United Nations

Report of the United Nations Commission on International Trade Law on its thirty-fifth session

17-28 June 2002

General Assembly

Official Records
Fifty-seventh session
Supplement No. 17 (A/57/17)

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Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-fifth session of the Commission, held in New York from 17 to 28 June 2002.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. UNCITRAL commenced its thirty-fifth session on 17 June 2002. The session was opened by the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Hans Corell.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The current members of the Commission, elected on 24 November 1997 and on 16 October 2000, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Argentina (2004, alternating annually with Uruguay), Austria (2004), Benin (2007), Brazil (2007), Burkina Faso (2004), Cameroon (2007), Canada (2007), China (2007), Colombia (2004), Fiji (2004), France (2007), Germany (2007), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2007), Kenya (2004), Lithuania (2004), Mexico (2007), Morocco (2007), Paraguay (2004), Romania (2004), Russian Federation (2007), Rwanda (2007), Sierra Leone (2007), Singapore (2007), Spain (2004), Sudan (2004), Sweden (2007), Thailand (2004), the former Yugoslav Republic of Macedonia (2007), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2007) and United States of America (2004).

5. With the exception of Benin and Rwanda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Australia, Belarus, Bulgaria, Chile, Congo, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Finland, Gabon, Greece, Guatemala, Indonesia, Iraq, Kuwait, Lesotho, Libyan Arab Jamahiriya, Luxembourg, Malta, Oman, Peru, Philippines, Portugal, Qatar, Republic of Korea, Saudi Arabia, Slovakia, Slovenia, South Africa, Switzerland, Turkey, Ukraine, Uruguay and Venezuela.

7. The session was also attended by observers from the following international organizations:

(a) United Nations system: United Nations Development Programme;

(b) Intergovernmental organizations: Asian-African Legal Consultative Organization, Asian Clearing Union, East African Development Bank (EADB), International Development Law Institute and Permanent Court of Arbitration;

(c) Non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association, Cairo Regional Centre for International Commercial Arbitration, Centre d'Arbitrage du Rwanda, Chartered Institute of Arbitrators, Global Center for Dispute Resolution Research, Institute of International Banking Law Practice, Inter-American Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration, International Cotton Advisory Committee, International Maritime Committee, International Union of Marine Insurance, North American Free Trade Agreement (NAFTA) Advisory Committee on Private Commercial Disputes, School of International Arbitration, University of the West Indies and U.S.-Mexico Conflict Resolution Center.

8. The Commission was appreciative of the fact that international non-governmental organizations that had expertise regarding the major items on the agenda of the current session had accepted the invitation to take part in the meetings. Being aware that it was crucial for the quality of texts formulated by the Commission that relevant non-governmental organizations should

participate in the sessions of the Commission and its working groups, the Commission requested the Secretariat to continue to invite such organizations to its sessions based on their particular qualifications.

C. Election of officers

9. The Commission elected the following officers:

Chairman: Henry M. Smart (Sierra Leone)

Vice-Chairmen: Guillermo Francisco Reyes (Colombia)
László Milassin (Hungary)
Vilawan Manglatanakul (Thailand)

Rapporteur: David Morán Bovio (Spain)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 739th meeting, on 17 June 2002, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation.
5. Insolvency law: progress report of Working Group V.
6. Security interests: progress report of Working Group VI.
7. Electronic commerce: progress report of Working Group IV.
8. Transport law: progress report of Working Group III.
9. Privately financed infrastructure projects: progress report of Working Group I.
10. Monitoring implementation of the 1958 New York Convention.
11. Enlargement of membership of the Commission.
12. Case law on UNCITRAL texts (CLOUT).
13. Digest of case law on United Nations Sales Convention.
14. Training and technical assistance.
15. Status and promotion of UNCITRAL legal texts.
16. General Assembly resolutions on the work of the Commission.
17. Coordination and cooperation.
18. Other business.
19. Date and place of future meetings.
20. Adoption of the report of the Commission.

E. Establishment of a Committee of the Whole

11. The Commission established itself as a Committee of the Whole for the consideration of agenda item 4. The Commission elected José María Abascal Zamora (Mexico) Chairman of the Committee of the Whole. The Committee of the Whole met from 17 to 25 June 2002.

F. Adoption of the report

12. At its 752nd meeting, on 25 June 2002, and at its 756th and 757th meetings, on 28 June 2002, the Commission adopted the present report by consensus.

III. Draft UNCITRAL Model Law on International Commercial Conciliation

A. General remarks

13. The Commission exchanged views on the usefulness of the draft UNCITRAL Model Law in International Commercial Conciliation (hereinafter referred to as the "Model Law" or "draft Model Law") and its potential to promote the use of conciliation both internationally and domestically and to strengthen the enforcement of settlement agreements. It was observed with approval that the draft Model Law avoided

over-regulation of conciliation proceedings and gave a high priority to party autonomy.

B. Title

14. The Commission adopted the draft title without comment.

C. Consideration of draft articles

Article 1. Scope of application and definitions

15. Draft article 1 as considered by the Commission was as follows:

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

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

"(3) A conciliation is international if:

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

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

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

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

"(4) For the purposes of this article:

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

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

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

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

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

"(8) This Law does not apply to:

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

"(b) […]."

Paragraph (1)

16. A drafting suggestion was that the title of article 1 should be "Definitions and scope of application".

17. Some concern was expressed as to the application of the Model Law in the context of the rules of private

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

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

international law, and it was suggested that that issue needed to be carefully addressed in the Guide to Enactment and Use of the Model Law (hereinafter referred to as "the Guide" or "the draft Guide", to avoid the Model Law being misinterpreted as interfering with existing conflict-of-laws rules. A related concern was the need to encourage States to adopt the Model Law with as few changes as possible to ensure uniformity of adoption, a result which would overcome the potential for conflict-of-laws issues to arise.

18. A further concern expressed related to the application of the Model Law to both national and international commercial conciliation and the desirability of having different regimes apply was questioned. It was recalled that different views were discussed in the Working Group and footnote 1 reflected the agreement on how that issue should be approached to take account of the different views. The Commission agreed to postpone its discussion of the content of footnote 1 until it had had the opportunity to consider a proposal on the amendments that would be required.

19. The Commission adopted paragraph (1) as drafted, pending discussion of the content of the footnote.

Paragraph (2)

20. It was suggested that the Guide should indicate that when interpreting article 1(2) it would be relevant to take into consideration the conduct of the parties that demonstrated their understanding that they were engaged in conciliation.

21. Paragraph (2) was adopted as drafted.

Paragraph (3)

22. A suggestion was made that the order of paragraphs (3)(b)(i) and (ii) should be reversed on the basis that paragraph (3)(b)(ii) stated the general principle and paragraph (3)(b)(i) was a specific example of that general principle. A contrary view was that since paragraph (3)(b)(i) indicated the most direct means of determining internationality, and paragraph (3)(b)(ii) raised more complex issues of conflicts of laws, the existing order should be maintained. In support of that view, it was observed that the current text reflected the discussion in the Working Group and was consistent with the approach taken in the UNCITRAL Model Law on International Commercial Arbitration. The Commission adopted paragraph (3) as drafted.

Paragraphs (4) and (5)

23. Paragraphs (4) and (5) were adopted by the Commission without comment.

Paragraph (6)

24. One suggestion expressed was that the parties should be able to agree to apply the Model Law in whole or in part and that paragraph (6) should be amended to that end. In reply, it was pointed out that paragraph (6) was concerned with the question of whether or not the Model Law would apply and that article 3 then dealt with the issue of, where the Model Law was to apply, whether it would apply in whole or in part. After discussion, the Commission adopted paragraph (6) as drafted.

Paragraph (7)

25. Paragraph (7) was adopted by the Commission without comment.

Paragraph (8)

26. In support of adopting paragraph (8) as drafted, it was observed that the paragraph would neither encourage or discourage the practice of a judge or arbitrator facilitating a settlement in the course of court or arbitration proceedings; the practices in that regard differed in the various legal systems and it was considered prudent not to interfere with the rules of procedure governing the conduct of the judge or arbitrator and provide that the Model Law would not apply in those situations. It was observed that, in some cases of so-called "court-annexed conciliation", it might not be clear whether such conciliation was carried out "in the course of a court […] proceeding". For such cases, it was suggested that the Guide should draw the attention of enacting States to the need to clarify in the piece of legislation enacting the Model Law whether such conciliation should be governed by that piece of legislation or not. It was pointed out, however, that the Model Law could apply to the situations referred to in paragraph (8) if the parties agreed under paragraph (5) that it should apply and that that issue should be addressed in the Guide. It was

noted that paragraph (8)(b) was provided to enable countries to indicate other situations where the Model Law might not apply and that examples would be given in the Guide. After discussion, paragraph (8) was adopted by the Commission without change.

27. The Commission referred draft article 1 to the drafting group.

Article 2. Interpretation

28. Draft article 2 as considered by the Commission was as follows:

> "(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."

29. Draft article 2 was adopted as drafted.

Article 3. Variation by agreement

30. Draft article 3 as considered by the Commission was as follows:

> "Except for the provisions of article 2 and article 7, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law."

31. A proposal was made that article 15 should also be referred to in article 3. A contrary view was that article 3 should be left as it was in order to preserve maximum party autonomy. A separate but related observation was that, while parties could not agree to a higher standard of enforceability than that reflected in article 15, they should be free to agree to a lesser standard. While the Commission approved that view, it was agreed that those issues should be further considered in the context of the discussion of article 15. It was also suggested that article 3 might need further consideration when the discussion of all articles of the Model Law had been completed. The Commission adopted draft article 3, subject to further consideration when the discussion of other articles had been completed.

Article 4. Commencement of conciliation proceedings

32. Draft article 4 as considered by the Commission was as follows:

> "Article 4. Commencement of conciliation proceedings[3]
>
> "(1) Unless otherwise agreed by the parties, the conciliation proceedings in respect of a particular dispute that has arisen commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.
>
> "(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate."

Footnote

33. Various views were expressed as to the substance and placement of draft article X contained in the footnote to draft article 4. In favour of maintaining a provision along the lines of draft article 4 in the text of the Model Law, it was 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. The contrary view was that, before adopting a provision along the lines of draft article X, States should be

[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."

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 article X should be informed of the possibilities for parties to preserve their rights when 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.

34. After discussion, the Commission adopted the footnote to draft article 4 without change. It was agreed that the Guide should reflect the opposing views that had been expressed regarding the suitability of enacting article X.

Paragraph (1)

35. The view was expressed that paragraph (1) did not distinguish clearly enough between the time when the parties agreed to conciliate (which might occur long before any dispute arose) and the time when the parties decided to engage in conciliation in the context of a specific dispute. In response, it was generally agreed that a provision dealing with the commencement of conciliation proceedings was clearly not geared to the stage where an agreement was made in principle to resort to conciliation but to the time when parties engaged in conciliation in respect of a particular dispute. However, it was also agreed that the text might be improved to avoid any misunderstanding, for example by adding the words "in respect of that dispute" at the end of paragraph (1). The matter was referred to the drafting group.

Paragraph (2)

36. A concern was expressed that paragraph (2) might not provide a satisfactory solution where, prior to any dispute having arisen, parties had concluded a general agreement to conciliate in respect of future disputes. It was stated that, in such a case, where a dispute arose and a party no longer wished to conciliate, paragraph (2) offered that party an opportunity to disregard its contractual obligation simply by not responding to the invitation to conciliate within thirty days. It was stated in response that the Model Law was based on the policy that no attempt should be made to force any party to conciliate. It was observed that, consistent with that policy, draft article 12 allowed any party to conciliation proceedings to terminate those proceedings unilaterally. The purpose of paragraph (2) was not to allow disregard of any contractual commitment to conciliate but rather to provide certainty in a situation where it was unclear whether the party was willing to conciliate (by determining the time when an attempt at conciliation was deemed to have failed), irrespective of whether that failure was or was not a violation of an agreement to conciliate. It was thus agreed that the Model Law should not deal with the consequences of failure by a party to comply with an agreement to conciliate. That matter was to be dealt with under the general law of obligations applicable in the circumstances.

37. While the Commission adopted the substance of paragraph (2) without change, the drafting group was invited to consider the possibility of expressing more clearly the above-mentioned policy in the context of paragraph (2) and it was agreed that further clarification would be included in the Guide.

Article 5. Number of conciliators

38. Draft article 5 as considered by the Commission was as follows:

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

39. The Commission adopted the substance of draft article 5 without change and referred it to the drafting group.

Article 6. Appointment of conciliators

40. Draft article 6 as considered by the Commission was as follows:

> "(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.
>
> "(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.
>
> "(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.
>
> "(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:
>
> "(a) A party may request such an institution or person to recommend names of suitable persons to act as conciliator; or
>
> "(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.
>
> "(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.
>
> "(6) When a person is approached in connection with his or her possible appointment as a conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her."

Paragraphs (1) to (3)

41. A concern was expressed as to how paragraphs (1) to (3) on appointment of conciliators would apply in the case of multiparty conciliations. It was observed that, while paragraph (2) expressed a general principle that, where there were two parties, each party could appoint a conciliator, that principle might not be appropriate for extension to cases where there were a large number of parties. In response, it was suggested that article 6 should adopt a more neutral formulation which focused on the autonomy of the parties to appoint conciliators; a choice of conciliators could not be imposed upon the parties and, if they could not agree as to who should be appointed, it would not be possible for the conciliation to take place. That neutral solution could be achieved by addressing the need for parties to reach agreement on the identity and number of conciliators to be appointed, or on a procedure by which those appointments could be made. To reflect those considerations, two possible variants were proposed as follows:

> *Variant 1*:
>
> "(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.
>
> "(2) In conciliation proceedings with two or more conciliators, the parties shall endeavour to reach agreement on either a joint appointment of the conciliators or on [the procedure for the appointment of the conciliators] [the way in which the parties will appoint the conciliators]."
>
> *Variant 2*:
>
> "(1) The parties shall endeavour to reach agreement on either a joint appointment of the conciliator or conciliators or on [the procedure for the appointment of the conciliator or conciliators] [the way in which the parties will appoint the conciliator or conciliators]."

42. It was noted that variant 1 retained paragraph (1) of the draft text where a sole conciliator was to be appointed and reformulated paragraph (2) to indicate the need, in a situation where two or more conciliators were to be appointed, for the parties to agree on either a joint appointment of conciliators or on a procedure for appointment. It was noted that variant 2 stated, as a general principle applicable to all proceedings without reference to the number of conciliators to be appointed, the need for the parties to agree on either a joint appointment of conciliators or on a procedure for appointment.

43. Wide support was expressed in favour of variant 1 on the basis that it offered a more structured approach to the issue of appointment and retained the reference to the possibility of appointing two conciliators, an important distinction between conciliation and arbitration; in arbitration the need for an odd number of arbitrators was generally emphasized. At the same time, variant 1 was felt to be sufficiently flexible to address situations where more than two conciliators were to be appointed, including in multiparty conciliations. The observation was made, however, that both variants removed the concept of each party appointing a conciliator, previously reflected in paragraph (2) of draft article 6 and that that notion should be reflected in the Guide as one of the possibilities to be covered by paragraph (2) of variant 2. A different suggestion was that that idea should somehow be incorporated in the text of variant 2. A further suggestion was that the concept reflected in paragraph (3) of draft article 6, that of the appointment of three conciliators, should also be included in the Guide. A related proposal was that paragraph (2) of variant 1 could be divided into two sentences. The first sentence would address the need for parties to agree on the appointment of conciliators. The second sentence would address the possibility of parties also reaching agreement on a procedure for appointment of conciliators; that approach was intended to cover the possibility included in paragraph (3) of draft article 6 of parties each appointing one conciliator and then agreeing upon the means of appointing a third conciliator. That proposal also received some support.

44. It was proposed that the reference to a "joint" appointment should be deleted on the basis that a joint appointment was only one possible means of parties making an appointment and that the emphasis should be placed more broadly upon the need for agreement as to the appointment. That proposal was widely supported.

45. General support was expressed in favour of retaining the first alternative text in square brackets, that is "the procedure for the appointment of the conciliators".

46. As a matter of drafting, it was suggested that the language of paragraph (1) of variant 1, which referred to the "agreement on the name of the sole conciliator" should be aligned with paragraph (2) of variant 1, which referred to agreement on appointment of conciliators or the procedure for appointment.

47. After discussion, the Commission agreed to adopt variant 1, with the deletion of the word "joint", the retention of the first alternative text in square brackets, and the alignment of the language of paragraphs (1) and (2). (For continuation of the discussion, see para. 53.)

Paragraph (4)

48. The Commission adopted the substance of paragraph (4) without change.

Paragraph (5)

49. It was observed that, in view of the adoption of variant 1 as proposed, the words in paragraph (5) "with respect to a sole or third conciliator" might need to be amended. The Commission adopted the substance of paragraph (5).

