INDIAN SYMPOSIUM ON DISPUTE RESOLUTION, 2018

AMITY LAW SCHOOL, DELHI &
Peacekeeping And Conflict Resolution Team
(The PACT.)

Reading Material (Volume 2 of 4), curated by, Arjun Natarajan, Advisor – ISDR

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CURATED BY:

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(IIAM and IICA under the aegis of Ministry of Corporate Affairs – Government of India)

Founder & Publishing Editor of www.indianmediationlaw.wordpress.com

NOTE

*Para. 1.

*Para. 4.

*Para. 6.

*Para. 8.

*Para. 9.

*Para. 10.

149 ANNEXURE V2/11

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **EFA (OS) No. 19 of 2009**

Date of Decision : May 18, 2009

SHRI RAVI AGGARWAL .....Appellant
Through: Mr. Sanjeev Palli, Advocate

Versus

SHRI ANIL JAGOTA .....Respondent
Through: Mr. Girish Aggarwal, Advocate
For the respondent/caveator.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJAY KISHAN KAUL, J. (ORAL)

Caveat No. 42/2009 in EFA(OS) No. 19/2009

Learned counsel for the respondent/caveator has entered appearance, thus the caveat stands discharged.

CM APPL. No. 7178/2009 (Exemption) in EFA(OS) No. 19/2009

Allowed subject to just exceptions.

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+ **EFA (OS) No. 19/2009**

1. The present appeal in fact raises an interesting question of law as to how a settlement recorded in a private mediation should be enforceable.

2. The factual matrix of the case is set out. The parties were partners in M/s. Plywood Traders. There were some disputes and the matter was taken up for mediation by one Mr.Virender Taneja, who was known to both the parties. A settlement was arrived at between the parties.

3. The appellant filed a petition under Section 8 read with Section 11 of the Arbitration and Conciliation Act on the ground that certain disputes had arisen between the parties and on account of there being an arbitration clause in the Partnership Deed, reference should be made to an arbitrator. The respondent took a preliminary objection that the disputes between the parties stood resolved in a private mediation where the mediator has been jointly appointed by the parties and thus nothing remained to be adjudicated. Respondent also took a stand that he has no objection if the settlement is implemented and acted upon. In fact the stand in those proceedings of the respondent was that the settlement had already been acted upon though this position was disputed by the appellant. The appellant also stated that he had no objection if the settlement was acted upon. The learned Single Judge thus by an order dated 25.10.2005, found that there was no need to appoint an arbitrator and in case the plea of the appellant was that "the

settlement/award had not been implemented fully", it was open to seek enforcement thereof by resorting to appropriate legal proceedings.

4. The appellant thereafter proceeded to file an execution petition seeking enforcement of the settlement. This execution petition has been held to be not maintainable in terms of the impugned order dated 26.03.2009. The reason for the same is that the parties had settled their disputes through a mediator and the Court had not appointed either an arbitrator or mediator. No decree had been passed in terms of Section 2(2) of the Civil Procedure Code which could be executable. We may notice that though the stand of the appellant was that the settlement arrived at between the parties was in the nature of an arbitral award and executable. The learned Single Judge found that no award had been passed by any arbitrator under the said Act.

5. Learned counsel for the appellant drew our attention to the provisions of Section 30 of the said Act in support of his case that even a settlement mutually arrived at in arbitration between the parties is enforceable and can be executed as a decree. The said provision reads as under:

> "30. Settlement. – (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

> (2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
>
> (3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
>
> (4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute."

6. We are unable to accept the submission of the learned counsel for the appellant for the reason that sub-section (1) of Section 30 of the said Act provides for a duly constituted arbitral Tribunal to encourage settlement. In case such a settlement is arrived at, the settlement is to be recorded in the form of an arbitral award on agreed terms. It is then only that the award becomes executable. Thus, it is not the settlement *per se* which is executable but an award made by a duly constituted Arbitral Tribunal based on a settlement which is executable. The facts of the present case show that no Arbitral Tribunal was constituted but undoubtedly a third party was put in the picture to arrive at a settlement who only acted as a mediator.

7. Learned counsel has also drawn our attention to the provisions of Sections 73 and 74 of the said Act which read as under:

> "73. Settlement agreement. – (1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After

receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement. – The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30."

8. The said provisions fall in Part III of the said Act dealing with conciliation. Conciliation proceedings had to be initiated in terms of Section 62 of the said Act. The settlement agreement envisaged under Section 73 of the said Act has to be one which is in pursuance to a duly constituted conciliation proceedings as per Section 62 of the said Act. If such a settlement comes about then that settlement is enforceable as an arbitral award in terms of Section 74 of the said Act. The legislature in its wisdom has not considered it appropriate to provide for a mediation settlement privately arrived at to be enforced as a decree *de hors* Part III of the said Act.

9. The result of the aforesaid is that though there is a valid settlement arrived at between the parties in mediation proceedings, which is undisputed by both the parties, the question is of implementation of that settlement and thus it partakes the character of a private agreement which is sought to be enforced by one of the parties alleging a breach while the other party is alleging due compliance.

10. We are thus of the considered view that the remedy of execution is not available to the appellant. The appellant has been endeavouring to seek different remedies under provisions of the said Act but will have to initiate appropriate legal proceedings in accordance with law for seeking enforcement of the settlement in the form of a private agreement.

11. Learned counsel for the appellant states that in view of his bona fide endeavour to seek enforcement of the settlement agreement and the legal proceedings initiated in pursuance thereto the period of limitation for enforcement of that agreement should be extended. This is a matter to be examined by the Court where such proceedings are initiated, if any.

12. The appeal is dismissed with the aforesaid observations.

SANJAY KISHAN KAUL, J.

MAY 18, 2009
rd

SUDERSHAN KUMAR MISRA, J.

