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2 DRAFT
3 FOR DISCUSSION ONLY
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6 **AMENDMENT TO THE**
7 **UNIFORM MEDIATION ACT**
8 **TO ADD AN ARTICLE REGARDING**
9 **INTERNATIONAL COMMERCIAL**
10 **CONCILIATION**
11

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14 NATIONAL CONFERENCE OF COMMISSIONERS
15 ON UNIFORM STATE LAWS
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24 *With Reporter's Notes*
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36 *Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the*
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38 *statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory*
39 *proposal.*

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

5 MICHAEL B. GETTY, 1560 Sandburg Terr., Suite 1104, Chicago, IL 60610, *Chair*
6 PHILLIP CARROLL, 120 E. Fourth St., Little Rock, AR 72201
7 STANLEY M. FISHER, 1100 Huntington Bldg., 925 Euclid Ave., Cleveland, OH 44115-1475
8 ELIZABETH KENT, P.O. Box 339, Honolulu, HI 96809-0339
9 BYRON D. SHER, California State Senate, State Capitol, Suite 2082, Sacramento, CA 95814
10 FRANCIS J. PAVETTI, 18 The Strand, Goshen Point, Waterford, CT 06385, *Enactment Plan Coordinator*
11 JOAN ZELDON, 500 Indiana Ave. NW, Room 1640, Washington, DC 20001
12 NANCY H. ROGERS, Ohio State University, Moritz College of Law, 55 W. 12th Ave., Columbus, OH
13 43210, *Reporter*
14

15
16 **EX OFFICIO**
17

18 K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *President*
19 MARTHA LEE WALTERS, 245 E. 4th St., Eugene, OR 97401, *Division Chair*
20

21 **AMERICAN BAR ASSOCIATION ADVISORS**

22 LAWRENCE D.W. GRAVES, 55 Stone Ridge Dr., Northampton, MA 01062-2672, *ABA Advisor*
23
24

25 **EXECUTIVE DIRECTOR**

26 WILLIAM H. HENNING, University of Missouri—Columbia, School of Law, 313 Hulston Hall,
27 Columbia, MO 65211, *Executive Director*
28 FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019,
29 *Executive Director Emeritus*
30 WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*
31
32

33
34 Copies of this Act may be obtained from:
35 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
36 211 E. Ontario Street, Suite 1300
37 Chicago, Illinois 60611
38 312/915_0195
39 www.nccusl.org
40
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1 **AMENDMENT TO THE UNIFORM MEDIATION ACT TO ADD AN ARTICLE**
2 **REGARDING INTERNATIONAL COMMERCIAL CONCILIATION**

3
4 **Prefatory Note**

5
6 This amendment would provide an alternative Uniform Mediation Act (UMA) for
7 those states that seek to provide statutory guidance for the mediation of international
8 commercial disputes. The amendment modifies the provisions of the United Nations
9 Commission on International Trade Law (UNCITRAL) Model Law on International
10 Commercial Conciliation to make them appropriate for enactment as state law in this
11 country.
12

13 Fifty UN member nations participated in the drafting process of the new UNCITRAL
14 Model Law. The Model Law is still in draft form. When finalized, it will be offered for
15 adoption by all of the member nations of the United Nations. The United States was
16 represented in the drafting process by the U.S. Department of State, and the delegation
17 included advisors from NCCUSL, the American Bar Association, the American
18 Arbitration Association, and the Maritime Law Association.
19

20 **1. Drafting Approach**

21
22 This amendment attempts to maintain the substantive provisions adopted by the new
23 UNCITRAL Model Law for International Commercial Conciliation. For the most part,
24 the amendment varies language from the UNCITRAL Model Law only to follow
25 American drafting traditions; the substance remains unchanged. In deference to the
26 international tradition, the Act refers to mediation as “conciliation,” though the terms
27 carry the same meaning, as Section 202 provides. The one exception to this substantive
28 consistency with the UNCITRAL Model Law is with respect to admission of evidence
29 and disclosure in proceedings.
30