Paragraph (6)

50. It was proposed and the Commission agreed that the Guide should make it clear that a failure to disclose facts which might give rise to justifiable doubts within the meaning of paragraph (6) should not create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law. It was noted that those grounds were not unified and that that was a matter for each jurisdiction to address under its own law. It was noted that that issue of nullification of the settlement agreement was not related to the question of whether a conciliator who failed to disclose such facts, whether intentionally or inadvertently, would be subject to sanctions for that failure.

51. As a matter of drafting, it was suggested that the words "of which he or she is aware" should be added to qualify the circumstances to be disclosed. In response, it was observed that a conciliator could not be required to disclose circumstances of which he or she was not aware and the additional words were not required. The Commission did not adopt the suggested text.

52. The Commission referred the substance of article 6 as adopted to the drafting group.

53. Following the discussion of draft articles 5 and 6, the Commission agreed to a suggestion to combine those draft articles in a draft article to be numbered article 5. The Commission referred to the drafting group the task of preparing that combined draft article and in so doing to reflect the discussion set forth above under articles 5 and 6.

Article 7. Conduct of conciliation

54. Draft article 7 as considered by the Commission was as follows:

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

Paragraphs (1) and (2)

55. The Commission adopted the substance of paragraphs (1) and (2) without change.

Paragraph (3)

56. A concern was expressed that, as currently drafted, paragraph (3) might easily be misinterpreted as creating new grounds for setting aside a conciliation settlement. Such misunderstanding might arise if paragraph (3) was construed as applying not only to the conduct of the conciliation proceedings but also to the result of such proceedings, i.e., the settlement agreement. It was suggested that paragraph (3) should be deleted or, as an alternative to the deletion of the entire paragraph, that it should be made non-mandatory under article 3, redrafted through a deletion of the words "in any case", and complemented by appropriate explanations in the Guide to clarify that paragraph (3) was not intended to create a cause of action to challenge the settlement agreement.

57. The widely prevailing view, however, was that paragraph (3) should be regarded as a basic obligation and a minimum standard to be observed mandatorily by any conciliator.

58. After discussion, the Commission adopted the substance of paragraph (3) without change. It was agreed that the Guide should make it clear that paragraph (3) was intended to govern the conduct of the conciliation proceedings and that it did not address the contents of the settlement agreement.

Paragraph (4)

59. The Commission adopted the substance of paragraph (4). As a matter of drafting, it was observed that the text of paragraph (4) should be brought in line with paragraphs (2) and (3) by referring not only to "the conciliator" but also to "the panel of conciliators".

60. The Commission referred the substance of article 7 as adopted to the drafting group.

Article 8. Communication between conciliator and parties

61. Draft article 8 as considered by the Commission was as follows:

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

62. The discussion focused on the opening words of the draft article ("Unless otherwise agreed by the parties"). The view was expressed that, in view of the general reference to party autonomy contained in article 3, the opening words were superfluous and should be deleted from both draft article 8 and other provisions where they appeared in the draft Model Law. The prevailing view was that, while the general terms of article 3 made it unnecessary to refer to party autonomy in every provision that could be varied

through contract, references to contractual derogations in the draft Model Law would need to be reviewed on a case-by-case basis. With respect to draft article 8, it was decided that the opening words should be omitted as superfluous.

63. The Commission referred the substance of article 8 as adopted to the drafting group.

Article 9. Disclosure of information between the parties

64. Draft article 9 as considered by the Commission was as follows:

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

Title

65. It was observed that the title of the draft article inadequately reflected the scope of the provision, which did not cover direct exchanges of information between the parties but rather information disclosed to the conciliator by a party (and possibly by the conciliator to another party). It was agreed that, in line with article 10 of the UNCITRAL Conciliation Rules, the title should read "Disclosure of information".

Reference to "information concerning the dispute"

66. The view was expressed that the reference to "information concerning the dispute" was too restrictive. It was stated that the conciliator, in the conduct of the conciliation proceedings, might find it useful to communicate to the other party information received from another party that might be conducive to a settlement, although it did not directly concern the dispute. Information regarding the practices of a party as to pricing was given as an example. It was thus suggested that the words "concerning the dispute" should be deleted. The Commission did not follow that suggestion.

Reference to "may disclose"

67. A question was raised as to whether it was appropriate to provide that the conciliator "may disclose" to a party the substance of the information received from another party. In particular, doubts were expressed as to whether such a discretionary power granted to the conciliator might disregard the duty to treat the parties with equality. In response, it was explained that the purpose of draft article 9 was to establish a discretionary power allowing the conciliator to proceed in the manner that was most likely to conduce to a solution of the dispute.

68. Certain countries expressed concern with respect to the policy on which draft article 9 was based, which was described as a long outdated approach. It was stated that, in the absence of agreement to the contrary, requiring the conciliator to maintain strict confidentiality of the information communicated by a party was the only way of ensuring frankness and openness of communications in the conciliation process. Such confidentiality was reported to be consistent with conciliation practice in certain countries (A/CN.9/487, para. 131). It was proposed that draft article 9 should be amended to read as follows: "When the conciliator, the panel of conciliators or a member of the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators shall not disclose that information to any other party unless the party giving the information expressly consents to such disclosure" (see A/CN.9/506, para. 78).

69. In response, the Commission reiterated the preference expressed by the Working Group for the view that had prevailed widely at its thirty-fourth and thirty-fifth sessions, according to which draft article 9 should ensure circulation of information between the various participants in the conciliation process. It was pointed out that requiring consent by the party who gave the information before any communication of that information to the other party by the conciliator was not the practice in some countries, and that was reflected in article 10 of the UNCITRAL Conciliation Rules (A/CN.9/487, para. 132 and A/CN.9/506, para. 79), but was the practice in some other countries.

70. However, in order 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 was widely agreed that the Guide should contain a recommendation to conciliators that they should inform the parties that information communicated to a conciliator might be revealed unless the conciliator was instructed otherwise (see para. 161, below).

Reference to "the substance of that information"

71. As a matter of drafting, it was suggested that the words "the substance of that information" should be replaced by the words "that information". It was pointed out in response that the current text, along the lines of article 10 of the UNCITRAL Conciliation Rules, was preferable to avoid burdening the conciliator with an obligation to communicate the literal content of any information received from the parties (A/CN.9/506, para. 81). The suggestion was not followed by the Commission.

Reference to "the other party"

72. As a matter of drafting, it was pointed out that the words "to the other party" in both the first and the second sentence of draft article 9 did not accommodate the needs of multiparty conciliation. In order to cover unambiguously the case where the proceedings involved more than one party, it was suggested that the words "to the other party" should be replaced by the words "to any other party". The Commission took note of the suggestion with approval.

73. After discussion, the Commission referred the substance of article 9 as adopted to the drafting group.

Article 10. Duty of confidentiality

74. Draft article 10 as considered by the Commission was as follows:

> "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."

75. A concern was expressed that, because of the broad definition of conciliation in article 1 of the draft Model Law, article 10 as drafted might apply to establish liability where a person other than a professional conciliator was asked to facilitate the settlement of a dispute in informal circumstances where neither the parties involved nor the person asked to facilitate would have any knowledge of the application of the Model Law or expectations as to their involvement in an international commercial conciliation. Although part of the solution to that issue might lie in the sanctions applicable under national law for breach of a duty of confidentiality, the concern was to protect inadvertent parties and third persons, rather than professional conciliators who were well aware of issues relating to confidentiality. It was observed that that problem had been identified in some countries and addressed by way of a narrower definition of conciliation that would restrict the instances in which such a duty could arise. However, given the Commission's adoption of a broad definition in the draft Model Law, it was proposed that draft article 10 should apply only "whenever agreed by the parties". A contrary view was that what was required in the draft Model Law was a rule on confidentiality that would reflect the general expectation of parties participating in conciliation that the proceedings would be confidential, without the need for them to explicitly address that issue in their conciliation agreement; the result of such a proposal for amendment would be that if the parties did not address the issue there would be no obligation to observe confidentiality. A related view was that the duty of confidentiality should apply broadly and be subject only to the limitations included in the draft article.

76. Another proposal to address the concerns raised was that the words "duty of" be deleted from the title, and that an explanation along the following lines be included in the Guide:

> "It is the intent of the drafters that, in the event a court or other tribunal is considering an allegation that a person did not comply with article 10, 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. A State that enacts the Model Law may wish to clarify article 10 to reflect this interpretation."

77. General support was expressed in favour of that approach. It was suggested, however, that the second sentence of the explanation implied that the draft article did not in fact achieve its stated purpose and it

was proposed that that sentence be deleted. Support was expressed in favour of retaining the idea expressed in the sentence because of the need for such a clarification in some States, but, acknowledging that that implication could be made, it was suggested that the sentence be amended to read: "When enacting the Model Law, certain States may wish to clarify article 10 to reflect that interpretation". That proposal was supported. As a further amendment to the title of article 10, it was proposed that the words "of conciliation" be added.

78. The view was expressed that the explanation to be included in the Guide for draft article 10 might also be relevant to other articles, such as draft article 11, to assist in determining the general question of whether or not a conciliation was being conducted. In support of that view, it was observed that further explanation was required in the Guide in respect of article 1 to clarify the circumstances in which a conciliation could be deemed to exist.

79. Some concern was expressed as to who would be required to observe the obligation of confidentiality and whether the article as drafted would cover the parties, the conciliator and third persons, including those charged with administering a conciliation. In response, it was observed that draft article 10 was broader than draft article 9 and applied broadly to "all information relating to the conciliation proceedings", regardless of who might be in possession of that information.

80. Some support was expressed in favour of deleting the words "unless otherwise agreed", since they were superfluous given the presence of article 3. After discussion, however, the prevailing view was that they should remain in order to reinforce in that context the principle of party autonomy.

81. The Commission adopted the substance of article 10 and referred it to the drafting group.

Article 11. Admissibility of evidence in other proceedings

82. Draft article 11 as considered by the Commission was as follows:

> "(1) Unless otherwise agreed by the parties, a party that participated in the conciliation proceedings or a third person, including a conciliator, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding, any of the following:
>
> "(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
>
> "(b) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;
>
> "(c) Statements or admissions made by a party in the course of the conciliation proceedings;
>
> "(d) Proposals made by the conciliator;
>
> "(e) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;
>
> "(f) A document prepared solely for purposes of the conciliation proceedings.
>
> "(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.
>
> "(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
>
> "(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.
>
> "(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation."

Paragraph (1)

83. It was noted in respect of the phrase "or a third person" that paragraph 61 of the draft Guide indicated that those words were used to clarify that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings were to be covered by paragraph (1). To better reflect that coverage, it was proposed that the words "or third persons" should be moved so that the paragraph would read: "Unless otherwise agreed by the parties, a party or third person that participated …". A further proposal was that the words "including a conciliator" should also be moved to the same position. In response to those suggestions, a concern was raised that that drafting would not cover third persons, including personnel who worked in a conciliation institution, who might obtain information of the type referred to in article 11, but who did not themselves participate directly in the proceedings. Support was expressed in favour of including such persons within the scope of paragraph (1), even though it was acknowledged that in some cases the information provided by such a third person might not, under applicable law, be admissible in arbitral, judicial or similar proceedings.

84. After discussion, the Commission agreed that paragraph (1) should cover parties to the conciliation, conciliators and third persons whether or not they participated in the proceedings including those from a conciliation institution charged with administering the proceedings.

85. As a matter of drafting, it was suggested that subparagraph (b) should read "made by a party in the conciliation" rather than "to the conciliation".

86. The Commission adopted the substance of paragraph (1).

Paragraph (2)

87. The Commission adopted the substance of paragraph (2) without comment.

Paragraph (3)

88. A concern was raised as to the meaning of the reference to "the law" in the second sentence of paragraph (3) and whether it was intended to cover both court decisions and legislation, with a preference being expressed that it be limited to legislation. It was observed in response that that matter was one of interpretation and might be addressed in the Guide.

89. The Commission adopted the substance of paragraph (3) without change.

Paragraphs (4) and (5)

90. The Commission adopted the substance of paragraphs (4) and (5) without comment.

91. The Commission referred article 11 as adopted to the drafting group.

Article 12. Termination of conciliation

92. Draft article 12 as considered by the Commission was as follows:

> "The conciliation proceedings are terminated:
>
> "(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;
>
> "(b) By a written declaration of the conciliator or the panel of conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;
>
> "(c) By a written declaration of the parties addressed to the conciliator or the panel of conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
>
> "(d) By a written declaration of a party to the other party and the conciliator or the panel of conciliators, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

93. A concern was raised as to how cases where the parties agreed orally to end their conciliation or by their conduct indicated that they would not proceed with conciliation should be treated given the terms of article 12. In response to that concern, and noting that other articles of the draft Model Law did not contain requirements for writing, and that conciliation could be an informal procedure, it was proposed that the requirement for a "written" declaration in subparagraphs (b) to (d) should be deleted. A different view was that the requirement for the declaration to be in

writing should be maintained as it related to other articles, such as article X in the footnote to article 4 and articles 10 and 11, and the need for certainty as to when conciliation proceedings had terminated. It was also pointed out in that regard that there was also a need for certainty as to when conciliation proceedings had commenced, which was addressed in article 4. It was observed that subparagraphs (b) to (d) dealt with failure of the conciliation, where the dispute remained on foot and parties would likely have recourse to arbitration or judicial proceedings for its resolution. In those cases, the courts and arbitral tribunals had to be certain that the conciliation proceedings had terminated and that the parties were entitled to commence those subsequent proceedings. The absence of a written declaration was likely to create uncertainty as to that issue. The particular importance of a written declaration to subparagraph (d), which involved a unilateral declaration, was emphasized. After discussion, the Commission decided that the arguments relating to informality prevailed and that the requirement for the declaration in subparagraphs (b) to (d) to be in writing should be deleted.

94. On a related matter, it was suggested that that proposal to delete the requirement for writing did not cover cases of abandonment of the conciliation procedure after it had commenced where this could only be judged by the conduct of the parties. Proposals to address that concern included adding a further paragraph to the article, or adding words to the effect of "after a reasonable attempt to consult" or "after inviting the parties to consult" as a substitute for "after consultation" in subparagraph (b). Those different proposals received some support. A different view was that subparagraph (b) would cover those cases because the phrase "after consultation with the parties" should be interpreted to include those cases where the conciliator had contacted the parties in an attempt to consult and received no response. That suggestion was generally supported and it was proposed that that interpretation should be confirmed in the Guide.

95. A different concern related to those cases where the parties had a prior contractual agreement to conciliate and it was suggested that as a minimum, to satisfy requirements of good faith, parties should be required or encouraged to engage in conciliation for some reasonable period. To reflect that concern it was proposed that the words "after reasonable delay" or "after a reasonable time frame" be added to subparagraph (d). That proposal did not receive support on the basis that agreements to conciliate varied widely, expressing different degrees of commitment to conciliate, and that it would be inappropriate to impose a single obligatory rule in all cases. It was also pointed out that the success of conciliation depended on both parties being willing participants and that it made no sense to force an unwilling party to conciliate. It was pointed out that the comment would imply no consequences with respect to any party's failure to comply with a contractual obligation to participate in a conciliation. It was also pointed out that the consequences of a failure to comply with a prior agreement to conciliate depended upon the applicable contract law and were not sought to be resolved in the Model Law.

96. It was suggested that while the word "written" should be deleted as a general matter, a State adopting article X might wish to require that termination be in writing since precision was required in determining when the conciliation ended so that the courts could properly determine the prescription period. In that context, it was noted that if a written declaration was required for termination, it might also be required for commencement of the conciliation. It was requested that that be reflected in the Guide.

97. As a matter of drafting, it was suggested that the heading of article 12 should refer to "conciliation proceedings" rather than simply to "conciliation".

98. The Commission referred the substance of article 12 as adopted to the drafting group.

Article 13. Conciliator acting as arbitrator

99. Draft article 13 as considered by the Commission was as follows:

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

100. Recalling its earlier discussion of the proviso "unless otherwise agreed" (see para. 80, above), the Commission considered the question whether that proviso should be retained in draft article 13. Differing views were expressed. One view was that the proviso stated the obvious and should, therefore, be deleted as

superfluous. In support of that view, it was stated that the proviso could even be counterproductive, because it could give the wrong impression that there were two different degrees of party autonomy, a higher and a lesser one. However, the prevailing view was that the proviso was useful and should be retained. It was stated that, like arbitration, conciliation was subject to party autonomy and, therefore, the agreement of the parties should be respected. In addition, it was observed that, even if the proviso stated the obvious, the issue was so important to a number of countries that the proviso could serve as a useful reminder to the parties so that they would not need to refer to draft article 3 which, in any case, would not address it directly. On the understanding that an explanation of the reasons for retaining the proviso would be included in the Guide, the Commission decided to retain it.

