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Summary record of the 744th meeting
Held at Headquarters, New York, on Wednesday, 19 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) . . . . . (Mexico)

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In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 12. Termination of conciliation (continued)

1. **Mr. Jacquet** (France) said that he understood the concern that the reasonable period of time proposed by his delegation with regard to draft article 12 (d) was unacceptable, since it was a matter for the contract, not for the draft Model Law. However, in his view, it was unwise to make such a clear distinction between the contract between the parties establishing conciliation and the conciliation process covered by the draft Model Law. There were two situations in which parties could abandon conciliation, presenting an irritating problem for the draft Model Law. Firstly, if a party refused to participate from the outset, draft article 4 provided for a failure to respond to an invitation within 30 days to be treated as a rejection of the invitation to conciliate, without elaborating on the consequences of rejection. Secondly, if a party abandoned without warning a process that had already begun, the situation would be covered by the provisions of draft article 12, subparagraphs (b) or (d). The proposal by the representative of Finland to insert the words "after inviting the parties to conciliate" into subparagraph (b) was superfluous, because draft article 4, rather than 12, would contain the relevant provisions if conciliation had never even begun.

2. **The Chairman** said that there was a consensus to retain the version of draft article 12 formulated by the Working Group, with the exception of removal of the term "written". The Guide to Enactment would contain an explanation that the consequences of failure to fulfil an agreement to conciliate would derive from the law applicable to that agreement. The Finnish proposal to amend subparagraph (b) was likely to create confusion in the light of the identical provisions of article 15 of the UNCITRAL Conciliation Rules.

3. *Draft article 12 was provisionally approved.*

Draft article 13. Conciliator acting as arbitrator

4. **Mr. Zanker** (Observer for Australia) said that the clause "unless otherwise agreed by the parties" was superfluous. In line with the practice followed in previous articles, it should be removed.

5. **Mr. Marsh** (United Kingdom) said that the description of "another dispute that has arisen from the same contract or any related contract" was slightly too narrow. It was possible for another dispute to arise from the same factual situation, without necessarily having any contractual relationship, in accordance with the provisions of draft article 1, paragraph (2), which referred to disputes relating to a contractual or other legal relationship.

6. **Mr. Shimizu** (Japan) asked whether "another dispute" referred to disputes between the same or different parties.

7. **The Chairman** explained that the Working Group intended "another dispute" to cover disputes between the same as well as different parties.

8. **Mr. Tang** Houzhi (China) said that, in the view of his delegation, the words "unless otherwise agreed by the parties" were extremely important. It should be possible for parties, having failed to reach a settlement after conciliation, to agree to pursue the process with the same person as arbitrator. The draft Model Law should respect the right of the parties to make such private agreements. If draft article 13 could not be retained in its entirety, it should be deleted altogether.

9. **The Chairman** explained that the deletion of the clause "unless otherwise agreed by the parties" did not mean that draft article 13 was therefore mandatory. The provisions of draft article 3, allowing parties to vary the text by agreement, could still be applied. He asked delegations to bear in mind that such changes were merely cosmetic.

10. **Mr. Holtzmann** (United States of America), supporting the view expressed by the representative of China, said that it was useful to remind parties of their right to vary the provisions of draft article 13 by agreement, instead of requiring them to discover that right by reading a different article. It was particularly important for China, given that in hundreds of cases each year under its jurisdiction, arbitration was combined with a conciliation in the same procedure. That process lay at the core of dispute resolution in China and played a key role in facilitating international

trade. Moreover, the current version of the text had after all been established following detailed discussion in the Working Group, and no strong reasons had been offered to justify changing it.

11. In response to the point made by the representative of the United Kingdom, he suggested amending the text to "another dispute that has arisen from the same or related contract or legal relationship".

12. **Mr. Rendón** (Mexico) asked whether it was advisable to change the wording of article 19 of the UNCITRAL Conciliation Rules in the formulation of draft article 13. While they were almost identical in other respects, the words "or as a representative or counsel of a party in any arbitral or judicial proceedings" had been omitted from the current version of draft article 13.

