



**SUPPORT FOR THE PROPOSAL TO DISCUSS ADJUDICATION IN UNCITRAL
WORKING GROUP II**

**Submitted to UNCITRAL Working Group II
by FICA (Forum for International Conciliation and Arbitration)**

**proposal for Model Law on Adjudication and
proposal for Explanatory Notes prepared by
DACABI (Dispute Avoidance, Conciliation and Adjudication Board Institute)**

24 March 2021

I. PROPOSAL FOR MODEL LAW ON ADJUDICATION

UNCITRAL Model Law on International Commercial Adjudication [reference] (As adopted by the United Nations Commission on International Trade Law on [date], and as amended by the United Nations Commission on International Trade Law on [date]).

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

- (1) This Law applies to international commercial adjudication, subject to any agreement in force between this State and any other State or States, or unless the enacting State decrees that this Law shall apply to domestic adjudication.
- (2) The provisions of this Law, except articles 28, 37 and 38, apply only if the place of adjudication is in this State.
- (3) An adjudication is international if:
 - (i) the parties to an adjudication agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (ii) one of the following places is situated outside the State in which the parties have their places of business:
 - (a) the place of adjudication where that place is already decided upon in, or pursuant to, the adjudication agreement;
 - (b) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (c) the parties have expressly agreed that the subject matter of the adjudication Agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article: if a party has more than one place of business, the place of business for the purposes of this law is that which has the closest relationship to the subject matter of the dispute;
- (5) This Law shall not override the provisions of any other law of this State, which provides that certain disputes may not be submitted to adjudication or may be submitted to adjudication only according to provisions of laws other than those of this Law.

Article 2. Definitions and rules of interpretation

- (1) For the purposes of this Law:
 - (a) “Adjudication” is a process, whether established by law or contract, to resolve a dispute arising out of a contract and which requires some expertise, whereby a party refers the dispute to an independent and impartial person called adjudicator.

The adjudicator may :
 - (i) assist the parties in avoiding disagreement;
 - (ii) or/and make a recommendation, which the parties undertake to execute;
 - (iii) or/and, if the parties agree, render a decision, which is binding upon the parties. Such decision can constitute a finding on facts or on substance.
 - (b) “Adjudication agreement” means an agreement to submit to adjudication all or certain disputes which have arisen or which may arise between the parties in respect of a defined legal relationship, whether contractual or not;
 - (c) “Adjudication panel” can refer to a sole adjudicator or a group of three adjudicators;
 - (d) Article headings are for reference purposes only and are not to be used for purposes of interpretation.
 - (e) 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:
 - (i) any trade transaction for the supply or exchange of goods or services;



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting;
- (ii) engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession;
 - (iii) joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
- (f) “Court” means a body or organ of the judicial system of a State;
- (g) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any adjudication rules referred to in that agreement;
- (h) where a provision of this Law, other than articles 25(a) and 32(2) (a), refers to a claim, the provision also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.
- (2) Whenever this Law is interpreted, regard is to be had to its international genesis (Commission of UNCITRAL) and to the need to promote uniformity in its application and the observance of the concept of impartiality.

Article 3. Forms of adjudication

- (1) If the contract so provides, adjudication may be a self-sufficient process.
- (2) Adjudication may also be used in combination with other alternative dispute settlement methods:
- (i) it can be preceded or followed by negotiation or mediation;
 - (ii) it can, whatever its form may be, be followed by arbitration or court proceedings;
 - or
 - (iii) it can take place during arbitration or court proceedings in support of such proceedings as set forth in article 4.

Article 4. Adjudication during arbitration or court proceedings New

- (1) Adjudication in support of arbitration or court proceedings is possible upon request of a party, the arbitral tribunal, or the court.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (2) The request shall describe the specific issues upon which the adjudicator shall decide. Findings on facts are binding on the arbitral tribunal or the court.

Article 5. Written communications

- (1) Unless otherwise agreed by the parties:

- (i) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address or delivered through an electronic platform known and used by the parties.

If none of these addresses can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent by registered letter to the addressee's last-known place of business or habitual residence, or sent to his mailing address or through any electronic platform known and used by the parties, which provides a record of the attempt to deliver it.

- (ii) the communication is deemed to have been received on the day it is delivered.

- (2) An oral communication may be enforceable as a valid communication where it is subsequently noted in written form and accepted by the other party.

Article 6. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the adjudication agreement, which has not been complied with and yet proceeds with the adjudication without stating his objection to such derogation or non-compliance in a timely manner or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

CHAPTER II. ADJUDICATION AGREEMENT

Article 7. Definition and form of adjudication agreement

Option 1

- (1) "Adjudication agreement" is an agreement by the parties to submit to adjudication all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

- (2) The adjudication agreement shall be in writing.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (3) An adjudication agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an adjudication agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages, “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an adjudication agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.
- (6) The reference in a contract to any document containing an adjudication clause constitutes an adjudication agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option 2

“Adjudication agreement” is an agreement in writing by the parties to submit to adjudication all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

CHAPTER III. ADJUDICATION PANEL

Article 8. Number of adjudicators

- (1) The parties are free to decide on the number of adjudicator(s). They can appoint a sole adjudicator or three adjudicators.
- (2) If there is no agreement, there shall be a sole adjudicator.

