
Report on
Mediation
and
Conciliation
in
Commercial
Matters

November 2010

**Law Reform
Commission**



LAW REFORM COMMISSION

Report

Mediation and Conciliation in Commercial Matters

[November 2010]

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Executive Summary

LAW REFORM COMMISSION OF MAURITIUS

Report on ‘Mediation and Conciliation in Commercial Matters’

[November 2010]

The Commission has examined, under section 6 of the Law Reform Commission Act, the concept of ‘mediation and conciliation’, which is used for the resolution of employment relations disputes, and has considered its application – in furtherance of Government Business Facilitation Strategy - for the resolution of commercial disputes. The Commission has reviewed developments of this aspect of the law in other jurisdictions, research work carried out by other law reform agencies, as well as the norms evolved by the United Nations Commission on International Trade Law [UNCITRAL]. The main objectives and principles of Alternative dispute resolution [ADR] in connection with mediation and conciliation in commercial matters have been considered.

ADR has become increasingly topical in the international business community. There is a world-wide trend for parties to turn to one of the processes of ADR, such as mediation and conciliation, when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts, and in a procedure which is the most informal possible. ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute in a private and confidential environment which also preserves good business relations.

In our view, parties involved in commercial disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal “winner v. loser” decision by a court. We therefore welcome the enactment by the Chief Justice of the Supreme Court (Mediation) Rules 2010.

In our view the resolution of commercial disputes by mediation and conciliation call for other developments. Parties should be encouraged to have recourse to Mediation Clauses in Contracts for the Settlement of Commercial Disputes. We also consider that it is in the interest of the nation that legislation be adopted, now that Mauritius has opened up to international law firms and the foundation has been laid for it to act as a jurisdiction of choice in the field of international arbitration, which would enable the country to emerge both as an ‘International Arbitration and Mediation Centre’ for international commercial disputes. The UNCITRAL Model Law on International Commercial Conciliation (2002) could be incorporated in our law. A system of training and accreditation of arbitrators and mediators/conciliators should be put in place, as well as ethical standards laid down.

LAW REFORM COMMISSION OF MAURITIUS
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‘Mediation and Conciliation in Commercial Matters’
[November 2010]

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(A) Introductory Note

1. The Commission has examined, under section 6 of the Law Reform Commission Act, the concept of ‘mediation and conciliation’,¹ which is used for the resolution of employment relations disputes,² and has considered its application – in furtherance of Government Business Facilitation Strategy - for the resolution of commercial disputes.³

¹ Disputes between parties can be resolved in a number of ways: lawsuits (litigation), arbitration, mediation, conciliation, or still by negotiation. Alternative dispute resolution [ADR] mechanisms are methods of resolving disputes otherwise than through the normal trial process. There are critical differences among the dispute resolution processes of negotiation, mediation, conciliation and arbitration.

Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation. An essential feature of arbitration, conciliation or mediation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties.

Mediation or Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in mediation or conciliation the parties retain full control over the process and the outcome, and the process is non-adjudicatory. In mediation or conciliation, the mediator or conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute. The mediation or conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution.

Arbitrators are usually appointed by the parties in accordance with the terms of the ‘arbitration agreement’ (a contract to refer a present or future legal dispute to arbitration) and the dispute is resolved by an award.

Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.

Conciliation is a process similar to mediation but the neutral third party takes a more interventionist role in bringing the two parties together. In the event the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role.

² Sections 68, 69, 87 to 89, 97 to 99 of the Employment Relations Act No. 32 of 2008.

³ In the Presidential Address on 8 June 2010 in respect of Government Program 2010-2015, it is mentioned at para. 77: “Reforms will be pursued to improve the ease-of-doing business”.

The World Bank carries annually a world-wide survey on the ease and cost of doing business. A set of regulations affecting 10 stages of a business’s life are measured:

- (1) starting a business;
- (2) dealing with construction permits;

2. The Commission has reviewed developments of this aspect of the law in other jurisdictions,⁴ research work carried out by other law reform agencies,⁵ as well as the

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- (3) employing workers;
 - (4) registering property;
 - (5) getting credit;
 - (6) protecting investors;
 - (7) paying taxes;
 - (8) trading across borders;
 - (9) enforcing contracts (resolution [Procedures, time and cost to resolve a commercial dispute]; and
 - (10) closing a business.

In 2008, Mauritius was ranked globally 27th out of 178 economies, but regarding the ‘enforcement of contracts [resolution of commercial disputes] criterion was ranked 78th.

In 2009, Mauritius was ranked 24th out of 181 economies, but was ranked 76th regarding ‘enforcement of contracts/resolution of commercial disputes’ criterion.

In 2010 Doing Business Report, Mauritius was ranked globally 17th and regarding the ‘enforcement of contracts/resolution of commercial disputes’ criterion was ranked 66th. According to this Report, it takes on average 720 days to recover a commercial debt through the courts in Mauritius, whereas in Singapore it takes on average 150 days and in the SADC region the average is of 645.1 days.

In 2011 Doing Business Report, which has recently been issued, Mauritius is ranked globally 20th and regarding the ‘enforcement of contracts/ resolution of commercial disputes’ criterion is ranked 61st. According to this Report, it takes now on average 645 days to recover a commercial debt through the courts in Mauritius, whereas in Singapore it takes on average 150 days.

⁴ We have considered, inter alia, conciliation proceedings in India under the Arbitration and Conciliation Act of 1996 [the Indian Parliament passed the Arbitration and Conciliation Act of 1996 mainly to implement the UNCITRAL Model Law on International Commercial Arbitration of 1985 and UNCITRAL Rules on Conciliation of 1980 and to improve upon the Arbitration Act of 1940 to make the arbitration law more in conformity with the changed global investment and commercial climate], in Nigeria under the Arbitration and Conciliation Act 1990, in Indonesia under the Arbitration and Alternative Dispute Resolution Act of 1999, and in Romania under Article 720 of the Civil Procedure Code.

We have also examined court-connected mediation in Japan under Article 1 of the Civil Conciliation Act (1951), in Germany as from 1 January 2000 under the new § 15 of the Introductory Law of the Code of Civil Procedure ("Einführungsgesetz zur Zivilprozeßordnung" or "EGZPO"), in Australia [for an overview of court-annexed mediation in Australia, vide B. Sordo, ‘Australian Mediation Initiatives to Resolve Matters awaiting Trial’ 5 (1994) *ADRJ* 62; on the institutionalization of mediation, see Hughes, ‘The Institutionalization of Mediation: Fashion, Fad or Future?’, (1997) 8 *ADRJ* 288, and in UK where mediation is the recommended process for Fast and Multi Track cases [vide HMCS ‘Court Mediation Service Toolkit’ (2007)].