101. The concern was expressed that, to the extent draft article 13 did not address the question of whether a conciliator might act as a representative, counsel or witness, it might be incomplete and inconsistent with article 19 of the UNCITRAL Conciliation Rules. In order to address that concern, it was suggested that draft article 13 should be aligned with article 19 of the UNCITRAL Conciliation Rules. That suggestion was objected to. It was recalled that, in view of the differing approaches taken in the various legal systems with respect to that question, the Working Group had decided not to address it in the Model Law and to refer to the various practices in the Guide (see A/CN.9/506, paras. 117-118).

102. In response to a question, it was explained that "another dispute" referred to in the draft article could involve parties other than the parties in the conciliation proceedings. The Commission affirmed that understanding and decided that it should be included in the Guide.

103. The concern was expressed that, in referring only to contracts, draft article 13 might be narrower in scope than draft article 1, paragraph (2), which referred to contractual or other legal relationships. In order to address that concern, several suggestions were made. One suggestion was to revise the last words of draft article 13 along the following lines: "same or related contract or legal relationship". Another suggestion was to refer to "the same or a related legal relationship". Another suggestion was to refer to "closely related disputes". Yet another suggestion was to refer to "the same factual situation". There was sufficient support in the Commission for expanding draft article 13 to refer to contractual or other legal relationships in line with draft article 1, paragraph (2).

104. It was suggested that the title of the article should be amended to indicate a greater consistency and correlation with its content, which referred expressly to an inability of the conciliator to act as an arbitrator. In that respect it was suggested to entitle the article "Inability of the conciliator to act as arbitrator". That proposal was not adopted.

105. Subject to the change referred to above (see para. 103), the Commission adopted draft article 13 and referred it to the drafting group.

Arbitrator acting as a conciliator

106. The Commission considered a suggestion to reinstate in a footnote to draft article 13 a provision which read as follows (see A/CN.9/506, para. 130):

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

107. In support of that suggestion, it was stated that the laws of a number of countries expressly provided for that practice. The Model Law should not ignore a practice that was accepted as a good practice in many countries. In addition, it was observed that the Working Group had not objected to the content of former draft article 16 but had agreed that it should be dealt with in the Guide, since it more properly belonged in a law on arbitration rather than in a law on conciliation. In that connection, it was said that that argument was not convincing, since the draft Model Law included several provisions addressing issues relating to arbitration.

108. While there was support for that suggestion, a number of objections were also raised. One objection was that a footnote along the lines of former draft article 16 would be inconsistent with draft article 1, paragraph (8), according to which the draft Model Law did not deal with cases where a judge or arbitrator, in the course of a court or an arbitral proceeding, attempted to facilitate a settlement. Another objection was that such a footnote would be inconsistent with draft article 13, the principle of which was that a

conciliator could not act as an arbitrator. It was mentioned that in some countries a situation dealt with in the proposed provision was viewed as unethical.

109. With a view to reaching a compromise solution, several suggestions were made, including suggestions: to include in the draft Model Law a footnote describing the various practices and not a model legislative provision; and to discuss the various practices in the Guide, drawing the attention of countries to the consequences of taking one or the other approach.

110. After discussion, as the Commission decided that former draft article 16 should not be reinstated as a footnote, the Commission reaffirmed the decision of the Working Group that the matter should be discussed in the Guide (see A/CN.9/506, para. 132).

Article 14. Resort to arbitral or judicial proceedings

111. Draft article 14 as considered by the Commission was as follows:

> "(1) Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with.
>
> "(2) A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings."

112. While support was expressed for the concept of draft article 14, a number of concerns were also expressed. One concern was that, in allowing parties to resort to arbitral or judicial proceedings at their discretion, paragraph (2) nullified the effect of paragraph (1). In order to address that concern, it was suggested reinstating the structure and approach of former draft article 15 (see A/CN.9/506, para. 124), which would prevent a party from unilaterally initiating arbitral or judicial proceedings when that was contrary to their express agreement. In support of that suggestion, it was stated that a provision along the lines of former draft article 15 would, on the one hand, give effect to express undertakings by parties not to initiate arbitral or judicial proceedings and, on the other hand, allow the parties to resort to arbitral or judicial proceedings in common situations in which the parties agreed to conciliate without concluding a specific agreement not to initiate arbitral or judicial proceedings during a specified period. However, that suggestion was widely opposed. It was stated that the Working Group had considered the matter, found a number of problems with the former draft article 15 (see A/CN.9/506, para. 127) and decided in favour of the approach taken in the current draft article 15 (see A/CN.9/506, para. 129). In addition, it was stated that the decision of the Working Group was acceptable, since inability of the party to initiate court proceedings in certain situations would discourage parties from entering into conciliation agreements. Moreover, it was said that preventing access to courts even in the case of an express waiver of that right by the parties might raise constitutional law issues in that access to courts was in some jurisdictions regarded as an inalienable right.

113. It was suggested that draft article 14 should address itself only to the parties (as did article 16 of the UNCITRAL Conciliation Rules) and not the arbitral tribunal or the court. That suggestion was not accepted.

114. A suggestion was made that draft Model Law did not go far enough in ensuring the effectiveness of conciliation agreements in that it addressed only express waivers of the right to initiate arbitral or judicial proceedings, while the draft Model Law did not deal with the effectiveness of the more usual conciliation agreements which were not combined with an express waiver of such a right during a specified period of time. According to that suggestion it should be clarified, either in the Model Law or in the Guide, that, when the parties agreed to conciliate, such agreement was binding in the sense that the parties committed themselves to making a good faith attempt to conciliate and that therefore the arbitral or judicial tribunal should stay the proceedings until such a good faith attempt had been made. While there was no fundamental opposition to the idea underlying that suggestion, namely that agreements to conciliate were binding under their own terms, it was observed that agreements to conciliate were drafted in many different ways reflecting a broad spectrum of expectations of parties regarding their behaviour in case of a dispute. It

was considered in response that the effect of agreements to conciliate should depend on the manner in which such agreements were interpreted pursuant to the applicable law of contract, which, however, the Model Law did not attempt to unify. Thus, the Commission confirmed its decision made by the Working Group that the Model Law should deal only with the effect of express waivers of the right to initiate arbitral or judicial proceedings and not with the contractual effects of agreements to conciliate with respect to such right.

115. The concern was expressed that paragraph (2), by allowing a party to initiate adversary proceedings "in its sole discretion", which constituted a purely subjective criterion, could render the rule enshrined in paragraph (1) ineffective. In order to address that concern, it was suggested that the words "in its sole discretion" should be deleted. That suggestion was met with a number of objections. It was stated that, in the absence of such a subjective criterion, a party would run the risk of losing its rights if it were unable to take steps, including the initiation of arbitral or judicial proceedings (including insolvency proceedings). The Commission considered that the draft Model Law should be drafted to control that risk. It was explained that, for that reason, article 16 of the UNCITRAL Conciliation Rules allowed a party to initiate arbitral or judicial proceedings where, "in his opinion", such proceedings were necessary for preserving rights. In addition, it was said that, by providing comfort to the parties that they would not run the risk of losing their rights, the Model Law would promote the use of conciliation. Moreover, the opinion was expressed that deciding what was "necessary" to preserve rights (paragraph (2)) involved judgement not only as a matter of law but also commercial judgement, which could only be left to the subjective assessment of the affected party. It was added that, if that ability of the parties to determine what was commercially necessary for them were to be taken away from them, they would be inclined to avoid conciliation.

116. Yet another concern was that the juxtaposition of the duty of the court to give effect to the parties' waiver of the right to initiate arbitral or judicial proceedings and the right of the parties to initiate arbitral or judicial proceedings to preserve their rights gave the impression that paragraph (2) was inconsistent with paragraph (1). In order to address that concern, it was suggested merging the two paragraphs by adding at the end of paragraph (1) the words "except to the extent necessary for a party, in its opinion", deleting the words "a party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary" and adding, after the words "in its opinion", the words "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." In support of that suggestion, it was stated that the suggested revision of draft article 14 would clarify that the right of the parties to resort to arbitral or judicial proceedings was 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. While some doubt was expressed as to whether the words "in its opinion", which were contained in article 16 of the UNCITRAL Conciliation Rules, had a different meaning from the words "in its sole discretion", the Commission nevertheless adopted the suggestion. The Commission also noted that some additional classification of the operation of article 14, should be provided in the Guide.

117. In response to a question, it was explained that article 14 did not refer only to proceedings to obtain provisional measures of protection but also to any action before an arbitral or judicial tribunal, including action taken by a party to preserve its rights before expiration of a prescription period. In the discussion, it was suggested that the Guide should clarify that a party might initiate court or arbitral proceedings also where one of the parties remained passive and thus hindered implementation of the conciliation agreement. On the other hand, it was stated that in such a case the other party could initiate judicial or arbitral proceedings after the conciliation proceedings were terminated pursuant to draft article 12.

118. Subject to the decided change, the Commission adopted draft article 14 and referred it to the drafting group.

Article 15. Enforceability of settlement agreement

119. Draft article 15 as considered by the Commission was as follows:

> "If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State*

inserts a description of the method of enforcing settlement agreements or refers to provisions governing such enforcement]."

120. It was observed that, as referred to in draft article 15, the nature of the settlement agreements were left open-ended. It was suggested that its contractual nature should be indicated in the draft provision. As to the notion of the settlement agreement being "enforceable", it was also suggested that the draft provision should explain whether the settlement agreement should benefit from some form of expedited recognition of its enforceability, for example by equating a settlement agreement with an arbitral award or a judicial decision.

121. The view was expressed that converting a conciliation settlement into an arbitral award was not acceptable since it would amount to attaching the same status to a contract between two private persons as to a court or arbitral decision. Two possibilities were envisaged: either the conciliation settlement was turned into a "real" arbitral award, with the risk that the proceedings would become far more cumbersome and more expensive for the parties (thus running counter to the whole spirit of conciliation); or else there could be a kind of quasi-automatic equating of the conciliation settlement to an arbitral award, which would entail some degree of exposure to abuse since the contract (conciliation settlement) would not generally be subject to scrutiny by a court of the country in which the settlement was invoked (see A/CN.9/513, comment by France).

122. With a view to enhancing the legal value of settlement agreements, yet preserving all the options that an enacting State might wish to consider in dealing with the issue of enforceability of a settlement agreement, and avoiding the reference to an arbitral award, the following wording was proposed as a substitute for draft article 15: "If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding. The authority of res judicata and/or the enforceability of such agreement shall, as appropriate, be recognized or granted by the law or the competent authority of [the country in which the agreement is invoked] [the enacting State]". No support was expressed for the proposal.

123. The discussion then focused on the opening words of draft article 15 ("If the parties reach and sign an agreement"). It was pointed out that the requirement that the settlement agreement should be signed might be important to facilitate the adduction of evidence regarding the existence and contents of the settlement agreement. A proposal was made that the opening words of draft article 15 should read along the following lines: "The settlement agreement is to be signed if such a signature requirement is necessary to ensure the enforceability under the law of the enacting State". No support was expressed for the proposal. The prevailing view was that, in line with modern contract law and consistent with the need to facilitate electronic commerce, no writing or signature requirement should be imposed regarding the conclusion of the settlement agreement. After discussion, it was agreed that the opening words of draft article 15 should read as follows: "If the parties conclude an agreement". It was also agreed that the Guide should make it clear that the purpose of the Model Law was not to prohibit the 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.

124. The Commission proceeded to consider the implications of using the words "binding and enforceable". It was generally agreed that those words were intended to reflect the common understanding that conciliation settlements were contractual in nature. While the word "binding" reflected the creation of a contractual obligation as between the parties to the settlement agreement, the word "enforceable" reflected the nature of that obligation as susceptible to enforcement by courts, without specifying the nature of such enforcement. It was thus agreed that the two words "binding" and "enforceable" served distinct purposes and were not merely repetitious. It was pointed out that the Model Law provided no new regulations concerning the formation of settlement agreements or their enforcement, and left those matters to be determined in accordance with the applicable municipal law. In that connection, it was noted that some States considered settlement agreements to be subject to the same rules of formation and enactment as other commercial contracts, while other States had special regimes regulating those matters, including, in some States, mechanisms for expediting execution of settlements. Accordingly, the Model Law included at the end of article 15 words in italics stating that an enacting State might insert a description or reference to its own system governing enforcement of settlement agreements. It was pointed out, however, that, in certain

legal systems or in certain language versions, the word "enforceable" might be interpreted in a manner that suggested a high degree of executability of the settlement agreement, thus deviating from the above-mentioned neutrality. For example, "enforceable" might be construed as indicating that the court would enforce a settlement agreement in a more expeditious way than it would enforce other types of contracts. However, in other legal systems or language versions the words "binding and enforceable" were used simply to refer to the legal value of contracts in general. To avoid any misinterpretation, it was suggested that the word "enforceable" should not be used. Instead, draft article 15 should recognize the right of any party to the settlement agreement to present that agreement before a court to obtain its execution where the applicable law so permitted. Under that suggestion, the Guide could provide examples of procedures that might be used to obtain such execution and list the defences to enforcement that might be admissible. While some support was expressed in favour of that suggestion, the prevailing view was that the issue of enforcement, defences to enforcement, and designation of courts or other authorities from whom enforcement of a settlement agreement might be sought should be left to applicable municipal law.

125. After discussion, the Commission decided that the words "binding and enforceable" should be retained. In those language versions where the word "enforceable" might give rise to ambiguity, it was found that a more neutral wording should be used, along the lines of "susceptible to enforcement".

126. The Commission adopted the substance of article 15 as amended and referred it to the drafting group.

Continuation of the discussion of article 3

127. Having completed its deliberations regarding the substantive provisions of the draft Model Law, the Commission reverted to the text of article 3, with a view to determining whether provisions in addition to article 2 and article 7, paragraph (3), should be listed as mandatory.

128. The view was expressed that article 14 should be listed among those provisions of the Model Law that were not open to contractual derogation. It was pointed out that, since article 14 had been structured into a rule that operated only where a specific agreement had been concluded between the parties, and an extremely broad range of unilaterally decided exceptions to that rule, it was difficult to imagine how contractual derogations under article 3 would fit in the overall structure of article 14. In the view of other delegations, the reason for listing article 14 as mandatory was that a party should not be permitted to vary the application of a provision that guaranteed what was regarded by those delegations as the constitutional right of the parties to initiate judicial proceedings, irrespective of any undertaking that might have been made not to use that right. Yet another view was that, although article 14 contained provisions of contract law that should be open to contractual derogation, article 14 also contained provisions of procedural law that should be regarded as mandatory.

129. Various views were expressed, however, in favour of not listing article 14 as a mandatory provision. In the view of a number of delegations that criticized the structure and contents of article 14, article 3 provided a welcome opportunity for the parties to set aside the entire mechanism of article 14, thus allowing, for example, those parties to agree on effective undertakings not to initiate judicial proceedings during the conciliation. In the view of other delegations, the preservation of party autonomy required that the parties who had mutually agreed not to initiate judicial proceedings under article 14 should be allowed to come to a different agreement at a later stage. Another view was that article 14 should not be listed as a mandatory provision because it was logically susceptible to derogations.

130. A question was raised regarding the interplay between articles 3 and 14 in circumstances where, for example, the parties had agreed to conciliate, expressly undertaken not to initiate judicial proceedings during a specified period of time, and subsequently terminated the conciliation proceedings before the expiration of that period of time. In such a case, the question might arise whether the parties continued to be bound by their original undertaking not to initiate judicial proceedings or whether that undertaking was modified by the termination of conciliation proceedings. The Commission did not discuss all aspects of that question and it was understood that the result depended on the terms of the commitment not to initiate court proceedings and of any agreement to terminate the conciliation proceedings.

131. After discussion, the Commission decided not to include article 14 among those provisions of the Model Law that could not be excluded or varied by agreement of the parties.

132. The view was expressed that article 15 should be listed among those provisions of the Model Law that were not open to contractual variation. It was stated that, to the extent article 15 established the rule that settlement agreements were binding, no contractual derogation to that rule was logically acceptable. It was also stated that, while no contractual derogation should be allowed regarding the binding nature of the settlement agreement, the parties would remain free to agree that the result of a conciliation process would take a form different from that of a settlement agreement. While some support was expressed in favour of that view, it was pointed out that excluding the possibility of a contractual derogation to article 15 might unduly undermine the right of the parties to agree on a settlement that would have a lesser degree of enforceability than that contemplated in article 15.

133. The view was also expressed that partners often turned to conciliation because of its non-binding nature, using it as a way forward from a dispute. Excluding article 15 from the possibility of variation by the parties would run counter to parties using conciliation for that purpose.

134. After discussion, the Commission decided not to include article 15 among those provisions of the Model Law that could not be excluded or varied by agreement of the parties.

