

*UNCITRAL
Model Law on
International
Commercial Conciliation
with
Guide to Enactment
and Use
2002*



UNITED NATIONS

***UNCITRAL
Model Law on
International
Commercial Conciliation
with
Guide to Enactment
and Use
2002***



**UNITED NATIONS
New York, 2004**

United Nations Publication
Sales No. E.05.V.4
ISBN 92-1-133730-5

Contents

Resolution adopted by the General Assembly	Page
	v

Part One

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION (2002)

Article 1. Scope of application and definitions	1
Article 2. Interpretation	2
Article 3. Variation by agreement	2
Article 4. Commencement of conciliation proceedings	3
Article 5. Number and appointment of conciliators	3
Article 6. Conduct of conciliation	4
Article 7. Communication between conciliator and parties	4
Article 8. Disclosure of information	4
Article 9. Confidentiality	5
Article 10. Admissibility of evidence in other proceedings	5
Article 11. Termination of conciliation proceedings	6
Article 12. Conciliator acting as arbitrator	6
Article 13. Resort to arbitral or judicial proceedings	6
Article 14. Enforceability of settlement agreement	7

Part Two

GUIDE TO ENACTMENT AND USE OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION (2002)

	Paragraph	Page
Purpose of this Guide	1-4	9
I. Introduction to the Model Law	5-27	10
A. Notion of conciliation and purpose of the Model Law	5-12	10
B. The Model Law as a tool for harmonizing legislation	13-14	13
C. Background and history	15-19	14
D. Scope	20-21	16
E. Structure of the Model Law	22-25	16
F. Assistance from UNCITRAL secretariat	26-27	17

	<i>Paragraph</i>	<i>Page</i>
II. Article-by-article remarks	28-92	18
Article 1. Scope of application and definitions	28-39	18
Article 2. Interpretation	40-41	26
Article 3. Variation by agreement	42	27
Article 4. Commencement of conciliation proceedings ..	43-48	28
Article 5. Number and appointment of conciliators	49-52	33
Article 6. Conduct of conciliation	53-56	36
Article 7. Communication between conciliator and parties	57	38
Article 8. Disclosure of information	58-60	38
Article 9. Confidentiality	61-63	41
Article 10. Admissibility of evidence in other proceedings	64-74	43
Article 11. Termination of conciliation	75-77	48
Article 12. Conciliator acting as arbitrator	78-82	50
Article 13. Resort to arbitral or judicial proceedings	83-86	53
Article 14. Enforceability of settlement agreement	87-92	55

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/57/562 and Corr.1)]

57/18. Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of model legislation on these methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Noting with satisfaction the completion and adoption by the United Nations Commission on International Trade Law of the Model Law on International Commercial Conciliation,*

Believing that the Model Law will significantly assist States in enhancing their legislation governing the use of modern conciliation or mediation techniques and in formulating such legislation where none currently exists,

Noting that the preparation of the Model Law was the subject of due deliberation and extensive consultations with Governments and interested circles,

Convinced that the Model Law, together with the Conciliation Rules recommended by the General Assembly in its resolution 35/52 of 4 December 1980,

*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), annex I.

contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on International Commercial Conciliation, the text of which is contained in the annex to the present resolution, and for preparing the Guide to Enactment and Use of the Model Law;

2. *Requests* the Secretary-General to make all efforts to ensure that the Model Law, together with its Guide to Enactment, becomes generally known and available;

3. *Recommends* that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice.

*52nd plenary meeting
19 November 2002*

Part One

UNCITRAL Model Law on International Commercial Conciliation (2002)

Article 1. Scope of application and definitions

1. This Law applies to international¹ commercial² conciliation.
2. For the purposes of this Law, “conciliator” means a sole conciliator or two or more conciliators, as the case may be.
3. For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) 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. The conciliator does not have the authority to impose upon the parties a solution to the dispute.
4. A conciliation is international if:
 - (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) The State in which the parties have their places of business is different from either:
 - (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

¹States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:

- Delete the word “international” in paragraph 1 of article 1; and
- Delete paragraphs 4, 5 and 6 of article 1.

²The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

- (ii) The State with which the subject matter of the dispute is most closely connected.

5. For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

7. The parties are free to agree to exclude the applicability of this Law.

8. Subject to the provisions of paragraph 9 of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

9. This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) [. . .]

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph 3, the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings³

1. Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

2. If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

1. There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

2. The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

³The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

2. Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

5. When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

2. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement⁴

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

⁴When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

Part Two

Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)

Purpose of this guide

1. In preparing and adopting model legislative provisions on international commercial conciliation, the United Nations Commission on International Trade Law (UNCITRAL or “the Commission”) was mindful that such provisions would be a more effective tool for States modernizing their legislation if accompanied by background and explanatory information. The Commission was also aware of the likelihood that the model provisions would be used in a number of States with limited familiarity with conciliation as a method of dispute settlement. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, the information provided in this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges.

2. Much of this Guide is drawn from the *travaux préparatoires* of the UNCITRAL Model Law on International Commercial Conciliation. The Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. When it drafted the model provisions, the Commission assumed that explanatory material would accompany the text of the Model Law. For example, some issues are not settled in the Model Law but are addressed in the Guide, which is designed to provide an additional source of inspiration to States enacting the Model Law. It might also assist States in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national circumstances.

3. This Guide has been prepared by the Secretariat pursuant to a request made by UNCITRAL. It reflects the deliberations and decisions of the Commission during the session at which the Model Law was adopted, and

the considerations of UNCITRAL's Working Group II (on Arbitration and Conciliation) that conducted the preparatory work.

4. The Commission entrusted the Secretariat with the finalization of the Guide, based on the draft prepared by the Secretariat (A/CN.9/514) and on the deliberations of the Commission at its thirty-fifth session (held from 17 to 28 June 2002), taking into account comments and suggestions made in the course of discussions by the Commission and other suggestions in the manner and the extent that the Secretariat determined in its discretion. The Secretariat was invited to publish the finalized Guide together with the Model Law.⁵

I. Introduction to the Model Law

A. Notion of conciliation and purpose of the Model Law

5. The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation.

6. An essential feature of conciliation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome, and the process is non-adjudicatory. In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute (see A/CN.9/WG.II/WP.108, para. 11). The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

⁵*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 144.*

7. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term “conciliation” to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties. To the extent that “alternative dispute resolution” (ADR) procedures are characterized by the features mentioned in this paragraph, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14). However, the Model Law does not refer to the notion of ADR since that notion is unclear and may be understood as a broad category that includes other types of alternatives to judicial dispute resolution (for example, arbitration), which typically results in a binding decision. To the extent that the scope of the Model Law is limited to non-binding types of dispute resolution, the Model Law deals only with part of the procedures covered by the notion of ADR.

8. Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. In addition, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted conciliation as a method of dispute settlement, and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation (see A/CN.9/WG.II/WP.108, para. 15). The greater focus on these methods of dispute settlement is justified particularly because the success rate of these methods has been high; in fact, in some countries and industrial sectors, it has been surprisingly high.

9. Since the role of the conciliator is only to facilitate a dialogue between the parties and not to make a decision, there is no need for procedural guarantees of the type that exist in arbitration, such as the prohibition of meetings by the conciliator with one party only or an unconditional duty on the conciliator to disclose to a party all information received from the other party. The flexibility of conciliation procedures and the ability to adapt the process to the circumstances of each case and to the wishes of the parties are thus considered to be of crucial importance.

10. This flexibility has led to a widespread view that it is not necessary to deal legislatively with a process that is so dependent upon the will of the parties. Indeed, it was believed that legislative rules would unduly restrict and harm the conciliation process. Contractual rules were widely considered to be the suitable way to provide certainty and predictability. The UNCITRAL Conciliation Rules,⁶ adopted in 1980, were prepared to offer parties an internationally harmonized set of rules suited for international commercial disputes. The Rules were also used as a model by many institutions that were drafting their own rules for offering conciliation or mediation services.

11. Nevertheless, States have been adopting laws on conciliation. They are doing so in order to respond to concerns by practitioners that contractual solutions alone do not completely meet the needs of the parties, while remaining conscious of the need to preserve the flexibility of conciliation. The single most important concern of parties in conciliation is to ensure that certain statements or admissions made by a party in conciliation proceedings will not be used as evidence against that party in other proceedings, and it was considered that a contractual solution was inadequate to accomplish this goal. In order to address this and other matters (such as the role of the conciliator in subsequent court or arbitral proceedings, the process for the appointment of conciliators, the broad principles applicable to the conciliation proceedings, and the enforceability of the settlement agreement), UNCITRAL decided to prepare a model law on the topic to support the increased use of conciliation. It was noted that while certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings, could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set

⁶United Nations publication, Sales No. E.81.V.6.

of conciliation rules. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide useful clarification. In addition, it was pointed out with respect to certain issues, such as facilitating enforcement of settlement agreements resulting from conciliation, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation.⁷

12. Conciliation proceedings may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions in the Model Law governing such proceedings are designed to accommodate those differences and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate. Essentially, the provisions seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the conciliation are met while also providing maximum flexibility by preserving party autonomy.

B. The Model Law as a tool for harmonizing legislation

13. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. States are strongly encouraged, however, to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

14. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely

⁷*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), para. 342.*

related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention. Because of the flexibility inherent in a model law, the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal systems; however, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting State.

C. Background and history

15. International trade and commerce have grown rapidly with cross-border transactions being entered into by a growing number of entities, including small and medium-sized ones. With the increasing use of electronic commerce, where business is frequently conducted across national boundaries, the need for effective and efficient dispute resolution systems has become paramount. UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to reduce costs of dispute settlement, foster maintaining a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, the parties will be encouraged to seek non-adjudicative dispute settlement methods that will increase cost-effectiveness in the marketplace.