NOTE

*Article 1(3) at page 162 of this volume.

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ANNEXURE V2/12

UNCITRAL Model Law on International Commercial Conciliation

with

Guide to Enactment and Use 2002

UNITED NATIONS

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UNCITRAL Model Law on International Commercial Conciliation

with

Guide to Enactment and Use 2002

UNITED NATIONS
New York, 2004

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Resolution adopted by the General Assembly

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

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

The General Assembly,

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

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

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

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

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

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

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

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

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

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

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

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

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

52nd plenary meeting
19 November 2002

Part One

UNCITRAL Model Law on International Commercial Conciliation (2002)

Article 1. Scope of application and definitions

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

2. For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

4. A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

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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:

— Delete the word "international" in paragraph 1 of article 1; and

— Delete paragraphs 4, 5 and 6 of article 1.

[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.

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

5. For the purposes of this article:

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

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

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

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

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

9. This Law does not apply to:

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

(b) [. . .]

Article 2. Interpretation

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

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

Article 3. Variation by agreement

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

Article 4. Commencement of conciliation proceedings[3]

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

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

Article 5. Number and appointment of conciliators

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

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

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

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

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

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

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[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 agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

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

Article 6. Conduct of conciliation

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

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

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

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

Article 7. Communication between conciliator and parties

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

Article 8. Disclosure of information

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

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Article 9. Confidentiality

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

Article 10. Admissibility of evidence in other proceedings

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

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

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

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

(d) Proposals made by the conciliator;

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

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

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

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

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

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

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

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

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

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

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

Article 12. Conciliator acting as arbitrator

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

Article 13. Resort to arbitral or judicial proceedings

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

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Article 14. Enforceability of settlement agreement[4]

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

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

Part Two

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

Purpose of this guide

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

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

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

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

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

I. Introduction to the Model Law

A. Notion of conciliation and purpose of the Model Law

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

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

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

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

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

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

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

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

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

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

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

B. *The Model Law as a tool for harmonizing legislation*

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

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

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

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

C. Background and history

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

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

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

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

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

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

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

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

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

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

D. Scope

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

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

E. Structure of the Model Law

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

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

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

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

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

F. Assistance from the UNCITRAL secretariat

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

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

UNCITRAL secretariat
Vienna International Centre
PO Box 500
A 1400 Vienna
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Telephone: +(43) (1) 26060-4060 or 4061
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Electronic mail: uncitral@uncitral.org
Internet home page: http://www.uncitral.org

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II. Article-by-article remarks

Article 1. Scope of application and definitions

Text of article 1

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

2. For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

4. A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

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

5. For the purposes of this article:

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

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

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

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

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

9. This Law does not apply to:

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

(b) [. . .].

[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:

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

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

[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.

Comments on article 1

Purpose of article 1

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

"Commercial conciliation"

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

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

Place of conciliation

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

Intent of the parties to conciliate

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

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

Broad notion of conciliation

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

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

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

International conciliation

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

Possible coverage of domestic conciliation

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

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

Opting out of the Model Law

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

Situation where parties are obliged to conciliate

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

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

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

Possible exclusions from the scope of enacting legislation

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

[12]Ibid., paras. 26 and 152.

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

Use of conciliation in multiparty situations

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

References to UNCITRAL documents in respect of article 1

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

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

[13] Ibid., paras. 173-177.

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

Article 2. Interpretation

Text of article 2

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

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

Comments on article 2

Interpretation of the Model Law

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

[14] United Nations publication, Sales No. E.95.V.12.
[15] United Nations publication, Sales No. E.99.V.4.
[16] United Nations publication, Sales No. E.99.V.3.
[17] United Nations publication, Sales No. E.02.V.8.

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

General principles upon which the Model Law is based

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

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

(b) To promote the uniformity of the law;

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

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

References to UNCITRAL documents in respect of article 2

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

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

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

Article 3. Variation by agreement

Text of article 3

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

Comments on article 3

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

References to UNCITRAL documents in respect of article 3

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

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

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

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

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

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

Article 4. Commencement of conciliation proceedings[3]

Text of article 4

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

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

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

[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 agreement.

Comments on article 4

Effect of article 4

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

Methods by which parties may agree to engage in conciliation

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

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

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

Time period for accepting an invitation to conciliate

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

Withdrawal of an invitation to conciliate

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

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

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

Possible provision on the suspension of a limitation period

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

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

[19] Ibid., para. 33.

[20] Ibid.

[21] Ibid.

[22] Ibid., para. 96.

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References to UNCITRAL documents in respect of article 4

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

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

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

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

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

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

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

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

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

Article 5. Number and appointment of conciliators

Text of article 5

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

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

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

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

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

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

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

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Comments on article 5

Default rule

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

Agreement by the parties on the selection of a conciliator

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

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

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

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

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

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

References to UNCITRAL documents in respect of article 5

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

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

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

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

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

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

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

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

[23] Ibid., paras. 50 and 157.

Article 6. Conduct of conciliation

Text of article 6

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

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

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

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

Comments on article 6

Agreement by the parties

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

Role of the conciliator

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

Fair and equal treatment of the parties

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

[24] Ibid., para. 158.

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

Proposal for settlement

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

References to UNCITRAL documents in respect of article 6

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

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

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

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

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

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

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

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

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

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

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

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[25] Ibid., para. 57.

[26] Ibid., para. 58.

[27] Ibid., para. 160.

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Article 7. Communication between conciliator and parties

Text of article 7

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

Comment on article 7

Freedom of communication

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

References to UNCITRAL documents in respect of article 7

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

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

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

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

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

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

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

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

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

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

Article 8. Disclosure of information

Text of article 8

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

Comments on article 8

Need for open communications between parties and the conciliator

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

Disclosure of information

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

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

Notion of "information"

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

References to UNCITRAL documents in respect of article 8

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

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

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

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

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

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

[28]Ibid., para. 161.

