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DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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With Reporter's Notes

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

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Amendment to the Uniform Mediation Act To Add An Article Regarding International Commercial Conciliation Interim Memorandum consists of the following individuals:

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, 1100 Huntington Bldg., 925 Euclid Ave., Cleveland, OH 44115-1475
ELIZABETH KENT, P.O. Box 339, Honolulu, HI 96809-0339
BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814
FRANCIS J. PAVETTI, 18 The Strand, Goshen Point, Waterford, CT 06385*, Enactment Plan Coordinator*
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, 687 Woodridge Dr., Mendota Heights, MN 55118, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

LAWRENCE D. W. GRAVES, 55 Stone Ridge Dr., Northampton, MA 01062-2672*, ABA Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall, Columbia, MO 65211, *Executive Director*
FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director Emeritus*
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

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

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 newly-approved United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (set forth in Appendix A) that will encourage the use of mediation among parties from different nations while maintaining consistency with the privilege provisions of the Uniform Mediation Act.

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 and thereby resolving 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 refer to 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 this point is strong. UNCITRAL adopted the Model Law on June 28, 2002. It is expected that the United Nations General Assembly will adopt a resolution endorsing the Model Law in the next few months. 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. There are strong policy reasons for U.S. states to adopt the UNCITRAL Model Law.

Adoption of the Model Law presents dilemmas, however, for U.S. states. Those who have adopted the Uniform Mediation Act or similar provisions already offer broader privilege protections than included in the Model Law. If both the UMA and the Model Law are enacted in a state, it will be unclear which provisions regarding use of mediation communications apply to a commercial mediation in which the parties are international. The Model Law protects only a portion of the mediation communications protected by the UMA. The provisions differ in other important ways as well, including who may object to the use of mediation communications and

what exceptions are recognized.

At the same time, there are strong arguments that the U.S. states should track the language of the Model Law as closely as possible. The United States participated in an effort to achieve language that could be adopted by all nations in the world so that lawyers in each nation would not have to research the law in other nations in order to participate in mediation. A major re-drafting of the Model Law would undermine this goal. Varying the language slightly, however, might be consistent with the goal. As a a model law, and not a treaty, the UNCITRAL drafters anticipated that nations would make changes in model laws, noting, "In order to achieve a satisfactory degree of harmonisation 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.

1. Limiting the Application to International Commercial Disputes

Noting the problems that are necessarily created by conflicts between the UNCITRAL Model Law and the Uniform Mediation Act, the drafters decided to limit the law's application to situations in which the strongest arguments for consistency with international language could be made – international commercial disputes. The draft below therefore does not include alternative language from footnote 1 of the UNCITRAL Model Law that would make the Model Law to apply to other types of disputes if the parties agree that it should apply.

2. Specifying Which Provision on Admission and Disclosure Supersedes

The draft specifies when the UNCITRAL Model Law provisions supersede conflicting state laws on conciliation and mediation and when the UMA provisions supersede the UNCITRAL Model Law. In general, the UNCITRAL Model Law applies to international commercial mediation except in the area of privilege, when the UMA applies.

3. Drafting Style

The drafters also wrestled with different approaches to drafting legislation. The drafters did not want to vary the language simply to confirm it to U.S. style, because this might be confusing for lawyers from other nations. At the same time, adopting the Model Law verbatim as a statute might produce unpredictable interpreation by U.S. courts. The drafters resolved this by incorporating the UNCITRAL Model Law by reference. It therefore will be clear to the courts that the drafting style was a compromise approach among nations with different drafting styles and the law will be interpreted appropriately.

In the UNCITRAL Model Law, the word "conciliation" is used in place of "mediation" for the same process.

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

SECTION ___. INTERNATIONAL COMMERCIAL CONCILIATION.

(a) If a conciliation is an international commercial conciliation, the conciliation shall be governed by 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 its resolution [insert date].

(b) In this section, "international commercial conciliation" means:

(1) the parties to an agreement to conciliate have, at the time of the conclusion of the agreement, their places of business in different nations; or

(2) the nation in which the parties have their places of business is different from either:

(A) the nation in which a substantial part of the obligations of the commercial relationship is to be performed; or

(B) the nation with which the subject matter of the dispute is most closely connected. For purposes of this definition, 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 or, if a party does not have a place of business, reference is to be made to the party's habitual residence.

(C) Notwithstanding subsection (b), Sections 3(d) and 5-7 of this Act apply to such a conciliation.

(D) For purposes of subsection (c), the definitions in Section 2 of Article 1 of this [Act] shall govern.

(E) For purposes of subsection (c), "conciliations" means "mediation" and "conciliator" means "mediator."

Legislative Note

The UNCITRAL Model Law on International Commercial Conciliation may be found at _____.

