AMENDMENT TO THE UNIFORM MEDIATION ACT TO ADD A SECTION REGARDING INTERNATIONAL COMMERCIAL CONCILIATION

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR
WASHINGTON, DC
AUGUST 1 - 7, 2003

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

The ideas, concepts and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been reviewed, debated or approved by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not reflect the views of the Conference and its Commissioners or the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal made by the National Conference of Commissioners on Uniform State Laws.

DRAFTING COMMITTEE TO AMEND THE UNIFORM MEDIATION ACT TO ADD A SECTION REGARDING INTERNATIONAL COMMERCIAL CONCILIATION

MICHAEL B. GETTY, 1560 Sandburg Terr., Suite 1104, Chicago, IL 60610, *Chair*
PHILLIP CARROLL, 120 E. Fourth St., Little Rock, AR 72201
STANLEY M. FISHER, 30100 Chagrin Boulevard, Suite 301, Cleveland, OH 44122
ELIZABETH KENT, Hawaii State Judiciary, Center for Alternative Dispute Resolution, 417 S. King St., Room 207, Honolulu, HI 96813
FRANCIS J. PAVETTI, 18 The Strand, Goshen Point, Waterford, CT 06385*, Enactment Plan Coordinator*
BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814
JOAN ZELDON, Superior Court, 500 Indiana Ave. NW, Room 1640, Washington, DC 20001
NANCY H. ROGERS, Ohio State University, Moritz College of Law*,* 55 W. 12th Ave., Columbus, OH 43210, *Reporter*

EX OFFICIO

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *President*
MARTHA LEE WALTERS, 245 E. Fourth St., Eugene, OR 97401, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LAWRENCE D. W. GRAVES, 39 Central Square 173, Keene, NH 03431*, ABA Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama, School of Law, P.O. Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

AMENDMENT TO THE UNIFORM MEDIATION ACT TO ADD A SECTION REGARDING INTERNATIONAL COMMERCIAL CONCILIATION

TABLE OF CONTENTS

Prefatory Note 1

SECTION ___. INTERNATIONAL COMMERCIAL CONCILIATION. 3

APPENDIX A

UNICTRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION 9

AMENDMENT TO THE UNIFORM MEDIATION ACT
TO ADD A SECTION
REGARDING INTERNATIONAL COMMERCIAL MEDIATION

Prefatory Note

As currently approved, the Uniform Mediation Act (UMA) applies to both domestic and international mediation. The purpose of this Amendment is to facilitate state adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (set forth in Appendix A) that was adopted on November 19, 2002. Adoption of the amendment will encourage the use of mediation of commercial disputes among parties from different nations while maintaining the strong protections of the Uniform Mediation Act regarding the use of mediation communications in legal proceedings.

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

International consensus on the benefits on enacting the Model Law is strong, and the U.S. State Department has joined the consensus. UNCITRAL adopted the Model Law on June 28, 2002, and it was endorsed by the United Nations General Assembly on November 19, 2002. The negotiations leading to the Model Law draft represented a major international effort to harmonize competing legal approaches in order to adopt a common default law for international conciliation. Representatives of 90 countries participated in the drafting of the UNCITRAL Model Law over a two-year period. In addition, 12 intergovernmental organizations and 22 international non-governmental organizations took part in the discussions. The U.S. Department

of State represented the United States in the drafting process. The U.S. delegation included advisors from NCCUSL, the American Bar Association, the American Arbitration Association, and the Maritime Law Association. Adoption of the UNCITRAL Model Law by U.S. States would help to achieve the desired international uniformity in a default law for international conciliation.

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

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

The Amendment also makes clear that the protection to mediation communications should be as strong for international commercial mediation as it is for domestic mediation of all types under the Uniform Mediation Act. It also makes explicit how the parties can waive those protections.

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

AMENDMENT TO THE UNIFORM MEDIATION ACT
TO ADD A SECTION
REGARDING INTERNATIONAL COMMERCIAL MEDIATION

SECTION ___. INTERNATIONAL COMMERCIAL MEDIATION.

(a) In this section, "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and "international commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

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

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

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

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

Comment

1. Varying by Agreement/Choice of Law

This Amendment allows parties to international commercial mediation to take advantage of the privilege protections of the Uniform Mediation Act, which typically 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 (3) 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 (4). 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, which indicates that mediation communications are confidential to extent agreed upon by the parties or provided in state law, when Article 9 is 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 clarity 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. Conflict of Laws

The drafters intend the privilege provisions to be widely applied by courts so that the

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

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

4. Uniformity

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

5. 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.

6. Derogation from the Uniform Mediation Act

The Amendment, subsection (c), provides that "nothing in Article 10 of the Model Law *derogates* 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.

7. 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.

8. Incorporation by Reference

It is important to note that the Amendment incorporates by reference a specific version of the Model Law, that adopted on June 22, 2002 (included in Appendix A). An amendment of the Model Law will not change this Section.

Some state legislatures may hesitate to incorporate by reference and may prefer to enact the Model Law. In that situation, the State can achieve uniformity by enacting this Amendment as well as the Model Law, changing the internal references accordingly.

APPENDIX A

(Model Law as adopted by the United Nations Commission on International Trade Law -- UNCITRAL at its 35th session in New York on 28 June 2002 and approved by the United Nations General Assembly on November 19, 2002)

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

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

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

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

(4) A conciliation is international if:

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

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

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

---

[1] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
- Delete the word "international" in paragraph (1) of article 1; and
- Delete paragraphs (4), (5) and (6) of article 1.

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

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

(5) For the purposes of this article:

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

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

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

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

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

(9) This Law does not apply to:

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

(b) […].

Article 2. Interpretation

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

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

Article 3. Variation by agreement

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

Article 4. Commencement of conciliation proceedings[3]

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

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

Article 5. Number and appointment of conciliators

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

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

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

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

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

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

(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

---

[3] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
(2) Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

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[4]

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

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