31 **2. Privilege**

32
33 The UNCITRAL Model Law, which is attached in the Appendix to this Draft,
34 contains a provision regarding admission of evidence -- Article 10. Article 10 differs
35 somewhat from the UMA. Its enactment as written in the UNCITRAL Model Law might
36 produce confusion in a state also adopting the UMA. This draft Amendment replaces
37 Article 10 with Section 211, which incorporates by reference the privilege and
38 nondisclosure provisions of the UMA. The UMA privilege is broader than that originally
39 provided in the UNCITRAL draft, covering a larger portion of discussions in mediation.
40 It also provides the detail expected in American law regarding who holds and may assert
41 and waive the privilege, as well as what exceptions should be recognized.
42

43 This Draft leaves substantively unchanged the UNCITRAL Model Law provisions
44 regarding disclosure of information and confidentiality. Provisions of this type were
45 omitted from the UMA, which applies outside the commercial context, because it was
46 thought inappropriate to impose obligations by statute upon parties who might not be
47 cognizant of the law. In addition, agreements to maintain confidentiality are enforceable

1 in American courts, thereby producing a situation in which there is less of a need to
2 provide for confidentiality by statute.

3 4 **3. Rationale for a Uniform Approach**

5
6 Some states have enacted a version of the earlier UNCITRAL Model Law for
7 Arbitration of International Commercial Disputes that contained some provisions for
8 conciliation. *See, e.g.*, CAL. CIVIL PRO. CODE § 1297.11 ET SEQ.; FLA. STAT. ANN. §
9 684.03, 684.10; HAW. REV. STAT. § 658D-1 ET SEQ.; N.C. GEN. STAT. § 1-567.60. See
10 www.uncitral.org. These statutes were inconsistent in approach, and therefore do not
11 provide clarity for international parties, who may not know at the time that they enter an
12 international commercial agreement the state in which the conciliation will occur. Also,
13 those statutes that provide for a privilege are inconsistent with the UMA and across the
14 states. The older UNCITRAL provisions were not previously enacted as federal statutes,
15 and it does not seem likely that Congress will act to adopt the new UNCITRAL Model
16 Law. This amendment to the UMA would be helpful to facilitate uniformity in U.S. state
17 law. In turn, this uniformity may encourage parties to international agreements to include
18 a conciliation clause and thereby reach an earlier and more amicable resolution of their
19 disputes.

20 21 **[ARTICLE] 2**

22 **INTERNATIONAL COMMERCIAL CONCILIATION**

23 **SECTION 201. APPLICATION.**

24 (a) This [article] applies to international commercial conciliations. It also
25 applies to a commercial conciliation if the parties agree that the conciliation is an
26 international commercial conciliation or agree to the applicability of this [article]. The
27 parties are free to agree to exclude the applicability of this [article].

28 (b) Except as otherwise provided in subsection (c), this [article] applies
29 irrespective of the basis upon which the conciliation is carried out, including agreement
30 between the parties whether reached before or after a dispute has arisen, an obligation
31 established by law, or a direction or suggestion of a court, arbitral tribunal or competent
32 governmental entity.

(c) This [article] does not apply to cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and [.....].

SECTION 202. DEFINITIONS. In this [article]:

(1) “Conciliator” means “mediator” as defined in Section 2 (3) of [Article 1 of this Act] and includes a sole conciliator or two or more conciliators.

(2) “Conciliation” means “mediation” as defined in Section 2(2) of [Article 1 of this Act]. (3) “International commercial conciliation” means that:

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

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

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

(ii) 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.

Reporter’s Notes

The UNCITRAL Model Law notes that the “conciliator does not have the authority to impose upon the parties a solution to the dispute.” This is consistent with the definition of mediation in Article 1.

1 **SECTION 203. INTERPRETATION.** In the interpretation of the [article],
2 regard is to be had to its international origin and to the need to promote uniformity in its
3 application and the observance of good faith. Questions concerning matters governed by
4 this [article] which are not expressly settled in it are to be settled in conformity with the
5 general principles on which this [article] is based.

6 **SECTION 204. VARIATION BY AGREEMENT.** Except for the provisions
7 of Section 2 and Section 207(c), the parties may agree to exclude or vary any of the
8 provisions of this [article].