16. The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are important for fostering economy and efficiency in international trade.

17. The Model Law was developed in the context of recognition of the increasing use of conciliation as a method for settling commercial disputes. The Model Law was also designed to provide uniform rules in respect of the conciliation process. In many countries, the legal rules affecting conciliation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality and evidentiary privilege and exceptions thereto. Uniformity on such topics helps to provide greater integrity and certainty in the conciliation process. The benefits of uniformity

are magnified in cases involving conciliation via the Internet where the applicable law may not be self-evident.

18. At its thirty-second session, in 1999, the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985),⁸ as well as the use of the UNCITRAL Arbitration Rules (1976)⁹ and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices. The Commission entrusted the work to one of its working groups, which it named Working Group II (Arbitration and Conciliation) (hereinafter referred to as “the Working Group”), and decided that the priority items should include work on conciliation. The Model Law was drafted over four sessions of the Working Group: the thirty-second, thirty-third, thirty-fourth and thirty-fifth sessions (reports of those sessions are published as documents A/CN.9/468, A/CN.9/485, A/CN.9/487 and A/CN.9/506, respectively).

19. At its thirty-fifth session, the Working Group completed its examination of the provisions and considered the draft guide to enactment. The secretariat revised the text of the draft guide to enactment and use of the Model Law, based on the deliberations in the Working Group. The draft model law, together with the draft guide to enactment and use, was circulated to member States and observers for comment and presented to the Commission for review and adoption at its thirty-fifth session, held in New York from 17 to 28 June 2002 (see A/CN.9/506, para. 13). Comments received were compiled in document A/CN.9/513 and addenda 1 and 2. UNCITRAL adopted the Model Law by consensus on 24 June 2002 (for the deliberations of the Commission on that topic, see the report of UNCITRAL on the work of its thirty-fifth session).¹⁰ During the preparation of the Model Law, some 90 States, 12 intergovernmental organizations and 22 non-governmental international organizations participated in the discussion. Subsequently, the General Assembly adopted the resolution reproduced at the beginning of this publication recommending that all States

⁸United Nations publication, Sales No. E.99.V.3.

⁹United Nations publication, Sales No. E.77.V.6.

¹⁰*Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17 (A/57/17)*, paras. 13-177.

give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice. The preparatory materials for the Model Law have been published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). These documents are available on the UNCITRAL web site (www.uncitral.org; under “Travaux préparatoires”). The documents are also compiled in the UNCITRAL Yearbook.

D. Scope

20. In preparing the draft model law and addressing the subject matter before it, the Commission had in mind a broad notion of conciliation, which could also be referred to as “mediation”, “alternative dispute resolution”, “neutral evaluation” and similar terms. The Commission’s intent was for the adopted model law to apply to the broadest range of commercial disputes. The Commission agreed that the title of the model law should refer to international commercial conciliation. While a definition of “conciliation” is provided in article 1, the definitions of “commercial” and “international” are contained in a footnote to article 1 and in paragraph 4 of article 1, respectively. While the Model Law is restricted to international and commercial cases, the State enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones (see footnote 1 to article 1).

21. The Model Law should be regarded as a balanced and discrete set of provisions and could be enacted as a single statute or as a part of a law on dispute settlement.

E. Structure of the Model Law

22. The Model Law contains definitions, procedures and guidelines on related issues based upon the importance of party control over the process and outcome.

23. Article 1 delineates the scope of the Model Law and defines conciliation in general terms and its international application in specific terms. These are the types of provisions that would generally be found in legislation to determine the range of matters that the Model Law is intended to cover. Article 2 provides guidance on the interpretation of the Model Law.

Article 3 expressly provides that all the provisions of the Model Law except for article 2 and paragraph 3 of article 6 may be varied by party agreement.

24. Articles 4-11 cover procedural aspects of the conciliation. These provisions have particular application to circumstances where the parties have not adopted rules governing a conciliation; thus, they are designed to be in the nature of default provisions. They are also intended to assist parties in dispute that may have defined dispute resolution processes in their agreement, in this context acting as a supplement to their agreement. In structuring the Model Law, the focus was on seeking to avoid situations where information from conciliation proceedings spill over into arbitral or court proceedings.

25. The remaining provisions of the Model Law (articles 12-14) address post-conciliation issues to avoid uncertainty resulting from an absence of statutory provisions governing those issues.

F. Assistance from the UNCITRAL secretariat

26. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the Model Law. UNCITRAL provides technical consultation for Governments considering legislation based on other UNCITRAL model laws or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

27. Further information concerning the Model Law, as well as the Guide and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

UNCITRAL secretariat
Vienna International Centre
PO Box 500
A 1400 Vienna
Austria

Telephone: +(43) (1) 26060-4060 or 4061
Telefax: +(43) (1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: <http://www.uncitral.org>

II. Article-by-article remarks

Article 1. Scope of application and definitions

Text of article 1

1. This Law applies to international¹ commercial² conciliation.
2. For the purposes of this Law, “conciliator” means a sole conciliator or two or more conciliators, as the case may be.
3. For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) 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. The conciliator does not have the authority to impose upon the parties a solution to the dispute.
4. A conciliation is international if:
 - (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) The State in which the parties have their places of business is different from either:
 - (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or
 - (ii) The State with which the subject matter of the dispute is most closely connected.
5. For the purposes of this article:
 - (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;
 - (b) If a party does not have a place of business, reference is to be made to the party’s habitual residence.
6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.
7. The parties are free to agree to exclude the applicability of this Law.
8. Subject to the provisions of paragraph 9 of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.
9. This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempts to facilitate a settlement; and

(b) [. . .].

¹States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:

(a) Delete the word “international” in paragraph 1 of article 1; and

(b) Delete paragraphs 4, 5 and 6 of article 1.

²The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

Comments on article 1

Purpose of article 1

28. The purpose of article 1 is to delineate the scope of application of the Model Law by expressly restricting it to international commercial conciliation. Article 1 defines the terms “conciliation” and “international” and provides the means of determining a party’s place of business where more than one place of business exists or a party has no place of business.

“Commercial conciliation”

29. In preparing the Model Law, it was agreed that the application of the uniform rules should be restricted to commercial matters (A/CN.9/468, para. 21; A/CN.9/485, paras. 113-116; A/CN.9/487, para. 89). Footnote 2 to paragraph 1 of article 1 provides an illustrative and open-ended list of relationships that might be described as “commercial” in nature. The purpose of the footnote is to be inclusive and broad and to overcome any technical difficulties that may arise in national law as to which transactions are commercial. It was inspired by the definition set out in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration. No strict definition of “commercial” is provided in the Model Law, the intention being that the term be interpreted broadly so as to cover matters arising from all legal relationships of a commercial nature, whether contractual or not. Footnote 2 emphasizes the width of the suggested interpretation and makes it clear that the test is not based on what the national law may regard as “commercial”. This may be particularly useful for those countries where a discrete body of commercial law does not exist; and

between countries in which such a discrete law exists, the footnote may play a harmonizing role. In certain countries, the use of footnotes in a statutory text might not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of the footnote in the body of the enacting legislation itself. The restriction to commercial matters is not only a reflection of the traditional mandate of UNCITRAL to prepare texts for commercial matters but also a result of the realization that conciliation of non-commercial matters touches upon policy issues that do not readily lend themselves to universal harmonization. Nevertheless if a country would wish to enact legislation relating to non-commercial disputes, the Model Law would serve as a useful model. Despite the fact that the Model Law is expressly limited to commercial conciliation, nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover conciliation outside the commercial sphere. It should be noted that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade (A/CN.9/506, para. 17).

Place of conciliation

30. As originally drafted, the place of conciliation was one of the main elements triggering the application of the Model Law. In drafting the Model Law, however, the Commission agreed that this approach might be inconsistent with current practice. Since parties often did not formally designate a place of conciliation and since, as a practical matter, the conciliation could occur in several places, it was believed to be problematic to use the somewhat artificial idea of the place of conciliation as the primary basis for triggering the application of the Model Law. For these reasons, the Model Law does not provide an objective rule for determining the place of conciliation (A/CN.9/506, para. 21). The issue is thus left to the agreement of the parties and, failing such an agreement, to the rules of private international law.

Intent of the parties to conciliate

31. Paragraph 3 of article 1 sets out the elements for the definition of conciliation. The definition takes into account the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an impartial and independent third person or persons that assists the parties in an attempt to reach an amicable settlement. The intent is to distinguish conciliation, on the one hand, from binding arbitration and, on the other hand, from mere negotiations between the parties or their

representatives. The words “and does not have the authority to impose upon the parties a solution to the dispute” are intended to further clarify and emphasize the main distinction between conciliation and a process such as arbitration (see A/CN.9/487, para. 101 and A/CN.9/WG.II/WP.115, remark 8). In verifying whether, in a given factual situation, the elements set forth in paragraph 3 of article 1 for the definition of conciliation are met, courts are invited to consider any evidence of conduct of the parties showing that they were conscious (and had an understanding) of being involved in a process of conciliation.¹¹ There may be situations where the parties in dispute seek the intervention of a third person in an “ad hoc” setting without designating such intervention as conciliation, mediation or otherwise and without being aware that they are acting under the aegis of the Model Law. In such a situation, the question would arise whether the parties are bound by provisions on admissibility of certain evidence and by the duty of confidentiality in articles 9 and 10. The Model Law does not give a hard and fast rule on this question. It leaves it to the interpreter of the Law to decide, on the basis of the circumstances of the case, what the understanding and expectations of the parties were as to the process that they engaged in and whether, on that basis, the Model Law is applicable.