Reporter's Notes

1. Alternative "Opt In" Approach.

In earlier discussions, the Drafters considered an option that the UNCITRAL Model Law apply to a mediation only if the parties agreed. This "opt in" approach had the advantage that U.S. parties would not be surprised to learn that the mediation was covered by the UNCITRAL Model Law. The disadvantage, of course, would be that international parties might be surprised that the UNCITRAL Model Law would not apply unless they agreed to be covered. The "opt in" approach could be drafted by adding to the end of subsection (c) the words "unless the parties agreed, prior to a conciliation, that the conciliation would be governed by the UNCITRAL Model Law provisions regarding disclosure and admission of evidence."

2. Conflict of Laws.

The Committee discussed the conflict of laws issues inherent in a state provision regarding international commercial conciliation. It was the desire of the drafters that the UMA privilege apply whenever the parties used an American court, agreed that U.S. law would apply, regardless of the forum nation, and or mediated within this nation. In this way, the parties' expectations at the time of the mediation were most likely to be realized. At the same time, because privilege falls in the gray area between substance and procedure, some forum nations may not give full force to this intention. At the same time, a provisions dealing would conflict of laws would not make it more likely that the intent of the drafters would be achieved.

2. Confidentiality.

The Act does not supersede the Model Law provisions for nondisclosure outside of legal proceedings, which are included in Section 209 of the Model Act (see Appendix).

APPENDIX A

This Model Law was adopted by the United Nations Commission on International Trade Law—UNCITRAL at its 35th session in New York on 28 June 2002

[ARTICLE] 2

International Commercial Conciliation

Reporter's Note

The word "country" has been used in place of "state" in the UNCITRAL Model Law.

SECTION 201. SCOPE OF APPLICATION AND DEFINITIONS.

(a) This Article applies to international [1] commercial [2] conciliation. If Article 2 applies to a conciliation, [Article 1 of this [Act]] does not apply.

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

(c) For the purposes of this Article, "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.

(d) A conciliation is international if:

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1 Countries wishing to enact this Model Article 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 Section 1; and
- Delete paragraphs (4), (5) and (6) of Section 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.

(1) [Two or more] [The] parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different Countries; or

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

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

(B) The Country with which the subject matter of the dispute is most closely connected.

(e) For the purposes of this Section:.

(1) 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;

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

(f) This Article also applies to a commercial conciliation when the parties agree that the conciliation is international.Article

(g) The parties are free to agree to exclude the applicability of this Article.

(h) Subject to the provisions of paragraph (9) of this Section, this Article 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.

(i) This Article does not apply to:

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

Reporter's Notes

(c) The drafters adopt the commentary from UNCITRAL: "The Commission intends that the word "conciliation" would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or person." It is the drafters' view that the the word "conciliation" is synomous with the word "mediation" in Article 1.

(d) The word "state" has been replaced by "country" in this draft. It is intended to cover all territories, including Hong Kong and Taiwan.

SECTION 202. INTERPRETATION.

(a) In the interpretation of this Article, 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.

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

SECTION 203. VARIATION BY AGREEMENT.

Except for the provisions of Section 202 and Section 206, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Article.

SECTION 204. COMMENCEMENT OF CONCILIATION PROCEEDINGS. [3]

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

(b) 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 [made] [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.

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

Section 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.

SECTION 205. NUMBER AND APPOINTMENT OF CONCILIATORS.

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

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

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

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

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

(d) 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.

(e) 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.

SECTION 206. CONDUCT OF CONCILIATION.

(a) 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.

(b) 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.

(c) 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.

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

SECTION 207. COMMUNICATION BETWEEN CONCILIATOR AND PARTIES.

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

Reporter's Notes

The reference to parties in Sections 207 and 208 is intended to include their attorneys or other authorized representatives of the parties.

SECTION 208. 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] [not be disclosed, the mediator shall not disclose] that information [shall not be disclosed] to any other party to the conciliation.

SECTION 209. 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.

SECTION 210. ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS.

(a) 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:

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

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

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

(4) Proposals made by the conciliator;

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

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

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

(c) The disclosure of the information referred to in paragraph (1) of this Section 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 Section, 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.

(d) The provisions of paragraphs (a), (b) and (c) of this Section 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.

(e) Subject to the limitations of paragraph (a) of this Section, 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.

SECTION 211. TERMINATION OF CONCILIATION PROCEEDINGS.

The conciliation proceedings are terminated:

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

(2) 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;

(3) 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

(4) 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.

SECTION 212. 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.

SECTION 213. 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.

SECTION 214. ENFORCEABILITY OF SETTLEMENT AGREEMENT. [4]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... *[the enacting Country 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 Country may consider the possibility of such a procedure being mandatory.