Footnote 1 to draft article 1

135. The proposed draft text for incorporation in footnote 1 of article 1 (by reference to paragraph numbers of article 1 as contained in document A/CN.9/506) as considered by the Commission was as follows:

> "1. 'In article 1, paragraph 1, delete the word "international".'
>
> 'Delete paragraph 3 of article 1.'
>
> 'Delete paragraph 4 of article 1.'
>
> '[Delete paragraph 5 of article 1] [Replace paragraph 5 of article 1 with the words "This Law also applies when the parties so agree".].'
>
> "2. Proposed text for inclusion in paragraph 47 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation:
>
> 'States that enact this Model Law to apply to domestic as well as international conciliation may wish, in paragraph 5 of article 6, to delete the words "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". Alternatively, such States may wish to modify paragraph 5 of article 6 by replacing the words "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" with "and, with respect to a sole or third conciliator, shall in the case of an international dispute, take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties" and including a definition of both "international" and "place of business" along the lines of paragraphs 3 and 4 of article 1.'"

136. Concern was expressed that, in respect of the proposal concerning paragraph (5) of article 1, the text appearing in the second set of square brackets of the proposed footnote ["This Law applies where the parties so agree."] should be aligned with the text of paragraph (5) as it would apply in the case of international conciliation, by adding a reference to commercial conciliation: "This Law applies to commercial conciliation where the parties so agree". Without that addition, it was suggested that the Model Law would apply differently in the two cases; in international conciliation, it would be limited to commercial conciliation, but, where it applied to both domestic and international conciliation, that limitation would not operate.

137. It was observed that the drafting of the proposed text of paragraph (1) of footnote 1 was intended to cover several circumstances where it might be

appropriate for the parties to be able to agree to the application of the Model Law. Those circumstances included very informal conciliation proceedings where it was uncertain whether the Model Law would apply under article 1, paragraph (2); conciliation proceedings which were conducted, for example, using electronic means between parties located in a number of different States and it was not clear what was the applicable law and whether or not the Model Law would apply; and circumstances where it was not clear whether the dispute would fall within the definition of commercial in article 1. Some support was expressed in favour of that flexible approach and in favour of retaining the text in the second set of square brackets in paragraph (1) of the proposed footnote.

138. A contrary view was that the Model Law should only apply to commercial conciliation, whether that conciliation was international or domestic and a reference to commercial conciliation should be included in the text of the footnote as proposed. In that case, the text of the footnote would reflect the text of paragraph (5) of article 1 as earlier adopted by the Commission. It was proposed that the same result could also be achieved by adopting the text appearing in the first set of square brackets in paragraph (1) of the proposed footnote text, resulting in the deletion of paragraph (6) of article 1 where States wished to apply the Model Law to both domestic and international commercial conciliation. Wide support was expressed in favour of the application of the Model Law to commercial conciliation, whether domestic or international, and in favour of the adoption of the text in the first set of square brackets in paragraph (1) of the proposed footnote text. The Commission adopted that approach.

139. A concern was expressed that, where the Model Law was to apply to domestic conciliation, the reference to its international origin in article 2 might not be appropriate. In response, it was pointed out that that same paragraph appeared in a number of other UNCITRAL texts (e.g., the UNCITRAL Model Law on Electronic Commerce) which could apply both domestically and internationally. It was of considerable use in promoting uniform interpretation by reference to international standards even where the text applied domestically. Without such a reference, there was a significant possibility of domestic interpretations differing from the interpretation of the text where it applied internationally, an undesirable result in view of the goal of uniformity.

140. The Commission adopted the substance of the text of the proposed footnote to draft article 1, retaining the text in the first set of square brackets in paragraph (1), and referred it to the drafting group.

D. Adoption of the UNCITRAL Model Law on International Commercial Conciliation

141. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group, adopted the following decision at its 750th meeting, on 24 June 2002:

> "*The United Nations Commission on International Trade Law*,
>
> "*Recognizing* the value of conciliation or mediation as a method of amicably settling disputes arising in the context of international commercial relations,
>
> "*Noting* in this connection that the expression 'conciliation' includes mediation and other processes of similar import,
>
> "*Convinced* that the establishment of a model law on conciliation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,
>
> "*Believing* that the UNCITRAL Model Law on International Commercial Conciliation 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 UNCITRAL Model Law on International Commercial Conciliation was the subject of due deliberation and extensive consultation after circulation of the draft text for observations of Governments and interested organizations,
>
> "*Convinced* that the Model Law, together with the UNCITRAL Conciliation Rules,[4]

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

recommended by the General Assembly in its resolution 35/52 of 4 December 1980, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

"1. *Adopts* the UNCITRAL Model Law on International Commercial Conciliation as it appears in annex I to the report of the United Nations Commission on International Trade Law on its thirty-fifth session;

"2. *Requests* the Secretary-General to transmit the text of the UNCITRAL Model Law on International Commercial Conciliation, together with *travaux préparatoires* from the thirty-fifth session of the Commission, and with the Guide to Enactment and Use of the Model Law to be finalized by the Secretariat based on the deliberations of the Commission at that thirty-fifth session, to Governments and to dispute settlement institutions and other interested bodies, such as chambers of commerce;

"3. *Recommends* that all States give due consideration to the Model Law on International Commercial Conciliation, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation or mediation practice."

E. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation

142. The Commission entrusted the secretariat with the finalization of the Guide to Enactment and Use of the Model Law, based on the draft prepared by the secretariat (A/CN.9/514) and on the deliberations of the Commission at its current session. The secretariat was invited to publish the finalized Guide together with the Model Law. It was generally agreed that, in preparing the final version of the Guide, the secretariat should take into account the comments and suggestions expressed in the course of the discussion by the Commission but that the secretariat should have discretion regarding the manner and the extent to which such comments and suggestions should be reflected in the Guide.

143. The Commission proceeded with a detailed review of the draft Guide (A/CN.9/514).

Purpose of the Guide

Paragraphs 1 to 4

144. The Commission decided that paragraph 4 should read along the lines of: "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 current session, 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."

Notion of conciliation and purpose of the Model Law

Paragraphs 5 to 10

145. With respect to paragraph 5, it was suggested that, in describing conciliation, the Guide should make it clear that an essential feature of conciliation was that it was based on a request addressed by the parties in dispute to a third party. As to paragraph 7, it was pointed out that, should the notion of "alternative dispute resolution" be used, the Guide should make it clear that the various techniques encompassed under that notion were to be regarded as alternatives to judicial dispute resolution and thus included arbitration. With respect to paragraph 9, it was suggested that the Guide should make it clear that procedural issues such as the admissibility of evidence in judicial or arbitral proceedings was not governed mainly by rules such as the UNCITRAL Conciliation Rules but by applicable statutory law. More generally with respect to paragraphs 5 to 10, it was suggested that the Guide might need to describe more extensively the attractive features of conciliation as a dispute settlement technique.

The Model Law as a tool for harmonizing legislation

Paragraphs 11 and 12

146. No comment was made in respect of paragraphs 11 and 12.

Background and history

Paragraphs 13 to 17

147. In the context of paragraph 13, doubts were expressed as to whether the use of "non-adjudicative dispute settlement methods" would increase "stability in the marketplace". It was suggested that a reference to "cost-effectiveness in the marketplace" might be more accurate. With respect to paragraph 14, it was suggested that stating that "the objectives of the Model Law … are essential for fostering economy and efficiency in international trade" might overstate the point. It was suggested that the Guide should state that the objectives of the Model Law were important for fostering economy and efficiency in international trade. As to paragraph 16, the view was expressed that too much emphasis was being placed on the description of arbitration. As to paragraph 17, a question was raised as to the usefulness of providing in the Guide such a level of historical detail. A suggestion was made that the history of the Model Law might be dealt with in tabular form in an annex to the Guide. It was widely agreed in response that a detailed account of the legislative history of the Model Law might be regarded as particularly helpful in certain countries considering enactment of the Model Law. Furthermore, it was pointed out that recording in the body of a guide the detailed history of the text was in line with the practice followed in respect of previous model laws adopted by UNCITRAL and accompanied by a guide to enactment.

Scope

Paragraphs 18 and 19

148. No comment was made in respect of paragraphs 18 and 19.

Structure of the Model Law

Paragraphs 20 to 23

149. With respect to paragraph 22, it was suggested that the Guide should reflect more clearly that, in structuring the Model Law, the drafters had focused on avoiding information being spilled over from conciliation proceedings into arbitral or court proceedings. No further comment was made on paragraphs 20 to 23.

Assistance from the UNCITRAL secretariat

Paragraphs 24 and 25

150. No comment was made in respect of paragraphs 24 and 25.

Article 1. Scope of application

Paragraphs 26 to 35

151. With respect to paragraph 27, it was suggested that the Guide should make it clear that the text of footnote 2 was not intended to provide a definition of the term "commercial". Instead, that footnote provided an illustrative and open-ended list of relationships that might be described as "commercial" in nature. In the context of paragraphs 29 and 30, it was suggested that, in verifying whether, in a given factual situation, the elements set forth in paragraph (2) of article 1 for the definition of conciliation were met, courts should be 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. With respect to paragraph 31, it was suggested that the Guide should make it clear that article 1 was not intended to interfere with the operation of the rules of private international law.

152. With respect to paragraph 35, several suggestions were made. One suggestion was that the Guide should make it clear that, in referring to "attempts [by a judge or arbitrator] to facilitate a settlement", paragraph (8) of article 1 was intended to distinguish between cases where the court or the arbitrator would act as a facilitator and those cases where the court or the arbitrator would act as a conciliator. In the former case, the judge or the arbitrator would take the initiative of acting as facilitator. In that case, the action of the judge or arbitrator acting as facilitator would not be covered by the Model Law. In the latter case, however, the action of the judge or arbitrator as a conciliator would be the result of the request of the parties in dispute and would fall within the scope of the Model Law. Another suggestion was that paragraph 35 should contain an indication along the following lines: "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 arbitral proceedings".

153. No further comment was made in respect of paragraphs 26 to 35.

Article 2. Interpretation

Paragraphs 36 and 37

154. No comment was made in respect of paragraphs 36 and 37.

Article 3. Variation by agreement

Paragraph 38

155. It was suggested that the Guide might need to establish a distinction between the general rule set forth in article 3, under which parties might freely "agree to exclude or vary any of the provisions of [the Model] Law", and the meaning of the words "unless otherwise agreed", which had been inserted in certain provisions of the Model Law. Under the suggested distinction, the general rule would simply recognize the possibility for the parties to avoid by contract the application of those provisions of the Model Law that were not specifically established as mandatory by article 3. However, article 3 would not establish the freedom of the parties to create an entirely new set of contractual obligations distinct from those established under the Model Law. The full autonomy of the parties would thus only be recognized by those provisions that were prefaced by the words "unless otherwise agreed". The suggestion was not adopted by the Commission. It was widely agreed that the Guide should not seek to establish any shade of meaning between article 3 and those provisions prefaced by the words "unless otherwise agreed". It was agreed that, in both cases, the Model Law was intended to reflect full autonomy of the parties to derogate from the provisions of the Model Law and to create a contractual framework entirely distinct from the provisions of the Model Law. The words "unless otherwise agreed" had been included in certain provisions mainly for educative reasons. It was suggested that the Guide should include wording along the following lines: "The use of the phrase 'unless otherwise agreed' does not mean that article 3 does not apply where that phrase does not appear". No further comment was made in respect of paragraph 38.

Article 4. Commencement of conciliation proceedings

Paragraphs 39 to 44

156. With respect to paragraph 44, it was suggested that the Guide should alert enacting States to the risks that might result from the adoption of article X. It was generally agreed in response that the Guide should reflect the arguments exchanged both against and in favour of the adoption of article X, as reflected in paragraphs 33 and 34, above. No further comment was made in respect of paragraphs 39 to 44 of the draft Guide.

Articles 5 and 6. Number and appointment of conciliators

Paragraphs 45 to 48

157. With respect to paragraph 46, it was pointed out that, as currently drafted, the Guide suggested that conciliation was necessarily conducted between two parties. It was suggested that the final text should reflect the multiparty approach to conciliation adopted by the Commission. With respect to paragraph 47, it was suggested that the words "reference has to be had" connoted an obligation and should be replaced by wording along the lines of "reference may be had". Another suggestion was that the Guide should make it clear that a failure to disclose facts which might give rise to justifiable doubts within the meaning of paragraph (6) of article 6 should not create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law (see para. 50, above). No further comment was made in respect of paragraphs 45 to 48.

Article 7. Conduct of conciliation

Paragraphs 49 to 53

158. With respect to paragraph 51, it was suggested that the Guide should reflect that the Model Law did set out a standard of conduct to be applied by a conciliator. It was also suggested that the sentence "some concern was expressed that the inclusion of a provision governing the conduct of the conciliation could have the unintended effect of inviting parties to seek annulment of the settlement agreement by alleging unfair treatment" should be deleted since it was unnecessary to advise the parties in that respect. It was recalled that the Commission had agreed that the Guide should make it clear that paragraph (3) of article 7 was intended to govern the conduct of the conciliation proceedings and that it did not address the contents of the settlement agreement (see para. 58, above).

159. It was generally felt that paragraph 52 should be deleted, since there was no need for the Guide to restate the UNCITRAL Conciliation Rules or to discuss the merits of national laws in the context of that article. No further comment was made in respect of paragraphs 49 to 53.

Article 8. Communication between conciliator and parties

Paragraphs 54 and 55

160. Doubts were expressed as to whether the notion of "equality of treatment" should be used and, more generally, as to whether paragraph 55 should be retained in the Guide. It was recalled in response that paragraph 55 reflected a compromise reached by the Working Group at its thirty-fourth session (A/CN.9/487, para. 129), which the Commission did not wish to revise. After discussion, it was generally agreed that the substance of paragraph 55 should be relocated in the section of the Guide dealing with paragraph (3) of article 7. No further comment was made in respect of paragraphs 54 and 55.

Article 9. Disclosure of information between the parties

Paragraphs 56 and 57

161. With respect to paragraph 56, the view was expressed that the tone of the last sentence was overly derogatory regarding the practice under which the consent of a party giving information should be sought before any communication of that information might be given to the other party. It was recalled that such practice was widely followed with good results in a number of countries. It was suggested that paragraph 55 should be redrafted to make it clear that, in certain countries, such practice was enshrined in mediation rules. The Model Law provided a recommendation for parties who did not have such a rule and was consistent with the UNCITRAL Conciliation Rules. It was recalled that the Commission had earlier agreed that the Guide should contain a clear recommendation to conciliators that they should inform the parties that information communicated to a conciliator might be disclosed unless the conciliator was informed otherwise (see para. 70, above). It was suggested that paragraph 56 should be redrafted to emphasize the intent to foster candid communication between each party and the conciliator.

162. With respect to the words "the substance of that information", it was suggested that the Guide should make it clear that the current wording, along the lines of article 10 of the UNCITRAL Conciliation Rules, had been preferred to the words "that information" to avoid burdening the conciliator with an obligation to communicate the literal content of any information received from the parties (see para. 70, above).

163. It was recalled that the title of article 9 had been amended to read "Disclosure of information". No further comment was made in respect of paragraphs 56 and 57.

Article 10. Duty of confidentiality

Paragraphs 58 to 60

164. The Commission was reminded of a proposal that the words "duty of" be deleted from the title and that an explanation as to the meaning of draft article 10 be included in the draft Guide (see para. 76, above).

Article 11. Admissibility of evidence in other proceedings

Paragraphs 61 to 68

165. The Commission was reminded of the need to adjust the last sentence of paragraph 61 to align it to the text of the draft article as revised.

166. A number of suggestions were made. One suggestion was that in paragraphs 62 to 67 it should be made clear that draft article 11 provided for two results with respect to admissibility of evidence in other proceedings: an obligation incumbent upon the parties not to rely on the types of evidence specified in article 11 and an obligation of courts to treat such evidence as inadmissible. Another suggestion was that the draft Guide should clarify that the term "similar proceedings" covered discovery and depositions in countries where such methods of obtaining evidence were used. Yet another suggestion was that in paragraph 67 it should be made clear that statements inadmissible in other proceedings included "documents prepared solely for the conciliation proceedings".

167. Yet another suggestion was that the draft Guide should explain that the term "law" in draft article 11, paragraph (3), meant 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 draft article 11, paragraph (1). In support, it was stated that, without such a statement, the confidentiality of information used in conciliation would be seriously compromised, since the second sentence of draft article 11, paragraph (3), seemed to introduce a broad exception to the principle of non-admissibility of such evidence. While it was widely agreed that the term "law" should be given a narrow interpretation, it was noted that 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 draft article 11(1)) were normally based on legislation and that certain types of such orders (in particular, if based on the law of criminal procedure or laws protecting public safety or professional integrity) might be regarded as exceptions to the rule of article 11(1). However, it was considered that, when disclosure of evidence was 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 in paragraph 67 of the draft Guide, A/CN.9/514), the court would be barred from issuing a disclosure order. The Commission requested the secretariat to express that narrow meaning of the expression "law" in the Guide, recognizing that, in certain systems, the term "law" included not only the texts of statutes, but also court decisions. The examples given in paragraph 67 of the draft Guide (A/CN.9/514) were to be reviewed so as to ensure that they would be properly understood in interpreting the last sentence of article 11(3).