The importance of Alternative Dispute Resolution was recognized in UK in the Heilbronn/Hodge Report which preceded and informed the two Woolf Reports and through them the White Book or CPR (the Civil Procedure Rules). Lord Woolf wanted to reshape the English civil justice system’s future. Consequently, he carried out an extensive reform of the obsolete civil laws and procedures whereby the CPR was brought in as the panacea to the problems in the system. In fact, the underlying motive of the CPR was to put an end to delay, exorbitant expenses and alleviating the overwhelming workload of the Civil Courts, which Lord Woolf had identified as the main scourges of an efficient Civil Justice System. And amongst the techniques that he recommended, ADR was to play an active role in the settlement of legal disputes.

It is to be noted that in Argentina, as from October 1995, Law N° 24.573 established procedures of mediation and conciliation, with a view to reducing the considerable number of judicial claims.

⁵ Australia Law Reform Commission Issue Paper 25 (1998) on “Review of the adversarial system of litigation: ADR - its role in federal dispute resolution”; Law Reform Commission of New South Wales Discussion Paper 21 (1989)

norms evolved by the United Nations Commission on International Trade Law [UNCITRAL].⁶

3. In this Report, the world-wide trend for parties to turn to one of the processes of ADR, such as mediation and conciliation, when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts and in a procedure which is the most informal possible, is first examined. This is followed by a discussion of the main objectives and principles of Alternative dispute resolution [ADR] in connection with mediation and conciliation in commercial matters. We then draw some concluding remarks as to the way forward for mediation and conciliation in commercial matters.

on “Alternative Dispute Resolution: Training and Accreditation of Mediators” and Report 67 (1991) on “Training and Accreditation of Mediators”; Victorian Parliament Law Reform Committee Discussion Paper on ‘Alternative Dispute Resolution’ (Sept 2007), and Final Report on “Inquiry into Alternative Dispute Resolution and Restorative Justice” (May 2009); Singapore Law Reform and Revision Division of the Attorney General’s Chambers, Discussion paper on ‘Need for Mediation Laws’ [LRRD No. 5/2001]; EIRE Law Reform Commission Consultation Paper on “Alternative Dispute Resolution”[LRC CP50-2008]; and Law Commission of India Report 222 (April 2009) on “Need for Justice-dispensation through ADR”.

⁶ UNCITRAL have evolved the following rules regarding international commercial arbitration and conciliation:

- 2006 - Recommendation regarding the interpretation of article II (2), and article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958);
- 2002 - UNCITRAL Model Law on International Commercial Conciliation;
- 1996 - UNCITRAL Notes on Organizing Arbitral Proceedings;
- 1985 - UNCITRAL Model Law on International Commercial Arbitration (amended in 2006);
- 1982 - Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules;
- 1980 - UNCITRAL Conciliation Rules;
- 1976 - UNCITRAL Arbitration Rules;
- 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention.

(B) The Comparative and International Trend in recognizing Mediation and Conciliation as Useful Tools for Alternative Dispute Resolution [ADR] in Commercial Matters

4. The Commission reckons that the trend world-wide is for parties to turn to one of the processes of ADR, such as mediation and conciliation, when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts, and in a procedure which is the most informal possible. There is no doubt that ADR represents today a new form of justice, a way of avoiding lengthy, complex and costly litigation procedures.⁷
5. Alternative dispute resolution has become increasingly topical in the international business community. One reason for ADR being considered by the business community as an increasingly attractive complement to litigation is that there are many situations today where the true object of a commercial dispute is not adequately resolved by a court ruling or an arbitral award.⁸ The interest in having the matter resolved may dissolve with the passage of the time necessary to try the case before a court or an arbitral tribunal; monetary relief may be inadequate; the solution received from a court or arbitral tribunal - though legally correct - may simply miss the point of restoring the commercial relationship from which the dispute arises.⁹ Today, commercial contractual relations often develop into relationships rather than being limited to the mere exchange of goods or services. It is clear, therefore, that the goals pursued by users of ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint

⁷ For a practical guidance on the methods of dispute resolution – both in the UK and internationally – and their techniques, vide *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (Sweet & Maxwell, 4th ed., 2003).

⁸ Regarding mediation as a method of dispute resolution to deal with large complex international commercial disputes, vide C. Chern, *International Commercial Mediation* (Informa, 2008).

⁹ Vide Carita Walgren, *ADR and Business*, in Jean Claude Goldsmith, Gerald H. Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006, p. 3.

project a success. Growth in the use of ADR simply reveals that companies are increasingly aware of the fact that contracts often give rise to disagreements about their meaning or performance. The purpose of this type of ADR is to ensure that the contract operates properly, rather than simply to remedy the consequences of any failure in its performance.¹⁰ ADR offers to the business community and their legal advisers a possibility to resolve disputes through commercial settlements that are more relevant to a company's operations than obtaining justice as defined and provided by law.¹¹

(a) Mediation Clauses in Contracts for the Settlement of Commercial Disputes

6. Most commercial disputes have at least three dimensions; legal, commercial, and emotional.¹² It is a well-established advantage that ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute in a private and confidential environment which also preserves good business relations. Litigation has the advantage of finality but may hamper the continuation of a business relationship. Commercial disputes often centre on very sensitive commercial details which parties would prefer not to have disclosed in public. The confidentiality afforded by mediation is, therefore, highly attractive. When commercial disputes arise, the most favourable outcome for those involved is to have the dispute resolved quickly and to maintain a working business relationship with the other party. As pointed out by Runesson and Guy:

¹⁰ Vide Jean-Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in Jean Claude Goldsmith, Gerald H. Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006, p.21-52.

¹¹ As to a criticism of the adversarial nature of litigation, and loss of faith in traditional adjudication, vide Shone, "Law Reform and ADR: Pulling Strands in the Civil Justice Web", Paper presented at the Australasian Law Reform Agencies Conference April 2006 Wellington New Zealand at 3.

¹² Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 28.