Broad notion of conciliation

32. Inclusion of the words “whether referred to by the expression conciliation, mediation, or an expression of similar import” in paragraph 3 is intended to indicate that the Model Law applies irrespective of the name given to the process. The broad nature of the definition indicates that there is no intention to distinguish among procedural styles or approaches to mediation. The Commission intends that the word “conciliation” would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons. Different procedural styles and techniques might be used in practice to achieve settlement of a dispute, and different expressions might be used to refer to those styles and techniques. In drafting the Model Law, the Commission intended to encompass all the styles and techniques that might fall within the scope of article 1. The Governments negotiating the Model Law intended to include in the new regime created by the Model Law all those methods of dispute settlement where the parties in dispute request a neutral third person to help them settle the dispute. These methods may differ as regards the technique, the degree to which the third person is involved in

¹¹Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 151.

the process and the kind of involvement (e.g. whether just by facilitating the dialogue or also by making substantive proposals as to possible settlement). However, the legislative policy reflected in the Model Law should apply equally to all such dispute settlement methods. For example, the Model Law could apply to “ad hoc” as well as “institutional” conciliations, where the process would normally be governed by the rules of a specific institution.

International conciliation

33. Article 1 is not intended to interfere with the operation of the rules of private international law. In principle, the Model Law only applies to international conciliation as defined in paragraph 4 of article 1. Paragraph 4 establishes a test for distinguishing international cases from domestic ones. The requirement of internationality will be met if the parties to the conciliation agreement have their places of business in different States at the time that the agreement was concluded or where the State in which either a substantial part of the obligations of the commercial relationship is to be performed or with which the subject matter of the dispute is most closely connected differs from the State in which the parties have their places of business. Paragraph 5 provides a test for determining a party’s place of business where the party either has more than one place of business or has no place of business. In the first case, the place of business is that bearing the closest relationship with the agreement to conciliate. Factors that may indicate that one place of business bears a close relationship with the agreement to conciliate may include that a substantial part of the obligations of the commercial relationship that is the subject of the dispute is to be performed at that place of business, or that the subject matter of the dispute is most closely connected to that place of business. Where a party has no place of business, reference is made to the party’s habitual residence.

Possible coverage of domestic conciliation

34. The Model Law should not be interpreted as encouraging enacting States to limit its applicability to international cases. The Commission, in adopting the Model Law, agreed that the acceptability of the Model Law would be enhanced if no attempt were made to interfere with domestic conciliation (A/CN.9/487, para. 106). The drafters of the Model Law thought it more prudent to restrict it to international cases (as defined in paragraphs 4 and 5). The reason was not to encumber the intergovernmental negotiations of the text with policies that might differ and be difficult to harmonize at the universal level. However, the Model Law contains no

provision that would, in principle, be unsuitable for domestic cases (A/CN.9/506, para. 16; A/CN.9/116, para. 36). An enacting State may, in the implementing legislation, extend the applicability of the Model Law to cover both domestic and international conciliation with minor adaptations of the text as provided in the footnote to paragraph 1 (A/CN.9/506, para. 17). If any further additions or changes are deemed necessary to reflect domestic policies in this area, the enacting State should be careful to evaluate whether the additions are suitable for international cases and, if they are not, should make them applicable to domestic cases only. Also, paragraph 6 allows the parties to agree to the application of the Model Law (i.e. to opt in to the Model Law) to a commercial conciliation even if the conciliation is not international as defined in the Model Law. Parties may “opt in” to the Model Law by agreeing that their conciliation is international (even if the circumstances of the case would not indicate its international character or if it is unclear whether the case is international) or by straightforward agreement on the applicability of the piece of legislation enacting the Model Law.

Opting out of the Model Law

35. Paragraph 7 allows parties to exclude the application of the Model Law. Paragraph 7 may be used, for example, where the parties to an otherwise domestic conciliation agree for convenience on a place of conciliation abroad without intending to make the conciliation “international”.

Situation where parties are obliged to conciliate

36. The Model Law takes into account the fact that, while conciliation is often set in motion by agreement of the parties after the dispute has arisen, there may exist various grounds pursuant to which the parties may be under a duty to make a good-faith attempt at conciliating their differences. One basis may be their own contractual commitment entered into before the dispute has arisen, while other bases may be legal rules that some countries have adopted requiring the parties in certain situations to conciliate or allowing a judge or a court official to suggest, or even direct, that parties conciliate before they continue with litigation. The Model Law does not deal with such obligations or with the sanctions that may be entailed by failure to comply with them. Provisions on these matters depend on national policies that do not easily lend themselves to worldwide harmonization. The Model Law is based on the principle that the procedural characteristics of conciliation proceedings and the need for the protections established by the Law (for example, with respect to the inadmissibility of certain evidence, as provided for in article 10) do not depend on whether the parties

conciliate in compliance with a prior agreement, a legal obligation or a court order. In order to remove any doubt about the application of the Model Law in all these situations, paragraph 8 provides that the Model Law applies irrespective of whether a conciliation is carried out by agreement between the parties or pursuant to a legal obligation or request by a court, arbitral tribunal or competent governmental entity.

37. It is suggested that, even if in the enacting State conciliation is left fully to the agreement of the parties, article 1, paragraph 8 should not be omitted from the piece of legislation enacting the Model Law. In such situations, this provision will be useful to clarify that the Model Law applies when parties commence a conciliation that is governed by the law of that State but is pursuant to a legal obligation arising from a foreign law or from a request by a foreign court.

Possible exclusions from the scope of enacting legislation

38. Paragraph 9 allows enacting States to exclude certain situations from the sphere of application of the Model Law. However, in interpreting paragraph 9, it should be noted that the Model Law does not exclude its application in any situation listed under paragraph 9 if the parties agreed under paragraph 6 that the Model Law should apply. Subparagraph (a) excludes from the application of the Model Law any case where either a judge or an arbitrator, in the course of adjudicating a dispute, undertakes a conciliatory process. That process may be undertaken either at the request of the parties that are in dispute or in the exercise of the judge's prerogatives or discretion. The exclusion expressed in subparagraph (a) was considered necessary to avoid undue interference with existing procedural law. It should be noted, however, that the Model Law is not intended to indicate whether or not a judge or an arbitrator may conduct conciliation in the course of court or arbitration proceedings. In some legal systems an arbitrator could, pursuant to an agreement of the parties, become a conciliator and conduct a conciliation proceeding, although this is not accepted practice in other legal systems.¹² In some cases of so-called court-annexed conciliation, it might not be clear whether such conciliation is being carried out "in the course of a court . . . proceeding". To avoid uncertainty in this respect, an enacting State may wish to clarify in the piece of legislation enacting the Model Law whether such conciliations are to be governed by that piece of legislation or not. Subparagraph (b) suggests that other areas of exclusion may be considered by the enacting State. For example, the

¹²Ibid., paras. 26 and 152.

enacting State may consider excluding the application of the Model Law for conciliations relating to collective bargaining relationships between employers and employees, given that a number of countries may have established conciliation systems in the collective bargaining system that may be subject to particular policy considerations that might differ from those underlying the Model Law. Another example of exclusion could relate to a conciliation that is conducted by a judicial officer (A/CN.9/WG.II/WP.113/Add.1, footnote 5, and A/CN.9/WG.II/WP.115, remark 7). Given that such judicially conducted conciliation mechanisms are governed by court rules and that the Model Law is not intended to deal with the jurisdiction of courts of any State, it may be appropriate to also exclude these from the scope of the Model Law.

Use of conciliation in multiparty situations

39. Experience in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral. The Commission noted that conciliation was being used with success in the case of complex, multiparty disputes. Notable examples of these include disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor's contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations.¹³

References to UNCITRAL documents in respect of article 1

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 15-27, 106-110, 135-140, 151-153 and 173-177;

A/CN.9/514, paras. 26-35;

¹³Ibid., paras. 173-177.

A/CN.9/506, paras. 15-36;
A/CN.9/WG.II/WP.115, remarks 1-13;
A/CN.9/WG.II/WP.116, paras. 23-32, 33-35 and 36;
A/CN.9/487, paras. 88-99, 100-109;
A/CN.9/WG.II/WP.113/Add.1, paras. 2-4 and footnotes 3-7;
A/CN.9/485, paras. 108-109, 111-120 and paras. 123-124;
A/CN.9/WG.II/WP.110, paras. 83-85, 87-90;
A/CN.9/468, paras. 18-19;
A/CN.9/WG.II/WP.108, para. 11;
A/CN.9/460, paras. 8-10.

Article 2. Interpretation

Text of article 2

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Comments on article 2

Interpretation of the Model Law

40. Article 2 provides guidance for the interpretation of the Model Law by courts and other national or local authorities with due regard being given to its international origin. It was inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (1980),¹⁴ article 3 of the UNCITRAL Model Law on Electronic Commerce (1996),¹⁵ article 8 of the UNCITRAL Model Law on Cross-Border Insolvency (1997)¹⁶ and article 4 of the UNCITRAL Model Law on Electronic Signatures (2001)¹⁷ (A/CN.9/506, para. 49). The expected effect of article 2 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law. The purpose of paragraph 1 is to draw the attention of courts

¹⁴United Nations publication, Sales No. E.95.V.12.

¹⁵United Nations publication, Sales No. E.99.V.4.

¹⁶United Nations publication, Sales No. E.99.V.3.

¹⁷United Nations publication, Sales No. E.02.V.8.

and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in various countries. Inclusion of court decisions interpreting the Model Law in the case-law on UNCITRAL texts (CLOUT) will assist this development.