Article 12. Termination of conciliation

Paragraph 69

168. A number of suggestions were made. One suggestion was that the draft Guide should explain that States adopting a provision along the lines of draft article X, in the interest of certainty with respect to the time of suspension and resumption of limitation periods, might need to consider requiring a written declaration for the termination of conciliation. It was widely felt that that clarification should be made in the context of the discussion in the draft Guide of draft article X.

169. Another suggestion was that the draft Guide should make it clear that conciliation could be terminated by 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. Some doubt was expressed as to the need to refer to conduct as a way to terminate conciliation, in particular, since in the case of abandonment of the proceedings by a party, the conciliator or the other party could declare them terminated. It was said in reply that conciliation was an informal process and that in some situations it might not be clear whether the parties were involved in settlement negotiations covered by the Model Law and that therefore informal methods of termination (including by conduct) should be allowed. However, it was pointed out that it was in the interest of legal certainty (in particular as regards subparagraph (d)) that conduct per se, without a statement or action that could be equated with "declaration", would not terminate conciliation proceedings. Yet another suggestion was that, to the extent a reference to "data message" appeared in the footnote, it should include a clarification of the meaning of the term "data message".

Article 13. Conciliator acting as arbitrator

Paragraphs 70 to 74

170. One suggestion was that it should be made clear that, while in some legal systems conciliators were permitted to act as arbitrators if parties so agreed and, in other legal systems, that was subject to rules in the nature of codes of conduct, the draft Model Law was neutral on that point. Another suggestion was that, in any event, the agreement of the parties and the conciliator should be able to override any such limitation, even where the matter was subject to rules in the nature of codes of conduct. A further suggestion was that it should be made clear that draft article 13 did not deal with situations in which arbitrators acted as conciliators, which was permitted in some legal systems. Yet another suggestion was that considerations governing a conciliator acting as an arbitrator might be relevant also in situations where a conciliator acted as a judge, and it was recalled that those situations were not addressed in the draft Model Law because they were rarer and because their regulation might interfere with national rules governing the judiciary. It was proposed mentioning those situations in the Guide so that enacting States would consider whether any special rule is needed in the context of their national rules governing the judiciary.

Article 14. Resort to arbitral or judicial proceedings

Paragraphs 75 and 76

171. Paragraphs 75 and 76 were not commented upon.

Article 15. Enforceability of settlement agreement

Paragraphs 77 to 81

172. A number of suggestions were made. One suggestion was that paragraphs 79 and 80 should be deleted, since such detail was not necessary and could cause confusion. That suggestion was objected to. It was stated that paragraphs 79 and 80 appropriately gave examples of ways in which settlement agreements could be enforced, in particular since draft article 15 left that matter to law applicable outside the draft Model Law. It was suggested that examples based on legislation of only two countries did not give a picture of the variety of approaches found in international practices and therefore should not be included. It was also observed that references to the laws of certain countries in paragraph 81 needed to be reviewed and corrected. Another suggestion was that paragraph 81 should be revised to avoid inadvertently giving the impression that draft article 15 was the result of an unhappy compromise.

Use of conciliation in multiparty situations

173. In order to emphasize the importance of conciliation in multiparty situations (and, inter alia, in cases of corporate insolvency), it was suggested that wording along the following lines should be included in the Guide:

> "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. Notable examples of these are 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."

174. Support was expressed for that suggestion. It was stated that conciliation was being used with success in the case of complex, multiparty disputes. The example was given of conciliation before and after commencement of insolvency proceedings. It was observed that one of the benefits of the settlement of disputes through conciliation was the avoidance of insolvency. It was also said that, without overriding the insolvency proceedings, conciliation often usefully supplemented them, in particular in the case of reorganization. In addition, it was observed that, in many countries, insolvency courts were not prevented from attempting to facilitate a settlement. It was agreed that the text for the Guide should be carefully drafted, drawing attention to the need that conciliation proceedings should not interfere with the objectives of insolvency proceedings as expressed by the law governing such insolvency proceedings.

175. However, the concern was expressed that such a detailed reference to the use of conciliation in insolvency proceedings could inadvertently give the impression that the application of conciliation was somehow limited. In order to address that concern, the suggestion was made that the proposed paragraph should be included in the footnote to the Model Law that contained the definition of the term "commercial". There was no support for that suggestion. The suggestion was also made that reference should be made to other examples, such as disputes arising in the context of construction contracts, syndicated loans, franchising and distribution agreements and co-insurance policies. While interest was expressed in that suggestion, a note of caution was struck that having another list next to the practices listed as being commercial might cause confusion.

176. In response to a question, it was noted that the reference to multiparty relations might fit into the discussion on draft article 1.

177. After discussion, the Commission agreed to include in the Guide a reference to the use of

conciliation in multiparty relations, taking into account the views and concerns expressed.

IV. Arbitration

178. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2]

179. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[3] requirement of written form for the arbitration agreement,[4] enforceability of interim measures of protection[5] and possible enforceability of an award that had been set aside in the State of origin.[6]

180. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[7]

181. At its thirty-fourth session, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.[8]

182. At its current session, the Commission took note with appreciation of the report of the Working Group on the work of its thirty-sixth session (A/CN.9/508). The Commission commended the Working Group for the progress accomplished so far regarding the issues under discussion, namely the requirement of the written form for the arbitration agreement and the issues of interim measures of protection.

183. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph (2) of the Model Law on Arbitration (A/CN.9/WG.II/WP.118, para. 9) and discussed a draft interpretative instrument regarding article II(2) of the New York Convention

(paras. 25-26). The Commission noted that the Working Group had not reached consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. The Commission noted the decision of the Working Group to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the secretariat was requested to prepare for future consideration by the Working Group, by establishing a "friendly bridge" between the new provisions and the New York Convention, pending a final decision by the Working Group on how best to deal with the application of article II(2) of the Convention (A/CN.9/508, para. 15). The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision of article VII of the New York Convention, as noted by the Commission at its thirty-fourth session.[9] For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions regarding the requirement of written form for the arbitration agreement and the New York Convention until its thirty-eighth session, in 2003.

184. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74) and that the secretariat had been requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. It was also noted that a revised draft of a new article prepared by the secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (para. 83) would be considered by the Working Group at its thirty-seventh session (A/CN.9/508, para. 16).

V. Insolvency law

185. The Commission, at its thirty-second session in 1999, had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. According to that proposal, the Commission, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that had expertise and interest in the law of insolvency, was an appropriate forum for the discussion of insolvency law issues. The Commission was urged in that proposal to consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

186. At that session, the Commission recognized the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

187. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session.[10] That session of the Working Group was held in Vienna from 6 to 17 December 1999.

188. At its thirty-third session, in 2000, the Commission noted the recommendation that the

Working Group had made in its report (A/CN.9/469, para. 140) and gave the Working Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

189. It was agreed that, in carrying out its task, the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund, the Asian Development Bank, the International Federation of Insolvency Professionals (INSOL) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the secretariat, in cooperation with INSOL and IBA, organized the UNCITRAL/ INSOL/IBA Global Insolvency Colloquium at Vienna, from 4 to 6 December 2000.[11]

190. At its thirty-fourth session, in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495). The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and the interpretation of the mandate given to the Working Group by the Commission at its thirty-third session.

191. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.[12]

192. At its current session, the Commission noted with appreciation the reports of the Working Group on the work of its twenty-fourth (A/CN.9/504), twenty-fifth (A/CN.9/507) and twenty-sixth sessions (A/CN.9/511). The Commission commended the Working Group for the progress accomplished so far in developing the legislative guide and stressed the importance of continued cooperation with intergovernmental and non-governmental organizations having expertise and interest in insolvency law.

193. With respect to the treatment of security interests in insolvency proceedings, the Commission emphasized the need for a consistent approach by Working Groups V (Insolvency Law) and VI (Security Interests). In that connection, the Commission noted with satisfaction that the Working Groups had already coordinated their work and had agreed on principles for treating issues of common concern (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the secretariat to consider organizing a joint session of the two Working Groups in December 2002.

194. The Commission also noted that, at its twenty-sixth session, the Working Group had discussed the likely timing for the completion of its work and had considered that it would be in a better position to make a recommendation to the Commission after its twenty-seventh session (Vienna, 9-13 December 2002) when it would have the opportunity to review a further draft of the legislative guide. The Commission requested the Working Group to continue the preparation of the legislative guide and to consider its position with respect to completion of its work at its twenty-seventh session.

Judicial colloquiums

195. The Commission also noted the report of the 4th Multinational Judicial Colloquium on Cross-Border Insolvency (London, 16 and 17 July 2001) that the secretariat and INSOL had jointly organized (A/CN.9/518). It was noted that over 60 judges and government officials from 29 States had attended the Colloquium. It was also noted that the Colloquium had considered the progress of adoption of the UNCITRAL Model Law on Cross-Border Insolvency by States and the application of legislation enacting the Model Law

to cross-border insolvency issues, as well as aspects of judicial training and education. In addition, it was noted that the Colloquium had provided an opportunity for judges to further their understanding of the various national approaches to cross-border insolvency issues.

196. The Commission further noted that participants in the Colloquium had generally recognized the need for continued judicial education and training to ensure proper and efficient functioning not only of the regime for cross-border insolvency issues, but also for insolvency laws in general. It was suggested that training and education programmes should be based upon an assessment of needs that would enable the programmes and their delivery to be tailored to the requirements (legal, social and cultural) of the local jurisdiction and be compatible with its budget, the caseload demands of judges and the availability of international assistance, including both financial and human resources.

197. The Commission expressed its satisfaction to the secretariat for organizing that Multinational Judicial Colloquium and requested the secretariat to continue cooperating actively with INSOL and other organizations with a view to organizing further such colloquiums in the future, to the extent its resources so permitted. The Commission also agreed that the participation of judges from developing countries was particularly important and requested the secretariat to explore ways of facilitating their participation in future colloquiums, as well as organizing regional or national colloquiums, in cooperation with organizations that might be able to cover expenses of participating judges from developing countries. The Commission also expressed the hope that Governments would reserve funds necessary for delegating judges to such events in view of the potential benefits that would result therefrom in terms of enhanced knowledge and improved court practices in insolvency matters.

VI. Security interests

198. At its thirty-third session in 2000, the Commission considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.[13]

199. At its thirty-fourth session in 2001, the Commission considered a note by the secretariat on security interests (A/CN.9/496). At that session, the Commission agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security interests could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be

fostered, with enterprises being prevented from expanding to meet their full potential.[14]

200. While some concerns were expressed with respect to the feasibility of work in the field of secured credit law, the Commission noted that those concerns were not widely shared and went on to consider the scope of work.[15] It was widely felt that work should focus on security interests in goods involved in a commercial activity, including inventory. It was also agreed that securities and intellectual property should not be dealt with.[16] As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.[17] After discussion, the Commission decided to entrust a working group with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity, including inventory. Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry, the Commission recommended that a two- to three-day colloquium be held.[18] The colloquium was held in Vienna from 20 to 22 March 2002. The report of the colloquium is contained in document A/CN.9/WG.VI/WP.3.

201. At its current session, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission commended the secretariat for having prepared a first, preliminary draft of a legislative guide on secured transactions (A/CN.9/WG.VI/WP.2 and addenda 1 through 12), for having organized, in cooperation with the Commercial Finance Association, an international colloquium on secured transactions at Vienna from 20 to 22 March 2002, and for having prepared the report on the colloquium (A/CN.9/WG.VI/WP.3).

202. At the outset, the Commission expressed its appreciation to the Working Group for the progress made in its work and in particular for having considered chapters I through V and X of the draft Guide. It was widely felt that, with that legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations. In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group. The comments submitted to Working Group VI in particular by the European Bank for Reconstruction and Development (A/CN.9/WG.VI/WP.4) were mentioned as an indication of that interest.

203. In addition, the feeling was widely shared that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission's own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group VI and Working Group V (Insolvency Law) towards coordinating their work on a subject of common interest such as the treatment of security interests in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance with respect to the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise chapter X of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the secretariat to consider organizing a joint session of the two Working Groups in December 2002.

204. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security interests in goods, including inventory.[19] The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.

VII. Electronic commerce

205. At its thirty-fourth session, in 2001, the Commission endorsed a set of recommendations for future work that had been made by the Working Group on Electronic Commerce at its thirty-eighth session (New York, 12-23 March 2001).[20] They included the preparation of an international instrument dealing with selected issues on electronic contracting and consideration of three other topics, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (see A/CN.9/484, para. 134).

206. At its current session, the Commission took note of the report of the Working Group on the work of its thirty-ninth session (A/CN.9/509), which was held in New York, from 11 to 15 March 2002. The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, the Commission also took note of the varying views that were expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, in 2003.

207. The Commission took note of the progress made thus far by the secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief concerning the importance of that project and its support for the efforts of the Working Group and the secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues relating to legal barriers to electronic commerce that had been raised in the secretariat's initial survey (A/CN.9/WG.IV/WP.94).

208. The Commission was informed, in that connection, that the secretariat had invited member and observer States to submit written comments on that project and requested international organizations, including organizations of the United Nations system and other intergovernmental organizations, to offer their views to the secretariat as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey. The Commission invited member and observer States, as well as international intergovernmental and interested non-governmental organizations, to submit their comments to the secretariat at their earliest convenience. The views of member and observer States, as well as the comments from other international organizations were said to be particularly important to ensure that the survey being conducted by the secretariat would reflect trade-related instruments emanating from the various geographical regions represented on the Commission.

209. The Commission affirmed its understanding that all topics referred to in paragraph 1 should remain under consideration by the Working Group as items of its short- and medium-term work programmes. As had already been indicated at the Commission's thirty-third session, the work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of

the above-mentioned topics.[21] With respect to the issues of online dispute resolution (ODR), the Commission received information on the work under way or currently being considered in other international organizations. The Commission requested the secretariat to continue monitoring closely such activities, with a view to developing suggestions, when appropriate, for future work by UNCITRAL in the field of ODR.

VIII. Transport law

210. At its twenty-ninth session, in 1996,[22] the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.[23]

211. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding various issues. Those gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication on the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.[23]

212. At that session, the Commission also decided that the secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, so as to be able to present at a later stage a report to the Commission. It was agreed that such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors.[24]

213. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.[25]

214. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.[26]

215. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.[27]

216. At its thirty-third session, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat. It also heard an oral report on behalf of CMI that the CMI working group had, in cooperation with the secretariat, launched an investigation based on the questionnaire. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

217. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible

solutions. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing.

218. At its thirty-fourth session, in 2001, the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

219. The report suggested that consultations conducted by the secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission.

220. At its thirty-fourth session, the Commission decided to entrust the project to the Working Group on Transport Law.[28]

221. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested intergovernmental organizations involved in work on transport law (such as the United Nations Conference on Trade and Development, the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS), as well as international non-governmental organizations.[28]

222. At its current session, the Commission had before it the report of the ninth session of the Working Group on Transport Law held in New York from 15 to 26 April 2002 at which the consideration of the project commenced (A/CN.9/510). At that session, the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21). The Working Group had before it also the comments prepared by ECE and UNCTAD, which were reproduced in annexes to the note by the secretariat (A/CN.9/WG.III/WP.21/Add.1). Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session. The Commission noted that the secretariat had been requested to prepare revised provisions of the draft instrument based on the deliberations and decisions of the Working Group (A/CN.9/510, para. 21). The Commission expressed appreciation for the work that had already been accomplished by the Working Group.

223. The Commission noted that the Working Group, conscious of the mandate given to it by the Commission (A/56/17, para. 345) (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view that it would be desirable to include within its discussions also door-to-door operations and to deal with those operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments (for considerations of the Working Group on the issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32).

224. With respect to the scope of the draft instrument, strong support was expressed by a number of delegations in favour of the working assumption that the scope of the draft instrument should extend to door-to-door transport operations. It was pointed out that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of practical situations where transport (in particular transport of containerized goods) was operated under door-to-door contracts. While no objection was raised against such an extended scope of the draft instrument, it was generally agreed that, for continuation of its deliberations, the Working Group should seek participation from international organizations such as the International Road Transport Union (IRU), the Intergovernmental Organisation for International Carriage by Rail (OTIF), and other international organizations involved in land transportation. The Working Group was invited to consider the dangers of extending the rules governing maritime transport to land transportation and to take into account, in developing the draft instrument, the specific needs of land carriage. The Commission also invited member and observer States to include land transport experts in the delegations that participated in the deliberations of the Working Group. The Commission further invited Working Groups III (Transport Law) and IV (Electronic Commerce) to coordinate their work in respect of dematerialized transport documentation. While it was generally agreed that the draft instrument should provide appropriate mechanisms to avoid possible conflicts between the draft instrument and other multilateral instruments (in particular those instruments that contained mandatory rules applicable to land transport), the view was expressed that avoiding such conflicts would not be sufficient to guarantee the broad acceptability of the draft instrument unless the substantive provisions of the draft instrument established acceptable rules for both maritime and land transport. The Working Group was invited to explore the possibility of the draft instrument providing separate yet interoperable sets of rules (some of which might be optional in nature) for maritime and road transport. After discussion, the Commission approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.

