

D R A F T

FOR APPROVAL

**AMENDMENT TO THE UNIFORM MEDIATION ACT  
TO ADD AN ARTICLE  
REGARDING INTERNATIONAL COMMERCIAL  
CONCILIATION**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR  
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**AMENDMENT TO THE UNIFORM MEDIATION ACT  
TO ADD AN ARTICLE  
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ON UNIFORM LAWS

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**AMENDMENT TO THE UNIFORM MEDIATION ACT TO ADD AN ARTICLE  
REGARDING INTERNATIONAL COMMERCIAL CONCILIATION  
INTERIM MEMORANDUM**

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**APPENDIX A**

**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW MODEL LAW ON  
INTERNATIONAL COMMERCIAL CONCILIATION**

1                   **AMENDMENT TO THE UNIFORM MEDIATION ACT**  
2                   **TO ADD AN ARTICLE**  
3                   **REGARDING INTERNATIONAL COMMERCIAL MEDIATION**  
4

5  
6                   **Prefatory Note**  
7

8  
9                   As currently approved, the Uniform Mediation Act (UMA) applies to both domestic and  
10 international mediation. The purpose of this Amendment is to facilitate state adoption of the  
11 newly-approved United Nations Commission on International Trade Law (UNCITRAL) Model  
12 Law on International Commercial Conciliation (set forth in Appendix A) that will encourage the  
13 use of mediation among parties from different nations while maintaining the strong protections  
14 of the Uniform Mediation Act regarding the use of mediation communications in legal  
15 proceedings.  
16

17                   There is broad international agreement that it is important to have a similar legal  
18 approach internationally for the mediation of international commercial disputes, so that the  
19 international parties will know the applicable law and feel comfortable using mediation and  
20 thereby resolving more of their disputes short of arbitration and litigation. The stated purpose of  
21 the UNCITRAL Model Law is to “support the increased use of conciliation” for international  
22 commercial disputes, according to the Draft Guide issued by the UNCITRAL Secretariat. Draft  
23 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial  
24 Conciliation (November 14, 2002)(“UNCITRAL Draft Guide”). The Draft Guide notes that  
25 parties in international commercial conciliation can refer to existing conventions, such as the  
26 UNCITRAL Conciliation Rules, but often fail to make the reference. The UNCITRAL Draft  
27 Guide states, “The conciliation process might thus benefit from the establishment of non-  
28 mandatory legislative provisions that would apply when the parties mutually desired to conciliate  
29 but had not agreed on a set of conciliation rules. Moreover in countries where agreements as to  
30 the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might  
31 provide a useful clarification. In addition it was pointed out with respect to certain issues, such  
32 as facilitating enforcement of settlement agreements resulting from conciliations, that the level of  
33 predictability and certainty required to foster conciliation could only be achieved through  
34 legislation.” UNCITRAL Draft Guide 4-5.  
35

36                   International consensus on this point is strong, and the U. S. State Department has joined  
37 the consensus. UNCITRAL adopted the Model Law on June 28, 2002. It is expected that the  
38 United Nations General Assembly will adopt a resolution endorsing the Model Law in the next  
39 few months. The negotiations leading to the Model Law draft represented a major international  
40 effort to harmonize competing legal approaches in order to adopt a common default law for  
41 international conciliation. Representatives of 90 countries participated in the drafting of the  
42 UNCITRAL Model Law over a two-year period. In addition, 12 intergovernmental organizations  
43 and 22 international non-governmental organizations took part in the discussions. The U.S.

1 Department of State represented the United States in the drafting process. The U.S. delegation  
2 included advisors from NCCUSL, the American Bar Association, the American Arbitration  
3 Association, and the Maritime Law Association. There are strong policy reasons for U.S. states  
4 to adopt the UNCITRAL Model Law.

5  
6 There also are strong reasons not to re-draft the UNCITRAL Model Law in substantial  
7 ways for enactment by the states.. International lawyers may be hesitant to conciliate if they must  
8 retain additional domestic counsel to determine the effects of any changes in the U.S. draft. The  
9 UNCITRAL Model Law Draft Guide notes, “In order to achieve a satisfactory degree of  
10 harmonization and certainty, States should consider making as few changes as possible in  
11 incorporating the Model Law into their legal system, but, if changes are made, they should  
12 remain within the basic principles of the Model Law. A significant reason for adhering as much  
13 as possible to the uniform text is to make the national law as transparent and familiar as possible  
14 for foreign parties, advisers and conciliators who participate in conciliations in the enacting  
15 state.” UNCITRAL Draft Guide 5.

