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### Settlement of commercial disputes

### Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation

### Report of the Secretary-General

#### Addendum

*[Chapters I and II are published in document A/CN.9/WG.II/WP.113]*

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### III. CONCILIATION

#### A. General Remarks

References to previous working papers and reports:

Note on possible future work: A/CN.9/460 (April 1999), paragraphs 8-19;  
Report of the Commission: A/54/17 (May-June 1999), paragraphs 340-343;  
Working paper: A/CN.9/WG.II/WP.108 (January 2000), paragraphs 11-62;  
Report of Working Group: A/CN.9/468 (March 2000), paragraphs 18-59;  
Working paper: A/CN.9/WG.II/WP.110 (September 2000), paragraphs 81-112;  
Report of Working Group: A/CN.9/485 (November-December 2000), paragraphs 107-159.

1. At its previous session (20 November – 1 December 2000), the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the draft model legislative provisions on conciliation (as set out and numbered in A/CN.9/WG.II/WP.110 at paragraphs 81-111). It requested that the Secretariat prepare revised drafts of these articles, taking account of the views expressed in the Working Group (see paragraphs 107 to 159 in document A/CN.9/485). The remaining articles (being articles 3, 4, 6, 11 and 12) were not considered due to lack of time.

2. The Working Group did not decide whether ultimately the uniform text would be named as model legislative provisions or a model law. The decision would seem to depend on whether the provisions would be adopted as a discrete model law on conciliation or as a set of model provisions that would be added as a new chapter to the UNCITRAL Model Law on International Commercial Arbitration (in which case the Working Group may wish to rename the Model Law to reflect its broader scope).

3. The revised draft model legislative provisions, presented below, have been prepared pursuant to the considerations and decisions of the Working Group.

#### B. Model legislative provisions on conciliation

##### Article 1. Scope of application

**(1) These model legislative provisions apply to a conciliation, as defined in article 2, if:**

**(a) It is commercial;<sup>1\*</sup>**

**(b) It is international, as defined in article 3;**

**(c) The place of conciliation is in this State<sup>2</sup>.**

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<sup>1</sup> See paragraphs 113-116 in document A/CN.9/485.

<sup>2</sup> In order to increase certainty as to when the model legislative provisions apply, the Working Group may wish to discuss the desirability of including a provision according to which the parties would agree upon the place of conciliation and, failing that agreement, it would be for the conciliator or the panel of conciliators to determine

- (2) Articles ... apply also if the place of conciliation is not in this State.<sup>3</sup>
- (3) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of a party, in compliance with an agreement of the parties, or pursuant to a direction or request of a court or competent governmental entity.<sup>4</sup>
- (4) These model legislative provisions do not apply to: [...].<sup>5</sup>
- (5) Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions.<sup>6</sup>

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**\*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 co-operation; carriage of goods or passengers by air, sea, rail or road.**

## **Article 2. Conciliation**

**For the purposes of these model legislative provisions, “conciliation” means a process [whether referred to by the expression conciliation, mediation or an expression of similar import,]<sup>7</sup> whereby parties request**

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that place. In order to address cases where the place of conciliation has not been agreed upon or determined and where, for other reasons, it is not possible to establish the place of conciliation (for example, when a conciliation is carried out by using telecommunications), the criteria for the applicability of the model legislative provisions might be, for example, the place of the institution that administers the conciliation proceedings, the place of residence of the conciliator, or the place of business of both parties if that place is in the same country.

<sup>3</sup> The draft paragraph has been included to stimulate discussion as to whether certain provisions (such as those on the admissibility of evidence in other proceedings, the role of conciliator in other proceedings or the limitation period) should produce effects in the enacting State even if the conciliation proceedings take, or took, place in another country and would thus not generally be governed by the law of the enacting State (see paragraphs 120 and 134 of document A/CN.9/485).

<sup>4</sup> The draft paragraph has been drafted in accordance with suggestions made in the Working Group (see paragraph 130 of document A/CN.9/485).

<sup>5</sup> Assuming that some enacting States may wish to exclude certain cases from the application of the model legislative provisions, the Working Group may wish to consider whether the possibility of exclusion, as proposed in draft article 1, paragraph 4, should be indicated in the text. Possible areas of exclusion might be indicated in the guide to enactment. Those areas might be, for example, situations where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself conducts a conciliatory process either at the request of the disputing parties or exercising his or her prerogatives or discretion. Another area of exclusion may be collective bargaining relationships between employers and employees.

<sup>6</sup> At its previous session, the Working Group agreed to proceed on the basis that the model legislative provisions would be non-mandatory but that the issue of the degree to which specific draft provisions would be mandatory would need to be revisited as work progressed on the provisions (paragraphs 112 and 142 of document A/CN.9/485). The Working Group may wish to consider whether the extent of the non-mandatory nature of the model legislative provisions should be clarified in one general provision (as has been done in draft paragraph 5). The Working Group may also wish to consider whether any mandatory provisions should be expressly indicated in draft paragraph 5.

