

III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. Draft UNCITRAL Conciliation Rules: preliminary draft prepared by the Secretary-General (A/CN.9/166)*

SCOPE OF APPLICATION

Article 1

(1) These Rules shall apply when the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to conciliation under the UNCITRAL Conciliation Rules.

(2) The parties may also agree to refer to conciliation under these Rules disputes arising out of legal relationships that are not contractual.

(3) The parties may agree in writing to any modification of these Rules.

NUMBER OF CONCILIATORS

Article 2

There shall be one conciliator unless the parties have agreed that there shall be three conciliators.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 3

(1) The party initiating recourse to conciliation shall give to the other party a written notice of conciliation.

(2) The other party shall within 30 days after receipt of the notice of conciliation reply to the party having given notice.

(3) (a) If in his reply the other party consents to conciliation, the conciliation proceedings shall commence on the date on which such reply is received by the party having given notice;

(b) If in his reply the other party refuses conciliation or if he does not reply within 30 days, there shall be no conciliation proceedings.

NOTICE OF CONCILIATION

Article 4

(1) The notice of conciliation shall include:

(a) An invitation that the dispute be referred to conciliation;

(b) The names and addresses of the parties;

(c) A reference to the conciliation clause or the separate conciliation agreement that is invoked;

(d) A reference to the contract the legal relationship out of or in relation to which the dispute arises;

(e) A brief description of the general nature of the dispute;

(f) A brief description of the points at issue.

(2) The notice of conciliation may also include:

(a) If no agreement has previously been reached on the number of conciliators, a proposal that there shall be one conciliator or three conciliators;

(b) (i) In conciliation proceedings with one conciliator, a proposal as to the name of the conciliator;

(ii) In conciliation proceedings with three conciliators, the name of the conciliator appointed by the party giving notice of conciliation.

(3) The party consenting to conciliation may in his reply give his own description of the general nature of the dispute and the points at issue. He may also indicate in his reply his agreement or disagreement with the proposals made by the other party under paragraph 2 (a) and (b) (i) of this article and, in conciliation proceedings with three conciliators, indicate the name of the conciliator appointed by him.

APPOINTMENT OF CONCILIATOR(S)

Article 5

(1) If a sole conciliator is to be appointed, and if within 15 days after the commencement of the conciliation proceedings the parties have not agreed on the name of the conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(2) If three conciliators are to be appointed, each party shall appoint one conciliator. The two conciliators thus appointed shall choose the third conciliator who will act as presiding conciliator. If within 15 days upon their appointment the conciliators appointed by the parties have not agreed on the name of the third conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(3) If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the conciliator within 60 days of the receipt of a party's request therefor, either party may request X to designate an appointing authority. The request shall be accompanied by a copy of the notice of conciliation and of the reply given thereto.

* 26 March 1979. A commentary on these Rules may be found in document A/CN.9/167, reproduced in this volume, part two, III, B, below.

APPLICATION TO APPOINTING AUTHORITY

Article 6

(1) The application to the appointing authority shall be accompanied by a copy of the notice of conciliation and of the reply given thereto and may suggest the professional qualifications of the sole or the presiding conciliator.

(2) The party applying to the appointing authority shall send a copy of the application to the other party. The other party may within 15 days after the receipt of the copy of the application send to the appointing authority such suggestions as he may wish to make on the professional qualifications of the sole or the presiding conciliator.

APPOINTMENT OF CONCILIATOR BY
APPOINTING AUTHORITY*Article 7*

(1) The appointing authority shall, by telegram or telex, confirm to the parties the receipt of the application.

(2) The appointing authority shall proceed with the appointment of the sole or presiding conciliator without undue delay, using the following list-procedure:

(a) The appointing authority shall communicate to the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time, the appointing authority shall appoint the sole or the presiding conciliator from among the names approved on the lists returned to it in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority shall exercise its discretion in appointing the sole or the presiding conciliator.

(3) In making the appointment, the appointing authority shall have regard to the suggestions of the parties as to the qualifications of the sole or the presiding conciliator and to such considerations as are likely to secure the appointment of an independent and impartial person. It shall also take into account the advisability of appointing a sole or a presiding conciliator of a nationality other than the nationalities of the parties.

NOTIFICATION OF APPOINTMENT OF CONCILIATOR

Article 8

The appointing authority, upon making the appointment, shall forthwith notify the parties of the name and address of the conciliator.*

* This and all following articles, in which the expression "conciliator" is used without qualification, apply to either a sole conciliator or to three conciliators, as the case may be.

FORWARDING OF NOTICE AND REPLY TO CONCILIATOR

Article 9

A copy of the notice of conciliation and of the reply thereto shall be given to the conciliator promptly after his appointment. This shall be done by the parties if they made the appointment, or by the appointing authority if it made the appointment.

REPRESENTATION AND ASSISTANCE

Article 10

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and to the conciliator; such communication must specify whether the appointment is being made for purposes of representation or assistance.

ROLE OF CONCILIATOR

Article 11

(1) The role of the conciliator shall be to assist the parties to reach an amicable settlement of their dispute.

(2) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may have expressed and the need for a speedy settlement of the dispute.

(3) In assisting the parties to reach a fair and equitable settlement, the conciliator shall give consideration to, among other things, the terms of the contract, the law applicable to the substance of the dispute, the usages of the trade concerned and the circumstances surrounding the dispute.

REQUEST BY CONCILIATOR FOR INFORMATION

Article 12

(1) The conciliator may request each party to submit to him a written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. He may also request each party to submit a fuller statement of points at issue.