13. **The Chairman** said that, while he failed to recall the reason for the omission, the matter had been properly discussed in the Working Group.

14. **Mr. Reyes** (Colombia) agreed that there should be a good reason for departing from the wording of article 19 of the UNCITRAL Conciliation Rules in draft article 13. Moreover, the heading of draft article 13 was inappropriate. Rather than "Conciliator acting as arbitrator", the heading should be closer to "Ineligibility of the conciliator as arbitrator", since the current heading did not reflect the content of the article.

15. **The Chairman** said that paragraphs 117 and 118 of the report of the Working Group (A/CN.9/506) contained an explanation for the omission of the words pointed out by the representative of Mexico.

16. **Mr. García Feraud** (Observer for Ecuador) said that even though article 3 allowed for the possibility of changing the rules, the phrase "unless otherwise agreed by the parties" should still be included in other articles. Although draft article 13 established a general rule to the effect that the conciliator should not act as an arbitrator, the fact was that in practice, an agreement by the parties to allow a conciliator to become an arbitrator would be an indication of their confidence in the conciliator's competence and ethical behaviour. With regard to the incompatibility of dealing with matters pertaining to the same contract or any related contract , it might be useful to refer not only to the possible legal relationship with the matter previously dealt with in the conciliation process but also to the legal situation itself. He suggested that the last part of draft article 13 should read as follows: "in respect of another dispute that has arisen from the same contract *or any other contract or legal relationship or situation*".

17. **Mr. Morán Bovio** (Spain) pointed out that paragraph 117 of the report of the Working Group (A/CN.9/506) explained the reasons that had led the Working Group to adopt the present text of draft article 13. That text, including the phrase "unless otherwise agreed by the parties", should be retained. The phrase might perhaps be extended with a reference to positive law, i.e., a stipulation that the provision must be permitted by the applicable rules, since there might be cases in which the rules of the bar association or a similar organization would preclude the action envisaged. In any event, the opening phrase "unless otherwise agreed by the parties" should be retained.

18. His delegation agreed with the delegations of Ecuador, the United States and the United Kingdom that the scope of draft article 13 should be extended to cover not only the contract or any related contract but also any other legal relationship. That was particularly important since the first part of the draft article allowed for the possibility of the parties agreeing to allow the conciliators to continue as arbitrators, as appeared to be the tradition in China.

19. **Mr. Möller** (Observer for Finland) said that the scope of draft article 13 should be limited to the matter of the conciliator acting as an arbitrator and not deal with the question of his acting as a representative. For the sake of clarity, the phrase "unless otherwise agreed by the parties" should be retained. The suggestion made by the United Kingdom, to refer to "the contract or any related contract" might be too narrow. One possibility would be to add, as suggested by the United States, "or legal relationship". It might be better, however, to say "the same contract or any related contract" or "the same legal relationship". He did not have strong feelings on the matter.

20. **Mr. Markus** (Observer for Switzerland) said that the draft article should focus on the arbitrator and not on the representative. With respect to the phrase "unless otherwise agreed by the parties", he noted that there was broad support for leaving it in the text; however, he wished to stress that the reason he felt it should be deleted was that it could give the mistaken impression that there were two different degrees of

party autonomy. The principle of party autonomy was a holistic one; the reader of the text might think that other articles not introduced by the phrase in question were more mandatory than, for instance, article 13. The issue could be resolved by leaving the phrase in draft article 13 but explaining in the Guide what was meant and why it had been retained, namely, only for the reasons explained by the United States delegation.

21. With respect to the United Kingdom proposal, he suggested that the text should refer to closely related disputes instead of contractual relationships and other legal relationships. That wording would cover both the contractual relationship and other closely related legal relationships. In some legal systems, there might also be a relationship between contracts and torts. He therefore suggested that the text should read as follows: "… conciliation proceedings or in respect of another dispute which is closely related to that dispute".

22. **Mr. Marsh** (United Kingdom) said that his delegation was in favour of retaining the phrase "unless otherwise agreed by the parties".