General principles upon which the Model Law is based

41. Paragraph 2 states that, where a question is not settled by the Model Law, reference may be made to the general principles upon which it is based. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered:

(a) To promote conciliation as a method of dispute settlement by providing international harmonized legal solutions to facilitate conciliation that respect the integrity of the process and promoting active party involvement and party autonomy by the parties;

(b) To promote the uniformity of the law;

(c) To promote frank and open discussions of parties by ensuring confidentiality of the process, limiting disclosure of certain information and facts raised in the conciliation in other subsequent proceedings subject only to the need for disclosure required by law or for the purposes of implementation or enforcement;

(d) To support developments and changes in the conciliation process arising from technological developments, such as electronic commerce.

References to UNCITRAL documents in respect of article 2

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 28-29 and 154;

A/CN.9/514, paras. 36-37;

A/CN.9/506, para. 49.

Article 3. Variation by agreement

Text of article 3

Except for the provisions of article 2 and article 6, paragraph 3, the parties may agree to exclude or vary any of the provisions of this Law.

Comments on article 3

42. With a view to emphasizing the prominent role given by the Model Law to the principle of party autonomy, this provision has been isolated in a separate article. Inclusion of this provision is a reflection of the principle that the whole concept of conciliation is dependent on the will of the parties. This type of drafting is also intended to bring the Model Law more closely in line with other UNCITRAL instruments (for example, article 6 of the United Nations Sales Convention, article 4 of the UNCITRAL Model Law on Electronic Commerce and article 5 of the UNCITRAL Model Law on Electronic Signatures). Expressing the principle of party autonomy in a separate article may further reduce the desirability of repeating that principle in the context of a number of specific provisions of the Model Law (A/CN.9/WG.II/WP.115, remark 14). However, the use of the phrase “unless otherwise agreed” does not mean that article 3 does not apply where that phrase does not appear in a particular article of the Model Law. Article 3 promotes the autonomy of the parties by leaving to them almost all matters that can be set by agreement. However, article 2, regarding interpretation of the Model Law and paragraph 3 of article 6, concerning the fair treatment of the parties, are matters that are not subject to the principle of party autonomy.

References to UNCITRAL documents in respect of article 3

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 30-31, 127-134 and 155;

A/CN.9/514, para. 38;

A/CN.9/506, paras. 51 and 140-144;

A/CN.9/WG.II/WP.116, para. 37;

A/CN.9/WG.II/WP.115, remark 14;

A/CN.9/WG.II/WP.110, para. 87.

*Article 4. Commencement of conciliation proceedings³**Text of article 4*

1. Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.

2. If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was

sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

³The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

2. Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

Comments on article 4

Effect of article 4

43. Article 4 addresses the question of when a conciliation proceeding can be understood to have commenced. The Commission, in adopting the Model Law, agreed that paragraph 1 of this article should be harmonized with paragraph 8 of article 1. This was done to accommodate the fact that a conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court, an arbitral tribunal or a competent governmental authority. Article 4 provides that a conciliation commences when the parties to a dispute agree to engage in such a proceeding. The effect of this provision is that, even if there exists a provision in a contract requiring parties to engage in conciliation or a court or arbitral tribunal directs parties to engage in conciliation proceedings, such proceedings will not commence until the parties agree to engage in such proceeding. The Model Law does not deal with any such requirement or with the consequences of the parties' or a party's failure to act as required.

Methods by which parties may agree to engage in conciliation

44. The general reference to the "day on which the parties to the dispute agree to engage in conciliation proceedings" is designed to cover the different methods by which parties may agree to engage in conciliation proceedings. Such methods may include, for example, the acceptance by one party of an invitation to conciliate made by the other party, or the acceptance by both parties of a direction or suggestion to conciliate made by a court, arbitral tribunal or a competent government entity.

45. By referring in paragraph 1 of article 4 to an agreement "to engage in conciliation proceedings", the Model Law leaves the determination of when exactly this agreement is concluded to laws outside the Model Law.

Ultimately, the question of when the parties reached agreement will be a question of evidence (A/CN.9/506, para. 97).

Time period for accepting an invitation to conciliate

46. Paragraph 2 provides that a party that has invited another party to engage in conciliation, may treat this invitation as having been rejected if the other party fails to accept that invitation within 30 days from when the invitation was sent or any other time as specified in the invitation. The time period for replying to an invitation to conciliate has been set at 30 days as provided for in the UNCITRAL Conciliation Rules. The time period is, however, subject to contrary agreement so as to provide maximum flexibility and respects the principle of party autonomy over the procedure to be followed in commencing conciliation. Paragraph 2 may give rise to a question regarding its effect in a situation where parties have agreed to conciliate future disputes but, after a dispute has arisen, a party no longer wishes to conciliate. The question is whether paragraph 2 offers that party an opportunity to disregard its contractual obligation simply by not responding to the invitation to conciliate within 30 days. In the preparation of the Model Law, it was agreed that the text should not deal with the consequences of failure by a party to comply with an agreement to conciliate, that matter being left to the general law of obligations that is not covered by the Model Law. Thus, the purpose of paragraph 2 is not to permit a contractual commitment to conciliate to be disregarded but rather to provide certainty in a situation where it is unclear whether a party is willing to conciliate (by determining the time when an attempt at conciliation is deemed to have failed), irrespective of whether that failure is or is not a violation of an agreement to conciliate under the general law of obligations.¹⁸

Withdrawal of an invitation to conciliate

47. Article 4 does not address the situation where an invitation to conciliate is withdrawn after it has been made. Although a proposal was made during the preparation of the Model Law to include a provision specifying that the party initiating the conciliation is free to withdraw the invitation to conciliate until that invitation has been accepted, it was decided that such a provision would probably be superfluous in view of the possibility offered to both parties to terminate conciliation proceedings at any time

¹⁸Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 36.

under subparagraph (d) of article 11. Also, inclusion of a provision regarding the withdrawal of an invitation to conciliate could unduly interfere with the law of contract formation by introducing new rules as to the conditions under which an offer or an acceptance to conciliate might be withdrawn (A/CN.9/WG.II/WP.115, remark 17).

Possible provision on the suspension of a limitation period

48. The footnote to the title of article 4 (footnote 3) includes text for optional use by States that wish to enact it. In the preparation of the Model Law, a discussion took place as to whether it would be desirable to include in the Model Law a uniform rule providing that the initiation of conciliation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the conciliation. Strong opposition was expressed to the retention of this article in the main text, principally on the basis that the issue of the limitation period raised complex technical issues and would be difficult to incorporate into national procedural regimes that took different approaches to the issue. Moreover, it was suggested that the provision was unnecessary since other avenues were available to the parties to protect their rights (for example, by agreeing to extend the limitation period or by commencing arbitral or court proceedings for the purpose of interrupting the running of the limitation period) (A/CN.9/514, para. 44). It was suggested that, before adopting a provision along the lines of draft article X (contained in the footnote to the title of article 4), States should be warned against the risks inherent in such a provision. It was stated that establishing as a rule that the commencement of conciliation proceedings should result in suspension of the limitation period would require a high degree of precision as to what constituted such commencement. Requiring such a degree of precision might disregard the fundamentally informal and flexible nature of conciliation. It was pointed out that the acceptability of the Model Law might be jeopardized if it were to interfere with existing procedural rules regarding the suspension or interruption of limitation periods. Furthermore, the good reputation of conciliation as a dispute settlement technique might suffer if expectations regarding its procedural implications were created and could not easily be fulfilled, due to the circumstances under which conciliation generally took place. It was also stated that States considering adoption of draft article X should be informed of the possibilities for parties to preserve their rights when draft article X had not been adopted, namely that a party could commence a national court proceeding or arbitration to protect its interests. It was suggested that the text of draft article X should not appear as a footnote to article 4 but should be dealt with exclusively in the Guide, with appropriate explanations being given as to the various arguments that had

been exchanged regarding that provision during the preparation of the Model Law.¹⁹ An equally strong view was presented in favour of inclusion of the text on the basis that preserving the parties' rights during a conciliation would enhance the attractiveness of conciliation. It was said that an agreed extension of the limitation period was not possible in some legal systems and that providing a straightforward and efficient means to protect the rights of the parties was preferable to leaving the parties with the option of commencing arbitral or court proceedings (A/CN.9/514, para. 44). In favour of maintaining a provision along the lines of draft article X in the text of the Model Law, it was also stated that, in the absence of such a provision, some legal systems would treat the commencement of conciliation proceedings as interrupting the limitation period, which, at the end of an unsuccessful attempt at conciliation, would have to start running again from day one. To avoid that result, a specific provision was needed to establish that the commencement of conciliation proceedings would result only in a suspension of the limitation period.²⁰ Ultimately, it was agreed to include the provision as a footnote to article 4 for optional use by States that wished to enact it (A/CN.9/506, paras. 93-94).²¹ If an enacting State adopts draft article X, that State may wish to require that termination be in writing and, if so, may also wish to require that the commencement of conciliation also be declared in writing (see para. 77 below).²² Further, States that adopt a provision on the suspension of the limitation period in the form of draft article X, may wish to consider including provisions to define more precisely what constitutes "conciliation". This may be needed in view of the fact that in the Model Law it was agreed to define the term "conciliation" broadly to reflect the concept that it is a flexible process that, in practice, takes many forms, some of which may be quite informal, and that it can be conducted without a written agreement to conciliate. Such provisions could be helpful in the context of applying provisions on the suspension of limitation periods, which by their nature must be very specific due to the serious legal consequences that may flow from determining whether a conciliation occurred and, if so, when it began. In determining whether or not to enact a provision in the form of draft article X, note should be taken of article 13 of the Model Law, which provides that any party is free by its own unilateral action to initiate arbitral or judicial proceedings to the extent that that is necessary to preserve its right. Given that such action is not, of itself, to be taken as a waiver of the agreement to conciliate, a party can thus, by unilateral action, extend the limitation period.