IX. Privately financed infrastructure projects

225. At its thirty-third session, in 2000, the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the secretariat was authorized to finalize in the light of the deliberations of the Commission.[29] The Legislative Guide was published in all official languages in 2001.

226. At the same session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private

investment in public infrastructure, it would be nevertheless desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.[30]

227. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session in 2001. In order to assist the Commission in making an informed decision on the matter, the secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.[31]

228. A Colloquium under the title "Privately Financed Infrastructure: Legal Framework and Technical Assistance" was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held from 2 to 4 July 2001 in Vienna, during the second week of the thirty-fourth session of the Commission.

229. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the secretariat (A/CN.9/488). The Commission expressed its gratitude to PPIAF for its financial and organizational support, and to the various international intergovernmental and non-governmental organizations represented and to the speakers who participated at the Colloquium.

230. At that session, the Commission considered the desirability and feasibility of further work of the Commission in the field of privately financed infrastructure projects.[32] After discussion, the Commission agreed that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within a reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the Legislative Guide. Accordingly, it was agreed that the first session of such a working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Legislative Guide, could be formulated.[33]

231. The Working Group, named Working Group I (Privately Financed Infrastructure Projects), held its fourth session (the first devoted to that item), in Vienna from 24 to 28 September 2001. The Working Group decided to use the legislative recommendations contained in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects as a basis for its deliberations.

232. In accordance with a suggestion that had been made at the Colloquium (A/CN.9/488, para. 19), the Working Group was invited to devote its attention to a specific phase of infrastructure projects, namely the selection of the concessionaire, with a view to formulating specific drafting proposals for legislative provisions. Nevertheless, the Working Group was of the view that model legislative provisions on various other topics might be desirable (see A/CN.9/505, paras. 18-174). The Working Group requested the secretariat to prepare draft model legislative provisions in the field of privately financed infrastructure projects, based on those deliberations and decisions, to be presented to the fifth session of the Working Group for review and further discussion.

233. At its current session, the Commission noted with appreciation the report of the Working Group on the work of its fourth session (A/CN.9/505). The Commission commended the Working Group and the secretariat for the progress accomplished so far in developing a set of draft model legislative provisions for the legislative guide. The Commission requested the Working Group to review the draft model legislative provisions with a view to completing its work at its fifth session. It was stated that early finalization of the draft model legislative provisions by the Working Group would facilitate timely distribution of the draft model legislative provisions to States and organizations for comments and their consideration for adoption by the Commission, as an addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, at its thirty-sixth session in 2003.

X. Monitoring implementation of the 1958 New York Convention

234. It was noted that the Commission, at its twenty-eighth session, in 1995, had approved the project, undertaken jointly with Committee D of IBA, aimed at monitoring the legislative implementation of the New York Convention.[34] It was also noted that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, that its purpose was not to monitor individual court decisions applying the Convention. Moreover, it was noted that, as at the beginning of the current session of the Commission, the secretariat had received 61 replies to the questionnaire sent to the States parties to the Convention (of a current total of 130 States parties) relating to the legal regime in those States governing the recognition and enforcement of foreign awards.

235. The Commission urged the secretariat to intensify its efforts to obtain information necessary for preparing the report and for that purpose to recirculate the questionnaire to the States parties to the Convention that had not yet replied to the questionnaire requesting them to reply as soon as possible or, to the extent necessary, to inform the secretariat about any new developments since their previous replies to the questionnaire. The secretariat was also urged to obtain information from other sources, in particular intergovernmental and non-governmental organizations. After discussion, the secretariat was requested to prepare, for a future session of the Commission, a note presenting the findings based on the analysis of the information gathered, which could be updated.

236. In the discussion of the importance of the project, the Commission's attention was drawn to the example of the cotton industry. As noted in a recent letter to the secretariat from the International Cotton Advisory Committee (ICAC, an intergovernmental organization of States having an interest in the production, export, import and consumption of cotton), in 2001 about two thirds of all arbitral awards issued in conjunction with international trade in cotton were ignored by the party at fault and that that fact undermined confidence in the cotton trading system and imposed costs throughout the cotton chain. It was widely felt that non-compliance with arbitral awards was a serious matter that required immediate attention since it could undermine the efficiency of arbitration and the reliability of contracts, which could seriously disrupt international trade. In that connection, it was emphasized that there was a need for increased efforts by the Commission in the field of training and assistance and that judicial colloquiums could usefully be held in order to foster an exchange of views among judges as to the interpretation and the application of the Convention. It was noted that additional secretariat resources could be devoted to that effort only if the secretariat of the Commission were strengthened (for the continuation of the discussion on the issue of the strengthening of the secretariat of the Commission, see paras. 258-271, below).

XI. Enlargement of the membership of the Commission

237. The Commission took note of General Assembly decision 56/422 of 12 December 2001 by which the General Assembly, on the recommendation of the Sixth Committee and after having considered a report by the Secretary-General (A/56/315), decided to defer consideration of and decision on the enlargement of the membership of the Commission to its fifty-seventh session under the item entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-fifth session".

238. It was generally agreed that the membership of the Commission should be enlarged as soon as possible. Recalling a similar discussion held at its thirty-fourth session,[35] the Commission generally felt that such an enlargement of the Commission would ensure that the Commission remained representative of all legal traditions and economic systems, in particular in view of the substantial increase in the membership of the Organization. In addition, it was observed that an enlargement of the Commission would assist the Commission in better implementing its mandate by drawing on a pool of experts from an increased number of countries and by enhancing the acceptability of its texts. It was also stated that such an enlargement would adequately reflect the increased importance of international trade law for economic development and the preservation of peace and stability. Moreover, it was said that such an enlargement of the Commission would foster participation of those States that could not justify the human and other resources necessary for the

preparation and attendance of the meetings of the Commission and its working groups unless they were members. It was also stated that an enlargement would facilitate coordination with the work of other organizations active in the unification of private law to the extent that the overlap between the membership of the Commission and the membership of those organizations would be increased. It was also observed that an enlargement of the Commission would not affect its efficiency or its working methods and, in particular, the participation as observers of non-member States and international organizations, whether governmental or non-governmental, active in the field of international trade law or the principle of reaching decisions by consensus without a formal vote.

239. As to the size of the enlargement, some preference was expressed for 60 member States, while reference was made also to 72 member States. As to the distribution of seats among geographic groups, divergent views were expressed. Views were expressed that the distribution of the membership to each regional group was to be considered upon the basis of equal and fair treatment in order to avoid any underrepresentation referring to the underlying principles of equal representation behind the Charter of the United Nations, article II, paragraph 1. However, views were also expressed that the current proportion among regional groups should be maintained. After discussion, it was agreed that both matters should be left to the Sixth Committee.

XII. Case law on UNCITRAL texts

A. Case law

240. The Commission noted with appreciation the ongoing work under the system that had been established for the collection and dissemination of case law on UNCITRAL texts (CLOUT), consisting of the preparation of case abstracts, compilation of full texts of decisions, and the preparation of research aids and analytic tools such as thesauri and indices. It was observed that, as of the date of the present Commission session, 36 issues of CLOUT had been published, dealing with 420 cases. It was noted that CLOUT represented an important aspect of the overall training and technical assistance information activities undertaken by UNCITRAL. In that regard, it was observed that the wide distribution of CLOUT in both print and electronic formats (see http://www.uncitral.org under "CLOUT") promoted the uniform interpretation and application of UNCITRAL texts by enabling interested persons, such as judges, arbitrators, lawyers or parties to commercial transactions to take into account decisions and awards of other jurisdictions when rendering their own judgements or opinions or adjusting their actions to the prevailing interpretation of those texts.

241. The Commission expressed appreciation to the national correspondents for their work in the collection of relevant decisions and arbitral awards and their preparation of case abstracts. It also expressed its appreciation for compiling, editing, issuing and distributing case abstracts, as well as for the preparation of a new, web-enhanced Thesaurus on the Model Arbitration Law, which was finalized after distribution to national corespondents for their comments.

242. The Commission noted that at present CLOUT predominately contained cases interpreting the Convention on the International Sale of Goods and the Model Arbitration Law. It was agreed that an effort should be made to extend the scope of materials contained within CLOUT to include cases and arbitral decisions interpreting other UNCITRAL texts as well, such as inter alia the Model Law on Electronic Commerce, the Hamburg Rules, and the Model Procurement Law.

B. Digest of case law on the United Nations Sales Convention

243. The Commission recalled that, at its thirty-fourth session, it had requested the secretariat to prepare, in cooperation with experts and national correspondents, a text in the form of an analytical digest of court and arbitral decisions identifying trends in the interpretation of the United Nations Convention on Contracts for the International Sale of Goods. It was noted that the drafting process was under way and that it was anticipated that a draft text would be circulated to national correspondents and finalized by the secretariat in light of comments received. It was also noted that the secretariat was working with the assistance of experts and national correspondents to collect cases, evaluate their significance and prepare

initial drafts. The Commission expressed its appreciation to the experts and national correspondents for their efforts in the preparation of the initial draft chapters of the digest on the Convention. In view of the importance of international commercial arbitration and the relevance of the UNCITRAL Model Law on International Commercial Arbitration in that context, the Commission requested the secretariat to prepare a similar digest of case law on the Model Law. The Commission also considered that the secretariat should explore the feasibility of preparing such a digest on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

XIII. Training and technical assistance

244. The Commission had before it a note by the secretariat (A/CN.9/515) setting forth the activities undertaken since its thirty-fourth session and indicating the direction of future activities being planned, in particular in view of the increase in the requests received by the secretariat. It was noted that training and technical assistance activities were typically carried out through seminars and briefing missions, which were designed to explain the salient features of UNCITRAL texts and the benefits to be derived from their adoption by States. It was also noted that such seminars and briefing missions were often followed by assistance in the drafting or finalizing of legislation based on an UNCITRAL text.

245. It was reported that, since the previous session, the following seminars and briefing missions had been organized: Vilnius (11-13 June 2001); Ouagadougou (18-22 June 2001); Santo Domingo (20-21 June 2001); Nairobi (10-13 September 2001); Minsk (26-28 September 2001); Kiev (2-4 October 2001); Dubrovnik, Croatia (1-5 October 2001); Lima (15-16 October 2001); Arequipa, Peru (18-19 October 2001); Bogota (25-26 October 2001); Hanoi (6-12 December 2001); Phnom Penh (3-5 April 2002); and Jakarta (8-10 April 2002). Members of the secretariat participated as speakers in a number of meetings convened by other organizations. The secretariat of the Commission reported that a number of requests had had to be turned down for lack of sufficient resources and that for the remainder of 2002 only some of the requests made by countries in Africa, Asia, Latin America and Eastern Europe could be met.

246. The Commission expressed its appreciation to the secretariat for the activities undertaken since its previous session and emphasized the importance of the training and technical assistance programme for the unification and harmonization efforts that were at the heart of the Commission's mandate. It was widely felt that training and technical assistance were particularly useful for developing countries and countries with economies in transition lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. It was also stated that the training and technical assistance activities of the secretariat could play an important role in the economic integration efforts being undertaken by many countries.

247. The Commission noted the various forms of technical assistance that might be provided to States preparing legislation based on UNCITRAL texts, such as review of preparatory drafts of legislation from the point of view of UNCITRAL texts, preparation of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts as embodied in national legislation. The Commission agreed that the upsurge in commercial law reform represented a crucial opportunity for the Commission to further significantly its objectives, as envisaged by the General Assembly in its resolution 2205 (XXI) of 17 December 1966. It was also widely felt that, with its balanced work over the last thirty-five years aimed at facilitating the development of international trade in a globalized economy on the basis of equality and mutual benefit, the Commission could make a unique contribution towards the goal of spreading the benefits of globalization to all States in a balanced and fair way.

248. The Commission took note with appreciation of the contributions made by Cyprus, France, Greece and Switzerland towards the training and technical assistance programme. It also expressed its appreciation to Austria, Cambodia, Cyprus, Kenya, Mexico and Singapore for their contributions to the Trust Fund for Granting Travel Assistance to Developing States members of UNCITRAL since its establishment. The Commission furthermore expressed its appreciation to those other States and organizations that had contributed to its programme of training and assistance by providing funds or staff or by hosting seminars.

249. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities, the Commission appealed once again to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust funds so as to enable the secretariat of the Commission to meet the increasing demands in developing countries and newly independent States for training and assistance and to enable delegates from developing countries to attend UNCITRAL meetings. It was also suggested that the secretariat should make efforts to actively seek contributions from donor countries and organizations, for instance by formulating concrete proposals for projects to support its training and technical assistance activities.

250. In view of the limited resources available to the secretariat of the Commission, whether from budgetary or extrabudgetary resources, strong concern was expressed that the Commission could not fully implement its mandate with regard to training and technical assistance. Concern was also expressed that, without effective cooperation and coordination between the secretariat and development assistance agencies providing or financing technical assistance, international assistance might lead to the adoption of national laws that did not represent internationally agreed standards, including UNCITRAL conventions and model laws.

251. The Commission noted with appreciation the initial steps taken in the direction of implementation of a request of the General Assembly made last year for the Secretary-General to increase substantially both the human and the financial resources available to its secretariat. However, the Commission also noted that those efforts had not been completed yet and that two members of its secretariat who had left since its last session had not been replaced yet. Therefore, in order to ensure the effective implementation of its training and assistance programme and the timely publication and dissemination of its work, the Commission decided to recommend that the General Assembly consider requesting the Secretary-General to intensify and expedite efforts to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization (paras. 258-271, below).

XIV. Status and promotion of UNCITRAL legal texts

252. On the basis of a note by the secretariat (A/CN.9/516), the Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new action of States and jurisdictions subsequent to 13 July 2001 (the date of the conclusion of the thirty-fourth session of the Commission) regarding the following instruments:

(a) Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980. Number of States parties: 17;

(b) [Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974). Number of States parties: 24;

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). Number of States parties: 28;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Colombia and Israel; number of States parties: 61;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). New action by Honduras. The Convention has three States parties; it requires seven additional actions for entry into force;

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Convention has two States parties; it requires three additional actions for entry into force;

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). New action by Belarus; number of States parties: 6;

(h) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions by Iceland, Iran (Islamic Republic of) and Zambia; number of States parties: 129;

(i) UNCITRAL Model Law on International Commercial Arbitration, 1985. New jurisdiction that has enacted legislation based on the Model Law: Croatia;

(j) UNCITRAL Model Law on International Credit Transfers, 1992;

(k) UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994. New jurisdictions that have enacted legislation based on the Model Law: Mauritius, Mongolia, Slovakia and United Republic of Tanzania;

(l) UNCITRAL Model Law on Electronic Commerce, 1996. New jurisdictions that have enacted legislation based on the Model Law: Ireland, Philippines, Slovenia and the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland);

(m) UNCITRAL Model Law on Cross-Border Insolvency, 1997. New jurisdiction that has enacted legislation based on the Model Law: within Yugoslavia, Montenegro.

253. It was also reported that Luxembourg had signed the United Nations Convention on the Assignment of Receivables in International Trade. Appreciation was expressed for those legislative actions on the texts of the Commission. A request was directed to States that had enacted or were about to enact a model law prepared by the Commission, or were considering legislative action regarding a convention resulting from the work of the Commission, to inform the secretariat of the Commission thereof. Such information would be useful to other States in their consideration of similar legislative action. It was suggested that consideration might be given to reporting activities towards legislative action on an UNCITRAL text and legislations influenced by an UNCITRAL text.

254. Representatives and observers of a number of States reported that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL. The view was also expressed that the Commission work had a general beneficial impact by emphasizing the benefits to be derived from uniform law texts, even before their adoption by States.

255. The Commission generally felt that its efforts towards the unification and harmonization of trade law had a general beneficial impact but could not be complete and produce concrete results unless texts prepared by the Commission were adopted by States and applied in a uniform way. In order to ensure that result, the Commission requested the secretariat to increase its efforts aimed at assisting States in considering texts prepared by the Commission for adoption (see also para. 250, above). The Commission also appealed to States and relevant organizations in the public and the private sector to assist the secretariat in those efforts, for example, by making contributions to the Trust Fund for UNCITRAL Symposia or by joining efforts with the secretariat in their law reform assistance programmes. The Commission also directed an appeal to the representatives and observers who had been participating in the meetings of the Commission and its working groups to contribute, to the extent that they in their discretion deemed appropriate, to facilitating consideration by legislative organs in their countries of texts of the Commission.