23. **The Chairman** noted that the Working Group had been strongly in favour of retaining the phrase "unless otherwise agreed by the parties". There was also broad support for the United Kingdom proposal to change the ending of draft article 13 to read: "of another dispute that has arisen from the same or a related contract or legal relationship". As requested by the Observer for Switzerland, the Guide would include an explanation of the relationship between draft article 13 and the provisions that included the phrase "unless otherwise agreed by the parties". Reference would also be made to the practice in certain countries, such as China, where a conciliator could also act as arbitrator.

24. **Mr. Zanker** (Observer for Australia) suggested that instead of referring to disputes arising out of the same contract or any related contract or legal relationship, the text might simply refer to a dispute that had arisen out of the same factual circumstances.

25. **Mr. Barsy** (Sudan) said that the phrase "any related contract" was very broad; it would be better to change it to refer to any contract that might be related to conciliation or perhaps a contract already mentioned during conciliation. The phrase "of a dispute that was or is the subject of the conciliation proceedings" was not clear. Did it refer to a dispute between the same parties or between other parties? It would be better to say "in a dispute between the two parties in question".

26. **The Chairman**, referring to the first point raised by the representative of the Sudan, pointed out that there had already been agreement to accept the amendment proposed by the United Kingdom. The second point raised by the Sudan had been considered by the Working Group, which had reached the conclusion that the scope of draft article 13 should cover not just the parties to the dispute but also other parties. The matter had already been discussed at length.

27. *Draft article 13, as amended, was provisionally approved.*

Proposal submitted by China

28. **Mr. Tang** Houzhi (China), drawing attention to original draft article 16 (A/CN.9/506, para. 130), entitled "Arbitrator acting as conciliator", recalled that although there had been no opposition to the content of that paragraph, the Working Group had deleted it and decided that an explanatory note would be included in the Guide. Some delegations had argued that the provision should be included in the law on arbitration rather than in the one on conciliation. China did not agree with that position because at least four articles in the draft model law on conciliation mentioned arbitration; therefore, it could not be argued that arbitration was irrelevant.

29. In addition to China, there were some 20 or 30 countries whose domestic law and practices allowed arbitrators to act as conciliators in the process of arbitration, including Oriental as well as Western countries. The World Intellectual Property Organization (WIPO) and the Society of Maritime Arbitrators also allowed for such a possibility. There were many other countries which did not allow arbitrators to act as conciliators. Deleting the original draft article 16 (A/CN.9/506, para. 130) would not be conducive to the development and improvement of the law in those 20-plus countries, including China. His delegation suggested that instead of treating the original article 16 as a formal article, it should be included as an optional article. It would thus be placed in a footnote as article Y.

The meeting was suspended at 4.30 p.m. and resumed at 5.10 p.m.

30. **Mr. Milassin** (Hungary) said that his delegation was willing to support the Chinese proposal to reintroduce former draft article 16 as a footnote to the

present draft article 13, even though it dealt with an arbitration situation. In Hungary, as it happened, the national rules governing conciliation fell within the rules of procedure of arbitral courts. Hungarians had little experience with conciliation but foresaw that it would be useful in the future.

31. **Mr. Joko Smart** (Sierra Leone) said that initially his delegation had thought that a model law on conciliation was not the place to deal with the competence of a conciliator to act as an arbitrator. However, in view of the trend towards encouraging conciliation in the context of arbitration, his delegation would support the Chinese proposal.

32. **Ms. Moosa** (Singapore) said that her delegation supported the Chinese proposal because it was consistent with her country's legal framework on arbitration. The inclusion of the text of former draft article 16 would be a useful compromise.

33. **Mr. Miki** (Japan) said that in earlier discussions his delegation had thought that the proper place for former draft article 16 was in a law on arbitration, not on conciliation, but it had no problems with the provision's inclusion in a footnote. It would seem more appropriate, however, to place it in a footnote to article 1, paragraph 8 (a), which referred to the same situation, where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement.

34. **Ms. Göth-Flemmich** (Austria) said that her delegation had sympathy for the Chinese position but did not see how draft article 13 and former draft article 16 could appear in the same text, even with the latter in a footnote, since they were contradictory. Perhaps a better solution would be to eliminate draft article 13. Countries that had adopted the UNCITRAL Model Law on International Commercial Arbitration would have no need for it; any party who did not wish to accept a former conciliator as an arbitrator could challenge the appointment.