Article 9. Appointment of adjudicators



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (1) The nationality of a person shall not preclude that person from acting as an adjudicator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the adjudicator(s), subject to the provisions of paragraphs (4) and (5) of this article.
- (3) If there is no agreement,
 - (i) in an adjudication where three adjudicators are appointed, each party shall appoint one adjudicator, and the two adjudicators thus appointed shall appoint the third adjudicator;
 - (ii) if a party fails to appoint its adjudicator within five days of receipt of a request to do so from the other party, or if the two adjudicators fail to agree on the third adjudicator within five days of their appointment, the appointment shall be made, upon request of a party, by the court;
 - (iii) in an adjudication, which shall be decided by a sole adjudicator, if the parties are unable to agree upon the identity of the adjudicator, he/she shall be appointed, upon request of a party, by the court.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (i) a party fails to implement the steps of that procedure, or
 - (ii) the parties, or two adjudicators, are unable to reach an agreement required of them under such procedure, or
 - (iii) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 26 to perform such a function, unless the agreement on the appointment procedure provides other means for making the appointment.
- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court shall not be subject to appeal.

The court, in appointing an adjudicator, shall have due regard to any qualifications required of the adjudicator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial adjudicator and, in the case of a sole or third adjudicator, shall also take into account a requirement of appointing an adjudicator of a nationality other than those of the parties.

Article 10. Grounds for challenge

- (1) When a person is approached in connection with a possible appointment as an



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

adjudicator, he/she shall disclose immediately any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An adjudicator, from the time of his/her appointment and throughout the adjudication proceedings, shall have a continuing duty to disclose without any delay any such circumstances to the parties.

- (2) An adjudicator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence. A party may challenge an adjudicator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

Article 11. Challenge procedure

- (1) The parties may agree on a procedure for challenging an adjudicator, subject to the provisions of paragraph (3) of this article.
- (2) If there is no agreement on a challenge procedure, a party who intends to challenge an adjudicator shall, within ten days after becoming aware of the identity of the adjudicator or after becoming aware of any circumstance that gives rise to justifiable doubts to his/her impartiality or independence, send a written statement of the reasons for the challenge to the adjudicator and to the other party(ies). Unless the challenged adjudicator withdraws from his/her office or the other party(ies) agree(s) to the challenge, the adjudicator himself/herself shall decide on the challenge.
- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within ten days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 27 to decide on the challenge, which decision shall not be subject to appeal.

Article 12. Failure or impossibility to act

- (1) If an adjudicator becomes unable to perform his/her functions or for other reasons fails to act without undue delay, his/her mandate terminates if he/she withdraws from his office or if the parties agree on the termination. However, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 27 to decide on the termination of the mandate, which decision shall not be subject to appeal.
- (2) If an adjudicator withdraws from his/her office or the parties agree to the termination of his/her mandate, this withdrawal or termination does not imply acceptance of the validity



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

of any ground referred to in this article or article 9(2).

Article 13. Appointment of substitute adjudicator

Where the appointment of an adjudicator is withdrawn or where his/her mandate is terminated under article 11 or 12, a substitute adjudicator shall be appointed according to the rules that were applicable to the appointment of the adjudicator being replaced.

CHAPTER IV. COMMON RULES FOR INFORMAL AND FORMAL ADJUDICATION

Article 14. Commencement of adjudication proceedings

Unless otherwise agreed by the parties, the proceedings in respect of a particular dispute commence on the date on which a Request for that dispute to be referred to adjudication is received by the other party.

Article 15. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a reasonable opportunity of presenting its case and the time allowed shall be proportionate to the timescale agreed for the adjudication, if any.

Article 16. Communication of documents

All statements, documents or other information supplied to the adjudicator by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the adjudicator may rely in making his decision shall be communicated to the parties.

CHAPTER V. INFORMAL ADJUDICATION PROCESS

Article 17. Process for avoidance of disagreement

- (1) If the contract so provides, or if the adjudicator considers, at any time, that there is a possibility to avoid a potential disagreement between the parties, the adjudicator may encourage the parties to avoid such disagreement on their own, without its involvement.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (2) The parties are free to agree, by reference to a set of rules or otherwise on the manner in which the avoidance of disagreement process is to be conducted.
- (3) Failing agreement on the manner in which the avoidance of disagreement process is to be conducted, the adjudicator may conduct the process in such a manner as he/she 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.
- (4) In any case, the adjudicator may provide informal assistance to the parties. It can assist the parties in defining a disagreement and suggest specific ways for the parties to avoid such disagreement.
- (5) In case the parties do not succeed in avoiding a disagreement, they may require the adjudicator to make a recommendation.

Article 18. Process for a recommendation

- (1) If the contract so provides, or if the parties failed to avoid a disagreement and agree so, the adjudicator may make a recommendation which the parties undertake to execute.
- (2) The parties are free to agree, by reference to a set of rules or otherwise on the manner in which the avoidance of disagreement process is to be conducted.
- (3) Failing agreement on the manner in which the avoidance of disagreement process is to be conducted, the adjudicator may conduct the process in such a manner as he/she 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.
- (4) Recommendations must be in writing.
- (5) Upon receipt of a recommendation, the parties may comply with it voluntarily but are not required to do so.