[29]Ibid., para. 162.

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

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

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

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

Article 9. Confidentiality

Text of article 9

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

Comments on article 9

General rule regarding confidentiality

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

Party autonomy

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

[30] Ibid., para. 81.

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

Exceptions to the rule

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

References to UNCITRAL documents in respect of article 9

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

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

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

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

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

[31] Ibid., para. 76.

Article 10. Admissibility of evidence in other proceedings

Text of article 10

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

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

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

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

(d) Proposals made by the conciliator;

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

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

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

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

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

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

Comments on article 10

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

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

arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. The possibility of such a "spillover" of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation (A/CN.9/WG.II/WP.108, para. 18). Thus, article 10 is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph 1 in any later proceedings (A/CN.9/514, para. 61). The words "and any third person" are used to clarify that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings are also bound by paragraph 1.[32] The term "similar proceedings" is intended to cover not only administrative proceedings but also such procedures as "discovery" and "depositions" in countries where such methods of obtaining evidence are used[33] and are not covered by the notion of "judicial proceedings".

Relationship with article 20 of the UNCITRAL Conciliation Rules

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

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

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

(c) Proposals made by the conciliator;

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

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

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[32] Ibid., para. 83.

[33] Ibid., para. 166.

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

Effect of article 10

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

Form of the information or evidence

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

Prohibition of disclosure of conciliation-related evidence or information

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

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

Situation where disclosure of information is permitted or required by law

70. In the preparation of the Model Law, it was recognized that, in certain systems, the term "law" includes not only the texts of statutes, but also court decisions. In finalizing the text of the Model Law, the Commission agreed that the term "law" should be given a narrow interpretation so as to be interpreted to refer to legislation rather than orders by arbitral or judicial tribunals ordering a party to a conciliation, at the request of another party, to disclose the information mentioned in paragraph 1. Thus, if disclosure of evidence is requested by a party so as to support its position in litigation or similar proceedings (without there existing overriding public policy interests such as those referred to below), the court would be barred from issuing a disclosure order. However, orders by a court (such as disclosure orders combined with a threat of sanctions, including criminal sanctions, directed to a party or another person who could give evidence referred to in paragraph 1), are normally based on legislation, and certain types of such orders (in particular, if based on the law of criminal procedure or laws protecting public safety or professional integrity) may be regarded as exceptions to the rule of paragraph 1.[36]

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

Relationship between conciliation and subsequent proceedings

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

[36] Ibid., para. 167.

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

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

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

References to UNCITRAL documents in respect of article 10

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

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

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

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

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

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

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

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

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

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

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

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

Article 11. Termination of conciliation

Text of article 11

The conciliation proceedings are terminated:

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

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

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

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

Comments on article 11

Circumstances in which conciliation may be terminated

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

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

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

Form of termination

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

References to UNCITRAL documents in respect of article 11

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

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

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

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

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

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

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

[37] Ibid., para. 169.

[38] Ibid., paras. 96 and 168.

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

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

Article 12. Conciliator acting as arbitrator

Text of article 12

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

Comments on article 12

Default rule, subject to party autonomy

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

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

[39] Ibid., para. 170.

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

Scope of article 12

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

Arbitrator acting as conciliator

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

[40]Ibid.

[41]Ibid., para. 102.

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

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

Conciliator acting as representative or counsel of a party

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

References to UNCITRAL documents in respect of article 12

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

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

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

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

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

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

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

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

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

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

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

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Article 13. Resort to arbitral or judicial proceedings

Text of article 13

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

Comments on article 13

Limitation of the freedom to initiate arbitral or judicial proceedings

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

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

"Except to the extent necessary for a party, in its opinion, to preserve its rights"

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

[44] Ibid., para. 112.

article 13 creates the possibility for a party to disregard that agreement where, in the opinion of that party, the initiation of arbitral or court proceedings is necessary to preserve its rights. That provision is based on the assumption that parties will effectively limit themselves in good faith to initiating arbitral or court proceedings in circumstances where such proceedings are truly necessary to preserve their rights. Possible circumstances that may require such proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of a limitation period (A/CN.9/514, para. 76).[45] A party might initiate court or arbitral proceedings also where one of the parties remained passive and thus hindered implementation of the conciliation agreement. However, in such a case, a party could initiate judicial or arbitral proceedings after the conciliation proceedings were terminated pursuant to article 11.[46]

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

References to UNCITRAL documents in respect of article 13

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

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

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

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

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

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

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

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

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

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

[45] Ibid., para. 117.

[46] Ibid.

[47] Ibid., para. 116.

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Article 14. Enforceability of settlement agreement[4]

Text of article 14

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

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

Comments on article 14

Reasons for expedited enforcement

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

Issue of enforcement of a settlement agreement left to domestic law

88. The text of the article reflects the smallest common denominator between the various legal systems. In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation. Article 14 thus leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable domestic law[48] or to provisions to be formulated in the legislation enacting the Model Law. In finalizing this article, the Commission noted that the purpose of the Model Law was not to discourage laws of the enacting State from imposing form requirements such as a requirement for signature or written form where such a requirement was considered essential.[49] Various examples of treatment of the issue of expedited enforcement of settlement agreements in domestic legislation are outlined below, with a view to facilitating consideration of possible options by legislators enacting the Model Law.

[48]Ibid., para. 124.

[49]Ibid., para. 123.