“... Mediation is about mending fences and finding a constructive approach to conflict resolution that brings to the surface issues of mutual concern; reviews the various angles of the issue at stake; and, allows the conflict to be used as a learning tool and as a basis for improved relations among the parties. Mediation enables parties to resume, or sometimes to begin, negotiations.”¹³

7. While commercial disputes are inevitable, the way they are handled can have a profound impact on the profitability and viability of business.¹⁴ As indicated by Runesson and Guy:

“Full blown disputes are always bad news for a company. They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and, in some cases, paralyze a company.”¹⁵

One of the most effective mechanisms for reducing and resolving commercial conflict is to incorporate ADR clauses into commercial contracts and corporate governing policies. The optimal time for businesses to implement strategies to avoid adverse effects of a dispute is before any dispute arises.¹⁶ It is good corporate governance to establish a framework to prevent and solve emerging disputes that may affect a company’s reputation and performance.¹⁷ By inserting ADR clauses, businesses establish procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship, and, as a result, avoid any delay in the resolution of the dispute:

“Mediation provisions in contracts put the dispute resolution framework in place at the relationship’s beginning, not when a conflict arises. The parties to a contracted mediation become used to the process. Their minds actually become attuned to meeting, discussing, and identifying disputes and then resolving them because of an identity of interest – the preservation of the relationship to achieve agreed goals.”¹⁸

¹³ Ibid., at 24.

¹⁴ Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006) at 49.

¹⁵ Runesson and Guy, op. cit. note 10, at 13.

¹⁶ *JAMS Guide to Dispute Resolution Clauses for Commercial Contracts* (2006).

¹⁷ Runesson and Guy, op. cit. note 10, at 44.

¹⁸ Ibid., at 6.

(b) Courts and ADR

8. There has been a tendency to incorporate mediation into the justice system. Commercial Courts invariably promote and encourage mediation.

England:-

9. In England, Lord Woolf reviewed the rules of civil procedure with a view to improving access to justice and reducing the cost and time of litigation¹⁹, and his Reports led to the enactment of the UK Civil Procedure Act 1997 and the Civil Procedure Rules 1998 (CPR) which apply both to proceedings in the High Court and the County Court. The CPR vests in the court the responsibility of active case management by encouraging the parties to co-operate and to use ADR.²⁰ Under the CPR a court may either at the request of the parties or of its own initiative stay proceedings while the parties try to settle the case by ADR or other means.

Since the introduction of the CPR, ADR has significantly developed in England and Wales and the judiciary has also strongly encouraged the use of ADR. The judgments of the Court of Appeal in *Cowl v Plymouth City Council* [2002] 1 W.L.R. 803 and *Dunnett v Railtrack plc* [2002] 2 All E.R. 850 both indicated that unreasonable failure to use ADR may be subject to cost sanctions. Indeed, the CPR have also introduced the possibility for cost sanctions if a party does not comply with the court's directions regarding ADR.²¹

¹⁹ See Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice Final Report* (1996).

²⁰ CPR 1.4.

²¹ CPR r. 44.5(3).

10. Justice Lightman, who is a strong supporter of incorporating mediation into the justice system, summarized the main developments since the introduction of the CPR Rules as follows:

- (1) The abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognized that there is no civil case in which mediation cannot have a part to play in resolving some (if not all of) the issues involved;
- (2) Practitioners generally no longer perceive mediation as a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own;
- (3) Practitioners recognize that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence;
- (4) The Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party;²²
- (5) Judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and
- (6) Mediation is now a respectable legal study and research at institutes of learning.²³

11. The English Commercial Court has issued a series of Practice Directions in recent years providing guidance concerning the procedures of the Court.

In 1993 the Court issued a Practice Statement which introduced changes to two questionnaires used by the court. The parties were required to complete and submit these at two stages in the case, first prior to the summons for direction and then another prior to the trial to confirm whether the directions had been carried out. The 1993 Practice

²² In March 2001, the Lord Chancellor published a formal pledge committing Government Departments and agencies to settle disputes by ADR techniques. Vide <http://www.ogc.gov.uk/documents/cp0077.pdf>.

²³ Speech by Mr. Justice Lightman, *Mediation: An Approximation to Justice* (28 June 2007).

Statement added questions about whether the party completing the form had considered the use of ADR and whether ADR had been explored with the other side. In 1995 additional questions were added to all pre-trial check lists in the following form:

- “Have you or your Counsel discussed with your clients the possibility of attempting to resolve this dispute (or particular issues) by Alternative Dispute Resolution?
- Might some form of ADR procedure assist to resolve or narrow the issue in this case?
- Have you or your clients explored with the parties the possibility of resolving this dispute (or particular issues) by ADR?”²⁴

In 1996 the Court issued a second Practice Statement on ADR. This indicated that from that time judges of the Commercial Court would:

- “Look at cases or issues in cases to see if they might be appropriate for settlement by ADR;
- Invite the parties to take positive steps to set ADR procedures in motion;
- Adjourn the proceedings to enable ADR to take place;
- Provide for the costs of any ADR procedure.”²⁵

In identifying cases regarded as appropriate for ADR, judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. Although the Court's practice is non-mandatory, ADR Orders impose substantial pressure on parties.²⁶

12. The 2006 Commercial Court Guide²⁷ includes a separate Chapter on ADR and a sample ADR Order printed. In the 2006 Guide, the Court emphasizes the ‘primary role’ of the

²⁴ Vide EIRE Law Reform Commission Consultation Paper on “Alternative Dispute Resolution”[LRC CP50-2008] at p. 241.

²⁵ Loc. Cit.

²⁶ Genn, “Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court & the Court of Appeal”, (Department of Constitutional Affairs, Research Report No. 1, 2002).

²⁷ *Admiralty, Commercial and Mercantile Court Guides* (Her Majesty’s Courts Service, 2006).

Commercial Court as a forum for deciding commercial cases, but encourages parties to consider the use of ADR as a possible means of resolving disputes or particular issues.

The 2006 Guide states:

“Whilst the Commercial Court remains an entirely appropriate forum for resolving most of the disputes which are entered in the Commercial List, the view of the Commercial Court is that the settlement of disputes by means of ADR:

- (i) significantly helps parties to save costs;
- (ii) saves parties the delay of litigation in reaching finality in their disputes;
- (iii) enables parties to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation;
- (iv) provides parties with a wider range of solutions than those offered by litigation; and
- (v) is likely to make a substantial contribution to the more efficient use of judicial resources.”²⁸

The 2006 Guide states that Commercial judges will, ‘in appropriate cases’, invite parties to consider whether their dispute, or issues in it, could be resolved through ADR. Parties wishing to attempt ADR can apply for directions at any stage, including before service of the defence and before the case management conference. The Guide adds that judges may ‘invite’ parties to use ADR if, at the case management conference, it appears to the judge that the case or any of its issues are ‘particularly appropriate’ for an attempt at settlement by means of ADR.²⁹ The judge has the power to adjourn the case to encourage and enable the parties to use ADR, or if deemed appropriate, may make an ADR Order in the terms set out in the Guide.

