B. Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules (A/CN.9/180)*

CONTENTS

INTRODUCTION

1. The United Nations Commission on International Trade Law adopted at its eleventh session (30 May–16 June 1978) a new programme of work.[1] One of the priority items included in that programme was "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules".[2] Pursuant to that decision, the Secretariat, after consultation with experts in the field of dispute settlement, prepared a prelimary draft of UNCITRAL Conciliation Rules (A/CN.9/166)** and a report entitled "Conciliation of international trade disputes" (A/CN.9/167).***

2. The Commission, at its twelfth session, considered what policy considerations should underlie conciliation rules and held an exchange of views on the preliminary draft UNCITRAL Conciliation Rules.[3] At that session the Commission requested the Secretary-General

"(*a*) To prepare, in consultation with interested international organizations and arbitral institutions, including the International Council for Commercial Arbitration, a revised draft of the UNCITRAL Conciliation Rules, taking into account the views expressed during the discussions at the present session;

"(*b*) To transmit the revised draft Rules, together with a commentary, to Governments and interested international organizations and institutions for their observations;

"(*c*) To submit to the Commission at the thirteenth session the revised draft Rules and commentary together with the observations received."[4]

3. Pursuant to that request, the Secretariat revised the draft Conciliation Rules, taking into account the views expressed at the twelfth session. The revised draft (A/CN.9/179)* was the subject of discussions during consultative meetings with members of the International Council for Commercial Arbitration (1 December 1979) and of the Working Group on International Arbitration of the International Chamber of Commerce (28 January 1980). Professor Pieter Sanders (Netherlands), who had acted as a consultant to the Secretariat in the drawing up of the draft UNCITRAL Conciliation Rules, again acted as consultant in the revision of these Rules.

4. This report is divided into two parts. Part I discusses the concept and principles of conciliation on which the revised draft is based. Part II contains the commentary on each article of the revised draft.

* 27 February 1980. The text of the revised draft UNCITRAL Conciliation Rules is contained in document A/CN.9/179, reproduced as A, above.

** Reproduced as Yearbook ... 1979, part two, III, A.

*** Reproduced as Yearbook ... 1979, part two, III, B.

[1] Report of the United Nations Commission on International Trade Law on the work of its eleventh session (30 May–16 June 1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 69 (Yearbook ... 1978, part one, II, A).

[2] *Ibid.*, para. 67 (*c*) (iv).

[3] Report of the United Nations Commission on International Trade Law on the work of its twelfth session (18–29 June 1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17,* paras. 84–87 and annex I (Yearbook ... 1979, part one, II, A).

* Reproduced in this volume, part two, IV, A, above.

[4] *Ibid.*, para. 88.

I. CONCEPT AND PRINCIPLES OF CONCILIATION

A. *Concept and characteristics of conciliation as distinguished from other methods of dispute settlement*

5. Conciliation is one out of various methods of dispute settlement. It may be defined as a method used by parties to a dispute to reach an amicable settlement with the assistance of an independent third person or institution.

6. The objective of conciliation is to bring about the amicable settlement of a dispute. Because of its non-judicial character conciliation is thus fundamentally different from litigation before the courts or arbitration. Judges and arbitrators "decide" the case in the form of a judgement or an award which is binding on the parties. Conciliators, however, merely "recommend" or "suggest" possible settlement terms which become binding on the parties only when they have agreed to them. It is true that also during judicial or arbitral proceedings parties may settle their dispute by agreement (e.g. *"accord des parties"*), sometimes at the initiative of the judge or arbitrator. Yet, such a settlement is not typical of what are essentially adversary proceedings.

7. Assistance by an independent third person or institution is the other criterion in the definition given and distinguishes conciliation from normal party negotiations which usually are the first step in attempting to settle a dispute. The independent and impartial character of the third person marks the difference between conciliation and party negotiations conducted through counsel or agents. Such persons, when assisting or representing a party in negotiations, act in the interest of the party by whom they are retained. The conciliator, however, assists both parties in an independent, neutral and impartial manner.

B. *Purpose and potential advantages of conciliation*

8. When a business dispute has arisen, it is advantageous to settle it without having to resort to costly and time-consuming proceedings, the outcome of which may be uncertain. Conciliation could, thus, be a possible and viable alternative to court litigation or arbitration which sometimes entails a considerable amount of time and money.

9. However, this advantage of conciliation over judicial and arbitral proceedings does not in all circumstances materialize. The conciliation attempt may fail, with the undesirable result that money and time have been spent in vain. Although this potential disadvantage cannot be disregarded, it is mitigated by the reasonable assumption that parties will only initiate conciliation proceedings if they regard an amicable settlement as possible. Moreover, if they realize during conciliation that settlement is unlikely, they will discontinue the conciliation effort and so avoid further expenses.