XV. General Assembly resolutions on the work of the Commission

256. The Commission took note with appreciation of General Assembly resolutions 56/79 on the report of the Commission on the work of its thirty-fourth session, 56/80 on the UNCITRAL Model Law on Electronic Signatures and the Guide to Enactment of the Model Law and 56/81 on the United Nations Convention on the Assignment of Receivables in International Trade, all of 12 December 2001.

257. The Commission also took note of General Assembly decision 56/422 of 12 December 2001 by which the General Assembly, on the recommendation of the Sixth Committee and having considered a report by the Secretary-General (A/56/315), decided to defer consideration of and decision on the enlargement of the membership of the Commission to its thirty-seventh session under the item entitled “Report of the United Nations Commission on International Trade Law on the work of its thirty-fifth session”.

Strengthening of UNCITRAL secretariat

258. The Commission noted that the General Assembly, in its resolution 56/79 of 12 December 2001, paragraph 13, on the report of the Commission on the work of its thirty-fourth session:

> "*Reiterates*, in view of the increased work programme of the Commission, its request to the Secretary-General to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization so as to ensure and enhance the effective implementation of the programme of the Commission."

259. On 9 April 2002, in conformity with General Assembly resolutions 48/218 B of 29 July 1994 and 54/244 of 23 December 1999, the Secretary-General had transmitted a report of the Office of Internal Oversight Services (OIOS) on the in-depth evaluation of legal affairs (E/AC.51/2002/5). That report had been reviewed by the relevant departments and offices. The Secretary-General had taken note of its findings and concurred with its recommendations.

260. In that OIOS report dealing with the Office of Legal Affairs (OLA), the overall assessment of the activities of the International Trade Law Branch, which functioned as the UNCITRAL secretariat, was highly positive. Interviews with members of the Commission, delegates from Member States, non-governmental organizations and other agencies indicated that the quality of the secretariat support was effective, technically competent and timely. Particular mention was made of the Branch's ability to maintain a balanced approach to issues. Yet, the OIOS survey also identified a few areas for improvement, namely in the fields of coordination with other organizations, promotion of uniform application and interpretation of UNCITRAL texts, and technical assistance with trade law reform. Accordingly, the OIOS report included two recommendations for increased coordination with trade law organizations (recommendation 13) and for promotion of wider participation in international trade law conventions and use of model laws (recommendation 14). The Commission noted that measures were being considered to implement those recommendations.

261. With respect to the UNCITRAL expanded programme of work, the OIOS report stated as follows (E/AC.51/2002/5, para. 66):

> "In recent years, UNCITRAL has been considering the implications of increasing its membership. In December 2001, the General Assembly deferred the membership issue for consideration at a later date. There has also been a review of the working methods of the Commission. From the proposals contained in the secretariat's note on working methods, the Commission expressed its preference for increasing the number of working groups by reducing the duration of each working group session from two weeks to one week. *While this will enable the number of working groups to be increased from three to six (within existing conference allocations) and accommodate the demand for work on more topics, it will require increased input from the International Trade Law Branch*. It is anticipated that this will only in part be met by streamlining working methods. Participants and observers of the work of the Commission stated to OIOS that the expansion of the working groups was recognized as an indication of the growing importance of, *and increased demand for uniform trade law standards in a globalized economy*. The limitation of the duration of the groups was also welcomed as it would facilitate attendance. However, doubts were repeatedly expressed as to whether the International Trade Law Branch would be able to maintain the quality and efficiency of its work. Aside from the addition of one Professional post at the P-4 level in 2001, staff resources have remained at the 1968 levels, that is, of 10 Professional and 7 General Service staff. An analysis and reappraisal of the requirements in terms of staff and other support to the expanded working groups appears timely. Given that the issues tackled are of interest to other organizations, the International Trade Law Branch could also consider more strategic efforts to raise funds from partners within and from outside the United Nations, in line with General Assembly resolution 51/161. The Commission decided to review the practical applications of the new working methods at a future session."

262. The corresponding recommendation read as follows:

> "Recommendation 15: UNCITRAL expanded programme of work
>
> "OLA should review the secretariat requirements that an expansion from 3 to 6 UNCITRAL working groups require and present to UNCITRAL, at its upcoming review of the practical applications of the new working methods, different options that would ensure the necessary level of secretariat services (see para. 66 above)."

263. In making that recommendation, OIOS was mindful of its possible financial implications and noted that "OIOS believes that implementation of a number of recommendations, in particular recommendations 4 (a), 4 (b), 7 and 15, may require additional resources for which OLA should prepare a detailed justification for review through the appropriate programme and budget review processes" (E/AC.51/2002/5, para. 82).

264. The follow-up to recommendation 15 of the OIOS report was discussed within OLA. The preliminary conclusion of those internal discussions was that a sustainable solution for ensuring enhanced efficiency in the work of the Commission might not bear fruit, if it was not accompanied by a significant strengthening of the Commission's secretariat. It should be recalled that, as a result of the demands emanating from member States for UNCITRAL to prepare legal standards in an increasing number of areas, the UNCITRAL secretariat was currently fully occupied with at least eight major ongoing projects, which meant that the number of major projects on the agenda of the Commission had more than doubled in the year 2001 as compared with previous years. That meant, in practical terms, that no more than one legal officer was currently available to concentrate on each project, in addition to that legal officer's other duties in connection with research and drafting of documents for various Working Groups and the Commission, and also with activities relating to the coordination of work of organizations active in the preparation of trade law texts, training and assistance, publications and information. Thus, the only workable options were either to reduce drastically the current programme of work of UNCITRAL or to increase significantly the resources of the UNCITRAL secretariat.

265. The Commission noted that a possible reduction in the programme of work of UNCITRAL would appear to run counter to several major objectives of the United Nations. Promoting higher standards of living, social progress and sustainable economic development were among the most important goals of the United Nations. Those goals had become even more pertinent following the Millennium Summit of the United Nations, at which heads of State and Government from the entire world committed themselves to substantially improving living conditions for their citizens through a number of concrete measures set forth in the Millennium Declaration. Economic growth, political modernization, the protection of human rights, and other larger objectives of the United Nations all hinged, at least in part, on "the rule of law". Policy makers in developing countries and countries with economies in transition were thus seeking ways to establish or strengthen the rule of law in their countries. The economic development that resulted from countries modernizing and harmonizing their trade laws paid direct dividends to all segments of a developing country's population. Children's health and education improved along with economic growth as they were no longer needed as a source of manual labour. Women were able to increase their participation in the marketplace. The environment could be protected as farmers and fishermen were given opportunities to develop less destructive practices. Peace and human rights were enhanced as the foundation of stability. In a number of instances, UNCITRAL had made and continued to make a significant contribution to facilitating a number of economic activities that formed the basis of an orderly functioning of the open economy, thus helping developing countries to fully participate in the benefits of the global marketplace. Examples where UNCITRAL should be given credit for its action and where it continued to be indispensable included the following: facilitating the access of small enterprises to international markets through electronic commerce; enhancing the framework for environmentally-sound infrastructure development through proper legislation on privately-financed infrastructure projects; curbing corruption in government contracting through modernization of legislation on government contracting and public procurement; facilitating access to credit, including cross-border credit, to commercial enterprises by elaborating models for legislation on secured transactions; and strengthening the stability of

national economies by preparing models for national insolvency legislation. Those achievements not only illustrated the positive role of UNCITRAL but also called for an increase in its action and certainly not for a reduction in its work programme.

266. With respect to the need to promote wider participation in international trade law conventions and use of model laws, the Commission noted that more work was also required, as pointed out by the Secretary-General in his report on the work of the Organization, to establish the rule of law in international affairs as a central priority.[36] As noted by the Secretary-General, much remained to be done; all too often individuals and corporations found that they were denied the rights and benefits that international law and treaties provided for.[37] Many States failed to sign or ratify treaties, not because of any lack of political will, but because of a simple shortage of technical expertise when it came to the implementation of treaty provisions. One of the central objectives of the United Nations was to assist Governments in establishing the necessary conditions for compliance with treaty commitments.[38]

267. The need to increase substantially the resources of the UNCITRAL secretariat was reflected in the proposed revisions to the medium-term plan for the period 2002-2005. As regards UNCITRAL and the International Trade Law Branch (UNCITRAL secretariat), it was proposed in the medium-term plan that, in order to enable the Branch to carry out the work programme of the Commission, it was necessary to implement the request by the General Assembly and the Commission to strengthen the secretariat of the Commission in view of its increased work programme. Since the costs of strengthening the UNCITRAL secretariat had to be "within the bounds of the resources available in the Organization", the Organization as a whole would have to consider its priorities and decide on the amount of resources it wished to allocate to that area of its activity. The Commission noted the suggested revised structure of the UNCITRAL secretariat, which would be upgraded to the level of a division within OLA. The proposed revisions to the medium-term plan for the period 2002-2005 had been transmitted to the Committee for Programme and Coordination, whose deliberations were crucial for the preparation of the session of the Fifth Committee of the General Assembly, which would be taking the ultimate budgetary recommendation.

268. It was submitted that the strengthening of the UNCITRAL secretariat was necessary for several reasons: one was that there was a clear demand from Member States for UNCITRAL to prepare legal standards for a globalized economy in areas where until recently the United Nations had not been active; second was the increased need for coordination among a growing number of international organizations (whether intergovernmental or non-governmental) that formulated rules and standards for international trade; third was the increased need for technical assistance, in particular in developing countries, that required particular attention on the part of UNCITRAL as the formulating agency when national Governments considered implementation of international standards in domestic legislation.

269. The Commission welcomed the above-mentioned request by the General Assembly, in its resolution 56/79, paragraph 13, to the Secretary-General to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization so as to ensure and enhance the effective implementation of the programme of the Commission (see para. 258, above).

270. However, while appreciating the initial steps taken by the Assembly, the Commission noted with concern that, if the secretariat of the Commission was not significantly strengthened, the Commission would have to reduce its work programme.

271. After discussion, the Commission adopted the following recommendation:

> "*The United Nations Commission on International Trade Law*,
>
> "*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade,
>
> "*Convinced* that the establishment of modern private law standards on international trade in a manner that is acceptable to States with

different legal, social and economic systems significantly contributes to the development of harmonious international relations, respect for the rule of law, peace and stability, and is indispensable for designing a sustainable economy,

"*Convinced also* that modernization of private law standards in international trade is essential for supporting economic development and is indispensable for designing a sustainable economy,

"*Noting* a clear demand that emanates from Member States, in particular developing countries, for UNCITRAL to prepare legal standards for a globalized economy in an increasing number of areas, and that as a result of those demands the number of major projects on the agenda of the Commission has more than doubled in the year 2001 as compared with previous years,

"*Noting also* the increased need for coordination among a growing number of international organizations (whether inter-governmental or non-governmental) that formulate rules and standards for international trade, and the specific function to be performed by UNCITRAL in that respect, as mandated by the General Assembly in its resolution 2205 (XXI) and reiterated by the General Assembly in subsequent resolutions,

"*Noting further* the increased need for technical assistance, in particular in developing countries, that requires particular attention on the part of UNCITRAL as the formulating agency to assist national Governments when they consider modernizing domestic trade laws and rules of practice through implementation of international standards,

"*Believing* that one of the essential conditions of the successful development and enactment of the legal standards elaborated by UNCITRAL is the high level of quality and professionalism constantly maintained by the International Trade Law Branch of the United Nations Office of Legal Affairs, serving as the substantive secretariat of the Commission,

"*Concerned* about the considerably increased demands on personnel resources of the secretariat of the Commission resulting from the increased work programme, and its inability to continue servicing the Commission's working groups and performing other related tasks such as assisting Governments in establishing the necessary work for compliance with treaty commitments,

"*Being aware* that, if the secretariat of the Commission is not given sufficient resources to carry out the tasks entrusted to it, the Commission will have to defer or discontinue work on topics on its agenda and reduce the number of its working groups,

"*Noting* the recommendation contained in the report of the Office of Internal Oversight Services on the in-depth evaluation of legal affairs[5] that the Office of Legal Affairs should review the secretariat requirements that an expansion from three to six UNCITRAL working groups require and present to UNCITRAL, at its upcoming review of the practical applications of the new working methods, different options that would ensure the necessary level of secretariat services,

"*Noting also* the comments provided by OLA at the opening of the thirty-fifth session of the Commission regarding the recommendation contained in the report of the Office of Internal Oversight Services,

"*Convinced* that the current working methods of the Commission have proved their efficiency,

"*Requests* the Secretary-General to consider measures to strengthen significantly the UNCITRAL secretariat within the bounds of the resources available in the Organization, if possible already during the current biennium and in any case during the 2004-2005 biennium."

[5] E/AC.51/2002/5.

XVI. Coordination and cooperation

A. Asian-African Legal Consultative Organization

272. On behalf of the Asian-African Legal Consultative Organization (AALCO), it was stated that, in view of the importance AALCO attached to the Commission's work, it had made it a practice to consider at its annual sessions the report of the Commission. AALCO welcomed the completion of the UNCITRAL Model Law on International Commercial Conciliation. The Commission was reminded of the interest of AALCO in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration. In that connection, reference was made to the success of regional arbitration centres in Kuala Lumpur, Cairo and Lagos, Nigeria. Reference was also made to another regional arbitration centre to become operational in Tehran in the near future. In addition, it was observed that AALCO had a special interest in the Commission's work on electronic commerce. Thus, support was expressed for the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, as well as for the current work towards an international text on electronic contracting. AALCO also welcomed the work of the Commission on insolvency law, security interests, transport law and privately financed infrastructure projects. Moreover, AALCO strongly urged the Commission to enlarge its membership to accommodate the interests of various countries in light of their importance in international trade. AALCO also expressed interest in an international trade law workshop to be held in cooperation with the secretariat of the Commission with a view to disseminating information on the work of the Commission in the Asian region. An invitation was addressed to members and observers of the Commission and to the secretariat to attend the forty-first annual session of AALCO, to be held in Abuja from 15 to 20 July 2002.

B. International Development Law Institute

273. On behalf of the International Development Law Institute (IDLI), it was stated that IDLI, which promoted the rule of law and good governance and the use of legal resources in the development process in developing countries and countries with economies in transition, fulfilled its mandate through training, technical assistance, research, and publication. It was also observed that IDLI had worked with over 12,000 legal professionals from 163 countries and had fostered the founding of IDLI alumni associations in 31 countries and maintained and supported a network of counterpart partner organizations in the other countries in which it had worked. Those organizations carried out in their countries the same kind of work that IDLI carried out on an international level.

274. In addition, it was observed that IDLI had taken note of document A/CN.9/515 which described the training and technical assistance activities carried out by UNCITRAL in pursuit of its mandate and wished to report that in the implementation of its training and technical assistance activities it had found that the demand for training and technical assistance in the field of international trade law was high. It was also observed that IDLI had responded to that demand by providing training in many of its regular and tailor-made courses and had provided technical assistance on international trade law in several countries. In that work, it was said, IDLI often provided training on the UNCITRAL texts in the relevant field.

275. IDLI tabled for consideration the following ways in which it could cooperate with UNCITRAL on training and technical assistance on international trade law with particular reference to the UNCITRAL texts:

(a) Joint or IDLI organization of training programmes or conferences;

(b) Development of training materials;

(c) Identification of experts from the IDLI staff or from its expert network for training or technical assistance;

(d) Training of trainers;

(e) Developing the capacities of the IDLI alumni associations and counterpart organizations to provide training and technical assistance in that area;

(f) Reporting on the work of UNCITRAL in IDLI publications.

276. It was also said that information on current IDLI programmes and activities could be found on the IDLI web site at www.idli.org.

277. Moreover, it was stated that, at its meeting of 5 November 2001, the Board of Directors urged the IDLI secretariat to find ways of cooperating with UNCITRAL and suggested finding ways to encourage participation by IDLI staff and IDLI alumni in the work of UNCITRAL in order to help UNCITRAL secure quality participation of legal professionals from its developing country members. To that end IDLI said that it looked forward to following up on preliminary discussions with UNCITRAL on ways for IDLI alumni to be represented in the work of UNCITRAL as an organized delegation selected by IDLI on the basis of criteria to be agreed upon by IDLI and UNCITRAL. It was also pointed out that, for those forms of cooperation that required other than incidental financial resources available in the two organizations' regular budgets, IDLI invited the UNCITRAL secretariat to explore with it ways to mobilize such resources.

C. Global Center for Dispute Resolution Research

278. On behalf of the Global Center for Dispute Resolution Research, a non-governmental, non-profit, international organization, it was stated that the Center conducted fact-based research on dispute resolution matters and would be prepared to assist the Commission, for example, with its work on monitoring legislative implementation of the 1958 New York Convention.