CHAPTER VI. FORMAL ADJUDICATION PROCEEDINGS

Article 19. Determination of rules of procedure



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the adjudicator in conducting the proceedings.
- (2) If there is no agreement, the adjudicator may, subject to the provisions of this Law, conduct the adjudication in such manner as he/she considers appropriate. The power conferred upon the adjudicator includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of Adjudication

- (1) The parties are free to agree on the place of adjudication. Failing such agreement, the place of adjudication shall be determined by the adjudicator having regard to the circumstances of the case, including the convenience of the parties.
- (2) Notwithstanding the provisions of paragraph (1) of this article, the adjudicator may, unless otherwise agreed by the parties, meet at any place he/she considers appropriate for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Language(s)

- (1) The parties are free to agree on the language(s) to be used in the proceedings. If there is no agreement, the adjudicator shall determine the language(s) to be used. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any decision or other communication by the adjudicator.
- (2) The adjudicator may order that any documentary evidence shall be accompanied by a translation into the language(s) agreed upon by the parties or determined by the adjudicator.

Article 22. Competence of the adjudicator to rule on his/her jurisdiction

- (1) The adjudicator may rule on his/her own jurisdiction, including any objections with respect to the existence or validity of the adjudication agreement.
- (2) A plea that the adjudicator does not have jurisdiction to decide all or part of a particular dispute shall be raised as soon as possible, and not later than the submission of any response to the formal notice for a dispute to be referred to adjudication.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

The adjudicator may admit a later plea as to jurisdiction if he/she considers the delay justified.

- (3) The adjudicator may rule on a plea referred to in paragraph (2) of this article either as a preliminary decision or in a final decision at the end of the adjudication.

If the adjudicator rules in a preliminary decision that he/she has jurisdiction, such decision is not subject to recourse until the final decision is rendered.

Article 23. Powers of the adjudicator

- (1) Unless otherwise agreed by the parties, the adjudicator shall:
- (i) take the initiative in ascertaining the facts and matters required for a decision, and make use of his/her own specialist knowledge, if any;
 - (ii) inform the parties of any use of investigatory powers and give the parties a reasonable opportunity to comment on the results;
 - (iii) adopt suitable procedures, avoiding unnecessary delay or expense;
 - (iv) conduct the adjudication within the timescale agreed by the parties, and if no timescale is agreed, in accordance with the timetable decided by the adjudicator which is communicated to the parties;
 - (v) if both parties agree, extend the timescale.
- (2) Unless otherwise agreed by the parties, the adjudicator may, upon request of a party, grant interim measures.

Option

- (3) Unless otherwise agreed by the parties, a party may, without notice to any other party, request a preliminary measure from the adjudicator if it considers that prior disclosure of the request for the measure to each other party against whom it is directed risks frustrating the purpose of the measure.

At the same time, the adjudicator shall give an opportunity to any party against whom a preliminary measure is directed to present its case at the earliest practicable time. The adjudicator shall decide promptly on any objection to the preliminary measure.

Such preliminary measure shall expire 15 days from the date on which it was issued.

Article 24. Statements of Referral and Response



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (1) Within the period of time agreed by the parties or determined by the adjudicator, the Referring party shall state the facts supporting its Referral, the points at issue and the relief or remedy sought, and the Respondent shall state its response in respect of these particulars.

The parties shall submit with their statements all documents they consider to be relevant or add a reference to the documents or other evidence they will submit.

- (2) Unless otherwise agreed by the parties, neither party may amend or supplement its Referral or Response during the course of the proceedings, unless the adjudicator considers it inappropriate to allow such amendment having regard to the delay resulting from it.

Article 25. Written proceedings and hearings

- (1) Unless otherwise agreed by the parties, no hearing shall be organized.
- (2) If one party requests a hearing, the adjudicator shall decide whether to hold such hearing and for which purpose.
- (3) Hearings may be held virtually, unless the parties jointly require a physical hearing, when this is possible.
- (4) The parties shall be given sufficient advance notice of any hearing and of any meeting of the adjudicator for the purposes of inspection of goods, other property, or documents.

Article 26. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (i) the Respondent fails to communicate its Response in accordance with article 24(1), the adjudicator shall continue the proceedings without treating such failure in itself as an admission of the Referring party's allegations and thereby will require the Referring party to prove its case;
- (ii) any party fails to appear at a hearing or to produce documentary evidence, the adjudicator may continue the proceedings and make the decision on the evidence before him/her.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

CHAPTER VII. COURT INTERVENTION AND ASSISTANCE

Article 27. Court intervention

- (1) In matters governed by this Law, no court shall intervene except where so provided in this Law.
- (2) The function referred to in article 28 shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Article 28. Interim measures

- (1) It is not incompatible with an adjudication Agreement for a party to request an interim measure from a court before adjudication proceedings.

Option

- (2) A court shall have the same power of issuing an interim measure in relation to adjudication proceedings, irrespective of whether the place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures and in consideration of the specific features of this law.

CHAPTER VIII. MAKING OF DECISION AND TERMINATION OF PROCEEDINGS

Article 29. Rules applicable to determining the substance of dispute

- (1) The parties are free to agree upon the rules of law to be applied by the adjudicator on the substance of the dispute.
- (2) The adjudicator shall take account of the provisions of the contract, if any between the parties, and any relevant usages and rules/regulations.

Article 30. Decision-making

- (1) If there are three adjudicators, any decision shall be made, unless otherwise agreed by the parties, by a majority of all adjudicators. The decision of any dissenting member shall be appended to and form part of the decision.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (2) If there are three adjudicators, questions of procedure may be decided by the presiding adjudicator, if so authorized by the parties.