10. An additional advantage lies in the non-adversary, friendly character of conciliation. While some businessmen may see no reason why court litigation or arbitration should adversely affect their business relationships, others may well view amicable proceedings as conducive to, or even necessary for, the preservation of good business relationships. This latter attitude is prevalent in countries where culture and tradition favour friendly settlement of disputes, such as in China, Japan, and some African countries. But in other regions, too, business partners with long-standing relations might prefer the "marriage counsellor" approach inherent in conciliation to the "divorce judge" approach inherent in court litigation or arbitration. Also, States and State agencies might opt for conciliation in order to avoid a binding decision imposed by a court or arbitral tribunal.

11. In addition, there are legal considerations that could be advanced in favour of conciliation. One consideration is that various procedural laws and rules discourage judges and arbitrators from promoting amicable settlements. Another consideration is that certain matters are not arbitrable under the applicable law, or parties may lack the legal capacity to arbitrate. Furthermore, reluctance to submit to litigation or arbitration may be caused by uncertainty about the applicable law.

12. Beyond that, conciliation could be of particular value where, for example in long-term contracts or non-contractual relationships, problems arise as to certain matters which are less juridical than technical.

13. Even where the dispute could be settled by a strict application of legal provisions conciliation may nevertheless be preferred for the very reason that it lessens the impact of such provisions. Parties may wish to reach a settlement "in the spirit of conciliation", i.e. a settlement which is not necessarily based on strict legal grounds but more on what they perceive as a just and a reasonable settlement based on mutual concessions. Although legal rules cannot be fully disregarded, allowance should be made for the attempt of parties to find an acceptable compromise that need not necessarily coincide with the terms of a "legally correct" decision.

C. *Policy considerations underlying the draft UNCITRAL Conciliation Rules*

14. The potential advantages of conciliation will only materialize if the rules of conciliation reflect the considerations referred to above and are tailored to the needs and expectations of the parties. The revised draft of the UNCITRAL Conciliation Rules is based on the following policy considerations.

15. The primary consideration is to further the purpose of conciliation, namely to assist the parties in reaching an amicable settlement. Since the success of such endeavour depends entirely on the willingness of the parties to conciliate, one policy consideration underlying the draft Rules is that the parties' freedom of action is kept intact at any stage of the conciliation proceedings. This principle pertains, in particular, to the commencement and the termination of conciliation proceedings.

16. Another consideration is that, in many instances, conciliation is an attractive alternative to adversary proceedings only if the rules make speedy and inexpensive proceedings possible. This calls for flexible procedural rules. Hence, time periods for certain procedural steps, if fixed at all, must be reasonably short, with due regard to the particular features of international disputes. And whereas parties are at liberty to agree on proceedings with more than one conciliator, conciliation with a single conciliator is envisaged as the normal procedure.

17. A further policy consideration is that the conciliator should be endowed with a reasonably wide discretion. Being entrusted by the parties with the conduct of the proceedings, he should be enabled to perform his functions without any unduly impeding rules. Since his role is essentially to assist the parties, he should consult with the parties even on procedural points and take into account their views to the extent possible. In this way, the conciliation proceedings can be conducted in an informal, flexible manner and be adapted to the particular circumstances of the case at hand.

II. COMMENTS ON DRAFT ARTICLES

A. *Application of the Rules and initiation of conciliation*

Article 1. Application of the Rules

18. The UNCITRAL Conciliation Rules—like the UNCITRAL Arbitration Rules—have no statutory force. They become applicable by the agreement of the parties, as laid down in article 1, paragraph (1) of the Rules.

19. The agreement envisaged in article 1, paragraph (1), relates only to the application of the Rules. It is not concerned with the primary question whether a dispute shall be referred to conciliation. In particular, it does not relate to any possible previous commitment by the parties to initiate conciliation in the event of a dispute. In view of its relatively limited content, the agreement on the application of the Rules need not be in writing.

20. Of course, parties are free to stipulate in advance that, in the event of a dispute arising, they commit themselves to seeking an amicable settlement before resorting to the courts or to arbitration. In such a case, they may wish to use one of the model clauses set forth at the end of the draft Rules (and discussed below, paras. 93–96). The conciliation clause or separate conciliation agreement would, then, include the agreement of the application of the Rules envisaged under article 1, paragraph (1).

21. Therefore, it is left to the conciliation clause or separate conciliation agreement whether there is such a commitment. It is not dealt with in the Rules themselves which are based on the fundamental notion that conciliation can usefully take place only if both parties, after a dispute has arisen, are willing to seek an amicable settlement of their dispute. Consequently, article 1, paragraph (1), speaks of "parties seeking an amicable settlement of their dispute" and does not refer to, nor require, any conciliation clause or separate conciliation agreement. This accords with the view prevailing in the Commission at its twelfth session "that the concept of conciliation embodied in the UNCITRAL Conciliation Rules should stress the voluntary, non-binding nature of conciliation and any commitment thereto".[5]

22. As to the scope of application, it may be noted that many existing conciliation rules restrict their application to certain parties, areas or subject-matters. For example, they require that at least one of the parties be a member of a certain chamber of commerce or trade association, a national of a certain State, or a Contracting Party to a Convention. Application may also be limited to disputes within a given region or within the jurisdiction of a given court of arbitration or similar body.

