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Report of the Working Group on Arbitration on the work of its thirty-fifth session (Vienna, 19-30 November 2001)

Contents

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Introduction

1. 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), as well as the use of the UNCITRAL Arbitration Rules 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.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group II (Arbitration and Conciliation) (hereinafter referred to as "the Working Group"), and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress

accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7]

6. At the close of its thirty-fourth session, the Working Group requested the Secretariat to prepare revised drafts of those articles, based on the discussion in the Working Group, for consideration at its next session (A/CN.9/487, para. 20).

7. The Working Group at its thirty-fifth session (Vienna, 19-30 November 2001) was attended by the following State members: Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, India, the Islamic Republic of Iran, Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Russian Federation, Singapore, Spain, Sudan, Sweden, Thailand, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay.

8. The session was attended by observers from the following States: Argentina, Australia, Chile, Croatia, Cuba, Czech Republic, Ecuador, Finland, Guatemala, Indonesia, Iraq, Israel, Lebanon, Nigeria, Peru, Philippines, Republic of Korea, Saudi Arabia, Slovakia, Slovenia, Switzerland, Turkey and Yemen.

9. The session was attended by observers from the following international organizations: the United Nations Economic Commission for Europe, the NAFTA Article 2022 Advisory Committee, the Permanent Court of Arbitration, the Cairo Regional Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators, the International Chamber of Commerce and the Queen Mary University of London, School of International Arbitration.

10. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Mr. V.G. HEGDE (India).

11. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.II/WP.114);

(b) Note by the Secretariat: Model Legislative provisions on international commercial conciliation (A/CN.9/WG.II/WP.115);

(c) Note by the Secretariat: Draft Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation] (A/CN.9/WG.II/WP.116).

12. The Working Group adopted the following agenda:

1. Election of Officers

2. Adoption of the agenda

3. Preparation of model legislative provisions on international commercial conciliation

4. Adoption of the report.

I. Deliberations and decisions

13. The Working Group discussed agenda item 3 on the basis of the documents prepared by the Secretariat (A/CN.9/WG.II/WP.115 and A/CN.9/WG.II/WP.116). The deliberations and conclusions of the Working Group with respect to that item are reflected in Chapters III and IV below. Having completed its consideration of the substance of the provisions of the draft model legislative provisions on international commercial conciliation, the Working Group requested the Secretariat to establish a drafting group to review the entire text with a view to ensuring consistency between the various draft articles in the various language versions. The final version of the draft provisions as approved by the Working Group is contained in the annex to this report, in the form of a draft model law on international commercial conciliation. The Secretariat was requested to revise the text of the draft guide to enactment and use of the Model Law, based on the deliberations in the Working Group. It was noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session, to be held in New York from 17 to 28 June 2002.

Article 1. Scope of application

14. The text of draft article 1 as considered by the Working Group was as follows:

"(1) These model legislative provisions apply to international commercial* conciliation, as defined in articles 2 and 3,

(a) if the place of conciliation, as agreed upon by the parties or, in the absence of such agreement, as determined with the assistance of the conciliator or panel of conciliators, is in this State; or

(b) if the place of conciliation has not been agreed or otherwise determined as provided for in subparagraph (a), the place of conciliation is deemed to be in this State if any of the following places is in this State: the place of the institution that administered the conciliation proceedings; the place of residence of the conciliator or the place of business of both parties if that place is in the same country.

"(2) These model legislative provisions also apply to a commercial conciliation that is not international in the sense of article 3 if the parties have [expressly] agreed that the model legislative provisions are applicable to the conciliation.

"(3) Articles … apply also if the place of conciliation is not in this State.

"(4) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of one party after a dispute has arisen, in compliance with a mutual agreement of the parties made before the

dispute arose, or pursuant to a direction or [request] [invitation] of a court or competent governmental entity.

"(5) These model legislative provisions do not apply to:

(a) cases where a judge or an arbitrator, in the course of adjudicating a particular dispute, conducts a conciliatory process; and

(b) […].

"* The 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".

Paragraph (1)

Internationality

15. Various views were expressed as to whether the sphere of application of the draft Model Law should cover only international conciliation. One view was that the Model Law should be made equally applicable to domestic and to international commercial conciliation. In support of doing away with the distinction between domestic and international cases, it was pointed out that modern commercial practices made it increasingly difficult to establish a workable test of internationality in the field of conciliation. With a view to avoiding such an artificial distinction unduly restricting the scope of the Model Law, it was suggested that draft article 1 should establish as a principle that the Model Law would govern commercial conciliation in general. In addition to that provision, a footnote or any appropriate explanation in the guide to enactment could make it clear for those States that wished to restrict the scope of the Model Law to international conciliation that they were at liberty to do so.

16. In line with the draft guide to enactment, a widely shared view was that "the acceptability of the draft Model Law would be enhanced if no attempt was made to interfere with domestic conciliation. However, the draft Model Law contained no provision that would, in principle, be unsuitable for domestic cases. In line with this thinking, the parties are allowed to opt in to the draft Model Law as provided for in article 1(2). It should be noted that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade. The draft Model Law should not be interpreted as encouraging enacting States to limit its applicability to international cases" (A/CN.9/116, para. 36).

17. On the above understanding, the Working Group agreed that the provision defining the scope of the draft Model Law should continue to refer to "international" conciliation to avoid unnecessary interference with domestic law. It was also agreed that a footnote to draft article 1 should make it clear that the Model Law could be made applicable to domestic conciliation by enacting States. The matter was referred to the drafting group. It was decided that the discussion should be reopened after completion of the review of the substantive articles of the draft Model Law to verify whether the

footnote would need to suggest changes to the text for those States that might wish to enact this Model Law to apply to domestic as well as international conciliation.

Place of conciliation

18. The discussion initially focused on the various elements listed under subparagraphs (a) and (b) for determining the place of conciliation as a criterion for the application of the draft Model Law. Various views were expressed with respect to those subparagraphs. One view was that the reference to the place of conciliation being "determined with the assistance of the conciliator or panel of conciliators" was inconsistent with the contractual nature of the conciliation and should be deleted from both subparagraphs (a) and (b) so as not to suggest that the conciliator or the panel of conciliators had the power to impose a decision upon the parties. The opposite view was that, in practice, the application of the draft Model Law would be greatly facilitated if it expressly provided for determination of the place of conciliation by the conciliator. A related view was that the words "determined by the conciliator or panel of conciliators after consultation with the parties" should replace the words "determined with the assistance of the conciliator or panel of conciliators". Yet another view was that subparagraphs (a) and (b) should be merged and the word "because" should be inserted before the text currently in subparagraph (b).

19. Another view was that the reference to the place of residence of the conciliator should be deleted from subparagraph (b) on the grounds that it might not provide a workable criterion in cases where the conciliation was conducted by a panel of conciliators. Moreover, it was observed that the place of residence of conciliators was inappropriate as a key element determining the application of the draft Model Law. As a matter of drafting, it was suggested that the words "the institution that administered" should be replaced by the words "the institution administering" so as not to suggest that the place of conciliation could only be determined after termination of the conciliation proceedings. Yet another view was that, as currently drafted, subparagraphs (a) and (b) did not sufficiently address the needs of multi-party conciliation. The following proposal was made as a possible substitute for paragraph (1):

> "(1) These model legislative provisions apply to international commercial conciliation, as defined in articles 2 and 3,
>
> (a) if the place of conciliation, as agreed upon by the parties, is in this State; or
>
> (b) where the place of conciliation has not been agreed upon by the parties, if the place of conciliation is deemed to be in this State.
>
> "(1A) Where the place of conciliation has not been agreed upon by the parties, the place of conciliation is deemed to be in a particular State:
>
> (a) if the entire conciliation takes place in that State;
>
> (b) where the conciliation takes place in more than one State, if the principal place of business of the institution that administered the conciliation proceedings is in that State;
>
> (c) where the conciliation takes place in more than one State and the conciliation proceedings are not administered by any institution, if the principal place of business of all parties to the conciliation is in that State; or

(d) where the conciliation takes place in more than one State, the conciliation proceedings are not administered by any institution and the principal places of business of the parties to the conciliation are in different States, if the place of residence of the conciliator or the panel of conciliators is in that State".

20. In the context of the above discussion, it was proposed that paragraph (1) should be deleted altogether. It was observed that the place of conciliation as one of the main elements triggering the application of the draft Model Law had been retained so far as a result of an analogy being made with the place of arbitration in article 1(2) of the UNCITRAL Model Law on International Commercial Arbitration. It was pointed out that the place of conciliation might not need to play the same central role as might have been given to the place of arbitration in earlier texts of uniform law. In addition, it was pointed out that relying too heavily on the place of conciliation to determine the scope of application of the draft Model Law 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 process 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 draft Model Law. Examples were also given of situations where a purely domestic conciliation might take place in a foreign country without the parties intending that place to produce any consequence as to the legal regime applicable to the conciliation. Another example was that of conciliation conducted as part of an on-line dispute resolution mechanism, where it might be extremely difficult to determine a physical location as the "place of conciliation", except on an arbitrary and artificial basis.

21. It was widely felt that there was no compelling reason for the draft Model Law to provide an objective rule for determining the place of conciliation. Strong support was expressed in favour of deleting subparagraph (b). As to the subjective determination of the place of conciliation by the parties, it was felt that the text might be easier to apply if it did not rely on a determination of the place of conciliation but recognized expressly the possibility for the parties to opt in to the legislation enacting the draft Model Law (which might be different from the law governing domestic conciliation in States that chose to maintain the distinction between domestic and international conciliation). As to the main criterion that should be used for determining the scope of application of the draft Model Law in the absence of a determination by the parties, it was generally agreed that "internationality" should be used, along the lines of article 1(1) and (3) of the UNCITRAL Model Law on International Commercial Arbitration. After discussion, it was agreed that paragraph (1) should be redrafted along the lines of "This Law applies to international commercial conciliation".

Paragraph (2)

22. In line with the above approval of an opting-in mechanism to trigger the application of the draft Model Law, the Working Group was in general agreement with the objectives of paragraph (2). As a matter of drafting, it was generally felt that the opting-in provision should address both the situation where the parties agreed that the conciliation was to be regarded as international and the situation where the parties decided directly that the draft Model Law should apply, irrespective of the domestic or international nature of the conciliation.