Article 31. Form and content of decision

- (1) The decision shall be made in writing and shall be signed by the adjudicator(s). In proceedings with more than one adjudicator, the signatures of the majority of all adjudicators shall suffice, provided that the reason for any omitted signature is stated.
- (2) The decision shall state the reasons upon which it is based, unless the parties have agreed that reasons are not to be given or the decision is a decision on agreed terms under article 33.
- (3) The decision shall state its date and the place of adjudication. The decision shall be deemed to have been made at that place.
- (4) After the decision is made, a copy signed by the adjudicator(s) in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Binding nature of the decision

- (1) A decision is binding on the parties upon its receipt or until reviewed by an arbitral tribunal or court. The parties shall comply with it without delay, notwithstanding any recourse.
- (2) Any party may file a recourse against the decision within 30 days of receiving it, pursuant to article 36.
- (3) Until the dispute is finally settled by an arbitral tribunal or a court, or unless the arbitral tribunal or the court decides otherwise, the parties remain bound to comply with any decision rendered by the adjudicator.
- (4) If neither party has filed a recourse against the decision within 30 days of receiving it, such decision shall remain binding and become final.

Article 33. Settlement

- (1) If, during proceedings, the parties settle the dispute, the parties shall notify the adjudicator of the settlement, the adjudicator shall terminate the proceedings and, if requested by the



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

parties and not objected to by the adjudicator, record the settlement in the form of a decision on agreed terms.

- (2) A decision on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is a decision.

Article 34. Termination of proceedings

- (1) Unless otherwise agreed by the parties, the proceedings are terminated with the notification of the decision of the adjudicator.
- (2) The adjudicator shall issue an order for the termination of the proceedings when:
 - (a) the claimant withdraws its referral, unless the respondent objects thereto and the adjudicator recognizes a legitimate interest on his part in providing a final determination of the dispute;
 - (b) the parties agree on the termination of the proceedings;
 - (c) the adjudicator finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Unless otherwise agreed by the parties, the mandate of the adjudicator terminates with the termination of the proceedings.

Article 35. Correction and interpretation of decision; additional decision

- (1) Within 30 days of receipt of the decision, unless another period of time has been agreed upon by the parties a party, with notice to the other party, may request the adjudicator to correct any errors in computation, any clerical or typographical errors or any errors of similar nature in the decision;
- (2) The adjudicator may correct any error of the type referred to in paragraph (1) of this article on its own initiative within 30 days of the date of the decision.
- (4) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the decision, the adjudicator to make an additional decision as to claims presented in the proceedings but omitted from the decision. If the adjudicator considers the request to be justified, he/she shall make the additional decision within 10 days.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

- (5) The adjudicator may extend, if necessary, the period of time within which he/she shall make a correction, interpretation or an additional decision under paragraph (1) or (3) of this article.
- (6) The provisions of article 31 shall apply to a correction or interpretation of the decision or to an additional decision.

CHAPTER IX. RECOURSE AGAINST DECISIONS

Article 36. Application for setting aside

- (1) Recourse to an arbitral tribunal or a court against a decision rendered by an adjudicator may be made only by an application for setting aside.
- (2) An application for setting aside may not be made after 30 days from the date on which the party making that application had received the decision.
- (3) A decision may be set aside in whole or in part by an arbitral tribunal or a court only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the adjudication agreement was under some incapacity; or
 - (ii) a party to the adjudication agreement was unable to present its case; or
 - (iii) the decision deals with a dispute not submitted to adjudication; or
 - (iv) the decision is manifestly unreasonable;
 - or
 - (b) the arbitral tribunal or the court finds that:
 - (i) the decision is in conflict with the public policy of the *lex fori*.

CHAPTER X. RECOGNITION AND ENFORCEMENT OF DECISIONS

Article 37. Recognition and enforcement procedure

- (1) A decision, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 38.
- (2) The party relying on a decision or applying for its enforcement shall supply the original



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

decision or a copy thereof. If the decision is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 38. Grounds for refusing recognition or enforcement

Recognition or enforcement of a decision, irrespective of the country in which it was made, may be refused only if:

- (a) at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought:
 - (i) a party to the adjudication agreement was unable to present its case; or
 - (ii) a party to the adjudication agreement was under some incapacity; or
 - (iii) the decision deals with a dispute not submitted to adjudication; or
 - (iv) the decision is manifestly unreasonable.

- (b) if the court finds that:
 - (i) the decision is in conflict with the public policy of its State.

- 0 - 0 - 0 - 0 -

II. PROPOSAL FOR EXPLANATORY NOTES TO MODEL LAW ON ADJUDICATION

1. The UNCITRAL Model Law on International Commercial Adjudication was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on [day month year], at the close of the [number]th annual session. The General Assembly, in its resolution of [ref] of [day month year], recommended that “all States give due consideration to the Model Law on International Commercial Adjudication, in view of the desirability of uniformity of the law of adjudication procedures and the specific needs of international commercial adjudication practice”.