23. Such restrictions would obviously be inappropriate for UNCITRAL Conciliation Rules which, like the UNCITRAL Arbitration Rules, are designed for universal application. Thus, article 1 does not contain any limitation as to categories of persons, areas or subject-matters. If there is a desire to indicate the principal field of application, i.e. "international commercial disputes", this could be done in a preamble or in the promoting resolution, following the example of the UNCITRAL Arbitration Rules (General Assembly resolution 31/98).*

24. While most disputes, at least in the field of international trade, arise in conctractual relationships, article 1 envisages application of the Rules also for disputes in non-contractual matters. This accords with the consideration that conciliation may be used in all kinds of dispute which are capable of being settled by agreement of the parties.

25. The wide scope of application is also reflected in paragraph (2) which allows parties to modify the Rules. This enables parties to tailor the Rules according to their particular needs whenever they feel that the Rules are not in every respect suitable in the prevailing circumstances.

Article 2. Commencement of conciliation proceedings

26. Article 2 sets forth the initial steps which should bring about certainty as to whether conciliation proceedings will or will not take place. The first step is, according to paragraph (1), that the party initiating conciliation invites the other party to conciliate.

27. The term "party initiating conciliation" is used as there is no "claimant" or "plaintiff" in the context of conciliation. Furthermore, either party could be the one initiating conciliation, irrespective of whether he is under a contractual obligation to initiate conciliation before resorting to the courts or to arbitration. This corresponds with the idea mentioned earlier (see para. 21) that the Rules by themselves do not pre-suppose any previous commitment but are flexible enough to cover cases where a party is committed to take an initial step such as inviting the other party to conciliate (cf. variant B of the proposed model conciliation clause).

28. According to paragraph (1), the initiating party shall, in its invitation to the other party, briefly identify the subject of the dispute. The purpose of this rule is to establish, *ab initio*, a degree of certainty as to on what matter conciliation is envisaged by the inviting party. This is of particular importance in cases of complex commercial relationships. A brief identification of the matter seems sufficient at this stage when it is not yet certain whether conciliation will actually take place. Therefore, a more detailed statement is only required if and when the conciliator has been appointed (see article 5).

29. The question arises whether, in view of the relatively limited content of the invitation, there should be the

[5] *Ibid.*, annex I, para. 3 (Yearbook ... 1979, part one, II, A).

* Reproduced as Yearbook ... 1977, part one, I, C.

requirement, as in article 2, paragraph (1), that the invitation be in writing. The view is taken that an invitation in writing seems preferable in terms of clarity and proof. While a party may well inquire orally about the other party's willingness to conciliate, the requirement that the invitation be in writing, laid down in paragraph (1), emphasizes the importance of the request as the first step in determining whether conciliation will take place or not. It also facilitates determining the 30-day period referred to in paragraph (4) and may serve as proof of the fact that there was an invitation to conciliate in cases where conciliation is, under the agreement of the parties, a pre-condition to arbitration or litigation.

30. Whether the initiative taken by one party will indeed lead to conciliation proceedings depends solely on the acceptance of the invitation by the other party. Article 2 adopts in respect of the commencement of the proceedings, like article 15 for their termination, the principle of the voluntary nature of conciliation in that genuine conciliation depends entirely on the willingness of the parties to conciliate. Therefore, conciliation proceedings commence only if the other party accepts the invitation to conciliate, paragraph (2). Conversely, no conciliation proceedings will take place where the other party refuses conciliation, paragraph (3).

31. Paragraph (4) deals with the eventuality that the other party does not reply within a given period of time. The normal period is 30 days; if the inviting party regards this under the circumstances as too long or too short he may in his invitation set another period. Yet, the date of expiry of such period is not to be construed as a definite cut-off date: the absence of reply during that period does not necessarily lead to the result that there will be no conciliation proceedings. Instead, it is up to the inviting party either to treat the silence of the other party as a rejection of the invitation or "to keep the door open" for some more time. If he elects to treat the absence of reply as a rejection, he must inform the other party accordingly. Although paragraph (4) does not expressly say so, it should be possible for the inviting party to indicate that decision already in the invitation (e.g.: "If I do not receive a reply from you within 30 days from the date of this letter I will assume that you do not wish to accept my invitation to conciliate").

B. *Number and appointment of conciliators*

Article 3. Number of conciliators

32. Article 3 envisages conciliation by a sole conciliator except where the parties prefer to appoint more than one conciliator. Since the task of a conciliator is basically to assist the parties in finding acceptable terms of a settlement, one conciliator will normally be adequate. A single conciliator may also be better able to conduct proceedings informally and hold confidential discussions with one or both parties. The suggested preference for a sole conciliator is, above all, supported by the need to provide for inexpensive and speedy proceedings.

33. Under certain circumstances more than one conciliator may be required. That may be the case, for example, where in a complex dispute special expertise is needed in more than one area. Moreover, it may sometimes be difficult to find a conciliator who is sufficiently familiar with the law and trade usages of the two or more countries with which an international transaction is connected.