16  
17 This Amendment incorporates the UNCITRAL Model Law by reference in order to avoid  
18 the substantial re-drafting that would be necessary to comport with U.S. drafting conventions.  
19 The Legislative Note references important notes on interpretation from the UNCITRAL  
20 Secretariat, the Draft Guide to Enactment and Use of the UNCITRAL Model Law on  
21 International Commercial Conciliation (November 14, 2002).

22  
23 The Amendment also makes clear that the protection to mediation communications given  
24 to international commercial mediation should be as strong as that given to domestic mediation of  
25 all types under the Uniform Mediation Act. It also makes explicit how the parties can waive  
26 those protections.

27  
28 The Amendment was drafted at two sessions that included broad observer participation,  
29 including representatives of the Association of Conflict Resolution, the U.S. State Department,  
30 and the American Bar Association. Professors Ellen Deason and Jim Brudney of the Ohio State  
31 University Moritz College of Law provided able counsel and assistance in the drafting process.

1                   **AMENDMENT TO THE UNIFORM MEDIATION ACT**  
2                   **TO ADD AN ARTICLE**  
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4

5                   **SECTION \_\_\_\_ . INTERNATIONAL COMMERCIAL MEDIATION.**

6                   (a) In this section, “Model Law” means the Model Law on International Commercial  
7 Conciliation adopted by the United Nations Commission on International Trade Law on 28 June  
8 2002, and recommended by the United Nations General Assembly in its resolution [insert date],  
9 and “international commercial mediation” means an international commercial conciliation as  
10 defined in Article 1 of the Model Law.

11                  (b) Except as otherwise provided in subsections (c) and (d), if a mediation is an  
12 international commercial mediation, the mediation is governed by the Model Law.

13                  (c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part  
14 of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any  
15 applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article  
16 10 of the Model Law derogates from Sections 4, 5, and 6.

17                  (d) If the parties to an international commercial mediation have agreed under Article 1,  
18 subsection (7), of the Model Law that the Model Law shall not apply, this [Act] applies.

19                                   **Legislative Note**

20                  The UNCITRAL Model Law on International Commercial Conciliation may be found at  
21 [www.uncitral.org/en-index.htm](http://www.uncitral.org/en-index.htm). Important comments on interpretation are included in the Draft  
22 Guide to Enactment and Use of UNCITRAL Model Law on International Commercial  
23 Conciliation. The States should note the Draft Guide in a Legislative Note to the Act. This is  
24 especially important with respect to interpretation of Article 9 of the Model Law.

## Preliminary Comments

### 1. Varying by Agreement/Choice of Law

This Amendment allows parties to international commercial mediation to take advantage of the greater privilege protections of the Uniform Mediation Act, whenever these are broader than the evidentiary exclusions of the UNCITRAL Model Law. A number of choices are available to the mediation participants:

(1). *If the participants prefer to have the mediation covered by the privilege protections of the Uniform Mediation Law, which are typically broader than the evidentiary exclusions of the UNCITRAL Model Law:* This is the default situation under this Amendment to the Uniform Mediation Act. This result is reached by reading subsections (a) and (c) together. No additional agreement is necessary.

(2). *If the participants prefer not to have the mediation covered by the provisions of the UNCITRAL Model Act but want the mediation covered by the Uniform Mediation Act:* The parties should agree, pursuant to Article 1, subsection (7) of the UNCITRAL Model Law to exclude the applicability of the Model Law. In this situation, subsection (d) of the Amendment provides that the default is that the mediation is covered by the Uniform Mediation Act.

(3). *If the participants prefer the narrower protections for the use of mediation communications provided by the UNCITRAL Model Law and do not want to be covered by the privilege provisions of the Uniform Mediation Act:* The participants should agree, in a record (written or other electronic form), that the privileges under Sections 4 through 6 of the Uniform Mediation Act do not apply to the mediation or part agreed upon. It is important to note that this agreement does not preclude the raising of the privilege by a participant who does not know of the agreement before making the statement that is the subject of the privilege. Section 3(c) provides:

If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

If the participants so agree, the UNCITRAL Model Law provision on the use of mediation communications, Article 10, will be the default position.