2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the adjudication process from the adjudication agreement to the recognition and enforcement of the adjudication decision and reflects a worldwide consensus on the principles and important issues of international adjudication practice. It is acceptable to States of all regions and the different legal or economic systems of the world.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

3. The form of a Model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new adjudication laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interests of the users of international adjudication, who are primarily foreign parties and their lawyers.
4. It is acknowledged that the Model Law on International Commercial Adjudication is adopted in advance of any Convention on International Commercial Adjudication, however, the Commission considers that the fragmentary nature of existing domestic laws on adjudication suggest that such Model Law may provide the basis to promote the introduction of a harmonized vehicle of adjudication in the domestic legislation of further States. This is of particular relevance for wider use of dispute boards (as a form of adjudication) which rely on the understanding of the vehicle of adjudication for wider acceptance and use.

A. BACKGROUND TO THE MODEL LAW

5. The Model Law is designed to meet concerns relating to the current state of national laws on adjudication. The need for improvement and harmonization is based on findings that the domestic laws are often non-existent or are inappropriate for international cases and that considerable disparity exists between them.
6. Adjudication is a method to resolve disputes out of courts which is already widely used in some countries and sectors. It can consist of: (i) avoidance of disagreements, (ii) recommendation(s), and/or (iii) a binding decision. Adjudication may be used in combination with other means to resolve disputes, such as negotiation, mediation or arbitration. In States where adjudication is available through legislation it appears that the decision is normally accepted or results in settlement and that it is not referred to further proceedings. The important distinction between adjudication and other forms of dispute resolution is that adjudication may result in a decision which is enforceable, if not complied with voluntarily. Recognition and enforcement of it rely on legislation.

An objective of the Model Law is the definition of adjudication, and with this definition provide a wider understanding and use of adjudication.

1. Inadequacy of domestic laws

7. A cursory review of the national laws on adjudication highlights considerable disparity in national laws on adjudication both in the scope of adjudication and the availability of statutory adjudication. This disparity is most evident when the success and popularity of adjudication in some common law jurisdictions is compared to the absence of legislation



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

and limited use of adjudication in the civil law jurisdictions. Even in those states where adjudication has been adopted widespread use of commercial adjudication is primarily in construction contracts. The use of adjudication principles for dispute boards currently derives primarily from adoption of common law principles, and procedures reliant on the parties' submission to arbitration to underpin contractual obligation to refer disputes to adjudication prior to referral to court or to arbitration.

2. Disparity between national laws

8. In the common law jurisdictions, some States have implemented statutory adjudication to provide a rapid means of resolving common types of construction industry disputes including payment disputes under construction contracts. In these States the defined status of the adjudicator's decision facilitates public policy which is supportive of the use of adjudication, resulting in widespread use of adjudication to resolve disputes in preference to referral to court, and a time when the construction works are still in progress to ensure that decisions can be made at a time when these are still relevant to the outcome of the project.
9. In the civil law jurisdictions, the courts in many States accept that expert determination is not subject to appeal to the court, and that court proceedings should be stayed to allow conciliation to proceed. In these States, conciliation is widely recognized as a pre-arbitral or pre-legislative step and as the conciliator's recommendation is not imposed on the parties, issue of recognition and enforcement are unproblematic. The States which have considered the constitutional admissibility of adjudication have found no inherent constitutional incompatibility with adjudication but did find need for legislation to set out appropriate procedures.
10. In short, common law jurisdictions rely on adjudication to the extent of granting a statutory entitlement to adjudication for disputes covered by their legislation, while civil law jurisdictions prefer that their State courts provide a recommendation to be voluntarily considered by the parties, so avoiding binding adjudication.
11. The Model Law shows that adjudication may be a way to avoid disagreement or may result in a recommendation by a third neutral or in a binding decision and demonstration that adoption of the Model Law does not limit the court power other than *mutatis mutandis* as for arbitration.

3. Adjudication in standard form international contracts

12. Dispute boards originated as a form of expert conciliation for which the parties submitted their dispute voluntarily to their chosen dispute board to seek a recommendation for its resolution. Some international construction contracts including those adopted by the



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

World Bank and multilateral development banks have adopted dispute boards where parties rely on the dispute board to provide a contractually binding adjudicated decision as a mandatory pre-arbitral step. The dispute board decision relies on the parties underlying submission to the adjudication of disputes, and recognition and enforcement of adjudication in the country governing the underlying contract, or underlying law at the seat or place of the adjudication.

13. In international contracts, access to international commercial adjudication through adoption of the Model Law may be the first tier of dispute resolution by a neutral party, and the Commission acknowledges the importance of adoption of the Model Law to provide a legal framework for adjudication as adequate settlement method.
14. It is accepted that parties may supplement the Model Law with additional procedural rules, and such rules have particular importance in setting out procedures for mediative or conciliatory pre-adjudication steps.

B. SALIENT FEATURES OF THE MODEL LAW

1. Special procedural regime for international commercial adjudication

15. The principles and individual solutions adopted in the Model Law on International Commercial Adjudication aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legislative regime geared to international commercial adjudication, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect for international cases, the desire of updating and improving the adjudication law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model law for both categories of cases.