34. For such cases, article 3 does not merely mention the option of appointing "more than one conciliator", but states two specific variants, namely "two or three conciliators". This solution seems preferable on the ground that it provides guidance to the parties and allows greater precision in certain subsequent provisions of the Rules. for example, those relating to appointment. Of course, parties would still be able to agree on another number of conciliators by way of modification of the Rules under article 1, paragraph (2).

35. It should be noted that conciliation with two conciliators is conceived under the Rules to be as appropriate as conciliation with three conciliators, despite the different composition and appointment procedures (cf. article 4). It may be felt, though, that the desirable independence and impartiality is only guaranteed by a conciliator who is chosen by both parties, as is the case with the presiding conciliator in a panel of three, while in conciliation with two conciliators each party appoints one of them. However, as stated in article 7, every conciliator, irrespective of the manner in which he was appointed, is expected to conduct the proceedings in an independent and impartial manner.

36. This expectation is supported by experience gathered in international conciliation proceedings where panels of two conciliators are not uncommon. It serves to distinguish between conciliation and party negotiations which are often conducted through counsel or agents (cf. above, para. 7). The notion is reinforced, in an indirect way, by article 19 which precludes a conciliator from acting as a counsel of a party in any arbitral or judicial proceedings in respect of the same dispute. The probable effect of this provision may be that a party might not wish to appoint his counsel as conciliator.

37. Finally, it may be pointed out that an uneven number of conciliators, while facilitating the internal decision-making process, is not necessary in conciliation since the task of the conciliators is to make recommendations for a settlement and not to render binding decisions.

38. As to the internal decision-making process itself, the Rules contain no specific provisions as to how certain decisions are arrived at in a panel of two or three conciliators. This means that the conciliators have discretion to conduct the proceedings in such a manner as is appropriate in the case at issue. It is expected that the conciliators will be able to reach agreement on how to proceed, possibly after consultations with the parties. In conciliation with three conciliators, the view of the presiding conciliator should normally prevail.

Article 4. Appointment of conciliator(s)

39. Article 4 implements, in substance, the principle of party autonomy with regard to the appointment of a conciliator. Depending on the number of conciliators to be appointed, a conciliator is appointed either by one party or jointly by both parties.

40. In conciliation proceedings with one conciliator, the parties are expected to agree on the name of a sole conciliator, article 4, paragraph (1) (*a*). Where the parties have agreed on conciliation proceedings with two conciliators, each party appoints one conciliator, paragraph (1) (*b*). If the parties have opted for conciliation proceedings with three conciliators, each party appoints one conciliator while the third ("presiding") conciliator is appointed by agreement of the parties, paragraph (1) (*c*). Before appointing the presiding conciliator the parties may wish to consult with the two party-appointed conciliators.

41. According to paragraph (2), parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. This assistance may be provided in two different ways which should be clearly distinguished.

42. The first way, set forth in paragraph (2) (*a*), is that the institution or person recommends the names of suitable individuals. Such a recommendation may be accompanied by an indication of the qualifications and experience of such individuals. In view of the non-binding character of such assistance, each party may request it without informing or consulting the other party.

43. The second way in which assistance may be enlisted, set forth in paragraph (2) (*b*), is that the institution or person appoints one or more conciliators. Such an appointment would, under the Rules, require a previous agreement.

44. The agreement under article 4, paragraph (2) (*b*), may be included in the original conciliation agreement (or clause) or may be concluded later when the need arises, possibly after the parties failed to reach agreement on the name of the conciliator. In their agreement on the appointment of conciliators by an institution or person, the parties may wish to specify the procedure to be followed. They may, for example, choose the list-procedure set out in article 6, paragraph (3) of the UNCITRAL Arbitration Rules which preserves a considerable measure of party autonomy by making it possible for parties to approve, object to, or express preference for the candidates listed.

45. Paragraph (2) of article 4 sets forth considerations that should guide the requested institution or person in selecting individuals to act as conciliator. The overriding concern is to secure the appointment of an independent and impartial conciliator which is the best guarantee for successful conciliation proceedings. One such consideration relates to the advisability to appoint a "neutral" conciliator of a third nationality; this is not formulated as a rigid rule (as sometimes found in other conciliation rules) because there may well be circumstances in which it would be proper to appoint as conciliator a person of the same nationality as that of one of the parties.

46. It may be noted that these consideration pertaining to the qualifications of conciliators are not stated as guidelines where parties appoint a conciliator without the assistance of an institution or third person (cf. paragraph (1)). However, article 7 obliges every conciliator, irrespective of the manner in which he is appointed, to act in an independent and impartial manner.

C. *Conduct of conciliation proceedings*

Article 5. Submission of statements to conciliator

47. Once the conciliator, or a panel of conciliators, has been appointed, the conciliation proceedings enter into an active phase. Each party submits a brief written statement describing the general nature of the dispute and the points at issue, paragraph (1). Only a brief statement is required, in order to provide the conciliator with general information about the dispute at issue. To require the elaboration of extensive and detailed "pleadings" would be contrary to the idea of speedy proceedings, could put a deterring burden on the parties and might well harden adverse positions.