Contractual nature of a settlement agreement in some States

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

Examples of additional characteristics of settlement agreements in certain legal systems

90. In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. Such legislation and practice were reported, for example, in Hungary[50] and the Republic of Korea.[51] In China, where conciliation may be conducted by an arbitral tribunal, legislation provides that if conciliation leads to a settlement agreement, the arbitral tribunal shall make a written conciliation statement or make an arbitration award in accordance with the settlement agreement. A written conciliation statement and a written arbitration award shall have equal legal validity and effect.[52] In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. For example, under Australian legislation, agreements reached in conciliation held outside the sphere of court-annexed conciliation schemes cannot be registered with the court unless court proceedings are on foot, whereas, in court-annexed conciliation schemes, a court may make orders in accordance with the settlement agreement and the orders have legal force and are enforceable as such (A/CN.9/514, para. 79).

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

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

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

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

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

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

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

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[53]Bermuda, Arbitration Act 1986.

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

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

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

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

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

"Conclude an agreement"

92. Any enacting State that has not enacted the UNCITRAL Model Law on Electronic Commerce should consider inclusion of a provision along the lines of articles 6 and 7 of that instrument[57] when enacting this Model Law (A/CN.9/506, para. 88) in order to remove obstacles to the increased use of electronic communications in international commercial conciliation.

References to UNCITRAL documents in respect of article 14

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

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

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

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

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

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

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

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

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

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

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

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

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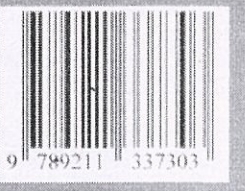

NOTE

*See pages 222 and 223 of this volume.

220 ANNEXURE V2/13

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Settlement of commercial disputes

Enforcement of settlement agreements resulting from international commercial conciliation/mediation

Compilation of comments by Governments

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I. Introduction

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

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

II. Questionnaire

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

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

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

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

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

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

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

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

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

In the affirmative, please indicate:

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

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

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

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

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

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

B. Reference to the questionnaire

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

Question 1: Information regarding the legislative framework

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

Question 3: Validity of international commercial settlement agreements

Question 4: Any other comment

III. Compilation of comments

1. Armenia

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

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

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

Question 3: Validity of international commercial settlement agreements

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

2. Austria

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

Question 4: Any other comment

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

3. Belarus

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

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

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

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

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

Enforcement of mediation agreements:

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

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

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

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

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4. Brunei Darussalam

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

Question 3: Validity of international commercial settlement agreements

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

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

5. Canada

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The legislation in Nova Scotia is silent on this issue.

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

Question 3: Validity of international commercial settlement agreements

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

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

The legislation in Nova Scotia is silent on this issue.

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

Question 4: Any other comment

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

6. Colombia

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

Question 1: Information regarding the legislative framework

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

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

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

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

7. Cyprus

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

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

Question 1: Information regarding the legislative framework

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

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

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

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

Please see answer (1) above.

Question 3: Validity of international commercial settlement agreements

Please see answer (1) above.

8. Ecuador

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

Question 1: Information regarding the legislative framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 3: Validity of international commercial settlement agreements

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

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

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

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

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

Question 4: Any other comment

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

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

9. Egypt

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

Question 1: Information regarding the legislative framework

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

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

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

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

Question 3: Validity of international commercial settlement agreements

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

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

10. Germany

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

Question 1: Information regarding the legislative framework

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

Agreements/contracts can be made enforceable as follows:

(A) Action in court

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

1. Court decisions from an EU Member State are declared enforceable under a simplified procedure (Article 38 et seqq. of Regulation (EC) No. 44/2001). As of 10 January 2015, the procedure for declaring the enforceability of court decisions from EU Member States will be done away completely (Article 39 et seqq. of Regulation (EU) No. 1215/2012). Recognition of the decision can, on the application of the person against whom enforcement is sought, in general be refused especially if certain procedural errors have occurred in the original proceedings or if the result of compulsory enforcement would violate the German *ordre public*.

2. Court decisions from a Contracting State of the Lugano Convention are declared enforceable under a simplified procedure (Article 38 et seqq. of the Lugano Convention of 30 October 2007).

3. Decisions by courts of other States have to be declared enforceable under the German procedure to obtain a declaration of enforceability. The preconditions for recognition and enforcement are governed by German international civil procedure law (sections 328, 722 and 733 of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO)).

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

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

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

(C) Court settlement

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

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

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

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

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

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

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

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

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

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

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

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

Question 3: Validity of international commercial settlement agreements

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

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

Question 4: Any other comment

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

11. Hungary

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

Question 1: Information regarding the legislative framework

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

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

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

(2) No other specific conditions are required.

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

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

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

Question 3: Validity of international commercial settlement agreements

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

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United Nations A/CN.9/WG.II/WP.191

General Assembly

Distr.: Limited
4 August 2015

Original: English

United Nations Commission on International Trade Law
Sixty-third session
Vienna, 7-11 September 2015

Settlement of commercial disputes

Enforcement of settlement agreements

Compilation of comments by Governments

Note by the Secretariat

Contents

V.15-05597 (E)

I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1] For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced in section II of document A/CN.9/846. The replies received by the Secretariat before the commencement of the forty-eighth session of the Commission have been reproduced in document A/CN.9/846 and its addenda. A reply received after that date is reproduced below.

II. Compilation of comments

1. India

[Original: English]
[Date: 14 July 2015]

Question 1: Information regarding the legislative framework

As per Indian domestic law, the terms "mediation" and "conciliation" are not used as synonym to each other. Both terms are having their own meaning. The Supreme Court of India in *Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344*, while considering the Report submitted by a Committee under the chairmanship of the then Chairman Law Commission appointed by the Supreme Court so as to ensure that amendments made in the Code of Civil Procedure, 1908 in 1999 and 2002 related to Alternative Disputes Resolution method become effective and quicker dispensation of justice, observed as under:

> "61. It seems clear from the Report that while drafting the model rules, after examining the Mediation Rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by the British author Mr. Brown in his work on India that in 'conciliation' there is a little more latitude and a conciliator can suggest some terms of settlements too."