(a) Scope of application

16. Article 1 sets out the scope of application of the Model Law by reference to the notion of “international commercial adjudication”. The Model Law defines an adjudication as international if “the parties to an adjudication agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1(1)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, internationality also covers cases where the place of adjudication, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the adjudication agreement relates to more



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

17. In respect to the term “commercial”, the Model Law provides no strict definition. Article 2(e) calls for a “wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”. The purpose of this Article 2(e) is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of “commercial law” that may exist in some legal systems.
18. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1(2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of adjudication is in the enacting State or elsewhere (or, as the case may be, even before the place of adjudication is determined). These articles are the following: articles 28, 37 and 38 which deal with the recognition of adjudication agreements, including their compatibility with interim measures requested by a party from the court, or ordered by a court in support of the adjudication or the adjudicator, and articles 37 and 38 on the recognition and enforcement of adjudication decisions.
19. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of adjudication is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the adjudication takes place, experience shows that the parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a “foreign law”, since the Model Law grants the parties wide freedom in shaping the rules of the adjudication proceedings. In addition to designating the law governing the adjudication procedure, the territorial criterion is of considerable practical importance in respect of Article 27(2), which entrust State courts with the power to issue interim measure in relation to adjudication proceedings. It should be noted that the territorial criterion legally triggered by the parties’ choice regarding the place of adjudication does not limit the adjudicator’s ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided in article 19.

(b) Delimitation of court intervention and assistance

20. Recent amendments to adjudication laws reveal a trend in favor of limiting court involvement in international commercial adjudication. This seems justified in view of the fact that the parties to an adjudication agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency, and the binding enforceable but not final decision that adjudication offers, to protracted battles in court.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

21. In this spirit, the Model Law envisages court involvement in the following instances. A first group consists of appointment, challenge and termination of the mandate of adjudicator (articles 9, 11, and 12) and setting aside of the adjudicator's decision (article 36). A second group comprises issues of court-ordered interim measures (article 28), and recognition and enforcement of adjudication decisions (articles 37 and 38).
22. Beyond these instances in these groups, "In matters governed by this Law, no court shall intervene except where so provided in this Law". Article 27(1) thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consideration of adjudication proceedings, the contractual relationship between adjudicator(s) and parties or adjudication institutions, or fixing of costs and fees, including deposits). Protecting the adjudication process from unpredictable or disruptive court interference is essential to parties who choose adjudication (in particular foreign parties).

2. Adjudication agreement

23. Chapter II of the Model Law deals with the Adjudication agreement, including its recognition by courts.

(a) Definition and form of the adjudication agreement

24. The Model Law (Article 7) sets out that an adjudication agreement may be in writing, or not. Two options have been foreseen.

(b) Adjudication agreement and the courts

25. Article 28 sets out that the agreement for adjudication does not limit any power of the court in relation to interim measures. That provision is ultimately addressed to the courts of any State, in so far as it establishes the compatibility between the interim measures possibly issued by the court and an adjudication agreement, irrespective of the place of adjudication.

3. The adjudication panel

26. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of adjudicators. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

27. Where under any procedure, agreed upon by the parties or based upon the supplementary rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an adjudicator, articles 9, 11 and 12 provide assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the adjudication panel or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set, and decisions rendered by the courts or other authorities on such matters are not appealable.
28. Article 8 sets out that that the parties are free to decide on the number of adjudicators. It sets out a default position of a sole adjudicator.
29. Article 9 sets out the procedure for appointment of Adjudicators, either to act as a sole adjudicator, or as three adjudicators. Paragraph 3 sets out the default position that in appointment of three adjudicators, the parties traditionally each select an adjudicator and these two adjudicators then jointly select a presiding adjudicator, and that in the event that no agreement can be reached, the court can select an adjudicator.
30. Article 10 sets out the grounds for challenge, and that these are limited to justifiable doubts of impartiality or independence.
31. Article 11 sets out the procedure to challenge an adjudicator, and the default timescale for that challenge.
32. Article 12 sets out the procedure in the event of a failure to act, or the impossibility for the adjudicator to act, and that if the court is invoked to consider the termination of the mandate the decision is not subject to appeal.
33. Article 13 sets out the principle that any substitute adjudicator is to be appointed through the same procedure as the original adjudicator.

4. Common rules for informal and formal adjudication

34. This Chapter IV applies to both informal and formal adjudication processes i.e. avoidance of disagreements and recomandations and formal adjudication proceedings, which may result in a binding decision. It sets out common rules regarding the commencement of adjudication and the principle of equal treatment of parties.
35. Articles 14 reflects current practice in States having enacted statutory adjudication that the adjudication timescale commences with the request by a party to refer a dispute to adjudication, and at the latest on the day on which the respondent in the adjudication receives a request for adjudication from the claimant. This referral date provides the reference date to calculate periods of time in the adjudication procedure.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

36. Article 15 sets out the fundamental requirement for equal treatment of the parties, and the parties' right to a reasonable opportunity to present their case in a manner which is proportionate to the timescale that is agreed for the adjudication itself. This highlights the need to balance the conflicting requirements of an intentionally tight timescale with the overriding requirement to safeguard due process in the dispute. In part, this balance is intended to be achieved by the adjudicator taking an active role in the dispute.

5. Informal adjudication process

37. Chapter V deals with the process of avoidance of disagreement and recommendation. Both forms of adjudication are informal processes. The avoidance of disagreement is a method to seek to obtain a settlement between the parties as soon as they have divergent opinions.

38. This process differs from mediation as it is a contradictory process, which means that all documents must be communicated to the other party (article 16).

39. The recommendation process is an adjudication method whereby the adjudicator does not necessarily seek to attempt a settlement, but makes one or more recommendations to the parties. Like the avoidance of disagreement process, the recommendation process is a contradictory process meaning that all parties must receive all the documents (article 16).