Paragraph (3)

23. In view of its decision to delete the reference to the place of conciliation from paragraph (1), the Working Group agreed that paragraph (3) should be deleted.

Paragraph (4)

24. The view was expressed that paragraph (4) should be deleted since any listing of the grounds on which conciliation was initiated ran the risk of being incomplete, and might lend itself to misinterpretation as to its exhaustive or non-exhaustive character. In support of deletion, it was stated that the draft Model Law should apply only to conciliation carried out as a result of an agreement by the parties. Situations where conciliation was mandated by law or resulted from a decision of a court or an arbitral tribunal raised policy issues that should not be interfered with by the draft Model Law.

25. The prevailing view, however, was that a provision along the lines of paragraph (4) should be retained. As a matter of drafting, it was suggested that the words "a conciliation carried out on the initiative of a party" were ambiguous and insufficiently reflective of the practice where a conciliation was carried out upon the invitation of one party accepted by the other. Additional suggestions were that paragraph (4) should expressly refer to cases where a conciliation was mandated by law and cases where it was carried out at the request of an arbitral tribunal. It was also pointed out that paragraph (4) should make it clear that the draft Model Law applied equally, whether the agreement to conciliate had been reached before or after the dispute had arisen. Those suggestions were found generally acceptable.

Paragraph (5)

26. It was suggested that paragraph (5) should be deleted, so as to avoid any misinterpretation as to whether a judge or an arbitrator did or did not have the power to conduct a conciliation under the draft Model Law. It was widely felt, in response, that paragraph (5) was necessary to make it clear that the draft Model Law did not interfere with any procedural law that might or might not create such power for judges and arbitrators.

27. As a matter of drafting, it was stated that the words "a conciliatory process" introduced unnecessary confusion as to how a "conciliatory process" could be distinguished from "conciliation proceedings". It was suggested that the words "conciliatory process" should be replaced by "settlement conference" or any other reference to attempts made by a judge or conciliator in the course of judicial or arbitral proceedings to facilitate a settlement.

Article 2. Conciliation

28. The text of draft article 2 as considered by the Working Group was as follows:

> **"For the purposes of these model legislative provisions, "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 a panel of persons, to assist them [in an independent and impartial manner] [and without the authority to impose a binding decision on the parties] in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship".**

29. There was general agreement with the substance of the draft article. As to the first set of words between square brackets ("in an independent and impartial manner"), it was widely felt that the issue of independence and impartiality of the conciliator should not be dealt with as part of the definition of what constituted conciliation. The Working Group decided that those words should be deleted.

30. With respect to the second set of words between square brackets ("and without the authority to impose a binding decision on the parties"), it was stated that the issue of the distinction between arbitration and conciliation might not need to be addressed in a definition of "conciliation". Accordingly, it was suggested that those words should be deleted. The prevailing view, however, was that, for the avoidance of any ambiguity, it was useful for the definition to refer to the fact that a conciliator or a panel of conciliators did not have the authority to impose upon the parties a solution of the dispute.

31. As a matter of drafting, it was suggested that the readability of the draft Model Law would be improved if the definition of "conciliation" was placed closer to the beginning of the text, possibly as part of draft article 1. That suggestion was generally approved by the Working Group.

Article 3. International conciliation

32. The text of draft article 3 as considered by the Working Group was as follows:

"(1) 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) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of conciliation; or

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; [13]

"(2) 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".

33. The discussion focused on the text of paragraph (1)(b). Consistent with the decision taken as to the reference to the place of conciliation in draft article 1, it was generally agreed that subparagraph (b)(i) should be deleted. In the context of that discussion, it was recalled that in practice, in some cases, parties to an otherwise

domestic conciliation would agree for convenience on a place of conciliation abroad, without intending to make the conciliation "international". Accordingly, it was suggested that, in addition to the opting-in provision under draft article 1, the text should include an opting-out provision to the effect that parties would be free to exclude the applicability of the legislation enacting the draft Model Law. That proposal was met with general support.

34. As to the reference to "the place with which the subject-matter of the dispute is most closely connected", it was stated that it might unnecessarily narrow down the scope of the draft Model Law. A proposal was made to refer instead to "the place with which the subject-matter of the dispute is connected". It was generally felt, however, that the initial wording, which mirrored that of article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration, should be maintained.

35. With respect to paragraph (2), it was pointed out that the reference to "the place of business which has the closest relationship to the agreement to conciliate" might unnecessarily complicate the determination of the relevant place of business by suggesting a distinction between the place of business most closely connected to the underlying contract between the parties and the place of business most closely connected to the agreement to conciliate. It was pointed out that the draft Model Law would more logically establish the relevance of "the place of business with which the dispute is most closely connected". After discussion, the Working Group decided that the initial wording should be retained for reasons of consistency with article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration.

36. At the close of the discussion, it was widely agreed that, with a view to enhancing the readability of the draft Model Law and to ensuring greater consistency with the UNCITRAL Model Law on International Commercial Arbitration, the provisions of draft article 3 should be merged into draft article 1.

Restructuring of draft articles 1, 2 and 3

37. In view of the above discussion, the Working Group decided that the texts of draft articles 1, 2 and 3 should be merged in a single provision that should read along the following lines:

> **"**Article 1. Scope of application and definitions
>
> (1) This Law applies to international* commercial** conciliation.
>
> (2) 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 a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship. The conciliator or the panel of conciliators does not have the authority to impose upon the parties a solution of the dispute.
>
> (3) 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.

(4) 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.

(5) 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.

(6) The parties are free to agree to exclude the applicability of this Law.

(7) Subject to the provisions of paragraph (8), 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.

(8) 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) […].

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* States 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: […]

** The 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".

The text of draft article 1 was referred to the drafting group. It was suggested that the Guide to Enactment should explain that draft article 1 was not intended to deal with the jurisdiction of the courts of any enacting State.

Article 17. Enforceability of settlement

38. In view of the fact that there had not been sufficient time during the thirty-fourth session of the Working Group to fully discuss draft article 17, and also in view of the

overall importance of any rule that might deal with the enforcement of settlement agreements under the draft Model Law and of its possible impact on other articles, the Working Group decided that draft article 17 should be discussed in a preliminary way before other substantive provisions of the draft Model Law.

39. The text of draft article 17 as considered by the Working Group was as follows:

"[Variant A]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable [*the enacting State inserts provisions specifying provisions for the enforceability of such agreements*].

"[Variant B]

If the parties reach agreement on a settlement of the dispute, that agreement is binding and enforceable as a contract.

"[Variant C]

If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal, including by appointing the conciliator or a member of the panel of conciliators, and request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms.

"[Variant D]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable as an arbitral award."

Variant B

40. It was noted that Variant B reflected the widely shared view that, in determining its enforceability, a settlement agreement should be dealt with as a contract. It was recalled that most legal systems of the world would recognize a settlement agreement as a contract. However, while Variant B might constitute a common denominator between those various legal systems, it was generally felt that a provision along the lines of Variant B might be read as merely restating the obvious and that every effort should be made to establish a more effective enforcement regime through which a settlement agreement would be accorded a higher degree of enforceability than any unspecified contract.

Variant C

41. While limited support was expressed in favour of Variant C, it was widely felt that a provision along those lines would result in an overly complex architecture. It was stated that it might be inappropriate for the draft Model Law to suggest in a general manner that all conciliation proceedings leading to a settlement agreement should result in the appointment of an arbitral tribunal. Although such a two-stage process might be justified in certain complex cases, it would be too cumbersome to apply as a default rule. It was recalled that, whether or not a provision along the lines of Variant C was included in the draft Model Law, the parties would normally be free to appoint an arbitral tribunal as a follow-up to the conciliation process if they so wished (except in those legal systems

where the absence of an existing dispute, due to the dispute having been resolved by the settlement agreement, was regarded as an obstacle to arbitration).

Variant D

42. Strong support was expressed in favour of Variant D. It was recalled that the notion of a settlement agreement being equated with an arbitral award had been a conceptual starting point of the project that led to the preparation of the draft Model Law. It was stated that a provision along the lines of Variant D would be particularly apt to create the additional level of enforceability which the draft Model Law sought to establish beyond the contractual level described in Variant B. In addition, it was pointed out that in certain countries, the text of Variant D would be in line with existing legislation.

43. It was widely felt, however, that introducing a provision along the lines of Variant D might result in considerable uncertainties and practical difficulties. In particular, the legal fiction that the settlement agreement should be treated as an arbitral award would not alter the fundamentally contractual nature of the settlement agreement. Difficulties might therefore arise from the interplay of the two legal regimes that might be applicable, namely the general law of contracts and the legal regime governing arbitral awards. For example, as to the reasons that might be invoked for challenging the binding and enforceable character of a settlement agreement, it was stated that the grounds listed in article V of the New York Convention and in article 36 of the UNCITRAL Model Law on International Commercial Arbitration for refusing enforcement, as well as the grounds listed under article 34 of that Model Law for setting aside an arbitral award, might be insufficient or inappropriate to deal with circumstances such as fraud, mistake, duress or any other grounds on which the validity of a contract might be challenged. As to recognition and enforcement, it was observed that settlement agreements might greatly benefit from the application of the New York Convention. However, the widely shared view was that strong doubts would exist in many countries as to whether and to what extent the New York Convention could govern settlement agreements. Furthermore, it was stated that a provision based on Variant D would require a criterion distinguishing between settlements reached during or as a result of conciliation proceedings and those settlements that might have been discussed during conciliation proceedings but were concluded outside the context of such proceedings. It was considered that drawing such distinctions could be difficult given the flexible nature of conciliation proceedings.

Variant A

44. Divergent views were expressed in respect of Variant A. The variant was objected to on the grounds that stating that the settlement agreement was “binding and enforceable” did not create any certainty as to the level of enforceability of the agreement. It was stated that in many countries given that settlement agreements were readily recognized as contracts, this variant would not add to the substance of existing law. In addition, Variant A was objected to on the grounds that it did not create uniformity since it failed to provide a unified solution as to how such settlement agreements might become “enforceable” but rather left the matter to the law of each enacting State.