(4). *If the parties would like to have an open mediation, with mediation communications being available for later proceedings:* The parties should enter the agreement described in point c and also agree that they exclude the applicability of Articles 9 and 10 of the UNCITRAL Model Law.

(5). *If the parties would like to have the mediation covered by another law:* They should designate in their agreement to mediate what law that will cover the international commercial mediation, in addition to taking the steps listed in point d. They should realize, however, that a court may be unwilling to import a law of privilege because the court might deem privilege to be an aspect of procedure governed by the forum state's law. In addition, if the parties seek to import a mediation privilege law that is broader than that of the forum state, the court might view the agreement as an attempt to keep evidence from the tribunal and against public policy and therefore unenforceable.

## **2. Confidentiality**

Article 9 of the UNCITRAL Model Law is consistent with Section 8 of the Uniform Mediation Act, when read together with the notes on interpretation in the to Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliation. The Draft Guide makes clear that the violation of Article 9 should not be a basis for sanctions unless the party disclosing understood that the mediation was governed by the confidentiality rule. The Draft Guide also makes clear that a participant may warn or disclose in the public interest despite the prohibitions. This is the current state of U.S. contract law regarding secrecy agreements as discussed in the Reporter's Notes to Section 8. The pertinent portion of the Draft Guide states:

The Working Group agreed that an illustrative and non-exhaustive list of possible exceptions to the general rule on confidentiality would more appropriately be provided in the Guide to Enactment. Examples of such laws may include laws requiring the conciliator or parties to reveal information if there is a reasonable threat that a person will suffer death or substantial bodily harm if the information is not disclosed and laws requiring disclosure if it is in the public interest. For example to alert the public about a health or environmental or safety risk. 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 9, it should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a conciliation existed and consequently an expectation of confidentiality. When enacting the Model Law, certain States may wish to clarify article 9 to reflect that interpretation.

It is important that a reference to the Draft Guide be included in the Legislative Note, so that the courts will understand the intent of the UNCITRAL Model Law drafters.

## **3. Accommodating Article 10 and Sections 4, 5 and 6**

In most instances, Sections 4, 5 and 6 provide for broader protections of mediation communications than provided by Article 10. This Act makes clear that, where there is a conflict, the broader protections of the Uniform Mediation Act apply, by stating, "Nothing in Article 10 of the Model Law derogates from Sections 4, 5 and 6." Thus, even though Article 10, subsection (3) provides that the information may be used "for the purposes of implementation or



1 enforcement of a settlement agreement,” the narrower Uniform Mediation Act approach should  
2 be applied because otherwise this would derogate the privilege. Under the Uniform Mediation  
3 Act, mediation communications may be offered through the limited exceptions in Section 6 for  
4 the agreement itself (Section 6(a)(1)) and for contract defenses (Sections 6(b)(2) and 6(c)).  
5

#### 6 **4. Conflict of Laws**

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8 The drafters intend the privilege provisions to be widely applied by courts so that the  
9 mediation participants will know the breadth of confidentiality when they are engaged in the  
10 mediation, even though they may not anticipate all of the nations or states where the mediation  
11 communications might be sought or introduced. Nonetheless, the mediation participants should  
12 realize that choice of law rules in other nations and states vary and those rules may result in  
13 application of law other than that of the state where the mediation took place. *See, e.g., Asten,*  
14 *Inc. v. Wangner Systems Corp.*, No. C.A. 15617, 1999 WL 803965 (Del. Ch. Sept 23, 1999)  
15 (applying South Carolina law to dispute arising out of Florida mediation of South Carolina court  
16 litigation between parties incorporated in Delaware because South Carolina had the most  
17 significant relationship to the transaction). In addition, courts in other nations and states may  
18 consider mediation privilege provisions to be procedural in nature, rather than substantive, and  
19 therefore apply the forum’s privilege law rather than the law where the mediation occurred.  
20 Even within the United States, the courts have acted inconsistently with respect to mediation  
21 privileges that apply where the mediation was held. *See, e.g., United States v. Gullo*, 672 F.  
22 Supp. 99 (W.D.N.Y. 1987) (applying a state privilege in a federal grand jury proceeding  
23 concerning communications made during mediation in state program); *In re March, 1995 –*  
24 *Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995) (refusing to apply state court mediation  
25 privilege in a federal grand jury proceeding concerning communications made during mediation  
26 in state court mediation program); *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d  
27 487 (5th Cir. 1998) (refusing to apply state privilege in a federal grand jury proceeding  
28 concerning mediation conducted in federally-funded mediation program operated by state).  
29