The draft ADR Order appended to the 2006 Guide provides for the parties to:

- “exchange lists of three neutral individuals available to conduct ADR procedures;
- to endeavour ‘in good faith’ to agree a neutral to conduct the ADR procedure;
- to take serious steps to resolve their dispute by ADR; and
- if the case is not finally settled, the parties are to inform the Court by letter what steps towards ADR have been taken and why such steps have failed”.³⁰

²⁸ Chapter G (G.1.2). of the *Commercial Court Guide* at 48.

²⁹ Chapter G (G 1.6) of the *Commercial Court Guide*, at 48.

³⁰ *Commercial Court Guide*, at 168.

13. The English Commercial Court also provides for Early Neutral Evaluation (ENE) of commercial disputes. The 2006 Commercial Court Guide states that, in appropriate cases, there is a facility for a without prejudice, nonbinding, ENE by a Commercial Court judge of a dispute, or of particular issues in a case. Following discussion with parties' legal representatives, a judge may offer to provide an evaluation himself, or arrange for another judge to do so, if it is thought that an ENE would help in resolving the dispute. If such an ENE is provided by a judge, that judge will normally take no further part in the case.

The 2007 *Report and Recommendations of the Commercial Court Long Trials Working Party* recommended that “at appropriate stages those representatives should also be required to sign a statement to the court indicating whether ADR has been considered internally within the client organization.”³¹ The Report argued that senior representatives of the parties should be required to sign this statement and also whether ADR has been considered with their opposite number. This process should occur automatically at two stages: (i) at the first case management conference; and (ii) after exchange of expert reports, or of witness statements if there are no expert reports. In addition, the judge may of course ask the question at any oral hearing at which he or she considers it appropriate. The proposals and recommendations in the 2007 Report have been put into practice in the Commercial Court for a trial period from February 2008.³²

14. A 2002 study entitled *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* assessed the impact of ADR Orders on the progress and outcome of 233 cases between 1996 and 2000, and explored reactions of practitioners to ADR Orders.³³ During the first three years reviewed in the study, the

³¹ *Report and Recommendations of the Commercial Court Long Trials Working Party* (Judiciary of England Wales, December 2007 at 58.

³² Loc. Cit.

³³ Genn, “Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court & the Court of Appeal” (Department of Constitutional Affairs, Research Report No. 1, 2002).

annual number of ADR Orders issued was about 30. ADR was undertaken in a little over half of the cases in which an ADR Order had been made. There was a substantial increase toward the end of the period, with some 68 Orders being issued in the final six months of the study. This was the result of one or two judges significantly increasing the number of ADR Orders made. Of the cases in which ADR was attempted, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23% of cases. Among cases in which ADR was not attempted following an ADR Order, about 63% were eventually settled. About 20% of these said that the settlement had been as a result of the ADR Order being made. However, the rate of trials among the group of cases not attempting ADR following an ADR Order was 15%. This compares unfavourably with the 5% of cases proceeding to trial following unsuccessful ADR.

The most common reasons given for not trying ADR following an ADR Order were:

- The case was not appropriate for ADR;
- The parties did not want to try ADR;
- The timing of the Order was wrong (too early or too late); and
- No faith in ADR as a process in general.³⁴

Ireland:-

15. The Commercial Court was established in 2004 pursuant to the Rules of the Superior Courts (Commercial Proceedings) 2004.³⁵ Its purpose is to expedite cases of a commercial nature valued at €1 million or more. The 2004 Rules state that the High Court judge may, of his own motion or on the application of any of the parties, adjourn the matter before it for a period not exceeding 28 days for the purpose of allowing the

³⁴ Ibid.

³⁵ See generally, Holmes, “Two years on – The Commercial Court” (2006) 1 *Journal of Civil Practice and Procedure* 1 at 15; Hayes, “The Commercial Court” (2005) 23 *Irish Law Times* 317; Jacobs and Roulston, “In the Know” (2004) 98 *Law Society Gazette* 4; Mr. Justice Peter Kelly, “The Commercial Court” (2004) 9 *Bar Review* 1; Stauber, “Commercial Courts: Twenty-First Century Necessity?” (2007) 1 *Judicial Studies Institute Journal* at 154.

parties to consider whether or not the proceedings ought to be referred to mediation, conciliation or Arbitration.³⁶

16. The 2004 Rules make clear that the judge does not have the power to direct that the parties attempt ADR but is limited to adjourning the proceedings to allow the parties to consider whether ADR is appropriate for them. Where the parties decide to attempt ADR, the judge may extend the time for compliance by them with any provision of the rules or order of the court.³⁷ The 2004 Rules represent the first statutory example in Irish law of the application of ADR in a court setting. This was followed by the Rules of the Superior Courts (Competition Proceedings) 2005³⁸ and section 15 of the Civil Liability and Courts Act 2004.

(c) The UNCITRAL Conciliation Rules (1980) and Model Law on International Commercial Conciliation (2002)

17. The United Nations Commission on International Trade Law (UNCITRAL)³⁹ recognized the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations.

³⁶ Order 63A, r.6(1)(b)(xiii).

³⁷ This direction will be given for the purpose of facilitating the determination of the proceedings in a manner which is just, expeditious and likely to minimize costs: vide Dowling *The Commercial Court* (Thomson Round Hall 2007) at 256.

³⁸ SI 130 of 2005.

³⁹ The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.

18. Responding to the need for the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations on 4 December 1980 UNCITRAL adopted the **Conciliation Rules**, reproduced as Annex 1 to this Report. These Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

19. In 2002, UNCITRAL adopted a **Model Law on International Commercial Conciliation** (the Model Law on Conciliation)⁴⁰, reproduced as Annex 2 to this Report, and recommended that all states consider enacting national legislation on this basis in view of the perceived desirability of creating a uniform legislative framework for the application of conciliatory settlement procedures in international commercial disputes.⁴¹ The model law makes it clear that it should be interpreted in light of its international origins, as well as the need to promote uniform application and respect for good faith. It is also clear that the issues that fall under the model law's scope but that it does not specifically address are to be dealt with according to the general principles from which the model law stems. The model law specifies that it covers any procedure, whether it

⁴⁰ UNCITRAL adopted the Model Law by consensus on 24 June 2002. During the preparation of the Model Law, some 90 States, 12 intergovernmental organizations and 22 non-governmental international organizations participated in the discussion. Subsequently, the General Assembly adopted the resolution A/RES/57/18 in 19 November 2002 recommending that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice. The preparatory materials for the Model Law have been published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). These documents are available on the UNCITRAL web site: www.uncitral.org.

