ensured that only settlement agreements in which the parties have opted-in in order to have the future instruments applied to their settlement agreement should be enforceable in the EU.

8. Accession clause

The Convention should contain a clause permitting the accession of regional economic integration organisations such as the European Union, possibly accompanied by a disconnection clause (*see next point*).

9. Disconnection clause

Depending on its content, the Convention should contain a disconnection clause which ensures a smooth link between the instruments of EU law and the Convention and safeguards the application of current or future Union instruments, in particular as far as recognition and enforcement of judicial settlements between the EU Member States is concerned. In particular, the disconnection clause should take into account the special relation of the Union with Denmark and with the Contracting States to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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