¹⁹*Ibid.*, para. 33.

²⁰*Ibid.*

²¹*Ibid.*

²²*Ibid.*, para. 96.

References to UNCITRAL documents in respect of article 4

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 32-37, 96 and 156;

A/CN.9/514, paras. 39-44;

A/CN.9/506, paras. 53-56 and 93-110;

A/CN.9/WG.II/WP.115, remarks 15-17, 28;

A/CN.9/487, paras. 110-115;

A/CN.9/WG.II/WP.113/Add.1, footnotes 11, 12 and 24;

A/CN.9/485, paras. 127-132;

A/CN.9/WG.II/WP.110, paras. 95-96;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 2.

Article 5. Number and appointment of conciliators

Text of article 5

1. There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

2. The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as a conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

*Comments on article 5**Default rule*

49. Unlike in international commercial arbitration where the default rule is often three arbitrators (see article 10 of the UNCITRAL Model Law on International Commercial Arbitration and article 5 of the UNCITRAL Arbitration Rules), conciliation practice shows that parties usually wish to have the dispute handled by one conciliator. For that reason, the default rule in article 5 is one conciliator (A/CN.9/514, para. 45).

Agreement by the parties on the selection of a conciliator

50. The intent of article 5 is to encourage the parties to agree on the selection of a conciliator. The advantage of the parties first endeavouring to mutually agree on a conciliator is that this approach respects the consensual nature of conciliation proceedings and also provides parties with greater control and therefore confidence in the conciliation process. Although a suggestion was made, while preparing the Model Law, that, where there is more than one conciliator, the appointment of each conciliator should be agreed to by the various parties involved in the conciliation, which would thereby avoid the perception of partisanship, the prevailing view was that the solution allowing each party to appoint a conciliator was the more practical approach. That approach allows for speedy commencement of the conciliation process and might foster settlement in the sense that the party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement. When three or more conciliators are to be appointed, the conciliator, other than the party-appointed conciliators, should in principle be appointed by agreement of the parties. That should foster greater confidence in the conciliation process (A/CN.9/514, para. 46). The provisions of article 5 in respect of two-party conciliation also apply, *mutatis mutandis*, to multiparty conciliation.

Absence of an agreement by the parties on the selection of a conciliator

51. When no agreement may be reached on a conciliator, reference may be made to an institution or a third person. Subparagraphs (a) and (b) of paragraph 3 provide that that institution or person may simply provide names of recommended conciliators or, by agreement of the parties, directly appoint conciliators. Paragraph 4 sets out some guidelines for that person or institution to follow in making recommendations or appointments. The

guidelines seek to foster the independence and impartiality of the conciliator (A/CN.9/514, para. 47).

Disclosure of circumstances likely to create doubts as to the impartiality of a conciliator

52. Paragraph 5 obliges a person who is approached to act as a conciliator to disclose any circumstance likely to raise justifiable doubts as to his or her impartiality or independence. That obligation is stated to apply not only from the time that the person is approached, but also throughout the conciliation. In the preparation of the Model Law, a suggestion was made that the provision address the consequences that might result from failure to make such a disclosure, for example by expressly stating that failure to make such disclosure should not result in nullification of the conciliation process. However, the prevailing view was that the consequences of failure to disclose such information should be left to the provisions of law in the enacting State other than the enactment of the Model Law (A/CN.9/506, para. 65). In particular, a failure to disclose facts that might give rise to justifiable doubts within the meaning of paragraph 5 does not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law.²³

References to UNCITRAL documents in respect of article 5

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), A/57/17, paras. 38-53 and 157;

A/CN.9/514, paras. 45-48;

A/CN.9/506, paras. 57-66;

A/CN.9/WG.II/WP.116, paras. 41-43;

A/CN.9/WG.II/WP.115, remarks 18-19;

A/CN.9/487, paras. 116-119;

A/CN.9/WG.II/WP.113/Add.1, footnotes 13 and 14;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), articles 3 and 4.

²³Ibid., paras. 50 and 157.

Article 6. Conduct of conciliation

Text of article 6

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.
2. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.
3. In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.
4. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Comments on article 6

Agreement by the parties

53. Paragraph 1, derived from article 19 of the UNCITRAL Model Law on International Commercial Arbitration, stresses that the parties are free to agree on the manner in which the conciliation is to be conducted. Examples of the “set of rules” that may be agreed upon by the parties to organize the conduct of conciliation include the UNCITRAL Conciliation Rules (1980) or the rules of one of the conciliation or mediation centres that offer to administer these types of dispute settlement processes.

Role of the conciliator

54. Paragraph 2, derived from article 7, paragraph 3, of the UNCITRAL Conciliation Rules, recognizes the role of the conciliator who, while observing the will of the parties, may shape the process as he or she considers appropriate.

Fair and equal treatment of the parties

55. By way of guidance regarding the standard of conduct to be applied by a conciliator,²⁴ paragraph 3 provides that the conciliator or panel of conciliators should seek to maintain fair treatment of the parties by

²⁴*Ibid.*, para. 158.

reference to the particular circumstances of the case. Paragraph 3 should be regarded as a basic obligation and a minimum standard to be observed mandatorily by a conciliator.²⁵ The reference in paragraph 3 to maintaining fair treatment of the parties is intended to govern the conduct of the conciliation process and not the contents of the settlement agreement.²⁶ The reference to “fair treatment” is to be understood as covering also the notion that conciliators should seek to maintain equality of treatment when dealing with the various parties. However, such equality of treatment does not mean that equal time should necessarily be devoted to separate meetings with each party. The conciliator may explain to the parties in advance that there may be time discrepancies, both real and imagined, which should not be construed as other than the fact that the conciliator is taking time to explore all issues, interests and possibilities for settlement (A/CN.9/514, para. 55).²⁷

Proposal for settlement

56. Paragraph 4 clarifies that a conciliator may, at any stage, make a proposal for settlement. Whether, to what extent and at which stage the conciliator may make any such proposal will depend on many factors, including the wishes of the parties and the techniques that the conciliator considers most conducive to a settlement.

References to UNCITRAL documents in respect of article 6

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 54-60 and 158-160;

A/CN.9/514, paras. 49-53 and 55;

A/CN.9/506, paras. 67-74;

A/CN.9/WG.II/WP.115, remarks 20-23;

A/CN.9/487, paras. 120-127;

A/CN.9/WG.II/WP.113/Add.1, footnotes 15-18;

A/CN.9/485, para. 125;

A/CN.9/WG.II/WP.110, paras. 91 and 92;

A/CN.9/468, paras. 56-59;

A/CN.9/WG.II/WP.108, paras. 61 and 62;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 7.

²⁵Ibid., para. 57.

²⁶Ibid., para. 58.

²⁷Ibid., para. 160.

Article 7. Communication between conciliator and parties

Text of article 7

The conciliator may meet or communicate with the parties together or with each of them separately.

Comment on article 7

Freedom of communication

57. Separate meetings between the conciliator and the parties are, in practice, so usual that a conciliator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. Some States have included this principle in their national laws on conciliation by providing that a conciliator is allowed to communicate with the parties collectively or separately. The purpose of this provision is to put this issue beyond doubt (A/CN.9/514, para. 54).

References to UNCITRAL documents in respect of article 7

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 61-63 and 160;

A/CN.9/514, paras. 54-55;

A/CN.9/506, paras. 75 and 76;

A/CN.9/WG.II/WP.115, remark 24;

A/CN.9/487, paras. 128-129;

A/CN.9/WG.II/WP.110, para. 93;

A/CN.9/WG.II/WP.113/Add.1, footnote 19;

A/CN.9/468, paras. 54 and 55;

A/CN.9/WG.II/WP.108, paras. 56 and 57;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 9.

Article 8. Disclosure of information

Text of article 8

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Comments on article 8

Need for open communications between parties and the conciliator

58. For conciliation to succeed, the parties and the conciliator must be able to explore and understand, as much as possible, the issues between the parties, the background and circumstances that gave rise to the issues (including the reasons for which the parties were unable to reach agreement), and the possibilities for the parties to overcome the existing issues and to settle the dispute. In the course of the conciliation, the scope of the discussion could thus cover matters beyond those that were in issue at the outset of the conciliation and may include, for example, possibilities for restructuring the future relationship between the parties or proposals for mutual concessions. For such discussions to have a chance of success, the parties should be ready to delve into matters that would normally not be considered in arbitral or court proceedings, including those that the parties deem sensitive or confidential. If there were a risk that some of that information could be disclosed to a third person or made public or that, if the conciliation failed, one of the parties could use disclosures or statements of the other party as evidence in arbitral or court proceedings, the parties would be reticent during the conciliation and less likely to arrive at a settlement. It is therefore critical that the legal regime governing conciliation proceedings lay down safeguards providing the desired degree of legal protection against unwanted disclosure of certain facts and information. These safeguards are the centrepiece of the conciliation regime and a particularly important reason why legislation on conciliation is needed.