<sup>7</sup> The reference to “mediation” was included in draft article 2 to reflect observations made at the previous session of the Working Group that, in addition to the term conciliation, other terms are used in practice. Sometimes those terms are used interchangeably (without an apparent difference in meaning) and, in other cases, distinctions are made depending on the procedural styles or techniques used. As the model legislative provisions are designed to cover different procedural styles or techniques when an independent and impartial

a third person, or a panel of persons, to assist them in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute arising out of or relating to or contract or other legal relationship.<sup>8</sup>

**Article 3. International conciliation**<sup>9</sup>

**(1) A conciliation is international if:**

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

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

**(i) the place of conciliation;**

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

**(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.**<sup>10</sup>

**(2) For the purposes of this article:**

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

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

**Article 4. Commencement of conciliation proceedings**

**(1) The conciliation proceedings in respect of a particular dispute commence on the day on which an invitation to conciliate that dispute made by one party is accepted by the other party.**<sup>11</sup>

**(2) If the party initiating conciliation does not receive a reply 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.**<sup>12</sup>

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person assists parties in resolving a dispute, the inclusion clarifies that the model legislative provisions encompass all such styles or techniques (see paragraphs 108-109 of document A/CN.9/485).

<sup>8</sup> For a discussion of this provision, see paragraphs 123-124 of document A/CN.9/485.

<sup>9</sup> For a discussion of this provision, see paragraphs 117-120 of document A/CN.9/485. In view of the broad scope of the definition of internationality, the Working Group may wish to consider whether the model legislative provisions should apply to all cases of commercial conciliation, without distinguishing between domestic and international cases.

<sup>10</sup> The Working Group may wish to consider whether the expression "the subject-matter of the agreement to conciliate relates to more than one country" might be replaced by words such as "these model legislative provisions are applicable".

<sup>11</sup> For the discussion of this provision, see paragraphs 127-132 of document A/CN.9/485. The draft is largely based on article 2 of the UNCITRAL Conciliation Rules. The Working Group may wish to discuss whether paragraph (1) adequately covers all situations, including those where the court or a competent governmental entity directs or requests the parties to conciliate.

<sup>12</sup> This paragraph was prepared pursuant to a discussion in the previous Working Group (see paragraph 129 of document A/CN.9/485).

**Article 5. Number of conciliators**

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.<sup>13</sup>

**Article 6. Appointment of conciliators**<sup>14</sup>

(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.

**Article 7. Conduct of conciliation**<sup>15</sup>

(1) The parties determine [, by reference to a standard set of rules or otherwise,] the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner on 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, the wishes that the parties may express, and the need for a speedy settlement of the dispute.<sup>16</sup>

(3) The conciliator shall be guided by principles of objectivity, fairness and justice. [Unless otherwise agreed by the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]<sup>17</sup>

[(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]<sup>18</sup>

<sup>13</sup> This has been inserted as requested by the Working Group at paragraph 123 of document A/CN.9/485. The draft reflects article 3 of the UNCITRAL Conciliation Rules.

<sup>14</sup> See paragraph 123 of A/CN.9/485. This draft article is based on article 4 of the UNCITRAL Conciliation Rules.

<sup>15</sup> For the discussion of this provision, see paragraph 122-125 in document A/CN.9/485.

<sup>16</sup> See article 7(3) of the UNCITRAL Conciliation Rules.

<sup>17</sup> The provision is largely based on paragraph 2 of article 7 of the UNCITRAL Conciliation Rules.

<sup>18</sup> For comments on paragraphs (3) and (4) of the current draft of article 7, see paragraph 92 of document A/CN.9/WG.II/WP.110.

**Article 8. Communication between conciliator and parties**<sup>19</sup>

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

**Article 9. Disclosure of information**<sup>20</sup>

*[Alternative 1:]* When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.<sup>21</sup>

*[Alternative 2:]* Unless otherwise agreed by the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.

**Article 10. Termination of conciliation**<sup>22</sup>

The conciliation proceedings are terminated:

- (a) by the signing of the settlement agreement by the parties, on the date of the agreement;<sup>23</sup>
- (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;
- (c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

**[Article 11. 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.<sup>24</sup>

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<sup>19</sup> Article 8 (which in the previous draft, as contained following paragraph 92 of document A/CN.9/WG.II/W.P.110, was draft article 3) was not considered at the previous session of the Working Group.

<sup>20</sup> Article 9 (which in the previous draft, as contained following paragraph 93 of document A/CN.9/WG.II/W.P.110, was draft article 4) was not considered at the previous session of the Working Group. For an earlier discussion on this issue see document A/CN.9/468, paragraphs 54-55.

<sup>21</sup> Alternative 1 is modeled on article 10 of the UNCITRAL Conciliation Rules.

<sup>22</sup> Article 10 (which in the previous draft, as contained following paragraph 96 of document A/CN.9/WG.II/W.P.110, was draft article 6) was not discussed at the previous session of the Working Group.

<sup>23</sup> The Working Group may wish to discuss whether the words “the signing” should be replaced by the words “the conclusion” to better accommodate electronic commerce.