45. The prevailing view however was that a provision along the lines of Variant A should be introduced into the draft Model Law since it allowed a certain level of flexibility and might even constitute a useful step towards establishing greater uniformity if the guide to enactment were to facilitate the sharing of information on existing requirements for enforcement, for example through an illustrative listing of such requirements. It was generally agreed that express reference should be made in the text

of Variant A to the contractual nature of the settlement agreement. It was also agreed that, the words "and the conciliator or the panel of conciliators have signed the settlement agreement" should be deleted so as not to suggest any implication as to the liability of the conciliator or the panel of conciliators, or to create any of the obligations that might stem from becoming a witness of the agreement. Further, many conciliators might wish to avoid the appearance of favouring a particular result.

46. Various suggestions were made as to how the text of Variant A could be used as a basis for establishing a legal regime through which settlement agreements would be granted greater enforceability than an ordinary contract. One suggestion was that the draft Model Law should provide that a settlement agreement, as a contract, should have authority as *res judicata*. It was pointed out that such an approach would be in line with the existing law of conciliation in a number of countries and that, more generally, the notion of *res judicata* was known in some form to numerous legal systems. Accordingly, it was suggested that a reference to that notion should be inserted in a redraft of Variant A. A related suggestion, made with a view to enhancing the acceptability of the provision, was that such direct reference to *res judicata* as a term of art should be replaced by a description of the contents of the notion. Another suggestion was that the text of Variant A should be redrafted along the following lines: "if the parties reach agreement on a settlement of a dispute, such agreement is deemed to be binding and enforceable. Enforcement of the settlement may be refused only at the request of a party against whom it is invoked if that party furnishes evidence to the competent court where recognition or enforcement is sought that the settlement is null and void."

47. A further suggestion was that, in order to ensure that a settlement that was sought to be enforced was actually the result of a conciliation and also to guard against parties being caught by surprise by enforcement provisions, draft article 17 should require the settlement agreement to state expressly that parties agreed that it arose as a result of a conciliation proceeding and that the parties intended that it would be enforceable under legislation enacting the draft Model Law. It was pointed out that the inclusion of such a requirement would be consistent with party autonomy as the underlying principle in conciliation. Concern was expressed, however, that such additional requirements might be suitable only to cases where conciliation was administered by a conciliation institution or authority but might be too cumbersome for conciliation carried out on an *ad hoc* basis. The unintended effect of imposing such requirements might be that a number of settlement agreements would not benefit from enforceability as recognized by the draft Model Law if they did not contain the required statements.

48. The Working Group did not come to a final conclusion as to the contents of draft article 17 during the initial discussion. It was agreed that the discussion should be resumed after the Working Group had completed its review of the draft articles. The resumed discussion should be based on a revised version of Variant A, taking into account the comments made and examples of solutions in national laws that provided for expedited enforcement of settlement agreements.

New article on interpretation of the Model Law

49. A suggestion was made, and the Working Group agreed, to include in the draft Model Law a provision along the lines of article 3 of the UNCITRAL Model Law on Electronic Commerce, article 8 of the UNCITRAL Model Law on Cross-Border Insolvency, and article 4 of the UNCITRAL Model Law on Electronic Signatures. Such a provision, based on article 7 of the United Nations Convention on Contracts for the International Sale of Goods, would provide guidance for interpretation of the draft Model Law; with due regard being given to its international origin. Taking as a model the

referred to provisions in the three UNCITRAL Model Laws, the Working Group agreed on the following wording of a new draft article:

"(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 4. Variation by agreement

50. The text of draft article 4 as considered by the Working Group was as follows:

"Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions."

51. It was suggested that the words "Except as otherwise provided" were unnecessary, since no provision of the draft Model Law appeared to provide otherwise. Concern was expressed that, if the effect of draft article 4 was to allow parties to exclude or vary any or all the provisions in the draft Model Law, this could result in unintended results. For example, if parties decided to exclude all the provisions of the draft Model Law except for those relating to enforcement, or if the parties could agree that paragraph 8(3), which provided guidelines for the conduct of the conciliator, would not apply to a particular conciliation. It was widely felt that a provision such as paragraph 8(3), if it were retained in the draft Model Law, should not be subject to the discretion of the parties. The Working Group agreed that the general rule underlying the draft Model Law ought to be party autonomy and that mandatory rules should be expressly identified. The Working Group, at this stage of its discussion, did not reach a final decision regarding the opening words of draft article 4. It was agreed that the matter should be reopened after the Working Group had completed its review of the substantive provisions of the draft Model Law, with a view to identifying those mandatory provisions of the draft Model Law, if any, that might need to be listed in draft article 4.

Article 5. Commencement of conciliation proceedings

52. The text of draft article 5 as considered by the Working Group was as follows:

"(1) The conciliation proceedings in respect of a particular dispute 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 a reply within [fourteen] 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."

Paragraph (1)

53. The Working Group decided to defer consideration of draft article 5(1) until a decision had been made whether a provision dealing with the limitation period (which was currently set forth in draft article 12) would be included in the draft Model Law. It

was suggested that, if it was decided not to include a provision on the limitation period, paragraph (1) could be considered to be unnecessary.

Paragraph (2)

54. Several suggestions were made in respect of paragraph (2). One suggestion was that the rule that the party inviting the other party to conciliation could elect to treat a failure to receive a reply within fourteen days as a rejection of the invitation to conciliation, was too rigid. It was considered that, in certain circumstances, a reply to an invitation to conciliate could be delayed through no fault of the party sending that reply. To avoid that situation, a suggestion was made that the following words be added at the end of paragraph (2): "on the condition that the party gives notice to the other party or parties to the dispute that it has elected to treat the failure to respond to the invitation as a rejection of the invitation to conciliate". Another suggestion was that, instead of stating that the party inviting the other party to conciliate should "receive" a reply within fourteen days, paragraph (2) should state that the reply should be "sent" within 14 days. In response, it was recalled that such an approach had been rejected at an earlier session of the Working Group. Little support was expressed in favour of those suggestions. However, with a view to alleviating the concern that the rule established in paragraph (2) might be too rigid, it was agreed that the time period during which a reply to an invitation to conciliate should be made should be extended from fourteen to thirty days.

55. The view was expressed that, as currently drafted, paragraph (2) did not make it clear whether or not acceptance or rejection of the invitation to conciliate was confidential information. It was agreed that this question might need to be considered in the context of draft article 13, which dealt with admissibility of evidence in other proceedings.

56. Subject to the extension of the time period to thirty days, the Working Group adopted the substance of draft paragraph (2) and referred it to the drafting group.

Article 6. Number of conciliators

57. The text of draft article 6 as considered by the Working Group was as follows:

> **"There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators."**

58. The Working Group adopted the substance of draft article 6 and referred it to the drafting group.

Article 7. Appointment of conciliators

59. The text of draft article 7 as considered by the Working Group was as follows:

> **"(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.**
>
> **"(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.**

"(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

"(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) a party may request such an institution or person to recommend names of 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.

"(5) 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, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

60. A concern was expressed that, as currently drafted, draft article 7 did not contemplate the possibility that, in court-initiated arbitrations, the situation might arise that a court rather than the parties appointed a conciliator. In response it was suggested that, even in court-initiated conciliations, in some States the parties in dispute were still generally responsible for appointing the conciliator or panel of conciliators.

61. The view was expressed that in paragraphs (2) and (3) of draft article 7, the appointment provisions should only represent a fall-back provision when the parties were unable to reach a mutual agreement on the appointment of a conciliator or panel of conciliators. It was suggested that paragraphs (1), (2) and (3) should establish as a general requirement that, in all cases, parties that contemplated conciliation should endeavour to reach a mutual agreement on a conciliator or panel of conciliators. The suggestion was objected to on the grounds that such a general requirement, which might require the inclusion of a time limit within which such endeavours should be made, would introduce unnecessary complication that could further delay the commencement and progress of conciliation proceedings.

62. Another suggestion was that paragraphs (1), (2) and (3) should be redrafted to take account of multi-party conciliations. In cases where there were more than two parties, it would be impracticable for each party to appoint one conciliator. In such cases, it would be appropriate for the parties to refer the matter to an arbitral institution or an independent third person. On that basis, it was suggested that the following text should replace the current paragraphs (1), (2) and (3):

"(1) The parties shall endeavor to reach agreement on the name of the sole conciliator, or the names of the members of the panel of conciliators, to be appointed.

" (2) In conciliation proceedings involving one conciliator, if the parties are unable to reach agreement on the name of the sole conciliator, the conciliator shall be appointed by [name of appropriate institution or description of appropriate person].

"(3) In conciliation proceedings involving a panel of conciliators, if the parties are unable to reach agreement on the name of any member of the panel, that

member of the panel shall be appointed by [name of appropriate institution or description of appropriate person]."

63. A further suggestion was that paragraphs (1), (2) and (3) should be redrafted to the effect that, where the parties intended to appoint an even number of conciliators, each party should appoint an equal number of conciliators. Where parties intended to appoint an odd number of conciliators, an additional stage would need to be considered, where parties should endeavour to reach agreement on the name of the remaining conciliator. In response to that suggestion, it was pointed out that, in practice, the maximum number of conciliators was usually three.

64. While limited support was expressed in favour of each of the above suggestions, the prevailing view was that text of draft article 7 should remain unchanged. It was agreed that the draft guide to enactment might need to point out the advantages of the parties first endeavoring to mutually agree on a conciliator or panel of conciliators. The text of draft article 7 was referred to the drafting group.

65. In the context of the discussion of draft article 7, a proposal was made that a conciliator should be required to disclose any circumstances that were likely to raise justifiable doubts as to his or her impartiality or independence. It was suggested that text be included along the lines set out in article 12(1) of the UNCITRAL Model Law on International Commercial Arbitration. General support was expressed in favour of that proposal. The Working Group also discussed whether, in the event that such a requirement of disclosure was included, the provision should also set out the consequences that might result from failure to make such a disclosure. One view was that the Model Law should state expressly that failure to make such disclosure should not result in the nullification of the conciliation process. The prevailing view was that the consequences of failure to disclose such information should be left to the law of the enacting State.

66. After discussion, it was decided that a provision along the following lines should be added to the draft Model Law: "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.". The matter was referred to the drafting group.

Article 8. Conduct of conciliation

67. The text of draft article 8 as considered by the Working Group was as follows:

"(1) The parties are free to agree, by reference to a set of rules or otherwise, upon 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 or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, any [views] [expectations] [intentions] [wishes] that the parties may express, and the need for a speedy settlement of the dispute.