⁴¹ Legislation based on the UNCITRAL Model Law on International Commercial Conciliation has been enacted in Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005) and Slovenia (2008).

bears the name of conciliation, of mediation or an equivalent name, in which the parties ask a third party to help them in their efforts to reach the amicable resolution of a dispute arising from legal, contractual or other relations, or linked to such relations.

20. The law contains provisions concerning important legal questions that may arise within the framework of mediation.⁴² It contains provisions dealing notably with the beginning of the conciliation procedure, the number and the appointment of the conciliators, the conduct of the conciliation, communication between the conciliator and the parties, disclosure of information, confidentiality, admissibility of elements of proof in other proceedings, the end of the conciliation procedure, med-arb, *lis pendens* and the enforceability of the agreement arising from conciliation. The Commission also suggests

⁴² The term “conciliation” is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation.

An essential feature of conciliation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome, and the process is non-adjudicatory. In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute (see A/CN.9/WG.II/WP.108, para. 11). The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term “conciliation” to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties. To the extent that “alternative dispute resolution” (ADR) procedures are characterized by the features mentioned in this paragraph, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14). However, the Model Law does not refer to the notion of ADR since that notion is unclear and may be understood as a broad category that includes other types of alternatives to judicial dispute resolution (for example, arbitration), which typically results in a binding decision. To the extent that the scope of the Model Law is limited to non-binding types of dispute resolution, the Model Law deals only with part of the procedures covered by the notion of ADR.

that States should adopt a section that provides for the interruption of the prescription (or limitation period) when conciliation begins and for its resumption in the event of failure.⁴³

(d) The US Uniform Mediation Act

21. In the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSL)⁴⁴, in collaboration with American Bar Association Section of Dispute Resolution adopted in 2001 the Uniform Mediation Act (amended in 2003).⁴⁵

22. This Act is designed to simplify a complex area of the law. Currently, legal rules affecting mediation can be found in more than 2500 statutes. Many of these statutes can be replaced by the Act, which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions. Existing statutory provisions frequently vary not only within a State but also by State in several different and meaningful respects. The privilege provides an important example. Virtually all States have adopted some form of privilege, reflecting a strong public policy favouring confidentiality in mediation. However, this policy is given effect

⁴³ For a thorough discussion of UNCITRAL Model Law on International Commercial Conciliation, vide P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2009, 3rd ed.), Chapter X.

⁴⁴ The National Conference of Commissioners on Uniform State Laws has worked for the uniformity of state laws since 1892. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. Most jurisdictions provide for their commission by statute. The state uniform law commissioners come together as the National Conference for one purpose: to study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. It must be emphasized that the Conference can only propose; no uniform law is effective until a state legislature adopts it. The Conference is a working organization. The uniform law commissioners participate in drafting specific acts; they discuss, consider, and amend drafts of other commissioners; they decide whether to recommend an act as a uniform or a model act; and they work toward enactment of Conference acts in their home jurisdictions.

⁴⁵ Available online at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

The Uniform Mediation Act has been enacted by numerous States, such as Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington and the District of Columbia.

through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

23. The purpose of the Act is to promote the use of mediation as an appropriate dispute resolution mechanism while protecting the rights of the parties involved in the process. It strengthens the laws adopted by the State legislatures and the rules of judicial practice by introducing a legal privilege that allows the parties, the mediator and the other participants in the process to forbid that the information communicated during mediation be used in subsequent court procedures. It is said that this privilege will ensure the uniformity of solutions before the courts of the various States.

24. The privilege granted has very wide scope. The mediations or communications that are excluded from it are rare and listed restrictively. Among those exclusions are, quite fortunately, threats of physical injury during the sessions of mediation, abuse or negligence suffered by persons needing protection and recourse to mediation for criminal purposes. Other exceptions make it possible to set the privilege aside in order to demonstrate that the out-of-court award was obtained by fraud or under the influence of violence or that the mediator infringed ethical rules. The Uniform Mediation Act requires that the mediator report any situation that may give rise to a conflict of interest and that he reveal his or her professional qualifications when this is required of him or her. The NCCSUL also suggested that adjustments should be introduced to bring the law into line with UNCITRAL'S model law.⁴⁶

⁴⁶ Vide Nabil N. Antaki, *Cultural Diversity and ADR Practices in the World*, in Jean Claude Goldsmith, Gerald H. Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006, p.296-301.

(e) The EU Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters

25. On 21 May 2008, the European Parliament and the Council enacted a Directive to encourage the use of mediation in civil and commercial matters, and to make uniform throughout the European Union the legal status of certain attributes of that practice.⁴⁷ The Directive culminated a ten-year process that occasioned each member state within the European community to consider the role of mediation in commercial affairs, and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

As stated in its Article 1, the purpose of the Directive is “*to facilitate access to cross-border dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings*”. Its scope of application shall cover “*cross-border disputes, [...] civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)*”.

The Directive must be implemented by 2011.⁴⁸

26. In Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience, and by others as a serious hindrance to commercial growth in the region⁴⁹ The Directive is one of the follow-up actions to the

⁴⁷ The text of the Directive is available at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML>.

⁴⁸ A Useful book with information on key developments within the European Union in the field of mediation and ADR is ‘The EU Mediation Atlas: Practice and Regulation’ (J. Singer & C. McKenna, Lexis, 2004).

⁴⁹ Vide F. Peter Phillips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn’t*, article available online: http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf

Green Paper on alternative dispute resolution presented by the Commission in 2002,⁵⁰ the other being the European Code of Conduct for Mediators established by a group of stakeholders with the assistance of the Commission and launched in July 2004.⁵¹

27. In accordance with its Article 1, the terms of the directive are intended to apply only to cross border mediation disputes; this does not however prevent their application to internal mediation processes. The Directive excludes disputes relating to family law and community law, does not apply to administrative actions; to matters in which the state itself may be liable; and to any efforts by courts to settle matters that are before it and finally, the Directive does not apply to rights and obligations on which the parties are not free to decide themselves.

