

May 5, 1980

M O D E L C L A U S E

Variant B seems to leave a gap. Although there is a commitment to invite for conciliation, arbitral or judicial proceedings may be necessary "for preserving rights" already at this stage. Preservation of rights is dealt with in article 16 "during conciliation proceedings". However, Conciliation proceedings only commence when the invitation is accepted (art. 2, para. 2). Between the invitation and the acceptance a period of 30 days may elapse (art. 2, para. 3). In this period preservation of rights may also be necessary!

This gap may be filled by an addition to Variant B as follows:

"However each of the parties may initiate judicial or, if so provided for, arbitral proceedings where, in his opinion, such proceedings are necessary for preserving his rights".

This addition corresponds with article 16, dealing with the preservation of rights "during conciliation proceedings".

ARTICLE 16

A situation, which could arise in practice, is that parties after judicial or arbitral proceedings are initiated, agree to conciliate. As a consequence these proceedings should then be suspended. The question arises: Should we not say so? It could be done by adding a second paragraph to Article 16.

1. As long as the conciliation proceedings are not terminated accordingly to Article 15 the parties undertake not to initiate any judicial or arbitral proceedings in respect of a dispute that is the subject of the Conciliation proceedings, except that a party may initiate such proceedings where, in his opinion, such proceedings are necessary for preserving his rights.
2. If the parties resort to conciliation proceedings after judicial or arbitral proceedings and initiated, they shall request the judge or arbitrator to suspend the proceedings pending the conciliation proceedings.

The judge or arbitrator is not obliged to comply with this request. The only obligation contained in para. 2 is for the parties. The addition of para. 2

may be deemed superfluous. Normally the parties will anyhow ask for suspension when, during court or arbitral proceedings, they agree to try to reach a settlement with the assistance of a conciliator.

ARTICLE 4, para. 2

Here I would prefer a separate article 4A. I would prefer to distinguish the assistance in the appointment, dealt with in the second paragraph, from the appointment, dealt with in the first paragraph.

Moreover, the introduction of the two cases a and b with the words "Parties may enlist" does not seem correct; the first case a is left to the discretion of each party individually. There is no need of a previous agreement between the parties, when one of them would ask an institution or person to recommend suitable names for conciliator.

I therefore propose the following wording

ARTICLE 4 A

1. In connexion with the appointment of conciliators the assistance of an appropriate institution or person may be requested. In particular
 - (a) a party may on its own initiative request such institution or person to recommend the names of suitable individuals to act as conciliator.
 - (b) the parties may agree that the appointment of one or more conciliators be made by such an institution or person.

2. In recommending or appointing

(= last paragraph of art. 4)