"(3) The conciliator shall be guided by principles of [objectivity, fairness and justice][objectivity, impartiality and independence] and seek to maintain fairness in treatment as between the parties.

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

Paragraph (1)

68. The substance of paragraph (1) was found generally acceptable.

Paragraph (2)

69. The view was expressed that paragraph (2) should be deleted, since the provision did not reflect the current practice of conciliation, which demonstrated that parties were unlikely to agree on rules of procedure that would be imposed by the conciliator. The widely prevailing view, however, was that the policy underlying the provision was appropriate, and that the substance of paragraph (2) was generally acceptable. With respect to the alternative words between square brackets, general preference was expressed for the word "wishes" (or "wishes expressed"), for reasons of consistency with article 7(3) of the UNCITRAL Conciliation Rules.

Paragraph (3)

70. The view was expressed that paragraph (3) should be deleted. The concern (expressed at the thirty-fourth session of the Working Group) was reiterated that, by providing courts with a yardstick against which to measure the conduct of conciliators, paragraph (3) could have the unintended effect of inviting parties to seek annulment of the settlement agreement through court review of the conciliation process. It was thus suggested that the statement of principles should be located in the draft guide to enactment (A/CN.9/487, para. 124). Another view was that the scope of paragraph (3) should be limited to establishing the principles to be applied by the conciliator in the conduct of the process, without interfering with the terms of the settlement agreement. However, the prevailing view was that the guiding principles should be retained in the body of the legislative provisions to the effect of providing guidance regarding conciliation, particularly for less experienced conciliators.

71. As to the alternative wordings between square brackets, it was recalled that the first variant reflected a decision made by the Working Group that "objectivity, fairness and justice" should be retained as one option (ibid., para. 125). The view was expressed that the first variant was to be preferred for the reason that it mirrored the language of article 7(2) of the UNCITRAL Conciliation Rules. The second variant reflected the view that "impartiality and independence" were to be preferred over words such as "fairness and justice" on the basis that the latter terms connoted the role of a decision maker (such as a judge or an arbitrator) rather than the role of a conciliator, and that using the English word "fairness" might cause difficulties in certain other languages, particularly if it were to be translated in the grammatical form of a substantive.

72. It was widely felt that both variants should be interpreted as establishing a standard of conduct that might vary considerably with the circumstances of the case. The view was expressed that failure to comply with paragraph (3) should not be regarded in itself as sufficient grounds for annulment of the settlement agreement. After discussion, it was agreed that the educative function, as well as the abstract and relative nature of the standard of conduct expressed in paragraph (3), might be better expressed

through the deletion of both variants. The Working Group decided that paragraph (3) should be redrafted along the following lines: "In conducting the proceedings, the conciliator or the panel of conciliators shall seek to maintain fairness in treatment as between the parties and, in so doing, shall take into account the circumstances of the case". The matter was referred to the drafting group.

73. At the close of the discussion, the Working Group agreed that, while other provisions of draft article 8 might be subject to contrary agreement between the parties, paragraph (3) should be regarded as setting a minimum standard. Thus, parties should not be allowed to agree on a different standard of conduct to be followed by conciliators. It was decided that an exception to the general application of draft article 4 should be made with respect to paragraph (3) of draft article 8.

Paragraph (4)

74. The view was expressed that paragraph (4) should be deleted. It was stated that enacting States should remain free to decide whether conciliators were entitled to make proposals for settlement. The widely prevailing view, however, was that the substance of paragraph (4) was generally acceptable.

Article 9. Communication between conciliator and parties

75. The text of draft article 9 as considered by the Working Group was as follows:

> **"Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately".**

76. It was generally felt that the text of draft article 9 might need to be revised to make it clear that any member of a panel of conciliators should be free to meet with the parties. The following text was proposed as a possible paragraph (2) to be inserted after the current draft provision: "Where there is more than one conciliator, each party-appointed conciliator shall be at liberty to meet with, discuss and communicate with the party who appointed that conciliator and, subject to any constraints placed upon the conciliator by the appointing party, the conciliator will be at liberty to disclose all or any of the content of what may have been discussed to the other conciliator or conciliators". While some support was expressed in favour of the proposed text, it was generally felt that the effect of such a provision might be to institutionalize partiality on the part of the conciliator appointed by one party. With a view to avoiding the creation of any particular relationship between a conciliator and a party, it was agreed that the text of draft article 9 should be reworded along the following lines: "Unless otherwise agreed by the parties, the conciliator, a member of the panel of conciliators or the panel of conciliators may meet or communicate with the parties together or with each of them separately". The matter was referred to the drafting group.

Article 10. Disclosure of information

77. The text of draft article 10 as considered by the Working Group was as follows:

> **"When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party.**

However, the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential".

78. The policy underlying draft article 10 was challenged, in line with a view expressed at the thirty-fourth session of the Working Group. It was stated that, in the absence of agreement to the contrary, requiring the conciliator to maintain strict confidentiality of the information communicated by a party was the only way of ensuring frankness and openness of communications in the conciliation process. Such confidentiality was reported to be consistent with conciliation practice in certain countries (A/CN.9/487, para. 131). It was proposed that draft article 10 should be amended to read as follows: "When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators shall not disclose that information to any other party unless the party giving the information expressly consents to such disclosure".

79. In response, the Working Group reiterated its preference for the view that had prevailed widely at its thirty-fourth session, according to which draft article 10 should ensure circulation of information between the various participants in the conciliation process. It was pointed out that requiring consent by the party who gave the information before any communication of that information to the other party by the conciliator would be overly formalistic, inconsistent with established practice in many countries as reflected in article 10 of the UNCITRAL Conciliation Rules, and likely to inhibit the entire conciliation process (ibid., para. 132).

80. It was pointed out that draft article 10 focused on disclosure of information as between the parties. With a view to expressing that focus more clearly, it was suggested that the current title of draft article 10 should be replaced by the words "disclosure of information between the parties". Along the same lines, it was suggested that the reference to information being "disclosed" should be reformulated to indicate unequivocally information being "disclosed to the other party". Those suggestions were accepted by the Working Group. With respect to disclosure of information to third parties, however, it was widely agreed that the draft Model Law should establish a strict rule on confidentiality (see A/CN.9/WG.II/XXXV/CRP.1/Add.5).

81. As a matter of drafting, it was suggested that the words "the substance of that information" should be replaced by the word "that information". It was pointed out in response that the current text, along the lines of article 10 of the UNCITRAL Conciliation Rules, was preferable to avoid burdening the conciliator with an obligation to communicate the literal content of any information received from the parties. Another suggestion was that the text should be brought in line with the revised text of draft article 9, through appropriate reference to "any member of the panel of conciliators". That suggestion was widely supported.

82. After discussion, the Working Group agreed that draft article 10 should be redrafted along the following lines: "When the conciliator, a member of the panel of conciliators or the panel of conciliators receives information concerning the dispute from a party, the conciliator, the member of the panel of conciliators or the panel of conciliators may disclose the substance of that information to the other party. However, the conciliator, the member of the panel of conciliators or the panel of conciliators shall not disclose to the other party information received from a party, when that party gives the information to the conciliator, the member of the panel of conciliators or the panel of

conciliators subject to a specific condition that it be kept confidential". The text was referred to the drafting group.

General provision on confidentiality

83. Support was expressed for the inclusion of a general rule of confidentiality applying to the conciliator and, possibly, to the parties. A proposal, developed on the basis of article 14 of the UNCITRAL Conciliation Rules, was made along the following lines: "The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings and the settlement agreement, except where disclosure is necessary for the purposes of implementation, enforcement or setting aside." Various concerns were expressed with respect to that proposal. One concern was that it might be inappropriate to impose upon the parties a rule that would not be subject to party autonomy and could be very difficult, if not impossible, to enforce. In response, it was suggested that the obligation to respect confidentiality could be made subject to the parties' contrary agreement. Another concern was that the proposal failed to provide for exceptions, for example in circumstances where an obligation to disclose was established by law, such as an obligation to disclose evidence of a criminal offence. A more general concern was expressed that the scope of a provision on confidentiality should be broad enough to cover not only information disclosed during the conciliation proceedings but also to cover the substance and the result of these 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.

84. With a view to alleviating those concerns, the following alternative text was proposed: "The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings and the settlement agreement. This does not apply to information which is (a) necessary for the purposes of implementation, enforcement or the setting aside of the settlement agreement; (b) authorized for disclosure by the party that originally divulged the information (c) in any event, in the public domain (d) required by law to be disclosed; or (e) necessary for a party to disclose to its professional advisers, to whom this provision would also apply." As a matter of drafting, it was pointed out by its proponents that the language set out in paragraph (b) of the proposed text might need to be finessed to cover the person with whom the information first originated. Whilst the first sentence of that proposal was found generally acceptable in substance, concern was expressed as to the exceptions set out in the second sentence. It was stated that the term "professional advisers" was unclear, for example as to whether the proposed text was intended to refer only to licensed practitioners or was also intended to cover unlicensed practitioners and whether independent auditors were considered advisors in all legal systems. Although a widely shared view emerged that the exceptions set forth in that proposal were relevant and appropriate in substance, it was strongly felt that listing exceptions in the text of the draft Model Law might raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive. After discussion, 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 the draft guide to enactment.