28. On the subject of mediation quality, in its Article 4 the Directive calls on the states to “*encourage voluntary codes of conduct by mediators and by organizations providing mediation services*”. This is substantially short of a requirement that mediators must be licensed. Instead, the states “*shall encourage codes of ethics and shall encourage training of mediators to ensure effectiveness, impartiality, and competence in relation to the parties.*”

⁵⁰ The *Green Paper on alternative dispute resolution in civil and commercial matters*. COM/2002/0196 Final, is available at <http://eurlex.europa.eu/>.

The Green paper was a follow-up to the conclusions of the 1999 Tampere European Council, the Council of Justice and Home Affairs asked the European Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration. Priority was to be given to examining the possibility of laying down basic principles, either in general or in specific areas, which would provide the necessary guarantees to ensure that out-of-court settlements offer the same guarantee of certainty as court settlements. It deals with the promotion on an EU wide basis of ADR as an alternative to litigation primarily due to the ever increasing number of international disputes but also with the aim of promoting a framework to ensure that disputes can be dealt with in an efficient and cost effective manner.

The questions in the Green Paper related to the essence of the various means of alternative dispute resolution such as clauses in contracts, limitation periods, confidentiality, the validity of consent given, the effectiveness of agreements generated by the process, the training of third parties, their accreditation and the rules governing their liability.

⁵¹ Vide ‘*A boost for mediation in civil and commercial matters: European Parliament endorses new rules*’, available Online at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

The Code sets out a number of principles to which individual mediators can voluntarily decide to commit. It is intended to be applicable to mediation in civil and commercial matters. Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organization to respect this code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

29. Furthermore, the Directive requires States to provide for enforcement of agreements that result from mediation (Article 6). In its Article 7, the Directive ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.

(C) Main Objectives and Principles of ADR in connection with Mediation and Conciliation

30. ADR systems and schemes are usually established in an attempt to fulfill policy goals and objectives, which are in turn drawn from a set of main principles.⁵² The Commission considers that if mediation and conciliation are to become integral processes in the civil justice system, they must be approached on a voluntary basis. Without this essential principle of voluntariness other underlying principles of ADR, notably, party empowerment, flexibility, and confidentiality cannot ensue. From the outset, parties must be free to voluntarily choose the form of dispute resolution they wish to pursue. They must not be forced into mediation, for example, simply because they cannot afford another option. Parties to a dispute should be educated on the full spectrum of ADR processes which are available to them to resolve their dispute.

31. The question, however, arises whether some form of compulsion may nonetheless be introduced into the ADR process as there may always be a difficulty for disputants taking the first step towards ADR as this may be perceived as a sign of weakness.

⁵² Alexander *Global Trends in Mediation* (2nd ed, Kluwer Law International, 2006) at 8.

In relation to mediation, those in favour of compulsion argue that mediation has a good success rate; that it could be compulsory subject to an opt-out, such as a court concluding that it is not appropriate in a particular case, and that nothing is lost by attempting it.⁵³ Furthermore, it is asserted that if a more compulsory form of mediation was introduced, such a step would ensure that greater numbers of litigants were compelled to experience ADR processes, thus, arguably speeding up the process of public and practitioner education about ADR.⁵⁴

The contrasting view is that compulsion conflicts with the essence of mediation as a consensual process. Compelling parties into a process against their wishes would only increase costs and delays and it has been suggested that the rates of settlement in court-ordered mediation are much the same as when mediation is entirely voluntary.⁵⁵

An important distinction must be made between mandatory attendance at an information session about ADR processes or at a mediation session and mandatory participation in an ADR process. A court-annexed scheme could make engagement in the mediation process procedurally mandatory in that the Court should have the power to recommend mediation and to impose cost sanctions if the parties unreasonably refuse to consider attempting mediation. Such procedural requirements are consistent with the concept that court-annexed mediation should remain a wholly consensual process.

32. Confidentiality is essential to the mediation process because without it, parties would not be willing to make the kind of concessions and admissions that lead to settlement.⁵⁶

⁵³ Cornes, “Commercial Mediation: the Impact of the Courts” (2007) 73 *Arbitration* 12-19.

⁵⁴ Genn, “Solving Civil Justice Problems What might be best?” [Paper presented at Scottish Consumer Council Seminar on Civil Justice, 19th January 2005].

⁵⁵ Cornes, “Commercial Mediation: the Impact of the Courts” (2007) 73 *Arbitration* 12-19.

⁵⁶ Vide Johnson, “Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?” (2003) 30 *Florida State University* 487.

Confidentiality in mediation is particularly pronounced because confidentiality is a fundamental expectation of parties in agreeing to mediation. The principle of confidentiality of mediation and conciliation should be placed on a statutory basis. Confidentiality in mediation should be subject to a distinct form of privilege.

In its 2002 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, the European Commission stated: "As a rule the third party [the mediator] should not be able to be called as a witness...within the framework of the same dispute if ADR has failed."⁵⁷

This approach is formalized in the United States as mediator privilege. The Uniform Mediation Act provides that a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.⁵⁸

33. Mediation and conciliation processes are based on the underlying concept of party autonomy which permits the parties to retain virtually all of the power over the resolution and outcome of their dispute.

Section 3.3 of the European Code of Conduct for mediators advises mediators to give all parties adequate opportunity to be involved in the mediation process and to ensure that all agreements are reached through informed consent. Paragraphs 16 and 17 of the European Commission's 2001 Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes states that:

(16) *Before the parties agree to a suggested solution on how to settle the dispute they should be allowed a reasonable amount of time to consider the details and any possible conditions or terms.*

⁵⁷ Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters COM/2002/0196 Final at para. 82.

⁵⁸ Section 4(b)(2). This follows a line of cases, the most notable of which was *NLRB v Macaluso* 618 F. 2d 51 (9th Cir. 1980), which stated that the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony.

(17) *In order to ensure that procedures are fair and flexible and that consumers have the opportunity to make a fully informed choice, they must be given clear and understandable information in order that they can reflect on whether to agree to a suggested solution, obtain advice if they wish or to consider other options.*⁵⁹

As noted in the European Commission's 2002 Green Paper on ADR:

“The parties' agreement is the essential and, from a certain standpoint, the most sensitive stage of the procedure. Indeed, care must be taken to ensure that the agreement concluded is genuinely an agreement... It would therefore appear that there is a need for a period of reflection before the signing or a period of retraction after the signing of the agreement.”⁶⁰

It is therefore crucial that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process.