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

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 13

(1) If, after reviewing the written materials submitted to him, the conciliator deems it advisable, he may invite the parties to meet with him.

(2) The conciliator may have oral discussions or communicate in writing with either party alone.

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

ADMINISTRATIVE ASSISTANCE

Article 14

In order to facilitate the conduct of the conciliation, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance to be provided by the appointing authority or other suitable institution.

PARTY SUGGESTIONS FOR SETTLEMENT OF DISPUTE

Article 15

The conciliator may invite the parties, or a party, to submit to him suggestions for settlement of the dispute. A party may do so upon his own initiative.

OBLIGATION OF PARTIES TO CO-OPERATE

Article 16

The parties shall in good faith endeavour to comply with requests by the conciliator to submit written materials, provide evidence, attend meetings and otherwise co-operate with him.

DISCLOSURE OF INFORMATION

Article 17

The conciliator, having regard to the procedures which he believes are most likely to lead to a settlement of the dispute, may determine the extent to which anything made known to him by a party shall be disclosed to the other party; provided, however, that he shall not disclose to a party anything made known to him by the other party subject to the condition that it be kept confidential.

PROPOSALS FOR SETTLEMENT

Article 18

At any stage of the conciliation proceedings the conciliator may make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

SETTLEMENT AGREEMENT

Article 19

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he may formulate the terms of a possible settlement and submit them to the parties for their observations.

(2) If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement.* Upon request of the parties, the conciliator shall draw up, or assist parties in drawing up, the settlement agreement.

* It is recommended that the settlement agreement contain a clause that any dispute arising out of or relating to the interpretation or performance of the settlement agreement shall be submitted to arbitration.

(3) Upon signing by the parties the settlement agreement becomes binding on them.

CONFIDENTIALITY

Article 20

Unless otherwise agreed by the parties or required by law, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings, including any settlement agreement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 21

The conciliation proceedings are terminated:

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

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

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

(d) By a written notice of a party to the conciliator and the other party to the effect that the conciliation proceedings are terminated, 30 days after the date of the declaration [, unless such party revokes the declaration prior to the expiration of the 30-day period].

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 22

Neither party shall initiate arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings from the date of the commencement of the conciliation proceedings, as defined in article 3, paragraph (3) (a), of these Rules, to the date of their termination, as provided in article 21.

COSTS

Article 23

(1) Upon the termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the sole or the presiding conciliator, to be fixed by that conciliator in accordance with article 24 of these Rules;

(b) The travel and other expenses of the sole or the presiding conciliator and of any witnesses requested by a conciliator after consultation with the parties;

(c) The cost, travel and other expenses of any expert advice requested by a conciliator after consultation with the parties;

(d) The cost of any administrative assistance provided pursuant to article 14 of these Rules;

(e) Any fees and expenses of the appointing authority and X.

(2) The costs, as defined above, shall be borne equally by the parties. All other expenses incurred by a party, including the fee, travel and other expenses of a conciliator appointed by a party, shall be borne by that party.

FEES OF CONCILIATOR

Article 24

The fees of the conciliator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the conciliator and other relevant factors.

DEPOSITS

Article 25

(1) The sole or the presiding conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 23, paragraph (1).

(2) During the course of the conciliation proceedings the sole or the presiding conciliator may request supplementary deposits in an equal amount from each party.

(3) Where a conciliator has been appointed by a party he may request a deposit or a supplementary deposit only from that party.

(4) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within 30 days after the receipt of a request therefor, the conciliator may suspend the proceedings or may make a written declaration of termination in accordance with article 21, subparagraph (b), of these Rules.

ROLE OF CONCILIATOR IN SUBSEQUENT PROCEEDINGS

Article 26

Unless the parties have agreed otherwise, no conciliator may act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be called as a witness by a party in any arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 27

A party shall not be entitled to rely on or to introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed by the other party in respect of a possible solution of the dispute;

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

(c) Proposals made by the conciliator;

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

B. Report of the Secretary-General: conciliation of international trade disputes (A/CN.9/167)*

CONTENTS

	<i>Paragraphs</i>		<i>Paragraphs</i>
INTRODUCTION	1-4	Article 7. Appointment of conciliator by appointing authority	
I. NATURE AND CHARACTERISTICS OF CONCILIATION	5-22	Article 8. Notification of appointment of conciliator	43-46
A. As distinguished from other methods of dispute settlement	5-8	C. Conduct of conciliation proceedings ...	47-63
B. Purpose and potential advantages of conciliation	9-17	Article 9. Forwarding of notice and reply to conciliator	47
C. Guiding principles for conciliation rules .	18-22	Article 10. Representation and assistance	48
II. COMMENTARY ON THE DRAFT UNCITRAL CONCILIATION RULES	23-77	Article 11. Role of conciliator	49-50
A. Scope of application	23-27	Article 12. Request by conciliator for information	
Article 1. Scope of application	23-27	Article 13. Communication between conciliator and parties	51-52
B. Initiation of conciliation and appointment of conciliator(s)	28-46	Article 14. Administrative assistance ..	53-54
Article 2. Number of conciliators ...	28-31	Article 15. Party suggestions for settlement of dispute	55
Article 3. Commencement of conciliation proceedings	32-34	Article 16. Obligation of parties to cooperate	56
Article 4. Notice of conciliation	35-36	Article 17. Disclosure of information .	57-59
Article 5. Appointment of conciliator(s)	37-40	Article 18. Proposals for settlement	
Article 6. Application to appointing authority	41-42	Article 19. Settlement agreement	60-62
		Article 20. Confidentiality	63

* 2 April 1979.