Disclosure of information

59. Article 8 expresses the principle that, whatever information that a party gives to a conciliator, that information may be disclosed to the other party, unless the party giving the information specifically requests otherwise. Article 8 provides an approach consistent with established practice in many countries as reflected in article 10 of the UNCITRAL Conciliation Rules. The intent is to foster open and frank communication of information between each party and the conciliator and, at the same time, to preserve the parties' rights to maintain confidentiality. The role of the conciliator is to cultivate a candid exchange of information regarding the dispute. Such disclosure fosters the confidence of all parties in the conciliation. However, the principle of disclosure is not absolute, as the conciliator has the freedom, but not the duty, to disclose such information to the other party. Indeed, the conciliator has a duty not to disclose a particular piece of information when the party that gave the information to the conciliator

made it subject to a specific condition that it be kept confidential. This approach is justified because the conciliator imposes no binding decision on the parties. In the preparation of the Model Law, the suggestion was made that the party giving the information to the conciliator should be required to give consent before any communication of that information may be given to the other party. That suggestion was ultimately not adopted, notwithstanding the recognition that such a practice was widely followed with good results in a number of countries and that, in certain countries, such practice was enshrined in mediation rules. However, to take into account what might be regarded as a natural and legitimate expectation by the parties that information communicated to conciliators would be treated as confidential, it is recommended that conciliators inform the parties that information communicated to the conciliator may be revealed unless the conciliator is instructed otherwise.²⁸

Notion of “information”

60. A broad notion of “information” is preferred in the context of the statutory rule established by article 8. It is intended to cover all relevant information communicated by a party to the conciliator. The notion of “information”, as used in this article, should be understood as covering not only communications that occurred during the conciliation, but also communications that took place before the actual commencement of the conciliation. The words “the substance of that information”, used in article 8, are along the lines of article 10 of the UNCITRAL Conciliation Rules. Those words were used in preference to the words “that information” to reflect the fact that conciliators do not always communicate the literal content of any information received from the parties.²⁹

References to UNCITRAL documents in respect of article 8

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 64-73 and 161-163;

A/CN.9/514, paras. 58-60;

A/CN.9/506, paras. 77-82;

A/CN.9/WG.II/WP.115, remark 25;

A/CN.9/487, paras. 130-134;

A/CN.9/WG.II/WP.110, para. 94;

²⁸Ibid., para. 161.

²⁹Ibid., para. 162.

A/CN.9/468, paras. 54-55;

A/CN.9/WG.II/WP.108, paras. 58-60;

A/CN.9/WG.II/WP.113/Add.1, footnotes 20 and 21;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 10.

Article 9. Confidentiality

Text of article 9

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Comments on article 9

General rule regarding confidentiality

61. In keeping with article 14 of the UNCITRAL Conciliation Rules, support was expressed in the preparation of the Model Law for the inclusion of a general rule of confidentiality applying to all participants in conciliation proceedings (A/CN.9/506, para. 86).³⁰ A provision on confidentiality is important, as the conciliation will be more appealing if parties can have confidence, supported by a statutory duty, that conciliation-related information will be kept confidential. The provision is drafted broadly referring to “all information relating to the conciliation proceedings” to cover not only information disclosed during the conciliation proceedings, but also the substance and the result of those proceedings, as well as matters relating to a conciliation that occurred before the agreement to conciliate was reached, including, for example, discussions concerning the desirability of conciliation, the terms of an agreement to conciliate, the choice of conciliators, an invitation to conciliate and the acceptance or rejection of such an invitation. The phrase “all information relating to the conciliation proceedings” was used because it reflects a tried and tested formula set out in article 14 of the UNCITRAL Conciliation Rules (A/CN.9/514, para. 58).

Party autonomy

62. Article 9 is expressly subject to party autonomy to meet concerns expressed that it might be inappropriate to impose upon the parties a rule that would not be subject to party autonomy and could be difficult to

³⁰Ibid., para. 81.

enforce. This reinforces one of the main objectives of the Model Law, which is to respect party autonomy and also to provide a clear rule to guide parties in the absence of contrary agreement (A/CN.9/514, para. 59).

Exceptions to the rule

63. The rule is also subject to express exceptions, namely where disclosure is required by law, such as an obligation to disclose evidence of a criminal offence, or where disclosure is required for the purposes of implementation or enforcement of a settlement agreement. Although the Working Group that prepared the Model Law initially considered including a list of specific exceptions, it was strongly felt that listing exceptions in the text of the Model Law might raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive. The Working Group agreed that an illustrative and non-exhaustive list of possible exceptions to the general rule on confidentiality would more appropriately be provided in this Guide. Examples of such laws may include laws requiring the conciliator or parties to reveal information if there is a threat that a person will suffer death or substantial bodily harm if the information is not disclosed and laws requiring disclosure if it is in the public interest, for example, to alert the public about a health or environmental or safety risk (A/CN.9/514, para. 60). It is the intent of the drafters that, in the event that a court is considering an allegation that a person did not comply with article 9, it should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a conciliation existed and consequently an expectation of confidentiality. When enacting the Model Law, certain States may wish to clarify article 9 to reflect that interpretation.³¹

References to UNCITRAL documents in respect of article 9

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 74-81 and 164;

A/CN.9/514, paras. 58-60;

A/CN.9/506, paras. 83-86;

A/CN.9/487, paras. 130-134;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 14.

³¹Ibid., para. 76.

Article 10. Admissibility of evidence in other proceedings

Text of article 10

1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Comments on article 10

General prohibition on the use of information obtained in conciliation for the purposes of other proceedings

64. In conciliation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and a party initiates judicial or

arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. The possibility of such a “spillover” of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation (A/CN.9/WG.II/WP.108, para. 18). Thus, article 10 is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph 1 in any later proceedings (A/CN.9/514, para. 61). The words “and any third person” are used to clarify that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings are also bound by paragraph 1.³² The term “similar proceedings” is intended to cover not only administrative proceedings but also such procedures as “discovery” and “depositions” in countries where such methods of obtaining evidence are used³³ and are not covered by the notion of “judicial proceedings”.

Relationship with article 20 of the UNCITRAL Conciliation Rules

65. The provision is needed in particular if the parties have not agreed on a provision such as that contained in article 20 of the UNCITRAL Conciliation Rules, which provides that the parties must not rely on or introduce as evidence in arbitral or judicial proceedings:³⁴

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

66. However even if the parties have agreed on a rule of that type, the legislative provision is useful because, at least under some legal systems, the court may not give full effect to agreements concerning the admissibility of evidence in court proceedings (A/CN.9/514, paras. 62-63).

³²Ibid., para. 83.

³³Ibid., para. 166.

³⁴United Nations publication, Sales No. E.81.V.6.

Effect of article 10

67. Article 10 provides for two results with respect to the admissibility of evidence in other proceedings: an obligation incumbent upon the parties not to rely on the types of evidence specified in article 10 and an obligation of courts to treat such evidence as inadmissible.³⁵ The Model Law aims at preventing the use of certain information in subsequent judicial or arbitral proceedings, regardless of whether the parties have agreed to a rule such as that contained in article 20 of the UNCITRAL Conciliation Rules. Where the parties have not agreed otherwise, the Model Law provides that the parties shall not rely in any subsequent arbitral or judicial proceedings on evidence of the types specified in the model provisions. The specified evidence would then be inadmissible in evidence and the arbitral tribunal or the court could not order disclosure (A/CN.9/514, para. 65).

Form of the information or evidence

68. Paragraph 2 provides that the prohibition in article 10 is intended to apply broadly to the range of information or evidence listed in paragraph 1, regardless of whether or not such information or evidence appears in the form of a written document, an oral statement or an electronic message. Documents prepared solely for purposes of the conciliation proceedings may include not only statements of the parties but also, for example, witness statements and expert opinions.

Prohibition of disclosure of conciliation-related evidence or information

69. In order to promote candour between the parties engaged in a conciliation, they must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. Paragraph 1 achieves that by prohibiting any of the parties involved in the conciliation process, including the conciliator and any third party, from using conciliation-related material in the context of other proceedings. With a view to clarifying and strengthening the rule expressed in paragraph 1, paragraph 3 restricts the rights of courts, arbitral tribunal or government entities from ordering disclosure of information referred to in paragraph 1, unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings, and requires such bodies to treat any such information offered as evidence as being inadmissible.

³⁵Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 166.

*Situation where disclosure of information is permitted
or required by law*

70. In the preparation of the Model Law, it was recognized that, in certain systems, the term “law” includes not only the texts of statutes, but also court decisions. In finalizing the text of the Model Law, the Commission agreed that the term “law” should be given a narrow interpretation so as to be interpreted to refer to legislation rather than orders by arbitral or judicial tribunals ordering a party to a conciliation, at the request of another party, to disclose the information mentioned in paragraph 1. Thus, if disclosure of evidence is requested by a party so as to support its position in litigation or similar proceedings (without there existing overriding public policy interests such as those referred to below), the court would be barred from issuing a disclosure order. However, orders by a court (such as disclosure orders combined with a threat of sanctions, including criminal sanctions, directed to a party or another person who could give evidence referred to in paragraph 1), are normally based on legislation, and certain types of such orders (in particular, if based on the law of criminal procedure or laws protecting public safety or professional integrity) may be regarded as exceptions to the rule of paragraph 1.³⁶

71. There may be situations where evidence of certain facts would be inadmissible under article 10, but the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy, for example: the need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties or where statements made during a conciliation show a significant threat to public health or safety. The final sentence in paragraph 3 expresses such exceptions in a general manner and is in terms similar to the exception expressed with respect to the duty of confidentiality in article 9 (A/CN.9/514, para. 67).

Relationship between conciliation and subsequent proceedings

72. Paragraph 4 extends the scope of application of paragraphs 1-3 to apply not only to subsequent proceedings related to the conciliation, but

³⁶Ibid., para. 167.

also to unrelated subsequent proceedings. This provision eliminates the possibility of avoiding the application of article 9 by introducing evidence in proceedings where the main issue is a different one from the issue considered in conciliation.