The said Committee defined the term mediation and conciliation in the following words:

Settlement by "conciliation" means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers under Sections 67 and 73 of that Act, by making

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

proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by "mediation" means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.

There is no specific law dealing with "mediation" except it has been referred to in Section 89 of the Code of Civil Procedure, 1908. On the other hand, "conciliation" is a non-adjudicatory alternative dispute resolution process, which is governed by the provisions of the Arbitration and Conciliation Act, 1996. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of the Arbitration and Conciliation Act, 1996 followed by appointment of conciliator(s) as provided in Section 64 of the said Act. Section 73 of the Act provides for settlement agreement. If the parties to a dispute reach a settlement, they may draw up and sign a written agreement. The signed agreement is final and binding on the parties and persons claiming under them respectively. As provided in Section 74, the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996.

Further, when a dispute is already referred to the Arbitral Tribunal, it may with the agreement of the parties use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. If, during arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral Tribunal, record the settlement in the form of an arbitral award on agreed terms. An arbitral award on agreed terms shall be made in accordance with Section 31 of the Arbitration and Conciliation Act, 1996 and shall state that it is an arbitral award. Such an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Further, when a dispute is already filed in the Civil court, and if it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the said court is required to formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for alternative disputes resolutions mechanism such as arbitration, conciliation or mediation. Where a dispute had been referred to arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply for mediation. the court can effect a compromise between the parties and shall follow such procedure as may be prescribed.

The enforcement of "international commercial settlement agreement" arising out of mediation/conciliation depends upon the seat/place of such settlement agreement.

(i) If the place of settlement is outside India — Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of foreign awards. The definition of the term "foreign award" is provided in Section 44, in respect of New York Convention awards and in Section 53 in respect of Geneva Convention awards. If any international commercial settlement agreement arising out of conciliation proceeding falls within the definition of "foreign award" as provided in Sections 44 or 53, such an agreement is enforceable in India as provided in Sections 49 and 58 of the Arbitration and Conciliation Act, 1996;

(ii) If the place of settlement is India — If such settlement agreement has been arrived and signed in India, the same is binding on the parties in terms of Section 74 of the Arbitration and Conciliation Act, 1996.

As per Section 74 of the Arbitration and Conciliation Act, 1996, the status of the written settlement agreement signed by the parties arising out of the conciliation proceedings shall have same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

There are no procedures for expedited enforcement of international commercial settlement agreements.

If a settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36.

(2) A settlement agreement should result from conciliation proceedings as envisaged in Part III of the Arbitration and Conciliation Act, 1996. It should be in writing and signed by the parties and should be authenticate by the conciliator.

(3) If an award on agreed terms falls within the definition of foreign awards contemplated in Section 44 of the Arbitration and Conciliation Act, 1996, courts consider such awards enforceable under the New York Convention.

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

If the settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36 of the Act.

Question 3: Validity of international commercial settlement agreements

There are no specific criteria that international commercial settlement agreements need to meet to be deemed valid.

NOTE

*Legislation based on or influenced by Model Law has been adopted in 16 States in a total of 28 jurisdictions, namely, Albania (2011), Belgium (2005), Bhutan (2013), Canada, in Nova Scotia (2005), and Ontario (2010), Croatia (2003); France (2011), Honduras (2000), Hungary (2002), Luxembourg (2012), Malaysia (2012), Montenegro (2005), Nicaragua (2005), Slovenia (2008), Switzerland (2008), the former Yugoslav Republic of Macedonia (2009) and United States of America, in District of Columbia (2006), Hawaii (2013), Idaho (2008), Illinois (2004), Iowa (2005), Nebraska (2003), New Jersey (2004), Ohio (2005), South Dakota (2007), Utah (2006), Vermont (2005) and Washington (2005).

*In United States of America, in District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, the legislation enacts uniform legislation influenced by Model Law and the principles on which it is based, namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.

*In Canada, in Nova Scotia and Ontario, the legislation enacts uniform legislation influenced by Model Law and the principles on which it is based, namely, International Commercial Mediation Act, adopted in 2005 by Uniform Law Conference of Canada.

*In France, Montenegro and Switzerland, the legislation is influenced by Model Law and the principles on which it is based.

*In Albania, the legislation amends previous legislation based on Model Law.

*India has not yet adopted Model Law.

ANNEXURE V2/15

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United Nations A/CN.9/909

General Assembly

Distr.: General
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United Nations Commission on International Trade Law
Fiftieth session
Vienna, 3-21 July 2017

Status of conventions and model laws

Note by the Secretariat*

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided[1] that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[2] which, although adopted prior to the establishment of the Commission, is closely related to the work of the Commission in the area of international commercial arbitration.

3. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987).[3] The Secretariat monitors adoption of model laws and conventions.

4. This note indicates the changes since 17 May 2016, when the last annual report in this series (A/CN.9/876) was issued. The information contained herein is current up to 24 April 2017. Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations, including historical status information, may be obtained by consulting the United Nations Treaty Collection (http://treaties.un.org), and the information on conventions in this note and on the UNCITRAL website (www.uncitral.org) is based on that information. Readers may also wish to contact the Treaty Section of the Office of Legal Affairs of the United Nations (tel.: (+1-212) 963-5047; fax: (+1-212) 963-3693; e-mail: treaty@un.org). Information on the status of conventions and model laws is made available on the UNCITRAL website as detailed tables related to specific texts and as a single table providing an overview of all texts. Information on the status of

* The submission of this document was delayed to ensure the timeliness of the information contained therein.

[1] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 163.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

[3] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

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model laws is updated on the website whenever the Secretariat is informed of a new enactment.