34. Mediation and conciliation provides an alternative to the costs of litigation. Of course, mediation and conciliation do not come free of charge. The expenses include the third party's fee, the cost of preparatory work undertaken and overheads for the mediation and conciliation itself. The fee and overheads are usually shared between the parties.

It has been pointed out in Ireland that:

“Where a dispute appears as if it is about to result in litigation, one of the questions at the back of a businessman's or businesswoman's mind is whether he or she can afford it...The advantage of mediation is that the parties involved can bring their issues to the mediator relatively inexpensively.”⁶¹

⁵⁹ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

⁶⁰ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final.

⁶¹ McDowell, Joint Committee on Justice, Equality, Defence and Women's Rights Parliamentary Debates Vol No 91, 1 June 2005.

According to the English Centre for Effective Dispute Resolution (CEDR) the commercial mediation profession could save British business in excess of £1 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.⁶² CEDR suggests that since 1990 the mediation profession has contributed savings of £6.3 billion.

In *Egan v Motor Services (Bath) Ltd*⁶³ the English Court of Appeal gave a very strong endorsement to the use of mediation at an early stage in a case, particularly where litigation costs were more likely to be disproportionate to the amount in dispute. In *Egan*, the amount in dispute was only £6,000 but the parties between them had spent in the region of £100,000 on the litigation, including the appeal. Ward LJ stated that he regarded the parties as "completely cuckoo" to have engaged in such expensive litigation with so little at stake. In support of mediation, Ward LJ stated:

"The cost of... mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."

The potential for cost savings through mediation appear to have support from a number of reviews carried out internationally. The Singapore Mediation Centre (SMC) indicates that up to April 2006 more than 1,000 cases have been referred to the SMC. Of those mediated, about 75% were settled. The SMC reported that the Singapore Supreme Court has recorded savings of more than \$18 million and 2,832 court days up to April 2006. The figures provided by the Singapore Supreme Court indicate, for example, that in a High Court case involving two parties, it is not uncommon for parties to save as much as \$80,000 in total.⁶⁴ In a study conducted at the end of 2002, of the 1,044 disputants who

⁶² CEDR UK, *Conflict is costing business £33 billion every year* (26 May 2006).

⁶³ [2007] EWCA Civ 1002.

⁶⁴ Vide the Singapore Mediation Centre's website <http://www.mediation.com.sg/>.

mediated at the SMC and provided feedback, 84% reported costs savings, 88% reported time savings and 94% would recommend the process to other persons the same conflict situation.⁶⁵ The responses from 900 lawyers who represented their clients and provided feedback was similar - 84% reported savings in costs, 83% reported savings in time and 97% of the lawyers indicated that they would recommend the process to others in a similar situation. It is to be noted that even parties and lawyers who did not reach a settlement reported time and cost savings.⁶⁶

35. In addition to the need to consider potential cost effectiveness, another aspect of the efficiency of ADR is the length of time it takes to resolve a dispute.

As pointed out by US Chief Justice Warren Burger: “People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”⁶⁷

Mediation and conciliation may lead to a faster settlement of a dispute than going to court.

In England, the Centre for Effective Dispute Resolution has stated that mediators reported that around 75% of their cases settled on the day, with another 13% settling shortly after that giving an aggregate settlement rate of 88%.⁶⁸

36. An important advantage of ADR is its flexibility in achieving consensual and mutually satisfactory resolutions which are not available through traditional adversarial litigation.

As noted in the European Commission’s 2002 Green Paper on ADR:

⁶⁵ Vide Onn , “Non-court annexed mediation in Singapore”. Paper presented at the international Conference and Showcase on Judicial Reforms. (Philippines, November 2005) at 6.
Available at [http://jrn21.supremecourt.gov.ph/forum_icsjr/ICSJR_Singapore%20\(L%20Onn\).pdf](http://jrn21.supremecourt.gov.ph/forum_icsjr/ICSJR_Singapore%20(L%20Onn).pdf)

⁶⁶ Ibid.

⁶⁷ US Chief Justice Warren Burger, “Our Vicious Legal Spiral” (1977) 22 *Judges Journal* 49.

⁶⁸ The Third Mediation Audit (Centre for Effective Dispute Resolution, November 2007).

“ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organization or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings.”⁶⁹

The ability of the parties to select ADR professionals who are qualified to deal with the issues that are specific to their dispute is a principal element of flexibility in ADR. The ADR professional need not be from a legal background but may be an expert in whatever area the dispute is about. In addition, ADR offers greater procedural flexibility than litigation. For example, the hearings conducted by a neutral in mediation or conciliation may be held at any place and at any time, subject to agreement. ADR processes also allow parties to apply their own knowledge and creativity in the process, ensuring that their needs are met more closely than the traditional litigation system is able to do. This in turn promotes party empowerment. Another feature of flexibility is the variety of outcomes available in ADR. In facilitative and advisory ADR processes, the agreement may contain a wide range of novel outcomes which would not normally form part of a court agreement and which may provide solutions that better suit each parties’ needs.⁷⁰

The New South Wales Law Reform Commission has recognized that mediation can provide a greater range of remedies than those available through the courts including: an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.⁷¹

37. The principles of neutrality and impartiality are fundamental to the success of ADR. Neutrality in the broadest sense of the term includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior

⁶⁹ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final.

⁷⁰ Vide EIRE Law Reform Commission Consultation Paper on “Alternative Dispute Resolution” [LRC CP50-2008] at p. 123.

⁷¹ New South Wales Law Reform Commission *Report on Community Justice Centres* (Report 106 - 2005) at 1.29.

knowledge of the dispute and/or the parties, the absence of the mediator making a judgment about the parties and their dispute, and the idea that the mediator will be fair and even-handed.⁷² Adopting a neutral stance helps mediators to establish trust, credibility, and respect.

If a mediator is unable to maintain a neutral stance, codes of ethics and standards of practice require that he or she withdraws from the case. The European Code of Conduct for Mediators thus provides that

“The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests.”⁷³

38. To the extent that mediation resolves a dispute which may otherwise have been decided by litigation in court, the questions of the training quality and accountability of mediators are crucial matters.⁷⁴ Those who require to use ADR processes are entitled to expect that mediators and conciliators involved in providing those processes are competent, have adequate training and expertise, and that their services will be of a suitable standard.⁷⁵
39. The transparency of the ADR procedure should also be guaranteed. To ensure the quality of the ADR process information about the procedure, including the costs involved, should be readily available to the parties in simple terms so that they can access and retain it before submitting a dispute.