73. In making sure that certain information is not used in subsequent proceedings, it must be borne in mind that parties in practice often present in conciliation proceedings information or evidence that has existed or has been created for purposes other than the conciliation and that, by presenting it in the conciliation proceedings, the party has not forfeited its use in subsequent proceedings or otherwise made it inadmissible. In order to put this beyond doubt, paragraph 5 makes it clear that all information that otherwise would be admissible as evidence in a subsequent court or arbitral proceeding does not become inadmissible solely by reason of it having been raised in an earlier conciliation proceeding (for example, in a dispute concerning a contract of carriage of goods by sea, a bill of lading would be admissible to prove the name of the shipper, notwithstanding its prior use in a conciliation). Only statements (or views, proposals etc.) made in conciliation proceedings, as listed in paragraph 1, are inadmissible, but the inadmissibility does not extend to any underlying evidence that may have given rise to those statements (A/CN.9/514, para. 67).

74. In many legal systems, a party may not be compelled to produce in court proceedings a document that enjoys a “privilege”—for example, a written communication between a client and its attorney. However, in some legal systems, the privilege may be lost if a party has relied on the privileged document in a proceeding. Privileged documents may be presented in conciliation proceedings with a view to facilitating settlement. In order not to discourage the use of privileged documents in conciliation, the enacting State may wish to consider including a provision stating that the use of a privileged document in conciliation proceedings does not constitute a waiver of the privilege (A/CN.9/514, para. 68).

References to UNCITRAL documents in respect of article 10

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 82-91 and 165-167;

A/CN.9/514, paras. 61-68;

A/CN.9/506, paras. 101-115;

A/CN.9/WG.II/WP.115, remarks 29-35;

A/CN.9/487, paras. 139-141;

A/CN.9/WG.II/WP.113/Add.1, footnotes 25-32;

A/CN.9/485, paras. 139-146;

A/CN.9/WG.II/WP.110, paras. 98-100;

A/CN.9/468, paras. 22-30;

A/CN.9/WG.II/WP.108, paras. 16 and 18-28;

A/CN.9/460, paras.11-13;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 20.

Article 11. Termination of conciliation

Text of article 11

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Comments on article 11

Circumstances in which conciliation may be terminated

75. The provision enumerates various circumstances in which conciliation proceedings may be terminated. In subparagraph (a) the provision uses the expression “conclusion” instead of “signing” in order to better reflect the possibility of entering into a settlement in a form other than a signed document, such as by an exchange of electronic communications or even orally (see A/CN.9/506, para. 88). The first circumstance listed in subparagraph (a) is where the conciliation ends successfully, namely where a settlement agreement is reached. The second circumstance set out in subparagraph (b) allows the conciliator or panel of conciliators to bring the conciliation proceedings to an end, after consulting with the parties (A/CN.9/514, para. 69). In the preparation of the Model Law, it was agreed that subparagraph (b) should also cover cases of abandonment of the conciliation procedure after it had commenced where such abandonment is implied by the conduct of the parties, for example conduct such as an

expression of a negative opinion by a party about the prospects of the conciliation, or refusal of a party to consult or to meet with the conciliator when invited.³⁷ The phrase “after consultation with the parties” should be interpreted to include those cases where the conciliator has contacted the parties in an attempt to consult and has received no response. Subparagraph (c) provides that both parties may declare the conciliation proceedings to be terminated, and subparagraph (d) allows one party to give such notice of termination to the other party and the conciliator or panel of conciliators.

76. As noted above in the context of article 4, the parties may be under an obligation to commence and participate in good faith in conciliation proceedings. Such an obligation may arise, for example, from an agreement of the parties entered into before or after the dispute arose, from a statutory provision or from a direction or request by a court. The sources of such an obligation differ from country to country and the Model Law does not deal with them. The Model Law also does not deal with the consequences of failure by a party to comply with such an obligation (see paras. 38 and 46 above).

Form of termination

77. While article 11 does not require that the termination be in writing, an enacting State that adopts draft article X as contained in the footnote to article 4 may wish to consider whether termination in writing should be required, since precision may be needed in determining when a conciliation ended so that courts can properly determine the moment when the limitation period resumes running (see para. 48 above).³⁸

References to UNCITRAL documents in respect of article 11

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 92-98 and 168-169;

A/CN.9/514, para. 69;

A/CN.9/506, paras. 87-91;

A/CN.9/WG.II/WP.115, remarks 26 and 27;

A/CN.9/487, paras. 135-136;

A/CN.9/WG.II/WP.113/Add.1, footnotes 22 and 23;

A/CN.9/WG.II/WP.110, paras. 95-96;

³⁷Ibid., para. 169.

³⁸Ibid., paras. 96 and 168.

A/CN.9/ 468, paras. 50-53;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 15.

Article 12. Conciliator acting as arbitrator

Text of article 12

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Comments on article 12

Default rule, subject to party autonomy

78. While, in some legal systems, conciliators are permitted to act as arbitrators if parties so agree and, in other legal systems, that is subject to rules in the nature of codes of conduct, the Model Law is essentially neutral on that point, providing a default rule subject to party autonomy. In any event, the agreement of the parties and the conciliator may be able to override any limitation on that point, even where the matter is subject to rules in the nature of codes of conduct.³⁹ Article 12 reinforces the effect of article 10 by limiting the possibility of the conciliator acting as arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or any related contract. The purpose of article 12 is to provide greater confidence in the conciliator and in conciliation as a method of dispute settlement. A party may be reluctant to strive actively for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed by the other party as an arbitrator in subsequent arbitration proceedings (A/CN.9/514, para. 70).

79. In some cases, the parties might regard prior knowledge on the part of the arbitrator as advantageous, particularly if the parties think that this knowledge would allow the arbitrator to conduct the case more efficiently. In such cases, the parties may actually prefer that the conciliator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The provision poses no obstacle to the appointment of the

³⁹*Ibid.*, para. 170.

former conciliator provided the parties depart from the rule by agreement—for example, by a joint appointment of the conciliator to serve as an arbitrator (A/CN.9/514, para. 71). Considerations governing a conciliator acting as an arbitrator may also be relevant in situations where a conciliator acts as a judge. That situation is not addressed in the Model Law, given that it is rarer and that its regulation might interfere with national rules governing the judiciary. Enacting States may wish to consider whether any special rule is needed in that respect in the context of their national rules governing the judiciary.⁴⁰

Scope of article 12

80. The provision applies not only with respect to “a dispute that was or is the subject of the conciliation proceedings” but also “in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship”. The first limb extends the application of the provision to both past and ongoing conciliations. The second limb extends the scope of the article to cover disputes arising under contracts that are distinct but commercially and factually closely related to the subject matter of the conciliation. While the formulation is very broad, determining whether a dispute raises issues relating to the main contract or legal relationship would require an examination of the facts of each case (A/CN.9/514, para. 72). In the preparation of the Model Law, it was agreed that the reference to “another dispute” in article 12 could involve parties other than the parties in the conciliation proceedings.⁴¹

Arbitrator acting as conciliator

81. An early draft of the Model Law contained a provision dealing with the situation where an arbitrator acts as a conciliator, a practice that is permitted in some legal systems. It was noted that such a provision would relate to the functions and competence of an arbitrator and to arbitration practices that differ from country to country and are influenced by legal and social traditions. There is no settled practice on the question of an arbitrator acting as conciliator, and some practice notes suggest that the arbitrator should exercise caution before suggesting or taking part in conciliation proceedings relating to the dispute.⁴² It was considered inappropriate to attempt unifying these practices through uniform legislation.

⁴⁰Ibid.

⁴¹Ibid., para. 102.

⁴²See, for example, *UNCITRAL Notes on Organizing Arbitral Proceedings* (Vienna, United Nations, 1996), para. 47.

Although the provision was deleted in the preparation of the Model Law, the Commission agreed that the Model Law was not intended to indicate whether or not an arbitrator could act or participate in conciliation proceedings relating to the dispute and that this was a matter left to the discretion of the parties and arbitrators acting within the context of applicable law and rules (A/CN.9/506, para. 132, and A/CN.9/514, para. 73).⁴³

Conciliator acting as representative or counsel of a party

82. An early draft of the Model Law also restricted a conciliator from acting as representative or counsel of either party subject to contrary party agreement. It was suggested, however, that, in some jurisdictions, even if the parties agreed to the conciliator acting as a representative or counsel of any party, such an agreement would contravene ethical guidance to be followed by conciliators and could also be perceived as undermining the integrity of conciliation as a method for dispute settlement. A proposal to amend the provision so as not to leave this question to party autonomy was rejected on the basis that it undermined the principle of party autonomy and failed to recognize that, in some jurisdictions where ethical rules required a conciliator not to act as representative or counsel, the conciliator would always be free to refuse to act in that capacity. On that basis, it was agreed that the provision should be silent on the question whether a conciliator could act as representative or counsel of any of the parties (A/CN.9/506, paras. 117-118, and A/CN.9/514, para. 74).

References to UNCITRAL documents in respect of article 12

Official Records of the General Assembly, Fifty seventh Session, Supplement No. 17 (A/57/17), paras. 106-110 and 170;

A/CN.9/514, paras. 70-74;

A/CN.9/WG.II/WP.110, footnote 30;

A/CN.9/WG.II/WP.108, paras. 29-33;

A/CN.9/506, paras. 117-123 and 130;

A/CN.9/WG.II/WP.115, remarks 36-41;

A/CN.9/487, paras. 142-145;

A/CN.9/485, paras. 148-153;

A/CN.9/468, paras. 31-37;

UNCITRAL Conciliation Rules (United Nations publication, Sales No. E.81.V.6), article 19.