5. This note covers the following texts, incorporating as indicated new treaty actions (the term "action" is used generically to denote the deposit of an instrument of ratification, approval, acceptance, accession, or signature in respect of a treaty, or participation in a treaty as a result of an action to a related treaty, or the withdrawal or modification of a declaration or of a reservation) and enactments of Model Laws based on information received since the last report:

(a) In the area of sale of goods:

Convention on the Limitation Period in the International Sale of Goods (New York, 1974),[4] as amended by the Protocol of 11 April 1980 (Vienna).[5] 23 States parties; unamended: 30 States parties;

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[6] 85 States parties;

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[7] New action by Angola (accession); 157 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),[8] with amendments as adopted in 2006.[9] New legislation based on the Model Law has been adopted in Turkmenistan (2016). New legislation based on the Model Law as amended in 2006 has been adopted in the Republic of Korea (2016) and Mongolia (2017);

UNCITRAL Model Law on International Commercial Conciliation (2002).[10] New legislation based on the Model Law has been adopted in Malaysia (2012);

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[11] New actions by Iraq (signature), Netherlands (signature), Canada (ratification) and Switzerland (ratification); 3 States parties;

(c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);[12]

(d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[13] 5 States parties;

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[4] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3. For the complete status of this text, see part I, sect. A.

[5] United Nations, *Treaty Series*, vol. 1511, No. 26121, p. 99. For the complete status of this text, see part I, sect. A.

[6] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see part I, sect. C.

[7] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. K.

[8] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I. For the complete status of this text, see part II, sect. A.

[9] United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

[10] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I. For the complete status of this text, see part II, sect. F.

[11] General Assembly resolution 69/116, annex. On 18 April 2017, the conditions for entry into force of the Convention were met. Accordingly, the Convention shall enter into force on 18 October 2017. For the complete status of this text, see part I, sect. J.

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I. For the complete status of this text, see part II, sect. G.

UNCITRAL Model Law on International Credit Transfers (1992);[14]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[15] 8 States parties;

(e) In the area of security interests:

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).[16] 1 State party;

UNCITRAL Model Law on Secured Transactions (2016);

(f) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997).[17] New legislation based on the Model Law has been adopted in the Dominican Republic (2015) and Singapore (2017);

(g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).[18] 34 States parties;

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).[19] 4 States parties;

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).[20] 3 States parties;

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).[21] New legislation based on the Model Law has been adopted in Malawi (2016); Mozambique (2017) and Fiji (2017);

UNCITRAL Model Law on Electronic Signatures (2001);[22]

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).[23] 7 States parties.

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[13] General Assembly resolution 43/165, annex. The Convention has not yet entered into force; it requires ten States parties for entry into force. For the complete status of this text, see part I, sect. D.

[14] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I. For the complete status of this text, see part II, sect. B.

[15] United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

[16] General Assembly resolution 56/81, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. G.

[17] General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

[18] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.

[19] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. E.

[20] General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force. For the complete status of this text, see part I, sect. I.

[21] United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

[22] General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

[23] General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

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6. Previous annual reports in this series also included chronological tables of actions for conventions. To avoid redundancy, this information can now be found on the UNCITRAL website.

7. UNCITRAL texts also include legislative and legal guides and contractual standards whose impact cannot be assessed by reference to their adoption by States.[24] In this regard, part III has been added to this note in an attempt to convey the impact of other selected UNCITRAL texts. Part III includes information on the use by arbitration centres of the UNCITRAL Arbitration Rules,[25] although it should be noted that the full impact of the Rules is difficult to assess since, for example, they are widely applied in ad hoc commercial arbitration where such use is generally not reported. In addition, part III includes information on the impact on investment treaties of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014).[26]

I. Participation in conventions

A. Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna)

State	*Signature*	*Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(*)*	*Entry into force*
Argentina		19 July 1983(*)	1 August 1988
Belarus	14 June 1974	23 January 1997(*)	1 August 1997
Belgium		1 August 2008(*)	1 March 2009
Benin[a]		29 July 2011(*)	1 February 2012
Bosnia and Herzegovina[a]		12 January 1994(§)	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi[a]		4 September 1998(*)	1 April 1999
Costa Rica	30 August 1974		
Côte d'Ivoire		1 February 2016(*)	1 September 2016
Cuba		2 November 1994(*)	1 June 1995
Czechia[b]		30 September 1993(§)	1 January 1993
Dominican Republic[d]		30 July 2010(*)	1 February 2011
Egypt		6 December 1982(*)	1 August 1988
Ghana[a]	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991(*)	1 August 1991
Hungary	14 June 1974	16 June 1983(*)	1 August 1988
Liberia		16 September 2005(*)	1 April 2006

[24] All UNCITRAL texts are available in the six official languages of the United Nations on the UNCITRAL website, www.uncitral.org.

[25] UNCITRAL Arbitration Rules (as revised in 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I; UNCITRAL Arbitration Rules (1976), Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57. For the status of this text, see part III, sect. A.

[26] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I. For the status of this text, see part III, sect. B.

E. UNCITRAL Model Law on Electronic Signatures (2001)

12. Legislation based on or influenced by the Model Law has been adopted in 32 States:

Antigua and Barbuda (2006); Barbados (2001); Bhutan (2006); Cape Verde (2003); China (2004); Colombia (2012); Costa Rica (2005[a]); Gambia (2009); Ghana (2008); Grenada (2008); Guatemala (2008); Honduras (2013); India (2009[a]); Jamaica (2006); Madagascar (2014); Mexico (2003); Nicaragua (2010[a]); Oman (2008[a]); Paraguay (2010); Qatar (2010); Rwanda (2010); Saint Kitts and Nevis (2011); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); San Marino (2013); Saudi Arabia (2007[a]); Thailand (2001); Trinidad and Tobago (2011); United Arab Emirates (2006); United Kingdom of Great Britain and Northern Ireland, in Montserrat (2009[b]); Viet Nam (2005); and Zambia (2009).