85. Yet another proposal was made that sought to respect party autonomy and avoid the use of any list (whether exhaustive or non-exhaustive) of exceptions. That proposal read along the following lines: "Unless otherwise agreed by the parties, and except to the

extent necessary by law or to protect a legal right, matters relating to the conciliation proceedings, shall be confidential." Concern was expressed that the phrase "legal right" was ambiguous. Wording elaborating on the text of article 14 of the UNCITRAL Conciliation Rules was proposed as an alternative so that the words "to protect a legal right" would be replaced by "for purposes of implementation, enforcement or the setting aside of the settlement agreement". While support was expressed in favour of that wording, it was pointed out that the reference to "setting aside" the settlement agreement might be inappropriate. It was stated that emphasizing the possibility of "setting aside" a settlement agreement might be inconsistent with the overall policy of the draft Model Law to provide additional enforceability for a settlement agreement, in particular under draft article 17. In addition, although article 34 of the UNCITRAL Model Law on International Commercial Arbitration enumerated grounds for setting aside an arbitral award, no similar provision had been envisaged under the draft Model Law. After discussion, it was agreed that no reference should be made to "setting aside" of the settlement agreement. As a matter of drafting a concern was raised that the words "conciliation proceedings" could be interpreted too narrowly as not covering the settlement agreement. To avoid that ambiguity, it was suggested that language such as "matters relating to the conciliation proceedings and the settlement agreement" should be used. Another suggestion was that words such as "matters relating to the conciliation proceedings, including the substance of the proceedings" would ensure a broader application for this rule. Ultimately, the phrase "all matters relating to the conciliation proceedings" was proposed and met with strong support not least because it reflected a tried and tested formula set out in article 14 of the UNCITRAL Conciliation Rules. It was agreed that the draft guide to enactment should provide the explanations necessary to avoid a narrow interpretation of the words "conciliation proceedings", and to make it clear that the exceptions to the general rule on confidentiality should cover not only the settlement agreement but also the conciliation proceedings to ensure that, for example in annulment proceedings, the right of a party to go to court (where such a right existed) would be protected.

86. In keeping with article 14 of the UNCITRAL Conciliation Rules, it was generally agreed that a provision should be included in the draft Model Law along the following lines: "Unless otherwise agreed by the parties, except where disclosure is required under the law or necessary for the purposes of implementation or enforcement of a settlement agreement, all matters relating to the conciliation proceedings shall be confidential". The matter was referred to the drafting group. The view was expressed that it would be advisable to specify the parties to whom the principle of confidentiality would apply given the reference in the provision to "law".

Article 11. Termination of conciliation

87. The text of draft Article 11 as considered by the Working Group was as follows:

"The conciliation proceedings are terminated:

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

(b) by a written declaration of the conciliator or the panel of conciliators, 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 written 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 written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

88. General support was expressed for the substance of draft article 11. Various issues were raised with respect to the wording of the draft article. It was recalled that, with a view to better accommodating the use of electronic commerce, the Working Group, at its previous session, had agreed to replace the words "the signing" with "the conclusion" of the settlement agreement. In keeping with the policy of supporting electronic means of communication, a question was raised as to whether the reference to "written declaration" in subparagraph (b) should be amended to simply refer to "declaration". It was suggested that, given that the intention of the article was to ensure that there was some evidence of termination via a declaration, words such as "or other means of communication" could be inserted in subparagraphs (b), (c) and (d) after the term "written declaration" to accommodate electronic means of communication. An alternative view was that the term "record" would be a more appropriate term to capture the need for the declaration to terminate to be retrievable. The Working Group agreed that article 6 of the UNCITRAL Model Law on Electronic Commerce provided a workable model that might be used in drafting a definition of "writing" that would accommodate electronic means of communication. It was suggested that a footnote in the draft Model Law or in its guide to enactment could provide that any enacting state that had not enacted the UNCITRAL Model Law on Electronic Commerce should consider inclusion of a provision along the lines of article 6 of that instrument when enacting the draft Model Law. It was suggested that, if it were considered necessary to elaborate upon the reference to "writing" in draft article 11, enacting States might need to consider similar developments with respect to other provisions of the draft Model Law, such as, for example, the notion "signed" in draft article 17. It was generally agreed that the issues of electronic commerce did not require specific provisions to be inserted in the draft Model Law, but should be addressed in the draft guide to enactment.

89. It was observed that the present draft addressed the situation where only one or more of the members of the panel of conciliators terminated conciliation proceedings. The current drafting of subparagraph (b) left open the question whether, where there was more than one conciliator, all members of the panel should act jointly and the declaration should originate from the entire panel of conciliators. In that connection it was noted that subparagraph (c) referred to a written declaration "addressed to the conciliator" and subparagraph (d) referred to a written declaration "of a party to the other party and the conciliator". It was suggested that both these paragraphs should be amended to cover conciliations involving more than one conciliator. That proposal received general acceptance.

90. A question was raised as to the "the date of the declaration" in subparagraphs (b), (c) and (d). It was stated that, as currently drafted, subparagraph (d) afforded a party to a conciliation not only the means of unilaterally terminating the conciliation proceedings, but also the possibility of making a unilateral decision as to the date upon which those proceedings would be terminated. A concern was raised that subparagraph (d) could lend itself to abuse by a party that backdated the declaration with the effect that certain disclosures made during the conciliation would not be covered by articles such as draft

article 10, which dealt with disclosure of information. Accordingly, a proposal was made that the words "the date of the declaration" in subparagraphs (b), (c) and (d) should be replaced by the words "the date when the declaration was received by the other party". However a contrary view was that, even if a conciliation was terminated, draft articles 10 and 13 would still govern disclosures made whilst the conciliation was still on foot.

91. After discussion, it was agreed that, with the exception of amendments needed to cover conciliations involving a panel of conciliators, the text of draft article 11 should remain unchanged, with the possible inclusion in the draft guide to enactment of an explanation regarding such terms as "written", "in writing" and "signed", when used in the context of electronic commerce. The draft article was referred to the drafting group.

Article 12. Limitation period

92. The text of draft article 12 as considered by the Working Group was as follows:

> **"[(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.]"**

93. Strong opposition was expressed to the retention of draft article 12, 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 which 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). Equally strong argument was presented in favour of inclusion of draft article 12 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 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. Some of those opposed to the inclusion of the article considered that the point of commencement of a conciliation proceeding (i.e. agreement of the parties to engage in conciliation proceedings as provided for in draft article 5) was not precise enough and that draft article 12 might be more acceptable if that point would be established with greater precision. In line with that thinking, it was suggested that paragraph (1) be redrafted along the following lines: "The running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended on the date on which the person or persons asked by the person to act as conciliator or conciliators agree to act in such capacity." It was suggested that that wording was an improvement on the current text as it tied the suspension of the limitation period to a more objective event than the agreement to engage in conciliation proceedings. However, the suggestion was opposed because it took control of suspension of the limitation period out of the hands of the parties and gave such control to conciliators. It was said that the claimant needed the protection of the interruption of the limitation period from the moment that it agreed to conciliate with the other party and that an interruption that was linked to the acceptance of person to act as a conciliator might

come too late to provide this protection. It was suggested that, if greater clarity were being sought, the better date would be the date on which an acceptance of an invitation to conciliate was received by the party inviting another party or parties to conciliation.

94. After discussion, it was decided that draft article 12 should be based on the idea that it was the agreement of the parties that suspended the limitation period and that the provision should be placed in a footnote to draft article 5 for optional use by States that wished to enact it.

Article 5(1) Commencement of conciliation proceedings

95. Having concluded its discussion of draft article 12, the Working Group reverted to draft article 5(1) in accordance with its earlier agreement that the discussion of this article be deferred until after the Working Group had considered draft article 12.

96. A suggestion that a reference to a "written agreement " for the parties to agree to conciliate (as required for arbitration agreements) was not supported because of the informality of the conciliation process and because there was no need to impose such a formal requirement upon parties wishing to resolve their dispute by conciliation.

97. It was observed that a provision on the commencement of conciliation proceedings could not be precise given that parties used different methods to agree to engage in conciliation proceedings. It was suggested that these methods could be spelt out in the guide to enactment. It was considered that, ultimately, the question of when the parties reached agreement to commence proceedings was a question of evidence. The view was expressed that defining commencement of conciliation would mainly be a problem for those States that chose to enact a provision for suspension of the limitation period along the lines of draft article 12 since parties would need to be certain of the date of such suspension. In order to make the rule more precise, a suggestion was made to include text based on article 5 of the UNCITRAL Conciliation Rules in the following terms: "Unless otherwise agreed by the parties, a conciliation will commence if a written invitation to conciliate is made by one party and received by the other party". However that suggestion was criticised because it reflected only one way in which agreement to conciliate might be reached. A further criticism was that where a court pursuant to its prerogatives ordered the parties to conciliate, it was inappropriate to assume that it was up to one party to invite the other party to conciliate and for the other party to accept such invitation. The possibility that a party's invitation was not forthcoming on the basis of a court order might imply that the parties were allowed to disregard the court order. Therefore, it was suggested that the date of the court order should be taken as the date when the conciliation proceedings commenced. Nevertheless the Working Group adopted the view that it was not the court order *per se* that triggered conciliation proceedings, but it was rather the moment when the parties implemented that order by taking steps to set the process in motion. That moment should therefore be defined in terms of the parties' initiation of conciliation proceedings. Any failure of the parties to follow the court order would give rise to consequences that fell outside the scope of the draft Model Law.

98. There was a concern that the drafting of the provision did not make a clear distinction between cases where the parties agreed to conciliate any future disputes that might arise between them and cases where the parties, after a dispute had arisen, agreed to request a third person to act as a conciliator in respect of that dispute. Draft article 5 referred only to the latter case, i.e. when the parties agreed to engage in conciliation after a dispute has arisen.

99. It was proposed that to address this the following text could be included: "(1A) For the purposes of paragraph (1), a term contained in a contract entered into before the difference or dispute arose that provides for differences or disputes arising under the contract to be resolved by conciliation does not constitute a formal agreement to engage in conciliation proceedings. (1B) For the purposes of paragraph (1), a formal agreement to engage in conciliation proceedings may be constituted by an invitation to conciliate coupled with an acceptance of such invitation." Whilst this particular wording was not supported, the policy underlying it received some support. An alternative text proposed was along the following lines: "Unless otherwise agreed by the parties, the conciliation proceedings in respect of a particular dispute that has arisen commence on the date on which a written invitation to commence proceedings made pursuant to an order of a competent authority, a prior agreement to conciliate or at the initiative of a party is accepted by the other party." However, the proposal was criticised on the basis that, as argued earlier (see para. 95 above), the provision was not appropriate for cases where a court ordered the proceedings and for cases where the parties agreed to conciliate without exchanging an invitation and its acceptance.

100. There was general agreement that a provision regarding commencement of conciliation proceedings should be retained. The view emerged that the current text was appropriate because it was general enough, provided it was amended to make it clearer that it dealt with agreements to conciliate made after a dispute arose. It was agreed that text along the following lines be included: "(1) Unless otherwise agreed, the conciliation proceedings in respect of a particular dispute that has arisen commence on the day on which the parties to the dispute agree to engage in conciliation proceedings. (2) If the 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." It was agreed that this text could replace the existing text of draft article 5(1). The substance of the provision was adopted and referred to the drafting group.