6. Formal adjudication proceedings

40. Chapter VI provides the legal framework for a fair and effective conduct of formal adjudication proceedings.

41. The adjudicator is to act actively and the proceedings are intentionally time limited. It follows that within an overriding objective of procedural fairness the time allowed must be proportionate.

(a) Determination of rules of procedure

42. Article 19 on the rights and powers to determine the rules of procedure expresses a principle that is fundamental to the Model Law.

43. It guarantees the parties' freedom to agree on the procedure to be followed by the adjudicator in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the adjudicator, failing agreement by the parties, to conduct the adjudication in such manner as it considers appropriate. The power conferred upon the adjudicator includes the power to determine the admissibility, relevance, materiality and weight of any evidence.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

44. The autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rule according to their specific wishes and needs, unimpeded by traditional possibly conflicting domestic concepts, thus obviating risk of frustration or surprise. The supplementary discretion of the adjudicator is equally important in that it allows the adjudicator to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the adjudication agreement or the Model Law.
45. Article 19(2) sets out adjudicator's duties to consider the evidence.
46. In addition to the general provisions of article 19, the provisions in the Model Law recognize party autonomy and failing agreement, empower the adjudicator to decide on certain matters. Examples of particular importance in international cases are article 20 on the place of the adjudication and article 21 on the language to be used in the proceedings.
47. Article 20 reflects the international nature of the adjudication and is akin to legislation for arbitration in consideration of the legal place of the adjudication, and that this may differ from the place where the dispute is heard, or evidence relevant to the adjudication is obtained, or secured, by interim measures.
48. Article 21 reflects the international nature of the adjudication and that the underlying contract or relevant evidence may not be in only one language and may require translation for use in the adjudication.

(b) Competence of the adjudicator to rule on his/her own jurisdiction

49. Article 22 sets out the principle and the timetable for the adjudicator to rule on his/her own jurisdiction.
50. This article adopts the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the adjudication clause. "Kompetenz-Kompetenz" means that the adjudicator may independently rule on the question of whether he/she has jurisdiction, including any objections with respect to the existence or validity of the adjudication agreement, without having to resort to a court. Separability means that an adjudication agreement shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the adjudicator that the contract is null and void shall not entail *ipso jure* the invalidity of the adjudication clause. A detailed provision in paragraph 2 requires that any objections related to the adjudicator's jurisdiction be made not later than the submission of any response to the Formal Notice for a dispute to be referred to adjudication.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

51. The competence of the adjudicator to rule on his/her own jurisdiction (i.e. on the foundation, content and extent of his/her mandate and power) is of course subject to court control. Where the adjudicator rules as a preliminary question that he/she has jurisdiction, article 22(3) allows for recourse only after the decision of the adjudicator has been rendered. In those cases, recourse on the question of jurisdiction is available by setting aside proceedings under article 36.

(c) Powers of the adjudicator

52. Article 23 sets out the principles which distinguish the adjudicator's powers and required behaviours. These powers and behaviours go to the core of what is intended to be achieved by adjudication, and in consequence, these far-reaching powers can only be disengaged if the parties agree. Fundament to these powers is that the adjudicator shall take the initiative in ascertaining the facts and matters required for a decision and shall make use of his/her own specialist knowledge if any to do so, with the procedural safeguard that the use of such investigatory powers shall be balanced with the parties having a reasonable opportunity to comment on the results. The limitation to a reasonable opportunity is an acknowledgement that the adjudication is intended to provide a rapid remedy and the opportunity is therefore proportionate to the time available in the adjudication. The principle that the timescale shall only be adopted with the consent of the referring party reflects the position in States which have enacted legislation for statutory adjudication and that the overriding objective that the purpose of adjudication is to provide a decision within an internationally limited timescale and that the Referring Party had chosen the adjudication vehicle to avail of a procedure which sets the limitation of the timescale as a primary objective. These principles are reinforced through adoption by the adjudicator of procedures which avoid unnecessary delay or expense.

53. The optional paragraph 3 is inspired by article 17B and 17C of the UNCITRAL Model Law on Arbitration. It foresees the possibility of having *ex parte* requests of interim measures filed with the adjudicator. The other party will be notified of the interim measure and the request that has been submitted thereto, only after the preliminary measure taken.

54. Article 24 sets out the parties duties to submit the evidence and that neither party can revise their claim or defence in the absence of the opposing party's agreement, to reflect the overriding aim that adjudication, at least in the formal adjudication proceedings, is intended to provide a promptly adjudicated decision which is binding, but is not final.

(d) Written proceedings and hearings



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

55. In acknowledgement of the internationally accepted principle of short timescale for the adjudication, the default position is that no hearing shall be required unless a party requests a hearing, or the adjudicator directs a hearing (article 25).

(e) Default of a party

56. Article 26 sets out the principles for the adjudicator's powers to conduct the adjudication when a party that was notified of the procedure decides not to participate or not to participate any longer.

57. The adjudication proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the Respondent to communicate its statement of defense (article 26(i)). The adjudicator may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 26(ii)).

58. Provisions that empower the adjudicator to carry out his/her task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provision, therefore, provides international commercial adjudication with its necessary effectiveness, with the limits of fundamental requirements of procedural justice.

7. Court intervention and assistance

(a) Limited court intervention

59. Article 27 sets out that no court shall intervene, unless this is foreseen in the Law. State shall determine which court shall have jurisdiction to take measures as deemed appropriate.