XVII. Other business

A. Possible study of commercial and financial fraud

279. It was observed that, while the work of the Commission had ably focused on legislative and non-legislative texts in order to harmonize and facilitate international commerce, there was another dimension of commercial law and practice of importance that had not been sufficiently dealt with by international bodies, namely fraudulent practices that affected legitimate instruments of trade and finance. Those frauds, typically international in character, had a significant adverse economic impact on world trade and negatively affected the legitimate devices used in it.

280. It was stated that, although those schemes might be obvious in retrospect, they appealed to thousands of sophisticated investors throughout the world. While no figures had been calculated for the reported losses from such schemes, in 2000 informal average estimates from entities involved in combating high yield financial instrument fraud alone placed annual worldwide losses at US$ 15 billion. Even more discouraging was the growth of those frauds despite attempts at cautionary warnings and exposure. It was observed that the advent of the Internet had offered additional avenues to the perpetrators. Those figures, however, did not detail fully the consequences of those schemes. It was reported to the Commission that such consequences included the following:

(a) Compromise of legitimate instruments of trade and commerce, since those schemes cast the pall of suspicion on the legitimate instruments that they used;

(b) Misuse of international organizations, since misappropriation of names or use of the names of major international organizations were common in these schemes. As a result, major international organizations including the World Bank, the International Monetary Fund, the Bank of International Settlements, and regional development banks had been associated with the schemes, as well as central banks of every major country. Those organizations were regularly compelled to use their resources to rebut those references and deny their role and the existence or legitimacy of those schemes; loss of time and energy was also experienced by individuals who might directly or indirectly be victims of fraudulent schemes;

(c) Loss of confidence in the mechanisms of international monetary transfer, since a regular feature of those schemes was reference to and use of the international monetary transfer system in the transfer of funds. The schemes included false and misleading references to the systems and their components and use of the systems to channel funds from victims to perpetrators in such a manner that they were difficult to trace. In addition, the systems were used regularly to mask transfers of funds and to channel them in order to avoid governmental scrutiny;

(d) Increased costs to international trade and commerce, since the growing fraudulent use of documentation led to a downgrading of existing trade systems and channels. Many of those schemes involved non-existent goods, falsified or forged documents such as bills of lading or warehouse receipts, sales of non-existent commodities, or multiple sales of the same goods. Additional costs to trade were also caused by fraud that involved rings and use of intermediaries acting in concert to defraud legitimate traders and businesses.

281. It was observed that, while criminal law implications should not be the focus of that work, an UNCITRAL project regarding commercial and financial fraud might provide useful elements for fighting organized crime. While the role of organized crime in those schemes was not yet apparent, they offered a fertile ground for breeding such associations. In addition, the schemes offered a potential means for illegal operatives to conveniently obtain funds.

282. It was pointed out that, while the illegitimate character of those schemes had long been apparent to authorities, there had been extensive and serious difficulties in combating them. The problems included the following matters:

(a) The international nature deliberately conferred on most fraudulent schemes. The relative roles and contribution of the various parties involved were often difficult to piece together and understand. Moreover, those parties were typically located in different jurisdictions. Moreover, all typically proclaimed their own innocence and pointed to the misconduct of others who inevitably were not accessible in the same jurisdiction as the cause of any loss. On an international level, the difficulties and complexities faced domestically in pursuing those schemes were multiplied. As a result, few civil or criminal prosecutors were able to muster the resources to pursue the perpetrators or the funds;

(b) The multiple domestic jurisdictions. Unlike violent crime, those fraudulent schemes did not fit into any one regulatory category. They might involve criminal elements as well as civil ones. Moreover, in each of those fields, they generally involved multiple dimensions, including the law governing ocean carriage, storage of goods, various types of transportation documents of title, securities, bank regulation, insurance regulation, consumer protection, pension fund regulation, regulation of securities brokers, and regulation of professional attorneys and accountants. Often those jurisdictional limits were not well defined and overlapped, leading to confusion and reluctance to utilize limited resources to combat them;

(c) The multiple disciplines involved. Most of the schemes cleverly included a variety of esoteric elements so that few professionals could address all of their components. As a result, most professionals were reluctant to state opinions regarding those matters because they extended beyond their expertise. Unfortunately, the perpetrators suffered from no such inhibitions;

(d) Hidden and dispersed funds. In addition to the international locations of the perpetrators of those schemes, the funds were typically sent to other nations and divided among the various players in a confusing manner increasing the difficulties of pursuit, proof and recovery. Recovery often presented difficulties when the funds had been transferred to jurisdictions that did not support actions to redress the defrauded parties. Where money-laundering was involved, those difficulties of discovery were further compounded.

283. The view was expressed that the Commission combined a governmental perspective with internationally recognized expertise in international commerce along with a long-standing tradition of cooperation with international organizations in the private sector and collaboration with recognized international experts. The Commission was also well placed to appreciate the workings of institutions of commerce and finance whose cooperation was essential for success and whose operations must not be unduly disrupted.

284. In addition to the competence of the Commission to undertake such an effort, many of those schemes touched on matters that had been specifically addressed by texts elaborated by the Commission, including the United Nations Convention on the Assignment of Receivables in International Trade, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Law on Cross-Border Insolvency and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The topic of fraud was considered during the deliberations that produced those texts, all of which contained important principles and

mechanisms to encourage transparency and reduce the occasion for fraud, corruption and self-dealing.

285. It was suggested that a study could be prepared by the secretariat to describe fraudulent financial and trade practices in various areas of trade and finance, and describe the ways in which the risk of common types of fraud affected the value of contractual and financial commitments (such as commercial paper, bills of lading, guarantees). Further, the study could identify weaknesses in commercial laws, non-legislative commercial and financial rules and trade and financial practices that were being exploited by perpetrators and other criminals for their goals. The study might also, to the extent feasible, describe trade law and civil regulatory measures that some countries might have taken to combat such crime.

286. It was proposed that the topic should be studied and placed before the thirty-sixth session of the Commission in 2003 so as to enable the Commission to take any action with respect to it. On the basis of such a study, the Commission could consider the need for any measures, such as legislative and other recommendations, as to how to prevent such illicit actions more effectively, with a focus on trade laws, rules and practices. Even if ultimately the Commission would find that preparing such recommendations was not feasible, the study would in itself be a useful product that would raise awareness of the problems and foster a change of attitudes and practices.

287. In response to the proposal, views were expressed recognizing that financial and commercial fraud constituted a growing problem and that measures to counter it were of great concern to Governments. It was also recognized that such fraud adversely affected the trust in the mechanisms of trade, finance and investment and had a destabilizing effect on the markets. Commercial entities from developing countries, inasmuch as they had limited experience with instruments of international trade, were particularly vulnerable and would benefit from information and advice as to how to avoid being defrauded. The work of the Commission would also help States, intergovernmental and non-governmental organizations to design or adjust legislative and non-legislative private law regimes that were better suited to prevent fraudulent schemes.

288. Serious reservations were also expressed regarding the feasibility of the project. It was stressed that the work, if it were to be undertaken, had the potential of addressing or having implications for areas that were dealt with by other organizations, whose focus was not trade law, and that care should be taken that the Commission should not be called to consider issues that fell outside its established area of work and expertise. It was also considered that, assuming the project would deal with private law aspects of fraud, the scope of the project was undefined and needed careful consideration.

289. A number of delegations shared the view that the project, despite its potential usefulness, could not be undertaken given the alarming situation regarding the personnel resources of the secretariat (see para. 268, above). Statements were made that it was ill-advised to add new projects at the time the Commission might be compelled to slow down or reduce its current work programme for lack of sufficient resources, and that undertaking the proposed study was contingent on additional personnel resources being made available to the secretariat of the Commission. In addition, statements were made that the proposed projects should not be given a high priority and that the Commission should rather place more emphasis on its training and technical assistance activities.

290. After discussion, the Commission was in agreement that it would be useful to prepare the proposed study for consideration of the Commission, without, at the present stage, committing the Commission to any action being taken on the basis of the study. In requesting the secretariat to undertake work on the study, the Commission did not put any time limit on the request. It was understood that the work on the study should be undertaken only to the extent that work did not claim resources needed for other projects on the Commission's agenda.

B. Bibliography

291. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/517). The Commission stressed the importance for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of such publications to the secretariat.

C. Willem C. Vis International Commercial Arbitration Moot

292. It was noted that the Institute of International Commercial Law at Pace University School of Law, New York, had organized the eighth Willem C. Vis International Commercial Arbitration Moot in Vienna from 22 to 28 March 2002. In addition, it was noted that legal issues dealt with by the teams of students participating in the Moot had been based on the United Nations Convention on Contracts for the International Sale of Goods, the United Nations Convention on the Assignment of Receivables in International Trade and the Arbitration Rules of the International Chamber of Commerce. Moreover, it was noted that, in the 2002 Moot, some 108 teams had participated from law schools in some 36 countries, involving about 650 students and about 275 arbitrators. The best team in oral arguments was that of the National University of Singapore. It was also noted that the ninth Moot was to be held at Vienna from 11 to 17 April 2003. It was also noted that the secretariat of the Commission had offered a series of lectures on texts prepared by UNCITRAL to about 120 of the Moot participants.

293. The Commission expressed its appreciation to the Institute of International Commercial Law at Pace University School of Law for organizing the Moot and to the secretariat for sponsoring it and offering a series of lectures. It was widely felt that the Moot, with its broad international participation, was an excellent method of disseminating information about uniform law texts and teaching international trade law.

D. UNCITRAL web site

294. The Commission expressed its appreciation for the UNCITRAL web site (http://www.uncitral.org). It was noted that the web site was an important component of the Commission's overall programme of information activities and training and technical assistance, which attracted some 900 users per day from approximately 95 jurisdictions. In that connection, it was stated that the web site provided delegates to working groups and the Commission with rapid access to working texts in the six official languages of the United Nations, thus promoting transparency and facilitating the work of the Commission. It was also noted that the web site provided global free access for a wide range of interested users, including parliamentarians, judges, practitioners, and academics, and that materials on the web site included, inter alia, adopted texts, up-to-date reports on the status of conventions and adopted texts, court and arbitral decisions interpreting UNCITRAL texts (CLOUT), and bibliographies of scholarly writing related to the work of the Commission. It was further noted that the secretariat anticipated completing the placement of all Yearbooks and *travaux préparatoires* of all adopted texts on the web site by the next Commission session. The Commission noted with appreciation the expanded availability on the web site of documents in the six official languages of the United Nations and urged the secretariat to continue its efforts in increasing the range of available archival texts.

XVIII. Date and place of future meetings

A. Thirty-sixth session of the Commission

295. The Commission approved holding its thirty-sixth session in Vienna from 30 June to 18 July 2003. It was noted that the duration of the session might be shortened, should a shorter session become advisable in view of the draft texts produced by the various working groups.

B. Sessions of working groups up to the thirty-sixth session of the Commission

296. The Commission approved the following schedule of meetings for its working groups, subject to possible cancellation of working group sessions being decided by the respective working groups in situations where, for lack of the necessary resources, the secretariat could not envisage the timely production of the necessary documentation:

(a) Working Group I (Privately Financed Infrastructure Projects) is to hold its fifth session at Vienna from 9 to 13 September 2002, immediately before the tenth session of Working Group III, and its sixth session, if necessary, in New York from 24 to 28 March 2003, immediately before the eleventh session of Working Group III;

(b) Working Group II (Arbitration) is to hold its thirty-seventh session at Vienna from 7 to 11 October 2002, immediately before the fortieth session of Working Group IV, and its thirty-eighth session in New York from 12 to 16 May 2003, immediately after the forty-first session of Working Group IV (It may be noted that the Commission originally approved that the thirty-eighth session of Working Group II be held from 28 April to 2 May 2003. However, those dates had to be revised to the current dates owing to the unavailability of a conference room.);

(c) Working Group III (Transport Law) is to hold its tenth session at Vienna from 16 to 20 September 2002, immediately after the fifth session of Working Group I, and its eleventh session in New York from 31 March to 4 April 2003, immediately after the sixth session of Working Group I;

(d) Working Group IV (Electronic Commerce) is to hold its fortieth session at Vienna from 14 to 18 October 2002, immediately after the thirty-seventh session of Working Group II, and its forty-first session in New York from 5 to 9 May 2003, immediately before the thirty-eighth session of Working Group II;

(e) Working Group V (Insolvency Law) is to hold its twenty-seventh session at Vienna from 9 to 13 December 2002, immediately before the second session of Working Group VI, and its twenty-eighth session in New York from 24 to 28 February 2003, immediately before the third session of Working Group VI;

(f) Working Group VI (Security Interests) is to hold its second session at Vienna from 16 to 20 December 2002, immediately after the twenty-seventh session of Working Group V, and its third session in New York from 3 to 7 March 2003, immediately after the twenty-eighth session of Working Group V.

C. Sessions of working groups after the thirty-sixth session of the Commission in 2003

297. The Commission noted that tentative arrangements had been made for working group meetings after its thirty-sixth session (the arrangements are subject to the approval of the Commission at its thirty-sixth session):

(a) Working Group I (Privately Financed Infrastructure Projects) is to hold its seventh session, if necessary, at Vienna from 6 to 10 October 2003;

(b) Working Group II (Arbitration) is to hold its thirty-ninth session at Vienna from 10 to 14 November 2003;

(c) Working Group III (Transport Law) is to hold its twelfth session at Vienna from 13 to 17 October 2003;

(d) Working Group IV (Electronic Commerce) is to hold its forty-second session at Vienna from 17 to 21 November 2003;

(e) Working Group V (Insolvency Law) is to hold its twenty-ninth session at Vienna from 1 to 5 September 2003;

(f) Working Group VI (Security Interests) is to hold its fourth session at Vienna from 8 to 12 September 2003.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the General Assembly at its fifty-second session, on 24 November 1997 (decision 52/314) and 17 were elected by the General Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308). By General Assembly resolution 31/99 of 15 December 1976, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election, and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

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

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

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

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

[6] Ibid., paras. 374-375.

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

[8] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-312.

[9] Ibid., para. 313.

[10] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 381-385.

[11] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 400-409.

[12] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 296-308.

[13] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 459.

[14] Ibid., *Fifty-sixth Session, Supplement No.* 17 (A/56/17), para. 351.

[15] Ibid., paras. 352-354.

[16] Ibid., paras. 355-356.

[17] Ibid., para. 357.

[18] Ibid., paras. 358-359.

[19] Ibid., para. 358.

[20] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 291-293.

[21] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 387.

[22] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17).

[23] Ibid., para. 210.

[24] Ibid., para. 215.

[25] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 264.

[26] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

[27] Ibid., para. 415.

[28] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 345.

[29] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 195-368.

[30] Ibid., para. 375.

[31] Ibid., para. 379.

[32] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 366-369.

[33] Ibid., para. 369.

[34] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[35] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 371.

[36] Ibid., *Fifty-fifth Session, Supplement No. 1* (A/55/1), para. 273. See also ibid., *Fifty-sixth Session, Supplement No. 1* (A/56/1), para. 216.

[37] Ibid., para. 278.

[38] Ibid., *Fifty-sixth Session, Supplement No. 1* (A/56/1), paras. 219-220.

Annex I

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international[a] commercial[b] 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.

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[a] 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.

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

(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[c]

(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.

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[c] 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.

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

Article 6. Conduct of conciliation

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

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

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

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

Article 7. Communication between conciliator and parties

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

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator,

subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

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

Article 10. Admissibility of evidence in other proceedings

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

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

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

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

(d) Proposals made by the conciliator;

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

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

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

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

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

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

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

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

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

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

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

Article 12. Conciliator acting as arbitrator

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

Article 13. Resort to arbitral or judicial proceedings

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

Article 14. Enforceability of settlement agreement[d]

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*].

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

Annex II

List of documents before the Commission at its thirty-fifth session

Symbol	*Title or description*
A/CN.9/503	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-fifth session
A/CN.9/504	Report of the Working Group on Insolvency Law on the work of its twenty-fourth session
A/CN.9/505	Report of the Working Group on Privately Financed Infrastructure Projects on the work of its fourth session
A/CN.9/506	Report of the Working Group on Arbitration on the work of its thirty-fifth session
A/CN.9/507	Report of the Working Group on Insolvency Law on the work of its twenty-fifth session
A/CN.9/508	Report of the Working Group on Arbitration on the work of its thirty-sixth session
A/CN.9/509	Report of the Working Group on Electronic Commerce on the work of its thirty-ninth session
A/CN.9/510	Report of the Working Group on Transport Law on the work of its ninth session
A/CN.9/511 and Corr.1	Report of the Working Group on Insolvency Law on the work of its twenty-sixth session
A/CN.9/512	Report of Working Group VI (Security Interests) on the work of its first session
A/CN.9/513 and Add.1-2	Draft Model Law on International Commercial Conciliation: compilation of comments by Governments and international organizations
A/CN.9/514	Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation
A/CN.9/515	Note by the Secretariat on training and technical assistance
A/CN.9/516	Note by the Secretariat on the status of conventions and model laws
A/CN.9/517	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL
A/CN.9/518	Report on the fourth UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, 2001