Article 13. Admissibility of evidence in other proceedings

101. The text of draft article 13 as considered by the Working Group was as follows:

"(1) [Unless otherwise agreed by the parties,] a party who participated in the conciliation proceedings or a third person shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings:

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

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

(c) Proposals made by the conciliator;

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

"(2) Paragraph (1) of this article applies irrespective of [the form of the information or evidence referred to therein] [whether the information or evidence referred to therein is in oral or written form].

"(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings] unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings.

"(4) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.

"(5) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation".

Paragraph (1)

Opening words

102. With respect to the words "[Unless otherwise agreed by the parties"], the view was expressed that the general principle stated in paragraph (1) should not be subject to party autonomy. Accordingly, it was suggested that the mandatory nature of paragraph (1) should be expressed in draft article 4. Some support was expressed in favour of that suggestion, which was aimed at preserving the autonomous and confidential character of conciliation. However, the prevailing view was that the public interest that might be attached to the prohibition established under paragraph (1) was not strong enough to justify deviation from party autonomy as one of the main principles underpinning the draft Model Law. After discussion, it was decided that paragraph (1) should remain subject to contrary agreement by the parties. As to how the non-mandatory nature of the provision should be expressed, the view was expressed that the words "[Unless otherwise agreed by the parties"] were superfluous in view of the general rule contained in draft article 4. However, the prevailing view was that maintaining those words would better reflect the function of the rule stated in paragraph (1) as a default rule of conduct for the parties.

Subparagraphs (a) to (d)

103. While general support was expressed in favour of subparagraphs (a) to (d), a suggestion was made for inclusion of two additional subparagraphs along the following lines: "(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings" and "(f) A document prepared solely for purposes of the conciliation proceedings". That suggestion was met with general approval.

104. A question was raised regarding the interplay between paragraph (1) of draft article 13 and draft article 12. It was said that to the extent that the commencement of the proceedings could suspend the limitation period under draft article 12, it was not clear how a party could provide evidence of such suspension if paragraph (1) of draft article 13 prohibited such evidence being introduced. In response, it was stated that, when it referred to "an invitation" to engage in conciliation and an expression of "willingness" to participate in conciliation proceedings, new subparagraph (a) was intended to preserve the confidentiality of the conciliation proceedings but not to deal with the agreement to conciliate. Thus, paragraph (1) did not prevent evidence of the

existence of an agreement to conciliate being introduced as a cause for suspension of the limitation period. It was observed that appropriate clarification in that respect might need to be given in the draft guide to enactment.

Paragraph (2)

105. The substance of paragraph (2) was found generally acceptable. With respect to the alternative wordings between square brackets, it was generally felt that the words "the form of the information or evidence referred to therein" should be preferred, as they did not refer to any specific form of the information. Those words thus avoided questions of interpretation that might arise, for example, as to whether information on an electronic medium should be regarded as written or oral. The matter was referred to the drafting group.

Paragraph (3)

"The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court"

106. General support was expressed for the basic rule established by paragraph (3) with respect to arbitral tribunals and courts. The discussion focused on the exceptions that should be made to the general prohibition of disclosure of information binding the parties under paragraph (1) and the courts and tribunals under paragaph (3) (see paras. 8 to 14 below).

"[whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings]"

107. While there was general agreement that the words between square brackets should be retained, it was felt that they should apply equally to paragraphs (1), (2) and (3). To that effect, it was agreed that those words should be relocated in a separate paragraph, which should read along the following lines: "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". The matter was referred to the drafting group.

"unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings"

108. Various views were expressed regarding possible exceptions to the general rule expressed earlier in paragraph (3). One view was that all mention of such possible exceptions should be deleted. It was pointed out that parties engaging in conciliation proceedings should feel confident that the confidentiality of the process would be protected by law and that they would not become obliged to divulge information relating to conciliation proceedings in the context of a later judicial or arbitral procedure. The prevailing view, however, was that the Model Law should establish expressly the power of courts and arbitral tribunals to order disclosure of information in specific circumstances.

109. As to the formulation of the exceptions to the general rule expressed at the beginning of paragraph (3), a suggestion was made that the wording of paragraph (3) should closely follow the wording adopted for the general provision on confidentiality (see A/CN.9/WG.II/XXXV/CRP.1/Add.5), along the following lines: "except where disclosure is required under the law or necessary for the purposes of implementation or enforcement of a settlement agreement". That suggestion was widely supported. In the

context of the suggested reformulation, it was pointed out that the words "is permitted under the law" contained in the current draft should be deleted. Referring to disclosure being "permitted" under the law would result in an overly broad exception to the general principle of non-disclosure, since the law could generally be interpreted as "permitting" the use of information as evidence.

110. In the context of that discussion, the view was expressed that exceptions to the prohibition of disclosure of information should apply equally to the parties under paragraphs (1) and courts or arbitral tribunals under paragraph (3). It was stated that exceptions under paragraph (1) were needed, for example to cover a situation where a party would legitimately wish to challenge the validity of the settlement agreement because that party's consent to the settlement was the result of wrongdoing on the part of the other party or the conciliator. It was stated in response that no exception to paragraph (1) was needed, provided that exceptions were offered under paragraph (3). Under that view, a party should not be allowed to make a determination as to whether information referred to in paragraph (1) should be disclosed. Instead, where a party considered that the production of information referred to in paragraph (1) was required under the law or necessary to preserve its rights, for example in cases of alleged fraud, that party should apply to a court to obtain a decision in that respect. It was stated that allowing a party to deviate from the general rule contained in paragraph (1) would undermine the right of the other party to confidentiality of the conciliation process.

111. With a view to reconciling the various views expressed regarding the exceptions to be provided to the general rules expressed in paragraphs (1) and (3), it was suggested that the issue might be dealt with under paragraph (4).

Paragraph (4)

112. A suggestion was made that the word "shall" should be replaced by "may". While support was expressed for the suggestion, the prevailing view was that the suggested amendment would give excessive discretion to the courts and encourage parties to ignore the general prohibition regarding disclosure of information. The prevailing view was that language inspired from the general provision on confidentiality (see A/CN.9/WG.II/XXXV/CRP.1/Add.5), along the lines retained for paragraph (3) ("except where disclosure is required under the law or necessary for the purposes of implementation or enforcement of a settlement agreement") would adequately cover the interests of a party in case of alleged fraud.

113. As a matter of drafting, it was agreed that, if the same language inspired from the general provision on confidentiality was to be inserted in paragraphs (3) and (4), the two paragraphs should be merged into a single provision.

114. After discussion, it was agreed that paragraphs (3) and (4) should be reformulated as a single paragraph (3) along the following lines: "(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".

Paragraph (5)

115. General agreement was expressed with the substance of paragraph (5). It was proposed that the provision should be prefaced by the words "Subject to the limitations in paragraph (1)" and the word "otherwise" should be added before the word "admissible". That proposal was found generally acceptable. The text was referred to the drafting group.

Article 14. Role of conciliator in other proceedings

116. The text of draft Article 14 as considered by the Working Group was as follows:

> **"(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.**
>
> **"(2) Evidence given by the conciliator regarding the matters referred to in paragraph (1) of article 13 or regarding the conduct of either party during the conciliation proceedings, is not admissible in any arbitral or judicial proceedings [whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings] [in respect of a dispute that was or is the subject of the conciliation proceedings]**
>
> **"(3) [Paragraph (1) applies] [Paragraphs (1) and (2) apply] also in respect of another dispute that has arisen from the same contract [or any related contract]."**

Paragraph (1)

117. It was argued that the question whether a conciliator should be able to act as a representative or counsel of either party should not be left to party autonomy. To give effect to that proposal, it was suggested that the words "or as a representative or counsel of a party" should be omitted from paragraph (1) or alternatively that the opening words of that paragraph "Unless otherwise agreed by the parties" should be deleted, with appropriate changes being introduced in draft article 4 to indicate the mandatory nature of paragraph (1). It was suggested that, in some jurisdictions, even if the parties agreed to the conciliator acting as a representative or as a counsel of any party, such an agreement would contravene ethical guidelines to be followed by conciliators and could also be perceived as undermining the integrity of conciliation as a method for dispute settlement. The proposal was objected to on the basis that it undermined the principle of party autonomy and failed to recognize that, in 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. It was suggested that paragraph (1) should be amended so that it would simply remain silent on the question whether a conciliator could act as representative or counsel of any of the parties. To that effect, it was proposed that the words "or as a representative or counsel of a party" should be deleted from paragraph (1). It was pointed out that, at least in countries where no ethical prohibition was established against it, the effect of such an amendment would be to allow a conciliator to act as counsel or representative of any party without any other party's consent. Notwithstanding that view, the Working Group agreed to the deletion of the words "or as a representative or counsel of a party in any arbitral or judicial proceedings". It was also agreed that an explanation should be given in the draft guide to enactment to clarify that,

in some jurisdictions, ethical guidelines prohibited a conciliator from acting as a representative or counsel whereas in other jurisdictions this was permitted.

118. As to the form of the agreement by the parties that a conciliator might act as an arbitrator, the view was expressed that paragraph (1) might be confusing in practice. It was suggested that the text might need to indicate more clearly whether the agreement by the parties would need to be express and also possibly written. That suggestion did not receive support.

Paragraph (2)

119. As a matter of drafting, it was suggested that the use of the term "evidence" might raise difficulties of interpretation in certain languages or legal systems when used as a substitute for "testimony" in relation to the conciliator. It was explained that paragraph (2) might be difficult to understand if it could be read as suggesting that evidence would be brought by the conciliator when it would normally be expected that such evidence would be brought by the parties. On that basis, it was suggested that the term "testimony" should be preferred to the word "evidence". It was stated in response that the concept of "testimony" was not broad enough to cover certain essential elements such as, for example, written notes taken by the conciliators in the context of the proceedings.