30 The choice of law rules in many jurisdictions in the United States recognize party  
31 autonomy to select the law that will govern their transactions. Thus the drafters believe that  
32 courts in the United States will be most likely to apply this law to international commercial  
33 mediations occurring in other nations or states that later become the subject of a suit in the  
34 United States if the parties to the mediation have specified that it will be governed by the  
35 Uniform Mediation Act.  
36

#### 37 **5. Uniformity**

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39 This Amendment is recommended. Nonetheless, a State may decide to adopt the  
40 Uniform Mediation Act without this amendment without losing the designation that it represents  
41 a Uniform State Law.  
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43

## 6. Reports to the Court

Whenever mediation occurs as part of a legal proceeding, the parties would be especially aggrieved if, in absence of full settlement, the mediator could make reports to the judge who will rule on the dispute being mediated. Such reports are specifically prohibited by Section 7 of the Uniform Mediation Act.

The drafters believe that Articles 9 and 10 of the UNCITRAL Model Law achieve the same result as Section 7 of the Uniform Mediation Act. Article 10(1) prohibits disclosures by a mediator and Article 10(3) prohibits a court or arbitral tribunal from ordering disclosures. When Article 9, which broadly requires confidentiality for all mediation information, is read in conjunction with these prohibitions, it should be interpreted to include a narrower confidentiality requirement that prohibits mediator reports, including recommendations of a specific outcome, to a judge or arbitrator. This interpretation maintains the reasonable expectations of the parties regarding confidentiality and avoids a situation in which the mediator could pressure settlement by threatening to make an unwelcome report to the person who will rule in the event that the mediation does not result in settlement.

## 7. Derogation from the Uniform Mediation Act

The Amendment, subsection (c), provides that the “Model Law does not *derogate* from Section 4, 5 or 6.” Black’s Law Dictionary indicate that one law derogates another law if it “limits the scope or impairs its utility and force.” The drafters intend that the Uniform Mediation Act purposes should be achieved. For example, under the Uniform Mediation Act, a mediation communication includes any mediator statement whereas the Model Law protects only mediator proposals. This provision directs to court to protect mediator statements that were not proposals so that the protections of the Uniform Mediation Act are given full force. As a further example, the Uniform Mediation Act applies to discovery process, while the Model Law does not mention discovery. Under this provision, the court should accord a privilege during the discovery phase in order to avoid limiting the force of the Uniform Mediation Act.

The provision that the Model Law does not derogate also would apply to exceptions to the Uniform Mediation Act that are not recognized in the Model Act. For example, the Uniform Mediation Act excepts from the privilege a mediation communication that is a threat to commit a crime of violence, but the Model Law does not. The derogation provision makes clear that the court should give effect to the exception for the threat, because to do otherwise would frustrate the purposes of the Uniform Mediation Act.

## 8. Interpretation of the Model Law

The Model Law was drafted jointly by an international group. Therefore, the courts should use the interpretation guide referenced in the Legislative Note rather than drafting conventions of U.S. law as they interpret the Model Law.

## APPENDIX A

(Unofficial version of the Model Law as adopted by the United Nations Commission on International Trade Law -- UNCITRAL at its 35<sup>th</sup> session in New York on 28 June 2002)

### UNCITRAL Model Law on International Commercial Conciliation

#### Article 1. Scope of application and definitions

(1) This Law applies to international<sup>1</sup> commercial<sup>2</sup> 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;

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

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

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

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

(9) This Law does not apply to:

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

(b) [...].

## **Article 2. Interpretation**

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

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

## **Article 3. Variation by agreement**

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

## **Article 4. Commencement of conciliation proceedings<sup>3</sup>**

(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.

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<sup>3</sup> 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) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

#### **Article 5. Number and appointment of conciliators**

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

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

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

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

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

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

(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.

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**Article 7. Communication between conciliator and parties**

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

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**Article 8. Disclosure of information**

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

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**Article 9. Confidentiality**

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

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**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.

1                   **Article 14. Enforceability of settlement agreement<sup>4</sup>**  
2  
3

4                   If the parties conclude an agreement settling a dispute, that  
5 settlement agreement is binding and enforceable ... *[the enacting State*  
6 *may insert a description of the method of enforcing settlement*  
7 *agreements or refer to provisions governing such enforcement]*.  
8

9                   \_\_\_\_\_  
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12

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<sup>4</sup> When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.