48. However, if the conciliator feels that he needs a broader basis for his decision on how to proceed, he may request each party to submit to him a further statement (paragraph (2)). In this additional submission, the party would specify his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that he deems appropriate. As in respect of the first submission, each party sends a copy of his statement to the other party so that both parties know each other's position and views. These statements are, thus, excluded from the general rule contained in article 10 which gives the conciliator discretion as to whether information provided by one party may be disclosed to the other party.

49. The fact that parties have submitted such a second statement does not mean that no further information is to be provided at a later stage. In particular, the content of these statements is not to be understood as determining the "terms of reference" of the conciliator (as provided for in some arbitration rules). This is clear from paragraph (3) according to which the conciliator may request additional information at any stage of the conciliation proceedings. His competence to request information from the parties is supported by article 12 which expresses the expectation that parties will in good faith endeavour to comply with requests by the conciliator.

Article 6. Representation and assistance

50. Article 6 is modelled after article 4 of the UNCITRAL Arbitration Rules. It allows parties to be represented or assisted by third persons. This is of particular practical relevance in international contexts. The requirement to inform in advance not only the conciliator but also the other party is intended to avoid any possible surprise. The further requirement to indicate whether the appointment is for purposes of representation or of assistance is appropriate in view of the different functions of such persons, in particular, in respect of their capacity to make and accept any settlement proposals.

Article 7. Role of conciliator

51. Article 7 states the basic function of the conciliator and sets forth general guidelines for his conduct. His primary role is to assist the parties to reach an amicable settlement of the dispute, paragraph (1). He is obliged to act in an independent and impartial manner, irrespective of whether he is appointed by only one party, by both parties or by an outside institution or person.

53. Because the rules are intended as rules for conciliation, they do not spell out standards that would be suitable in adversary proceedings. For example, no reference is made to the law applicable to the substance of the dispute. This is justified in view of the purpose of conciliation which is to settle the dispute by agreement of the parties, not by an imposed decision. Thus, allowance is made for parties' attempts to find an acceptable compromise which does not necessarily coincide with the terms of a legally correct decision. This does not mean that relevant legal rules will not be taken into account by the conciliator: they may well have their impact on the settlement proposals which he will make. Therefore, a general reference is made to the rights and obligations of the parties, in addition to more practice-oriented considerations, such as the usages of the trade concerned and the previous business practices of the parties.

54. Paragraph (3) stresses that the conciliator may exercise his discretion in conducting the conciliation proceedings, with due regard to the parties' wishes and the need for speedy proceedings.

55. Paragraph (4) emphasizes the most important of the conciliator's actions which is to make proposals for a settlement of the dispute. In the interest of the informality of the proceedings, such proposals can be made orally and without stating the reasons therefor.

Article 8. Administrative assistance

56. Many arbitration institutions, chambers of commerce, trade associations and similar bodies place administrative assistance at the disposal of parties desiring conciliation. Consequently, their rules provide for various administrative functions which range from the simple forwarding and registering of communications to the keeping of lists of conciliators and the taking of decisions on procedure, costs, and the appointment of a conciliator.

57. It may not always be advisable to establish too close a link of conciliation proceedings with a body that may later be involved in the arbitration of the same dispute. On the other hand, there is a certain value in providing for administrative assistance. Article 8 therefore alludes to the possibility of such assistance being provided by a suitable institution. Such assistance could include registration and forwarding of communications, providing interpretation and translation services, and the making of necessary arrangements for meetings.

Article 9. Communication between conciliator and parties

58. Article 9 describes the procedural powers which enable the conciliator to carry out his function. He may communicate orally or in writing and may do so with both parties or with one party alone. He may also invite the parties to meet with him.

59. The conciliator has, in general, full discretion in deciding on how to proceed (cf. article 8, paragraph (3)). However, his discretion is somewhat limited with regard to the determination of the place of meetings with the parties; he is obliged to consult in this respect with the parties before making a decision. This seems justified in view of the possible implications of that decision in an international context.

60. The conciliator has no discretion with regard to appointing an expert or hearing a witness. The Rules do not empower him to take such action on his own initiative, but require in this respect the consent of the parties (cf. article 17, paragraph (1) (*c*) and (*d*)). It seems appropriate that parties do not incur possible high costs without prior commitment.

Article 10. Disclosure of information

61. In conciliation, the question of confidentiality of information raises two different issues. One issue relates to the desirability that the contents of the proceedings not be disclosed to outsiders. This is dealt with in article 14 (see below, para. 70). The other issue, which is the subject of article 10, concerns the flow of information between the participants of the conciliation proceedings. The key issue here is whether the conciliator should disclose to a party all information obtained from the other party or to what extent he must keep it confidential.

62. Existing conciliation rules deal with this delicate problem, if they do at all, in varying ways, reflecting different perceptions of the concept of conciliation and the function of the conciliator. Where the conciliator is regarded as a messenger-type mediator whose task it is to bring the parties together, confidentiality would be inappropriate, except, perhaps, in respect of settlement proposals made by a party with the express request for confidentiality. Where, however, the assistance by the conciliator is viewed as an active involvement in the search for an amicable settlement of the dispute, stricter confidentiality seems justified.