[a] The legislation is influenced by the Model Law and the principles on which it is based.
[b] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

F. UNCITRAL Model Law on International Commercial Conciliation (2002)

13. Legislation based on or influenced by the Model Law has been adopted in 16 States in a total of 28 jurisdictions:

Albania (2011[d]); Belgium (2005); Bhutan (2013); Canada, in Nova Scotia (2005[b]), and Ontario (2010[b]); Croatia (2003); France (2011[c]); Honduras (2000); Hungary (2002); Luxembourg (2012); Malaysia (2012); Montenegro (2005[c]); Nicaragua (2005); Slovenia (2008); Switzerland (2008[c]); the former Yugoslav Republic of Macedonia (2009); and United States of America, in District of Columbia (2006[a]), Hawaii (2013[a]); Idaho (2008[a]), Illinois (2004[a]), Iowa (2005[a]), Nebraska (2003[a]), New Jersey (2004[a]), Ohio (2005[a]), South Dakota (2007[a]), Utah (2006[a]), Vermont (2005[a]), and Washington (2005[a]).

[a] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.
[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada.
[c] The legislation is influenced by the Model Law and the principles on which it is based.
[d] The legislation amends previous legislation based on the Model Law.

G. UNCITRAL Model Law on Public Procurement (2011)[29]

14. The UNCITRAL Model Law on Public Procurement as adopted in 2011 forms the basis of or is reflected in the public procurement laws and regulations in the following States. These States have used the Model Law and accompanying Guide to Enactment in reforming their public procurement law and systems, though the extent to which the resulting regulatory framework incorporates the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives:

Afghanistan, Armenia, Belarus, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Mexico, Mongolia, Myanmar, Russian Federation, Rwanda, Tajikistan, Trinidad and Tobago, Tunisia, Ukraine, Uganda, United Republic of Tanzania, Uzbekistan and Zambia.

[29] The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) is available on the UNCITRAL website, www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

NOTE

*Presently there is no legislative framework to ensure the success of private mediation. Thus, The Arbitration and Conciliation Act, 1996 cannot be applied to private mediations.

*Presently there is no regulation of mediators outside of the court mediation scheme i.e., presently in private mediation, there is no requirement for training or certification, there is no code of conduct or regulation of behaviour. Thus, private mediation is faced with a legal vacuum.

*For private mediation, The Arbitration and Conciliation Act, 1996 as it stands now, is so ill-equipped that a private mediator is not protected.

*For private mediation, The Arbitration and Conciliation Act, 1996 as it stands now, is so ill-equipped that it is user-unfriendly.

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Mediation
Practice & Law

The path to successful dispute resolution

Sriram Panchu

Senior Advocate
and
Mediator

Foreword by
Justice T S Thakur
Judge, Supreme Court of India

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matters where the stakes are substantial, parties would prefer to choose the best person they can. Where parties appoint, and pay, their own mediator, the chances of success are high—they trust the mediator's integrity and competence, they take the process seriously since it costs them money, and for the same reason they do not adopt delaying tactics.

The judiciary should also encourage the growth of mediation as a profession. While mediators may begin pro bono or part-time along with conventional law practice, some will want to adopt this in time as their main professional avenue. Specialist mediators will emerge, for example, in family matters or commercial cases. As complex cases flow on to mediation tables, competent and experienced mediators who offer their services full time should be available. Disputing parties are entitled to have the full range of mediation services provided by committed professionals. Mediation, therefore, should grow into a full professional practice avenue. This has happened in a few countries, happening in others, and should happen in the rest. The map for the future should see mediation as a parallel and alternative profession to the conventional legal career.

DEVELOPMENTS REQUIRED FOR THE GROWTH OF MEDIATION

While court-annexed mediation has received quite a fillip in the last decade, the field of private mediation is yet to take off and it will be some time before its potential is realised and achieved. However, the legislative framework must be put in place to ensure its success when that time comes. Having established mediation centres in the Supreme Court, all High Courts and some district courts, there is a need to ensure that the process continues to move forward.

Currently, the law does not protect the title 'mediator'. Mediators operating under the court mediation scheme are regulated by rules framed under the CPC but there is no regulation of mediators outside of the court mediation scheme. There is no requirement for training or certification, code of conduct or regulation of behaviour. These aspects are essential for the success of mediation.

In the arena of private mediation there is no provision in Arbitration and Conciliation Act providing the mediator immunity for things done or omitted to be done *bona fide* during the course of mediation. Nor is there a provision protecting a mediator from being

compelled to testify regarding the mediation proceedings. The Model Civil Procedure Mediation Rules (which are the basis for the Rules adopted by the High Courts) provide in Rule 22 that a mediator is protected from civil and criminal liability and from having to be summoned by the court to testify as regards the mediation proceedings. Similar protection is required under the ACA.

The laws governing private mediation also do not provide for an extension of the limitation period for a dispute under mediation. Section 77 of the ACA provides for a bar to arbitral or judicial proceedings during conciliation proceedings in respect of a dispute that is the subject matter of the conciliation proceedings with the exception that a party may initiate such proceedings where they are necessary for preserving his rights. However, this is insufficient for promoting mediation as a serious alternative to litigation. While the bar to arbitral and judicial proceedings should remain, a provision should also be inserted for extension of limitation period for a dispute that is being mediated. This could be either an extension for the duration of the mediation proceedings, or a fixed period in addition to the statutorily provided limitation period providing extra time for mediation, or a combination of the two such as provided by Germany's Mediation Code.