⁷² Field, “Neutrality and Power: Myths and Reality” (2000) 3 *ADR Bulletin* 1 at 16-19.

⁷³ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

⁷⁴ Vide EIRE Law Reform Commission Consultation Paper on “Alternative Dispute Resolution” [LRC CP50-2008] at pp. 305 seq.

⁷⁵ Vide Law Reform Commission of New South Wales Discussion Paper 21 (1989) on “Alternative Dispute Resolution: Training and Accreditation of Mediators” and Report 67 (1991) on “Training and Accreditation of Mediators”.

The European Commission 2001 Recommendation on ADR in consumer disputes states that information should be made available on: how the procedure will operate, the types of disputes that can be dealt by it and any restrictions on its operation; the rules governing any preliminary requirements that the parties may have to meet, and other procedural rules, notably those concerning the operation of the procedure and the languages in which the procedure will be conducted; the cost, if any, to be borne by the parties; the timetable applicable to the procedure, particularly with regard to the type of dispute in question; any substantive rules that may be applicable (legal provisions, industry best practice, considerations of equity, codes of conduct); the role of the procedure in bringing about the resolution of a dispute; and the status of any agreed solution for resolving the dispute.⁷⁶

(D) Concluding Remarks: The Way Forward

40. An integrated civil justice process should include a combination of ADR processes, such as mediation and conciliation, and the court-based litigation process. Each process plays its appropriate role in meeting the needs of the parties involved and fundamental principles of justice. We therefore welcome the enactment by the Chief Justice of the Supreme Court (Mediation) Rules 2010.⁷⁷ These rules meet the requirements of ADR principles as examined above.

41. In our view the resolution of commercial disputes by mediation and conciliation call for other developments.

⁷⁶ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

⁷⁷ GN No. 180 of 2010. The Rules have come into operation on 1 October 2010. Any civil case pending before the Supreme Court, as the Chief Justice may deem appropriate, may be referred for mediation before a Judge of the Supreme Court.

Parties should be encouraged to have recourse to Mediation Clauses in Contracts for the Settlement of Commercial Disputes.

We also consider that it is in the interest of the nation that legislation be adopted, now that Mauritius has opened up to international law firms and the foundation has been laid for it to act as a jurisdiction of choice in the field of international arbitration,⁷⁸ which would enable the country to emerge both as an ‘International Arbitration and Mediation Centre’ for international commercial disputes. The UNCITRAL Model Law on International Commercial Conciliation (2002) could be incorporated in our law.

There is an urgent need for systematic training and research on ADR processes, including mediation and conciliation. It is abundantly clear that in all States where mediation is practised, the need for appropriate training and accreditation of mediators is an essential foundation for a fully functioning system of mediation. Practice Standards must be laid down, which set out the fundamental guiding principles about mediation that mediators must adhere to. These include: procedural fairness, competence, confidentiality, and impartial and ethical practice.

⁷⁸ Vide Law Practitioners (Amendment) Act No. 8 of 2008; International Arbitration Act No. 37 (2008).

Annex 1: UNCITRAL Conciliation Rules (1980)

UNCITRAL CONCILIATION RULES

- Article 1: Application of the rules
 - Article 2: Commencement of conciliation proceedings
 - Article 3: Number of conciliators
 - Article 4: Appointment of conciliators
 - Article 5: Submission of statements to conciliator
 - Article 6: Representation and assistance
 - Article 7: Role of conciliator
 - Article 8: Administrative assistance
 - Article 9: Communication between conciliator and parties
 - Article 10: Disclosure of information
 - Article 11: Co-operation of parties with conciliator
 - Article 12: Suggestions by parties for settlement of dispute
 - Article 13: Settlement agreement
 - Article 14: Confidentiality
 - Article 15: Termination of conciliation proceedings
 - Article 16: Resort to arbitral or judicial proceedings
 - Article 17: Costs
 - Article 18: Deposits
 - Article 19: Role of conciliator in other proceedings
 - Article 20: Admissibility of evidence in other proceedings
- Model Conciliation Clause

RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY ON 4 DECEMBER 1980

35/52. Conciliation Rules of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Noting that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session¹ after consideration of the observations of Governments and interested organizations,

1. *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;
2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

¹ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, paras.105 and 106

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator.

The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals 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.

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

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

*In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after

consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
- (b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

- (a) The fee of the conciliator which shall be reasonable in amount;
- (b) The travel and other expenses of the conciliator;
- (c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
- (d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

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

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

(c) Proposals made by the conciliator;

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

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

Annex 2: UNCITRAL Model Law on International Commercial Conciliation (2002)

- Article 1. Scope of application and definitions
- Article 2. Interpretation
- Article 3. Variation by agreement
- Article 4. Commencement of conciliation proceedings
- Article 5. Number and appointment of conciliators
- Article 6. Conduct of conciliation
- Article 7. Communication between conciliator and parties
- Article 8. Disclosure of information
- Article 9. Confidentiality
- Article 10. Admissibility of evidence in other proceedings
- Article 11. Termination of conciliation proceedings
- Article 12. Conciliator acting as arbitrator
- Article 13. Resort to arbitral or judicial proceedings
- Article 14. Enforceability of settlement agreement

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/57/562 and Corr.1)]

57/18. Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of model legislation on these methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,
Noting with satisfaction the completion and adoption by the United Nations Commission on International Trade Law of the Model Law on International Commercial Conciliation,*

Believing that the Model Law will significantly assist States in enhancing their legislation governing the use of modern conciliation or mediation techniques and in formulating such legislation where none currently exists,

Noting that the preparation of the Model Law was the subject of due deliberation and extensive consultations with Governments and interested circles,

Convinced that the Model Law, together with the Conciliation Rules recommended by the General Assembly in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

**Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), annex I.*

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on International Commercial Conciliation, the text of which is contained in the annex to the present resolution, and for preparing the Guide to Enactment and Use of the Model Law;
2. *Requests* the Secretary-General to make all efforts to ensure that the Model Law, together with its Guide to Enactment, becomes generally known and available;
3. *Recommends* that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice.

52nd plenary meeting

19 November 2002

Part One
**UNCITRAL Model Law on International
Commercial Conciliation (2002)**

Article 1. Scope of application and definitions

1. This Law applies to international¹ commercial² conciliation.

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.

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;

(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.

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.

³The 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.
-

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

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 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*].

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