(b) Court ordered interim measures

60. A party may request a court to render interim measures in case parties have agreed on adjudication (article 28). However, they can only do so before the commencement of adjudication proceedings so that the internationally accepted principle of short timescales for adjudication be respected.

61. Article 28(2) is foreseen as an option. It provides that State courts can have jurisdiction to take interim measures with regards to adjudication proceedings, even if these proceedings are taking place outside of the territory of that State.



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

8. Making of decisions and termination of proceedings

(a) Making a decision and other decisions

62. Under paragraph Article 29(1), the adjudicator decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. Article 29(2) sets out the principle that in any event, the adjudicator shall take into account the provisions of the contrat, if any, and any relevant usages and rules/regulations.
63. Article 30 sets out the procedures for decision-making by three adjudicators. Article 30(1) acknowledges that a unanimous decision may not be possible, and that if there is a dissenting opinion it shall be appended to and form part of the decision. Article 30(2) acknowledges that the parties may authorize the presiding adjudicator (or ‘chair’) to deal with questions of procedure subject to the agreement of the parties and the other adjudicators.
64. Article 31 sets out the required form and content of a decision, and importantly requires that the decision is to state reasons (as distinct from reasoning) unless the parties have agreed that no reasons are required, or the decision reflects a decision made to record a settlement reached under Article 33.
65. Article 32 sets out that the decision rendered by the adjudicator is binding but not automatically final. Indeed, the parties are given the opportunity to file a recourse either before an arbitral tribunal or a court (choice to be made by the parties) within a set time limit. If no recourse is filed within the set time limit, the adjudicator’s decision becomes final (article 32(4)). If a recourse is filed against the decision, the decision shall remain binding until the dispute is finally decided by an arbitral tribunal or a court or unless the arbitral tribunal or the court decides otherwise (article 32(3)).
66. Article 33 sets out the procedure in event that a settlement is reached during the adjudication procedure and that the status of that decision reflects that of an adjudication decision. In the event of a settlement being reached, the parties are required to inform the adjudicator of the settlement, following which the adjudicator is required to terminate the proceedings, and following which the adjudicator may, but is not required to, record the settlement in the form of decision on the agreed terms. This reflects the position of a



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

consent award in arbitration, with the necessary adjustments in acknowledgement of the binding, but not the final nature of adjudication.

67. Article 34 sets out the procedure for termination of the proceedings and for the termination order to be issued by the adjudicator. The reasons for termination include that the adjudication cannot be continued.

(b) Correction and interpretation of decision; additional decision

68. Article 35 sets out the procedure to address slips and requests for interpretation and a default timescale. The procedure set out in article 35 allows for a party to apply to the adjudicator, or the adjudicator on its own initiative to correct the decision and sets out the timetable for the issue of any corrected decision.
69. The Model Law provides the opportunity for the parties to request an additional decision on claim(s) presented in the proceedings if they have been omitted from a decision, unless the parties have excluded such possibility.

9. Recourse against decisions

70. The disparity found in national laws, at least in the countries with a law on adjudication, as regards the types of recourse against an adjudication available to the parties presents a major difficulty in harmonizing international adjudication legislation. This situation (of considerable concern to those involved in international commercial adjudication particularly the use of adjudication in dispute boards) is greatly improved in the Model Law, which provides uniform ground upon which (and clear time periods within which) recourse against an adjudication decision can be made.
71. Article 36 sets out the grounds for an arbitral tribunal or a court to set aside an adjudicator's decision. The first three grounds are taken from the UNCITRAL Model Law on Arbitration (Article 36), whilst the fourth is specific for adjudication as it allows an arbitral tribunal or a court to set aside a decision taken by the adjudicator if it is manifestly unreasonable. The latter ground is a *prima facie* control so that the arbitral tribunal or the court cannot review the adjudicator's decision on the substance. The timescale of 30 days for filing a motion for setting aside is more or less in line with current practice in international commercial adjudication practice (international dispute boards under construction contracts, such as in the contracts used by the World Bank and multilateral development banks and the United Nations).

10. Recognition and enforcement of decisions



Support for proposal to discuss Adjudication in UNCITRAL Working Group II – proposal for Model Law on Adjudication and Explanatory Notes thereto – submitted by FICA - prepared by DACABI

72. The tenth and last chapter of the Model Law deals with recognition and enforcement of adjudication decisions. Its provisions reflect the significant policy decisions that the same rules should apply to adjudication decisions whether made in the country of enforcement, or abroad, and that those rules should follow closely the UNCITRAL Model Law on Arbitration (Article 35) and the 1958 New York Convention (Article V), *mutatis mutandis* to reflect the binding but not final nature and objectives of adjudication.

(a) Procedural conditions of recognition and enforcement

73. Under article 37 any adjudication decision, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions in particular of article 37, and of article 38 (which sets forth the grounds on which recognition or enforcement may be refused).

74. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the decision and the adjudication agreement (article 7).

(b) Grounds for refusing recognition or enforcement

75. The first three grounds are taken from the UNCITRAL Model Law on Arbitration (Article 36), whilst the fourth ground is specific for adjudication as it allows a court to refuse recognition or enforcement of a decision from the adjudicator if it is manifestly unreasonable. The latter ground is a *prima facie* control so that the court cannot review the adjudicator's decision on the substance. .