The confusion between mediation and conciliation should be erased by using the term "mediation" uniformly for the process. There should be a harmonisation of the provisions for court-annexed mediation and private mediation. As pointed out earlier, it is important to promote private mediation for the benefits of the ADR process to be felt by disputants and the courts. It is therefore necessary that a comprehensive national law on mediation be legislated to cover all mediators, those in the court system and private mediators. It should provide for qualification, training standards, accreditation of mediators, continued education requirements, mediation firms, institutes for training mediators, basic and essential practice requirements such as disclosure of conflict of interest, ethics and confidentiality, decertification, liability, and so on.

ETHICS

Why being Ethical is Important for a Mediator

Mediation depends on the trust that the parties place in the mediator. This comes from the reputation that the mediator carries and from his conduct of the process. Maintaining ethical standards and following good practices are thus essential, and is the bedrock of the process. If the parties feel that they cannot trust a mediator that will be the end of that mediation. If instances of unethical practice are more than infrequent, the process as a whole will be distrusted. We must remember that unlike a court or arbitration process there is nothing that compels parties to come to, or stay in, mediation. Mediation is carried on privately unlike a court which has public hearings. Further, in mediation there are some separate sessions from which the other party is excluded. All these aspects place a premium on the trustworthiness of the mediator. Any shortfall in ethics will suffice to put parties off, perhaps permanently. The parties may be willing to put up with a mediator who does not display high expertise but is honest; they will shun a brilliant one whom they cannot trust. Thus, mediators must follow a high standard of ethical practice for the good of the parties, the process, the profession and for their own selves. Awareness of ethical considerations and good practices will prevent mistakes and the inadvertent crossing of the line. Even if there are no legal provisions to enforce these guidelines, their observance is virtually mandatory for the reasons outlined above.

In India the Rules governing court-annexed mediation have a section on ethics to be followed by mediators such as confidentiality, the right to self-determination of parties in the process and upholding the integrity and fairness of the mediation process. The Arbitration and Conciliation Act 1996 which regulates other mediations does not have similar provisions; this is a deficiency that needs to be addressed. However, lack of legislation not withstanding, good practices mandate observance of these principles.

Principles for Ethical Conduct

Self-determination by parties

It must be explained to the parties right at the outset that they alone can take the decisions regarding the matters in dispute, and that they have the unqualified right to terminate the mediation at any time they

report, merely noted that 'a fine distinction is tried to be maintained between conciliation and mediation…".

Problems faced when both the words, 'Conciliation' and 'Mediation' are used.

Several problems can arise where both terms are used:

(a) There will be confusion in the minds of practitioners as to whether they are conciliators or mediators.

(b) Similarly, the users, the disputants, will also be confused as to who they should approach—conciliators or mediators—and what process would be followed by each.

(c) An agreement reached through mediation may be challenged on the ground that the mediator made proposals.

(d) If it is termed as a conciliation process and the conciliator identifies issues, clarifies priorities and generates options, objection may be taken that he performed the functions of a mediator.

(e) If an out-of-court settlement is conducted under the label of mediation (as is commonly done) and the agreement is called the mediation agreement, objection may be taken when it is filed for enforcement under the Arbitration and Conciliation Act. The objection can be that it is a mediation agreement and not a conciliation agreement.

In fact, a decision of the Delhi High Court in *Shri Ravi Aggarwal v. Shri Anil Jagota*[35] illustrates the confusion that can be caused on this score. The parties had reached a settlement agreement in a private mediation. Differences arose on whether the settlement had been acted upon. One party approached the court seeking enforcement under Sections 73 and 74 of the Arbitration and Conciliation Act. The court refused to do so, holding that the proceedings had not been duly commenced as a conciliation under Section 62 of the Act.[36] It is submitted that the matter should have been considered in a broader aspect and a settlement agreement reached by consent should have been given effect to.

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[35] (OS) No. 19 of 2009.

[36] It is submitted that after the decision of the Apex Court in *Afcons v. Varkey* (discussion follows), private mediation would have to be treated as a conciliation under the Arbitration and Conciliation Act and hence the settlement agreement will be enforceable under that Act.

NOTE

*See Section 67(4) of Part III of The Arbitration and Conciliation Act, 1996 at page 254

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(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

60. Saving.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

PART III
CONCILIATION

61. Application and scope.—(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

62. Commencement of conciliation proceedings.—(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

63. Number of conciliators.—(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

64. Appointment of conciliators.—(1) Subject to sub-section (2),—

(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,—

(a) a party may request such an institution or person to recommend the names of suitable individuals 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:

Provided that 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.

65. Submission of statements to conciliator.—(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation.—In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators as the case may be.

66. Conciliator not bound by certain enactments.—The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

67. Role of conciliator.—(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

68. Administrative assistance.—In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

69. Communication between conciliator and parties.—(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

70. Disclosure of information.—When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

71. Co-operation of parties with conciliator.—The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

72. Suggestions by parties for settlement of dispute.—Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

73. Settlement agreement.—(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.—The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

75. Confidentiality.—Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

76. Termination of conciliation proceedings.—The conciliation proceedings shall be terminated—

(a) by the signing of the settlement agreement by the parties on the date of the agreement; or

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

(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.

77. Resort to arbitral or judicial proceedings.—The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

78. Costs.—(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), "costs" means reasonable costs relating to—

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

(b) any expert advice requested by the conciliator with the consent of the parties;

(c) any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68;

(d) any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

79. Deposits.—(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

80. Role of conciliator in other proceedings.—Unless otherwise agreed by the parties,—

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

81. Admissibility of evidence in other proceedings.—The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,—

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

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

(c) proposals made by the conciliator;

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

PART IV

SUPPLEMENTARY PROVISIONS

82. Power of High Court to make rules.—The High Court may make rules consistent with this Act as to all proceedings before the Court under this Act.

83. Removal of difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

84. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in