63. This second concept has been adopted in article 10 which, in principle, leaves the decision about confidentiality of information to the conciliator. To provide him with discretionary power in this matter seems reasonable in view of the fact that it is he who knows best what steps to take in order to achieve an amicable settlement. However, his discretion is restricted by any express demand of a party that certain information be kept confidential. Statements submitted under article 5, paragraphs (1) and (2), are excluded, as has been explained earlier (see above, para. 48).

Article 11. Party suggestions for settlement of dispute

64. Article 11 is designed to promote an amicable settlement based on suggestions by the parties themselves. Such suggestions will help the conciliator to make acceptable proposals for settlement and to formulate the specific terms for a possible settlement as envisaged by article 13, paragraph (1). Parties may make suggestions on their own initiative or upon an invitation by the conciliator. The term "invite" indicates that there is not, on the part of the conciliator, a "request" which parties are supposed to comply with according to article 12.

Article 12. Co-operation of parties with conciliator

65. Under the Rules the conciliator has a large measure of discretion in conducting the conciliation proceedings (article 7, para. (3)). In several instances, corresponding to various stages of the proceedings, the Rules amplify this authority of the conciliator and specify, though

not exhaustively, what requests the conciliator may make. Under article 12 the parties undertake to comply with such requests in good faith. Since the settlement of a dispute by conciliation depends ultimately on the will and attitude of the parties, such undertaking, though not legally enforceable, is central to the successful outcome of conciliation proceedings.

Article 13. Settlement agreement

66. Article 13, paragraph (1), invites the conciliator to formulate the terms of a possible settlement when, in his assessment, the proceedings have reached an appropriate stage. He submits them to the parties for their observations. If, in the light of these observations, he is of the view that a modification of the tentative terms is called for, he may reformulate those terms and resubmit them to the parties.

67. If the parties accept the proposed terms, the settlement agreement should be drawn up by the parties. They may request the conciliator to assist them or may ask him to draw up the agreement. The settlement agreement must be in writing, not only because it is to be signed by the parties, but also to avoid any uncertainty or dispute as to the particulars of the settlement terms. It suffices that the document to be drawn up contains the terms of the settlement; it need not contain a summary of the proceedings (as prescribed by some conciliation rules in more formal types of conciliation).

68. Paragraph (3) stresses the purpose of conciliation, namely a settlement of the dispute. Finality of the settlement is achieved when the parties have signed the agreement. Its legal effect is then that of any other binding agreement, irrespective of whether the applicable law qualifies it, for example, as a revision of the original contract or part of it or as a new contract.

69. It should be noted that the settlement agreement, in terms of enforceability, is not equal to an "arbitral award on agreed terms" (as provided for in at least one set of conciliation rules). Whether parties could, nevertheless, obtain the advantages of easy recognition and enforcement by entering the settlement as an *"accord des parties"* in arbitration proceedings would depend on the relevant arbitration rules and applicable law.

Article 14. Confidentiality

70. Article 14 deals with the second issue of confidentiality identified above (see para. 61). Subject to the agreement of the parties or mandatory law, the provision prohibits disclosure to outsiders of any matters relating to the conciliation proceedings. Such guarantee of confidentiality is conducive to reaching an amicable settlement in informal proceedings. As an exception to the general rule of confidentiality, the settlement agreement itself may be disclosed where this is necessary for purposes of its implementation and enforcement.

D. *Termination of conciliation proceedings and costs*

Article 15. Termination of conciliation proceedings

71. Article 15 sets out the various ways in which conciliation proceedings may be terminated and determines the effective date of the termination. Certainty as to the duration of the proceedings is of general interest to the parties and the conciliator in that they know at any time up to which point their dealings and conduct are governed by the Conciliation Rules. The particular relevance of article 15 becomes apparent if viewed together with article 16 which precludes recourse to court or arbitration proceedings before the termination of the conciliation proceedings (see below, paras. 74–76).

72. Article 15 does not adopt the approach of other conciliation rules which attach to the submission to conciliation a binding effect, e.g. an obligation to participate in the proceedings for a predetermined period of time or until a settlement proposal has been rejected. Article 15 is instead inspired by the principle of absolute freedom of the parties and is based on the premise that a policy compelling parties to continued participation in the proceedings would not, in all circumstances, lead to a genuine settlement.

73. Article 15, therefore, allows not only both parties by common agreement but also either party alone to terminate the conciliation proceedings with immediate effect (subparagraphs (*c*) and (*d*)). The conciliation proceedings may also be terminated by the conciliator if he regards the conciliation effort as having failed (subparagraph (*b*)). Another—one would hope most common—cause for termination is the signing of the settlement agreement (subparagraph (*a*)).