9 **SECTION 205. COMMENCEMENT OF CONCILIATION**
10 **PROCEEDINGS.**

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

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

18 **SECTION 206. NUMBER AND APPOINTMENT OF CONCILIATORS.**

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

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

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

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

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

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

10 (e) When a person is approached in connection with his or her possible
11 appointment as conciliator, he or she shall disclose any circumstances likely to give rise
12 to justifiable doubts as to his or her impartiality or independence. A conciliator, from the
13 time of his or her appointment and throughout the conciliation proceedings, shall without
14 delay disclose any such circumstances to the parties unless they have already been
15 informed of them by him or her.

16 **SECTION 207. CONDUCT OF CONCILIATION.**

17 (a) The parties are free to agree, by reference to a set of rules or otherwise,
18 on the manner in which the conciliation is to be conducted.

19 (b) Failing agreement on the manner in which the conciliation is to be
20 conducted, the conciliator may conduct the conciliation proceedings in such a manner as
21 the conciliator considers appropriate, taking into account the circumstances of the case,
22 any wishes that the parties may express and the need for a speedy settlement of the
23 dispute.

1 (c) In any case, in conducting the proceedings, the conciliator shall seek to
2 maintain fair treatment of the parties and, in so doing, shall take into account the
3 circumstances of the case.

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

6 **SECTION 208. COMMUNICATION BETWEEN CONCILIATOR AND**
7 **PARTIES.** The conciliator may meet or communicate with the parties together or with
8 each of them separately.

9 **SECTION 209. DISCLOSURE OF INFORMATION.** When the conciliator
10 receives information concerning the dispute from a party, the conciliator may disclose the
11 substance of that information to any other party to the conciliation. However, when a
12 party gives any information to the conciliator, subject to a specific condition that it be
13 kept confidential, that information shall not be disclosed to any other party to the
14 conciliation.

15 **SECTION 210. CONFIDENTIALITY.** Unless otherwise agreed by the parties,
16 all information relating to the conciliation proceedings shall be kept confidential, except
17 where disclosure is required under the law or for the purposes of implementation or
18 enforcement of a settlement agreement.

19 **SECTION 211. DISCLOSURE OF EVIDENCE IN OTHER**
20 **PROCEEDINGS.** Disclosure of evidence in other proceedings shall be governed by
21 Sections 2, 3(c), 4, 5, 6(a)(1)-(6), 6(b)-(d), and (7) of [Article 1 of this Act].

22 **SECTION 212. TERMINATION OF CONCILIATION PROCEEDINGS.**
23 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 not 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 conciliation proceedings are terminated, on the date of the declaration.

SECTION 213. 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 214. 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 **SECTION 215. ENFORCEABILITY OF SETTLEMENT AGREEMENT.**

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

APPENDIX

(Unofficial version of the 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)

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international commercial 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:

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.

(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 proceedings³

(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.

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.

(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.

Article 7. Communication between conciliator and parties

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

3
4 **Article 8. Disclosure of information**
5

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

12
13 **Article 9. Confidentiality**
14

15 Unless otherwise agreed by the parties, all information relating
16 to the conciliation proceedings shall be kept confidential, except
17 where disclosure is required under the law or for the purposes of
18 implementation or enforcement of a settlement agreement.
19

20 **Article 10. Admissibility of evidence in other proceedings**
21

22 (1) A party to the conciliation proceedings, the conciliator and any
23 third person, including those involved in the administration of the
24 conciliation proceedings, shall not in arbitral, judicial or similar
25 proceedings rely on, introduce as evidence or give testimony or
26 evidence regarding any of the following:

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

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

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

34 (d) Proposals made by the conciliator;

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

37 (f) A document prepared solely for purposes of the
38 conciliation proceedings.

39 (2) Paragraph (1) of this article applies irrespective of the form of
40 the information or evidence referred to therein.

41 (3) The disclosure of the information referred to in paragraph (1) of
42 this article shall not be ordered by an arbitral tribunal, court or other
43 competent governmental authority and, if such information is offered
44 as evidence in contravention of paragraph (1) of this article, that
45 evidence shall be treated as inadmissible. Nevertheless, such
46 information may be disclosed or admitted in evidence to the extent
47 required under the law or for the purposes of implementation or
48 enforcement of a settlement agreement.

49 (4) The provisions of paragraphs (1), (2) and (3) of this article apply
50 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 agreement⁴

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]*.

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