⁴³*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 170.*

Article 13. *Resort to arbitral or judicial proceedings*

Text of article 13

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Comments on article 13

Limitation of the freedom to initiate arbitral or judicial proceedings

83. In the preparation of the Model Law, it was noted that the initiation of arbitral or judicial proceedings by the parties while conciliation was pending was likely to have a negative impact on the chances of reaching a settlement. However, no consensus was found on the formulation of a general rule that would prohibit the parties from initiating such arbitral or judicial proceedings or restrict such an action to taking the steps necessary to prevent expiry of a limitation period. It was found that limiting the parties' right to initiate arbitral or court proceedings might, in certain situations, discourage parties from entering into conciliation agreements. Moreover, preventing access to courts might raise constitutional law issues in that access to courts is in some jurisdictions regarded as an inalienable right.⁴⁴

84. In article 13, the Model Law limits itself to dealing with the hypothesis where the parties would have specifically agreed to waive their right to initiate arbitral or judicial proceedings while conciliation is pending. The consequence of that provision is that the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties (see A/CN.9/514, para. 75).

*“Except to the extent necessary for a party, in its opinion,
to preserve its rights”*

85. Even in the case where the parties would have agreed to waive their right to initiate arbitral or judicial proceedings while conciliation is pending,

⁴⁴Ibid., para. 112.

article 13 creates the possibility for a party to disregard that agreement where, in the opinion of that party, the initiation of arbitral or court proceedings is necessary to preserve its rights. That provision is based on the assumption that parties will effectively limit themselves in good faith to initiating arbitral or court proceedings in circumstances where such proceedings are truly necessary to preserve their rights. Possible circumstances that may require such proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of a limitation period (A/CN.9/514, para. 76).⁴⁵ A party might initiate court or arbitral proceedings also where one of the parties remained passive and thus hindered implementation of the conciliation agreement. However, in such a case, a party could initiate judicial or arbitral proceedings after the conciliation proceedings were terminated pursuant to article 11.⁴⁶

86. Article 13 makes it clear that the parties' right to resort to arbitral or judicial proceedings is an exception to the duty of arbitral or judicial tribunals to stay any proceeding in the case of a waiver by the parties of the right to initiate arbitral or judicial proceedings.⁴⁷

References to UNCITRAL documents in respect of article 13

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 111-118 and 171;

A/CN.9/514, paras. 75-76;

A/CN.9/506, paras. 124-129;

A/CN.9/WG.II/WP.115, remarks 42 and 43;

A/CN.9/487, paras. 146-150;

A/CN.9/WG.II/WP.113/Add.1, footnotes 36 and 37;

A/CN.9/485, paras. 154-158;

A/CN.9/468, paras. 45-49;

A/CN.9/WG.II/WP.108, paras. 49-52;

UNCITRAL Arbitration Rules (United Nations publication, Sales No. E.81.V.6), article 16.

⁴⁵Ibid., para. 117.

⁴⁶Ibid.

⁴⁷Ibid., para. 116.

Article 14. *Enforceability of settlement agreement*⁴

Text of article 14

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

⁴When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

Comments on article 14

Reasons for expedited enforcement

87. Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award (A/CN.9/514, para. 77).

Issue of enforcement of a settlement agreement left to domestic law

88. The text of the article reflects the smallest common denominator between the various legal systems. In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation. Article 14 thus leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable domestic law⁴⁸ or to provisions to be formulated in the legislation enacting the Model Law. In finalizing this article, the Commission noted that the purpose of the Model Law was not to discourage laws of the enacting State from imposing form requirements such as a requirement for signature or written form where such a requirement was considered essential.⁴⁹ Various examples of treatment of the issue of expedited enforcement of settlement agreements in domestic legislation are outlined below, with a view to facilitating consideration of possible options by legislators enacting the Model Law.

⁴⁸Ibid., para. 124.

⁴⁹Ibid., para. 123.

Contractual nature of a settlement agreement in some States

89. Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts has been restated in some laws on conciliation (A/CN.9/514, para. 78).

Examples of additional characteristics of settlement agreements in certain legal systems

90. In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. Such legislation and practice were reported, for example, in Hungary⁵⁰ and the Republic of Korea.⁵¹ In China, where conciliation may be conducted by an arbitral tribunal, legislation provides that if conciliation leads to a settlement agreement, the arbitral tribunal shall make a written conciliation statement or make an arbitration award in accordance with the settlement agreement. A written conciliation statement and a written arbitration award shall have equal legal validity and effect.⁵² In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. For example, under Australian legislation, agreements reached in conciliation held outside the sphere of court-annexed conciliation schemes cannot be registered with the court unless court proceedings are on foot, whereas, in court-annexed conciliation schemes, a court may make orders in accordance with the settlement agreement and the orders have legal force and are enforceable as such (A/CN.9/514, para. 79).

⁵⁰In Hungary, section 39 of Act LXXI, of 8 November 1994 provides that:

(a) If during the arbitral proceedings the parties settle the dispute, the arbitral tribunal shall terminate the proceedings by an order.

(b) If requested by the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms, provided that it considers the settlement as being in accordance with the law.

(c) An award on agreed terms has the same effect as that of any other award made by the arbitral tribunal.

⁵¹In the Republic of Korea, the arbitration law does not contain provisions on conciliation but conciliation or mediation is practised widely (see the Commercial Arbitration Rules of the Korean Commercial Arbitration Board, as amended on 14 December 1993). Article 18, paragraph 3, provides that, if the conciliation succeeds, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties and the settlement reached shall be treated as an award on agreed terms.

⁵²Arbitration Law of the People's Republic of China, article 51.

91. Some legal systems provide for enforcement in a summary fashion if the parties and their counsel signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement. Also, settlements might be the subject of expedited enforcement if, for example, the settlement agreement was notarized or formalized by a judge. For example, in Bermuda, legislation provides that if the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement, the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the court or a judge thereof, be enforced in the same manner as a judgement or order to the same effect, and where leave is so given, judgement may be entered in terms of the agreement.⁵³ Similarly, in India, a settlement agreement that has been signed by the parties is final and binding on the parties and persons claiming under them respectively and shall have the same status and effect as if it is an arbitral award.⁵⁴ In Germany, the *Zivilprozeßordnung* (Code of Civil Procedure) expressly takes account of the practice that amicable settlement of a dispute is often reached during the arbitration procedure by providing that the tribunal shall record the settlement in the form of an arbitral award on agreed terms, if requested by the parties, and such an award shall have the same effect as any other award on the merits of the case.⁵⁵ However, in some jurisdictions the enforceability of a settlement agreement reached during conciliation proceedings will only apply if the settlement agreement was reached between the parties to an arbitration or arbitration agreement. For example, in the Hong Kong Special Administrative Region of China, where conciliation proceedings succeed and the parties make a written settlement agreement (whether prior to or during arbitration proceedings), such agreement may be enforced by the Court of First Instance as if it were an award, provided that the settlement agreement has been made by the parties to an arbitration agreement.⁵⁶ This provision is supported by Order 73, rule 10, of the Rules of the High Court, which applies the procedure

⁵³Bermuda, Arbitration Act 1986.

⁵⁴India, Arbitration and Conciliation Ordinance, 1996, articles 73 and 74.

⁵⁵Germany, *Zivilprozeßordnung*, tenth book, sect. 1053.

⁵⁶Section 2C of the Arbitration Ordinance (Cap. 341) as amended (effective 27 June 1997) provides:

If the parties to an arbitration agreement reach agreement in settlement of their dispute and enter into an agreement in writing containing the terms of settlement ("the settlement agreement") the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgement or order to the same effect and, where leave is so given, judgement may be entered in terms of the agreement.

for enforcing arbitral awards to the enforcement of settlement agreements so that summary application may be made to the court and judgement may be entered in terms of the agreement (A/CN.9/514, para. 80).

“Conclude an agreement”

92. Any enacting State that has not enacted the UNCITRAL Model Law on Electronic Commerce should consider inclusion of a provision along the lines of articles 6 and 7 of that instrument⁵⁷ when enacting this Model Law (A/CN.9/506, para. 88) in order to remove obstacles to the increased use of electronic communications in international commercial conciliation.

References to UNCITRAL documents in respect of article 14

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 119-126 and 172;

A/CN.9/514, paras. 77-81;

A/CN.9/506, paras. 38-48 and 133-139;

A/CN.9/WG.II/WP.115, remarks 45-49;

A/CN.9/487, paras. 153-159;

A/CN.9/WG.II/WP.110, paras. 105-112;

A/CN.9/WG.II/WP.113/Add.1, footnote 39;

A/CN.9/485, para. 159;

A/CN.9/468, paras. 38-40;

A/CN.9/WG.II/WP.108, para. 16 and paras. 34-42;

A/CN.9/460, paras. 16-18.

⁵⁷Article 6 of the UNCITRAL Model Law on Electronic Commerce provides in part that, where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. Article 7 of that instrument provides that where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement (United Nations publication, Sales No. E.99.V.4).

كيفية الحصول على منشورات الأمم المتحدة
يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استعلم
عنها من المكتبة التي تتعامل معها أو اكتب إلى: الأمم المتحدة، قسم البيع في نيويورك أو في جنيف.

如何购取联合国出版物

联合国出版物在全世界各地的书店和经营处均有发售。 请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à: Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

CÓMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Printed in Austria
V.03-90953—November 2004—5,450

United Nations publication
Sales No. E.05.V.4
ISBN 92-1-133730-5