Article 16. Resort to arbitral or judicial proceedings

74. Article 16 deals with the delicate question whether a party may resort to court litigation or arbitration whilst the conciliation proceedings are under way, i.e. after their commencement in accordance with article 2, paragraph (2), and before their termination according to article 15. Article 16 discourages such a step but, in line with the general policy underlying the Rules, is formulated in a flexible manner.

75. Article 16 emphasizes the value of serious conciliation efforts by expressing the idea that, under normal circumstances, court or arbitration proceedings should not be initiated as they might adversely affect the prospects of an amicable settlement. However, the article also takes into account that resort to the courts or to arbitration does not necessarily indicate an unwillingness on the part of the initiating party to conciliate. In view of the fact that, under article 15 (*d*), an unwilling party may terminate the conciliation proceedings at any time, it may well be that, if a party initiates court or arbitral proceedings, he does so for different reasons.

76. For example, a party may want to prevent the expiration of a prescription period or must meet the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration. Instead of attempting to set out a list of possible grounds, article 16 adopts a general and subjective formula: "... except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights". The exception is not phrased in objective terms in order to avoid controversy as to whether the initiation of adversary proceedings is justified.

Article 17. Costs

77. Upon termination of the conciliation proceedings, the conciliator fixes the costs of conciliation as specified in article 17. The first item concerns the fee of the conciliator which shall be reasonable in amount. In view of the varying circumstances under which conciliation may take place, no specific criteria are given for the determination of the amount of the fee. The second item consists of the travel and other expenses of the conciliator. Under both items, "conciliator" means any conciliator, whether appointed by both parties, by one party alone or by an outside institution or person.

78. The third item concerns the travel and other expenses of any witnesses requested by the conciliator with the consent of the parties. Since the conciliator is not empowered to call a witness on his own initiative (cf. above, para. 60), the parties are only obliged to bear such costs if they have agreed in advance that the witness be invited. The same restriction applies to the fourth item which concerns the engagement of experts. The last item consists of the costs incurred by having requested administrative assistance pursuant to article 8.

79. The five items listed in paragraph (1), and only those, constitute the "costs" of the conciliation. Because there is not in conciliation, whatever its outcome, a "successful" and an "unsuccessful" party, these costs are to be divided equally between the parties unless the settlement agreement provides for a different apportionment (paragraph (2)). All other expenses incurred by a party, e.g. his own travel costs or the expenses of his representative or agent, are borne by that party.

Article 18. Deposits

80. Article 18 is modelled after article 41 of the UNCITRAL Arbitration Rules. It empowers the conciliator to request equal deposits from each party as an advance for the costs referred to in article 17, paragraph (1). The conciliator may make his first such request upon his appointment. The amount requested would be based on an estimate of the future costs as the exact amount can only be determined upon the termination of the conciliation proceedings. If the estimate turns out to be too low or the deposits are for other reasons insufficient, supplementary deposits may be requested, paragraph (2). Where the deposits received exceed the actual cost of conciliation, the conciliator returns the unexpended balance to the parties (paragraph (4)).

81. If the deposits requested by the conciliator are not paid in full by both parties within 30 days, the conciliator may suspend or terminate the proceedings. Whether he chooses suspension or termination would depend on his assessment of the reasons for non-payment. Thus, he might prefer suspension to termination where it appears to him that payment is merely delayed for technical reasons, e.g. exchange control difficulties, and there is no indication of unwillingness of the party concerned to participate in the conciliation effort.

E. *Subsequent proceedings*

Article 19. Role of conciliator in subsequent proceedings

82. In the course of conciliation proceedings the conciliator may acquire an intimate knowledge of the dispute at issue and of the strength and weakness of the legal position of each party. Therefore, the willingness of parties to conciliate and to confide in the conciliator might well be adversely affected if it were possible for the conciliator, in subsequent arbitral or judicial proceedings, to act in a capacity where his knowledge could be prejudicial to the interests of a party. Article 19 is designed to safeguard such interests by describing the functions which a conciliator is precluded from performing whenever the dispute that was the subject of conciliation proceedings is subsequently submitted to a court or an arbitral tribunal.

83. The most obvious case is where the conciliator subsequently acts as arbitrator. While a party may challenge an arbitrator on the ground that his having acted as a conciliator in the same dispute creates doubts as to his impartiality and independence, it is not certain whether such a challenge will be sustained. Hence the necessity to include an express provision in the Rules.

84. While such a provision is contained in most conciliation rules (sometimes requiring the conciliator upon his appointment to sign a statement), it seems also reasonable to preclude the conciliator from later acting as representative or counsel of a party. The reason, here, is not so much the possible danger of bias or prejudice but the competitive advantage which the party represented by a former conciliator would have due to knowledge which the conciliator obtained during the conciliation proceedings. The result would, in particular, be undesirable with regard to confidential information received from the other party.

85. The third case is where a conciliator is a witness in subsequent proceedings. The provision precluding this is not formulated in terms of a strict prohibition since such prohibition may be invalidated by the applicable law. It merely precludes a party from presenting (or naming) the conciliator as witness.