<sup>24</sup> For the discussion of the question whether draft article 11 (which in the previous draft, as contained following paragraph 96 in document A/CN.9/WG.II/WP.110, was draft article 7) should be retained, see paragraphs 134-138 of document A/CN.9/485.

**Article 12. Admissibility of evidence in other proceedings**<sup>25</sup>

**(1) [Unless otherwise agreed by the parties,]<sup>26</sup> a party who participated in the conciliation proceedings [or a third person<sup>27</sup>] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:<sup>28</sup>**

**(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or]<sup>29</sup> a possible settlement of the dispute;**

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

**(c) Proposals made by the conciliator;**

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

**(2) The disclosure<sup>30</sup> of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings].<sup>31</sup>**

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

**(4) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation.<sup>32</sup>**

<sup>25</sup> General support was expressed for the policy underlying draft article 12 (which in the previous draft, as contained following paragraph 97 of document A/CN.9/WG.II/W.P.110, was draft article 8). The draft article is largely modeled on article 20 of the UNCITRAL Conciliation Rules although, whereas article 20 is drafted as a contractual commitment, draft article 12 is drafted as a statutory prohibition (paragraph 140 of document A/CN.9/485). A suggestion to include a rule in the model legislative provisions establishing a general duty for the conciliator and the parties to keep confidential all matters relating to conciliation along the lines set out in article 14 of the UNCITRAL Conciliation Rules, was rejected (see paragraph 146 of document A/CN.9/485).

<sup>26</sup> The Working Group agreed that draft article 12 should be subject to party autonomy, but did not finally decide whether this issue should be expressed specifically in the article or whether it should be left to be expressed in a general manner, such as above in draft article 1(5). (See paragraph 142 of document A/CN.9/485).

<sup>27</sup> The reference to “third person” is meant to indicate a person that is not a party to the conciliation but that is nevertheless in a position to use as evidence views, admissions, proposals or other facts or information referred to in subparagraphs (a) to (d) of paragraph (1) (paragraph 143 of document A/CN.9/485).

<sup>28</sup> The Working Group expressed the view that draft paragraph (1) covered evidence of facts and other information regardless of whether this information was in writing or in other form. No decision was taken as to whether this interpretation was sufficiently clear from the draft article or whether it would be useful to include a clarification on this point (see paragraph 145 of document A/CN.9/485). The Working Group may wish to consider whether an additional subparagraph should be included in draft paragraph (1) along the lines of the proposal made in the Working Group prohibiting the disclosure of the content of an invitation to conciliate or a statement that the conciliation has failed (see the last sentence in paragraph 143 of document A/CN.9/485).

<sup>29</sup> The Working Group agreed that the words “matters in dispute or” be retained in square brackets pending further consideration of their effect in draft article 12 (see paragraph 143 of document A/CN.9/485).

<sup>30</sup> The Working Group may wish to consider whether the expression “disclosure” is the most appropriate term in this context or whether that term should be replaced by a broader formulation to the effect that the court should not order the parties to produce as evidence information referred to in paragraph (1).

<sup>31</sup> For a discussion of draft paragraphs (2) and (3) see paragraph 144 of document A/CN.9/485.

<sup>32</sup> See paragraph 141 of document A/CN.9/485.

**Article 13. Role of conciliator in other proceedings**

(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is<sup>33</sup> the subject of the conciliation proceedings.

(2) Testimony of the conciliator regarding the facts referred to in paragraph (1) of article 12 shall not be admissible in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.<sup>34</sup>

(3) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract [or another contract forming part of a single commercial transaction] [or the same transaction or event] [or any related contract].<sup>35</sup>

**Article 14. Resort to arbitral or judicial proceedings**<sup>36</sup>

(1) [During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.]

(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with].

[(3) The provisions of paragraph (1) and (2) of this article do not prevent a party from approaching an appointing authority with a view to requesting it to appoint a conciliator.]<sup>37</sup>

**Article 15. Arbitrator acting as conciliator**

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.<sup>38</sup>

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<sup>33</sup> See paragraph 150 of document A/CN.9/485.

<sup>34</sup> The Working Group decided to reconsider the question whether the provision should be broadened to include testimony by a conciliator that a party acted in bad faith during a conciliation (paragraph 152 of document A/CN.9/485).

<sup>35</sup> See paragraph 153 of document A/CN.9/485.

<sup>36</sup> See paragraphs 155-158 of document A/CN.9/485.

<sup>37</sup> See paragraph 158 of document A/CN.9/485.

<sup>38</sup> Article 15 (which in the previous draft, as contained and commented upon in paragraphs 102 to 104 of document A/CN.9/WG.II/WP.110, was draft article 11) was not discussed at the previous session of the Working Group.

**Article 16. Enforceability of settlement**

**If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable *[the enacting State inserts provisions specifying provisions for the enforceability of such agreements]*.**<sup>39</sup>

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<sup>39</sup> Article 16 (which in the previous draft, as contained and commented upon in paragraphs 104-112 of document A/CN.9/WG.II/WP.110, was draft article 12) was not discussed at the previous session of the Working Group.