120. It was also suggested that the term "matters" should be replaced either by the term "facts" or "information", in line with the language used in draft article 13. A proposal was made to delete the words "or regarding the conduct of either party during the conciliation proceedings" on the basis that it contradicted the idea that conciliation should involve frank and candid discussions. That proposal was opposed on the basis that evidence as to the conduct of parties by a conciliator could be highly prejudicial and undermine the confidence of parties in conciliation proceedings. However, it was considered that the words were unnecessary since testimony about the conduct of a party was inadmissible because it was covered by one of the subparagraphs of draft article 13(1). As to the alternative wordings between square brackets, the Working Group expressed a preference for the retention of the first set of words ("[whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings]").

121. A proposal was made that, for purposes of clarity, paragraph (2) should be redrafted along the following lines "The conciliator shall not give evidence regarding the matters referred to in paragraph (1) of article 13 or regarding the conduct of either party during the conciliation proceedings." It was proposed that this sentence should be followed by a new sentence modifying the existing text to read as follows "Such evidence is not admissible in any arbitral or judicial proceedings whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation." That proposal received some support.

122. An alternative proposal to overcome concerns expressed about the term "evidence" and to better align the status of the conciliator with that of any other "third person" under draft article 13, was to amend draft article 13(1) to encompass evidence or testimony given by a conciliator. To achieve this it was proposed that paragraph (2) of draft article 14 should be deleted and that the opening words of paragraph (1) of draft article 13 should be amended to read as follows: "Unless otherwise agreed by the parties, a party who participated in the conciliation proceedings, or a third person, including the conciliator, shall not give testimony or evidence on, or introduce as evidence, in arbitral, judicial or similar proceedings". After discussion, that proposal was accepted by the Working Group and referred to the drafting group. It was also agreed that the guide to

enactment should reflect the fact that, in some jurisdictions, even the parties to a conciliation could not waive the prohibition on calling a conciliator as a witness unless a specific exception applied, such as obligation under law.

Paragraph (3)

123. It was recalled that this provision was intended to extend the coverage of both paragraphs (1) and (2) to cover disputes arising from the same or a related contract, irrespective of whether or not a conciliation clause applied to all of these disputes. It was agreed that paragraph (3) should be deleted and that its substance should be added at the end of paragraph (1) as follows: "in respect of a dispute that was or is the subject of the conciliation proceedings, as well as any dispute that has arisen from the same contract or any related contract". The matter was referred to the drafting group.

Article 15. Resort to arbitral or judicial proceedings

124. The text of draft Article 15 as considered by the Working Group was as follows:

> **"(1) During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.**
>
> **"(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with]].**
>
> **"[(3) The provisions of paragraphs (1) and (2) of this article do not prevent a party from approaching an appointing authority requesting it to appoint an arbitrator.]"**

125. The discussion focused on the implications of the second sentence of paragraph (1). It was recalled that, as currently drafted, it left each party with very broad discretion to determine whether initiating arbitral or judicial proceedings was "necessary for preserving its rights". For example, any application for interim measures of protection could easily be described as "necessary for preserving the rights" of the applicant. The probability that the second sentence might be used to defeat the first sentence of paragraph (1) thus seemed very high (A/CN.9/WG.II/WP.115, para. 42).

126. A concern was expressed that the use of the phrase "in its opinion" might not be appropriate in a model law and that further efforts should be made to find a more objective statement protecting a party's right to resort to arbitral or judicial proceedings. Subject to the possible outcome of such efforts, general support was expressed in favour of the policy underlying that second sentence of paragraph (1). It was widely felt that the rule contained in the first sentence of paragraph (1), which prohibited the initiation of any judicial or arbitral proceedings during conciliation proceedings, should be deleted, since it was too broadly stated to be acceptable as the basic rule underlying the relationship between conciliation and arbitral or judicial proceedings. A view was also expressed that this rule should be deleted because it was too narrow, applying only after

conciliation proceedings had begun, and because it remained unclear how the obligation arising from it would be enforced in some legal systems. It was agreed that the first sentence should be replaced by paragraph (2), which focused more appropriately on the case where a specific agreement of the parties prohibited the initiation of competing arbitral or judicial proceedings in cases where the parties had agreed to resort to conciliation. It was pointed out that such a redraft of article 15 should result in increased confidence in conciliation as a dispute settlement method if parties were reassured that resorting to conciliation would not undermine their legal rights. In that connection, general support was expressed in favour of the third sentence of paragraph (1), which made it clear that the initiation of judicial or arbitral proceedings during conciliation proceedings was not to be regarded in itself as termination of the conciliation proceedings.

127. With respect to the formulation of paragraph (2), general support was expressed for the current wording including the various sets of words between square brackets. However, a concern was expressed that it might allow parties to set an unreasonably long period of time during which arbitral or judicial proceedings could not be undertaken. A related concern was that paragraph (2) as currently drafted required a court or arbitral tribunal to give effect to a contractual obligation irrespective of whether or not the contractual formalities of the law outside the draft Model Law had been complied with. This could cause problems in some jurisdictions, where courts would have the discretion to refuse contractual obligations that were not drafted with sufficient certainty. In that respect, a number of delegations acknowledged that it was always open to a court to examine a contract, including a contractual provision relating to delaying court or arbitral proceedings, to determine its validity. It was suggested that the draft guide to enactment should reflect the fact that paragraph (2) would be integrated with the requirements of existing procedural and substantive law.

128. It was agreed that paragraph (3) could be deleted since it had become unnecessary in light of the accepted changes in draft article 15.

129. After discussion, it was agreed that draft article 15 should read along the lines of: "Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a certain time or until an event has occurred arbitral or judicial proceedings with respect to a present 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. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving 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". The text was referred to the drafting group.

Article 16. Arbitrator acting as conciliator

130. The text of draft article 16 as considered by the Working Group was as follows:

> **"[It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.]"**

131. It was recalled that, at the thirty-fourth session of the Working Group, the view was expressed that draft article 16 should be deleted because its focus was on actions that

could be taken during arbitral proceedings rather than actions taken during conciliation proceedings. Therefore, if that provision was needed at all, its proper place was legislation that dealt with arbitration (A/CN.9/WG.II/WP.115, para. 44). Moreover, it was recalled that, in the context of draft article 1, the Working Group had decided to exclude from the scope of the draft model legislative provisions those situations where an arbitrator would conduct a conciliation pursuant to his or her procedural prerogatives or discretion (A/CN.9/487, para. 103).

132. Two contrary views emerged on the issue whether or not to include draft article 16. One view was that its inclusion would be useful, particularly for countries with little experience in the field of conciliation. It was pointed out that the Working Group had generally accepted the principle that an arbitrator could propose and participate in conciliation. It was also pointed out that there would be no inconsistency between excluding cases where conciliation was conducted by a judge or an arbitrator from the scope of the draft Model Law and expressing in that same draft Model Law the principle that judges and conciliators were allowed to conduct such conciliation. Expressing that principle in the draft Model Law might be even more necessary in view of the fact that the UNCITRAL Model Law on International Commercial Arbitration did not deal with the issue at all. The prevailing view, however, was that, since draft article 16 dealt with the functions and the competence of an arbitrator, it would be inappropriate and confusing to include such a provision in a model law on conciliation. After discussion, it was agreed that draft article 16 should be deleted but that an appropriate explanation should be included in the draft guide to enactment to make it clear that the draft Model Law was not intended to indicate whether or not an arbitrator could act or participate in a conciliation relating to the dispute, a matter that was to the discretion of the parties acting within the context of applicable law. It was agreed that, in preparing such explanations, the Secretariat should bear in mind the text of paragraph 47 of the UNCITRAL Notes on Organizing Arbitral Proceedings.

Draft article 17

133. The Working Group resumed its consideration of draft article 17 (for previous discussion, see A/CN.9/WG.II/XXXV/CRP.1/Add.2). Various proposals were made as to how Variant A could be used as a basis for establishing a legal regime through which settlement agreements would be granted greater enforceability than an ordinary contract. One suggestion was that draft article 17 should be redrafted as follows:

> "(1) If the parties reach agreement on a settlement of the dispute and the parties have signed the settlement agreement, that agreement is binding and enforceable as a contract.
>
> "(2) After signature of the agreement, any party is barred from challenging the terms of the settlement unless it proves that the agreement is null and void [or otherwise ineffective] [under applicable law] *[the enacting State may insert further provisions specifying provisions for the enforceability of such agreements"]*.

134. While the substance of paragraph (1) was found to reflect a common denominator acceptable to the Working Group, it was widely felt that the text of proposed paragraph (2) was too restrictive since the draft Model Law might need to cover grounds for challenging a settlement agreement other than that agreement being null and void. The example was given of a settlement agreement that might be challenged on the grounds that it does not accurately reflect the terms agreed between the parties. Doubts were

expressed as to whether challenging a settlement agreement on such grounds should be permitted under the draft Model Law.

135. With a view to providing a more generic description of expedited procedures for the enforcement of settlement agreements, another proposal for a revised text of draft article 17 was made as follows:

> "If the parties reach agreement on a settlement of the dispute, that agreement is binding, and enforceable by the same procedures as a settlement agreement of a commercial dispute is enforceable in this State. [The enacting State may insert a description or reference to such procedures. In addition, the enacting State may insert: "If the parties include in the settlement agreement that it was reached in a conciliation and that they agree that it is enforceable in the same way as an arbitral award in an international commercial dispute is enforceable in this State, it shall be enforceable by such procedures and subject to such defences and means of recourse as apply in this State with respect to international commercial arbitral awards.]"

136. While some support was expressed in favour of that proposal, it was widely felt that simply referring in the text to the existence of procedures for the enforcement of a settlement agreement of a commercial dispute under the law of the enacting State resulted in merely restating the obvious and failed to provide the minimum level of harmonization that could be expected from a text of uniform law prepared by UNCITRAL. As a matter of drafting, doubts were expressed as to whether using the words "the same procedures" adequately reflected the need to refer to both procedural and substantive law. It was also pointed out that, in view of the multiplicity of procedures that might be available in any country regarding the enforcement of a settlement agreement, the suggested text would be of little assistance to its users.

137. Regarding the possibility that parties would agree that the settlement agreement "is enforceable in the same way as an arbitral award", divergent views were expressed as to whether the effect of that proposal would be to render a settlement agreement enforceable under the New York Convention (see A/CN.9/WG.II/XXXV/CRP.1/Add.2, para. 6). Strong reservations were expressed as to the feasibility of equating a settlement agreement that was fundamentally a contract with an arbitral award. It was stated that, in some countries, objections of a constitutional nature would oppose the establishment of such a fiction.