86. The parties may of course agree to a conciliator performing the functions referred to in article 19. They may do so, for example, where the conciliator's familiarity with the dispute is regarded as an asset rather than a disadvantage, or where the conciliation attempt has failed at an early stage of the proceedings without much involvement of the conciliator.

Article 20. Admissibility of evidence in other proceedings

87. Article 20 is designed to serve the same purpose as article 19, that is, to ensure negotiations in the conciliation proceedings unimpeded by any fear of later disadvantages. While article 19 deals with the personal aspect in terms of a later role of the conciliator, article 20 is concerned with substantive information or views expressed during the conciliation proceedings. It attempts to answer the difficult question to what extent such information should be inadmissible in other proceedings because of its possibly adverse effect on the position of a party.

88. Most existing conciliation rules deal with this problem, if at all, in general terms by stating, for instance, that "nothing that has transpired in connexion with the conciliation proceedings shall in any way affect the legal rights of any of the parties whether in an arbitration or in a court of law". Such wording would seem to be too narrow in that there may be more at stake than the effects of disclosure on the legal rights of the parties, i.e. other disadvantages which disclosure may have on the position of a party in arbitral or judicial proceedings.

89. On the other hand, such a rule seems to be too wide in that it would cover "all that has transpired". It could include, for example, information contained in an expert opinion or a report about an examination of goods which no longer exist at the time of the other proceedings. In such cases, it would seem reasonable, or even necessary, to allow the use of this evidence in other proceedings.

90. Article 20, therefore, attempts to define certain categories of information which would be inadmissible in other proceedings. Taking into account the purpose of the provision, it lists as "classified material" various kinds of information or statements given for the purpose of reaching a settlement agreement. It is this common thrust of the items listed which makes them potentially prejudicial to one or the other party and justifies their inadmissibility in other proceedings.

91. In conclusion, it may be noted here that article 20 is wider than article 19 in two respects. It does not only relate to subsequent proceedings and, what is even more important in practical terms, not only to proceedings in respect of the same dispute as the conciliation proceedings. This wider scope seems appropriate in view of the practical possibility that a certain legal aspect or fact which is, for example, the object of an admission or is an element of a settlement proposal may become relevant in a different context which is the subject of other proceedings.

F. *Model Conciliation Clause*

92. As has been explained earlier (see paras. 19–21), the Rules are based on the fundamental notion that genuine conciliation can only take place if both parties, once a dispute has arisen, are willing to seek an amicable settlement of their dispute. While the Rules, accordingly, do not pre-suppose a previous commitment of the parties to take some step towards conciliation, parties are free to stipulate in advance that they commit themselves to attempt conciliation before resorting to the courts or to arbitration. In such a case, they may use one of the two variants of the Model Conciliation Clause set forth at the end of the Rules.

93. The first model clause (variant A) is fully non-committal by making it a condition that the parties, when a dispute has arisen, wish to seek an amicable settlement of the dispute. This clause makes it clear that the parties, at the time of the conclusion of the contract, do not undertake any legal obligation to initiate conciliation in the event of a dispute. The only commitment expressed in that clause concerns the application of the Rules as envisaged under article 1, paragraph (1).

94. The second model clause (variant B) provides for a degree of commitment by obliging a party, before resorting to adversary proceedings, to invite the other party to conciliation. The purpose of such invitation is to ascertain, in the event of a dispute, whether the other party is willing to seek an amicable settlement. In view of the right of the other party to refuse conciliation, such an obligation to invite might be regarded as one-sided or even unfair. However, the same imbalance exists in other proceedings where procedural burdens are placed on the party who wishes to pursue his rights. Furthermore, the duty to invite is a relatively light burden which could be even further eased by choosing a shorter period of time for reply than the 30 days laid down in article 2, paragraph (4).

95. There is another aspect of that clause: a party could be required to send an invitation even if he himself is not willing to conciliate. This possibly undesirable result is mitigated by the fact that, as experience shows, the attitude of a party may well change in the light of a positive response by the other party. If the inviting party remains unwilling, he may wish to terminate the conciliation proceedings in accordance with article 15 (*d*). His right to terminate is embodied in the Rules which the parties adopt by virtue of the conciliation clause.

96. If parties prefer a stronger commitment than the mere obligation to invite, a different clause would be required and parties should modify some of the Rules, in particular, articles 2 (requirement of consent of both parties to commencement of proceedings), 15 (right to terminate at any time) and 16 (limited resort to adversary proceedings).

C. Observations and comments by States and international organizations on the revised draft UNCITRAL Conciliation Rules (A/CN.9/187 and Add. 1 to 3)*

AUSTRALIA

Article 2. Commencement of conciliation proceedings

It would reduce the possibility of misunderstanding if the Rules were to envisage that the acceptance of the invitation to conciliate would be in writing.

A conversational response would seem more open to the possibility, for example, of the invitor treating as an acceptance, or as a rejection, a response intended to be merely exploratory.

A written response, on the other hand, would be more likely to show whether there was agreement to conciliate—thus attracting the continued application of the Rules—or whether the invitor could proceed on the basis that there would be no conciliation.

* 25 June and 1, 11 and 14 July 1980.