138. A widely shared view was that more work and additional research was needed as to how the enforceable character of a settlement agreement might be expressed in the draft Model Law. Additional suggestions were made as to how the draft Model Law might achieve a step towards harmonizing the various laws and establishing an expedited enforcement mechanism. One suggestion was that the draft Model Law should establish as a minimum uniform rule that, in challenging the binding and enforceable character of a settlement agreement, the claimant would bear the burden of proof. Another suggestion was that additional work should concentrate on the grounds for refusing enforcement of a settlement agreement, with article V of the New York Convention and articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration being used as a source of inspiration. Yet another suggestion was that the legal regime of notarized acts in certain countries might constitute a useful model. It was pointed out, however, that such a model might require the establishment of form requirement for settlement agreement, thus introducing a level of formalism that might contradict existing conciliation practice.

139. After discussion, the Working Group decided that the text of draft article 17 should be redrafted along the following lines: "If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State inserts a description of the method of enforcing settlement agreements or refers to provisions governing such enforcement*]". It was pointed out that the text was aimed at reflecting the smallest common denominator between the various legal systems. It was recognized that the text was ambiguous, since it might be read in different languages and different legal systems either as creating a high degree of enforceability or as merely referring to the obvious fact that a settlement agreement could be made enforceable through appropriate procedures. It was noted that, in preparation for the thirty-fifth session of the Commission, States would be invited to submit official comments on the draft text and that the Secretariat would hold informal consultations regarding the feasibility of improving on that text.

Draft article 4

140. Pursuant to its earlier agreement, the Working Group proceeded to consider provisions in the draft Model Law that might need to be regarded as mandatory and thus not subject to variation by agreement as permitted by draft article 4. It was recalled that any such provisions would need to be listed in draft article 4.

141. It was recalled that paragraph (3) of draft article 8, which set out guiding principles of conduct for the conciliator had been agreed as a mandatory provision which was not subject to party autonomy. In addition, it was agreed that the new article regarding interpretation of the draft Model Law was not intended to apply to the relationships between the parties. That new article should therefore be considered as mandatory and not be subject to party autonomy.

142. A suggestion was made that draft article 17 should be mandatory. A number of delegations expressed concern with that suggestion on the basis that the draft text was ambiguous. In response, it was stated that, although greater clarity in draft article 17 could be sought through informal consultations or the provision of comments by Governments, draft article 17 should be mandatory as a provision on enforcement, regardless of its final drafting. It was generally agreed that, to the extent the draft Model Law would contain a provision on enforcement, that provision should not be subject to party autonomy. However, it was also felt that the uncertainty regarding draft article 17 as currently drafted was such that it should not be listed among the mandatory provisions of the draft Model Law. An alternative proposal was made that a footnote to draft article 17 could be included in the text along the following lines: "When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility for such a procedure to be mandatory". After discussion, that proposal was adopted by the Working Group.

143. A question was raised as to whether draft article 1 also needed to be listed among the mandatory provisions. It was suggested that, in its future deliberations, the Commission might need to consider the extent to which certain provisions regarding the sphere of application of the Model Law would need to be included in the list of mandatory provisions contained in draft article 4. The Working Group took note of that suggestion.

144. After discussion, it was agreed that draft article 17 should be listed as a mandatory provision in draft article 4. However, it was also agreed that the Secretariat would continue to hold informal consultations on the drafting of article 17.

II. Draft Guide to Enactment of the UNCITRAL Model Law on International Commercial Conciliation

Title and general comments

145. The Working Group proceeded to consider the draft guide to enactment of the UNCITRAL Model Law on International Commercial Conciliation set out in A/CN.9/WG.II/WP.116.

146. It was suggested that the title of the draft guide should be changed to "Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation" to better reflect that the guide was intended not only for legislators but also for other users of the text, including judges, practitioners and academics. The Working Group accepted that proposal.

147. A question was raised as to whether the draft guide was intended for adoption by the Commission or simply for publication under the responsibility of the Secretariat. While guides to enactment published with earlier UNCITRAL model laws had been expressly adopted by the Commission, it was noted that the two options were open. It was agreed that whatever course was taken, the draft guide should reflect the decision of the Commission in its opening statement under the section entitled "Purpose of this guide".

Paragraph 4

148. It was suggested that, in light of the changes made to paragraph 8(3) which omitted references to "independent and impartial", it would be appropriate to amend references to these terms in the first sentence of draft paragraph 4 of the draft guide. It was also suggested that, in the penultimate sentence of draft paragraph 4, it might be appropriate to provide a clearer distinction between conciliation and arbitration such as, for example, by including a reference to the non-adjudicatory nature of the conciliation process. Alternatively, it was proposed that the language in that sentence could be amended by deleting "involves independent and impartial third person assistance" and substituting that with "involves third person assistance in an independent and impartial manner".

Paragraph 7

149. It was suggested that draft paragraph 7 should be amended to better reflect the policy expressed in the Working Group that the draft Model Law should seek to improve the possibilities of making settlement agreements binding and enforceable. As presently drafted, the draft paragraph might be read as indicating that conciliation could never be binding.

Scope

150. In respect of section D entitled "Scope", it was suggested that paragraph 12 should be amended to reflect the discussion in the Working Group that some provisions were intended to be mandatory.

Structure of the Model Law

151. The view was expressed that the use of the term "rules" in paragraph 19, and earlier in paragraph 16, was confusing. It was suggested that, where appropriate, the draft guide should refer to the term "rules" when speaking of conciliation rules but

should use the term "provisions" when referring to provisions of the text of the draft Model Law.

Article-by-article remarks

152. A suggestion was made that draft paragraph 23 should reflect that the reference to "commercial" was based on a definition set out in the UNCITRAL Model Law on International Commercial Arbitration. Another suggestion was that the reference to "commercial" should also include a reference to "electronic commerce". It was recalled that the notion of "electronic commerce" did not apply only to the commercial sphere, as observed in the context of work by the Commission in the field of electronic commerce. However, it was agreed that appropriate explanations would be included in the draft guide to indicate that the draft Model Law was intended to accommodate the needs of electronic commerce and on-line dispute settlement.

153. It was also suggested that the indication in paragraph 23 that defining "commercial" "may be particularly useful for those countries where a discrete body of commercial law does not exist" was too narrow. It was suggested that the footnote could also be useful in countries where a discrete body of commercial law existed because this law might differ from country to country and the footnote could play a harmonising role in this respect.

Article 6. Number of conciliators

154. It was suggested that draft paragraph 41 should be amended to indicate that the default rule referred to therein was inspired by the rule as set out in the UNCITRAL Model Law on International Commercial Arbitration. However, a number of private international arbitration rules provided a default rule of one arbitrator.

Article 7. Appointment of conciliators

155. It was suggested that a general reference should be included in draft paragraph 42 that, in the case of conciliation, it was possible to have an even number of conciliators on the basis that the conciliators were not required to render a decision or to vote.

Article 8. Conduct of conciliation

156. It was suggested that the commentary regarding draft article 9 in draft paragraphs 44 to 46 (inclusive) should express the policy agreed to in the Working Group that the references to "fair treatment of the parties" in the draft Model Law was intended to govern the conciliation process and not the settlement agreement.

Article 9. Communication between conciliator and the parties

157. It was suggested that in draft paragraph 48 the words "shall use his or her best efforts" or "shall act so as to" should be included after the words "The conciliator" to better reflect changes made during the discussion regarding draft article 8.

Article 10. Disclosure of information

158. It was suggested that the final words in draft paragraph 49, namely ", unlike in arbitration, where the duty of disclosure is absolute" should be deleted as that could be considered to be an overstatement and also was not appropriate to include in a guide relating to conciliation.

Article 16

159. Although the Working Group acknowledged that draft article 16 had been omitted, there was agreement that the draft guide should reflect, in an appropriate place,

the fact that, in a number of jurisdictions, arbitrators were permitted to act as conciliators, although this practice was prohibited in other jurisdictions.

Article 17 Enforceability of settlement

160. It was agreed that States would provide the Secretariat with examples of national legislation and practices relating to enforcement of settlement agreements, for possible reflection in the draft guide to enactment.

161. The Secretariat was requested to prepare a revised version of the draft guide to enactment and use of the draft Model Law on International Commercial Conciliation, taking into account the deliberations of the Working Group regarding the draft articles and the above suggestions.

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Annex

Draft UNCITRAL Model Law on International Commercial Conciliation

(as approved by UNCITRAL Working Group II (Arbitration and Conciliation) at its thirty-fifth session, held at Vienna from 19 to 30 November 2001)

Article 1. Scope of application and definitions

(1) This Law applies to international[1] commercial[2] conciliation.

(2) 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 a panel of persons, 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 or the panel of conciliators does not have the authority to impose upon the parties a solution to the dispute.

(3) 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.

(4) 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.

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[1] States 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: […]

[2] The 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.

(5) 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.

(6) The parties are free to agree to exclude the applicability of this Law.

(7) Subject to the provisions of paragraph (8) 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.

(8) 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) […].

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 7, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings[3]

(1) Unless otherwise agreed by the parties, the conciliation proceedings in respect of a particular 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.

[3] The 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.

Article 5. Number of conciliators

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.

Article 6. Appointment of conciliators

(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend names of 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.

(5) 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, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(6) 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.

Article 7. 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 or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators 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 or the panel of conciliators 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 8. Communication between conciliator and parties

Unless otherwise agreed by the parties, the conciliator, the panel of conciliators or a member of the panel may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information between the parties

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

Article 10. Duty of 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 11. Admissibility of evidence in other proceedings

(1) Unless otherwise agreed by the parties, a party that participated in the conciliation proceedings or a third person, including a conciliator, 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.

Article 12. Termination of conciliation

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 written declaration of the conciliator or the panel of conciliators, 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 written declaration of the parties addressed to the conciliator or the panel of conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

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

Article 13. 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 any related contract.

Article 14. Resort to arbitral or judicial proceedings

(1) 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.

(2) A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary 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 15. Enforceability of settlement agreement[4]

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

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

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[2] Ibid., paras. 340-343.

[3] Ibid., paras. 344-350.

[4] Ibid., paras. 371-373.

[5] Ibid., paras. 374 and 375.

[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[7] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.