35. **The Chairman** said that the two draft articles had been exhaustively debated in the Working Group, and there had been broad agreement that draft article 13 should be in the text.

36. **Ms. Chadha** (India) said that her delegation supported the Chinese proposal because it suggested another mode in which an arbitrator might sponsor conciliation and was not inappropriate.

37. **Mr. Holtzmann** (United States of America) said that his delegation regretted that it must demur when so many delegations had spoken in support of the Chinese proposal. Former draft article 16 had been extensively discussed at both the thirty-fourth and thirty-fifth sessions of the Working Group on Arbitration and rejected as being out of place in a model law on conciliation. His delegation was concerned about having it included even in a footnote, because it could create traps for the unwary. Those countries that might consider incorporating it in their national legislation on conciliation should be aware of the potential hazards their nationals might encounter in other jurisdictions where the principle ran counter to national laws and codes of ethics. For example, the International Bar Association's Rules of Ethics for International Arbitration provided that if an arbitrator acted as a conciliator, the normal result would be that the arbitrator would become disqualified from any future participation in the arbitration. Such discrepancies might have the effect of discouraging international conciliation. His delegation felt that if the provision was to be left in at all, it should only be in the Guide to Enactment, accompanied by the appropriate caveats.

38. **Mr. Graham** (Mexico) said that Mexican law had nothing to say about arbitrators acting as conciliators or vice versa. The wording of what was now draft article 13 had evolved over time towards a more liberal interpretation. The rule that a conciliator should not later be an arbitrator in the same matter was not mandatory. The opening phrase, "unless otherwise agreed by the parties", ensured that the option considered desirable by some other delegations was not excluded. However, the inclusion of text in a footnote setting forth a rule that dealt with the area of arbitration could create confusion.

39. **Mr. Heger** (Germany) said the representative of Japan was correct in linking former draft article 16 with article 1, paragraph 8 (a); the two provisions were indeed about the same topic, but on examination they were contradictory. Draft article 1, paragraph 8 (a), stated that the Model Law did not apply to cases where an arbitrator attempted to facilitate a settlement, whereas former draft article 16 sought to formulate a rule for just such a situation.

40. Draft article 13 and former draft article 16 seemed to be contradictory in principle, even though they dealt with somewhat different situations. In draft article 13, the conciliator was barred from acting as an

arbitrator in the same matter subsequent to failed conciliation proceedings, whereas former draft article 16 postulated the situation in China and some other countries where it was normal for an arbitrator, in the midst of arbitration proceedings, to act as a conciliator. However, as Mexico had pointed out, the rule in draft article 13 left room for flexibility, since it was preceded by the phrase, "unless otherwise agreed by the parties".

41. **Mr. Lebedev** (Russian Federation) emphasized the complexity of the problems raised by the Chinese proposal. The previous draft article 16 had been deleted from the text of the Model Law following discussion, at two previous sessions of the Commission, of the difficulties it would cause. However, a large number of countries appeared to have a provision of that kind in their existing law, so there was no objection in principle to States incorporating such a provision when adopting the Model Law. The main problem now was to find a compromise formula to reflect the provision in the text of the Model Law. To ignore it altogether would be the easy way out, but would not square with the Commission's endeavours to find solutions acceptable to a majority of States. Like the United States delegation, he would prefer to place it in the Guide to Enactment. That would perhaps satisfy the interests of China and other countries in having the Commission adopt a text which reflected their own practice and which they could in future incorporate in their own law. It would not affect countries, such as his own and India, whose arbitration law prohibited the practice of combining conciliation with arbitration.

42. **Mr. Jacquet** (France) acknowledged that the legal systems of a number of countries, in addition to China, admitted the practice of combining conciliation with arbitration. He was therefore sympathetic to the Chinese proposal, and felt the Commission should strive for a synthesis which reflected as many trends as possible. However, the technique of including footnotes or optional articles was undesirable and should not be followed in the present instance, because it would detract from the meaning and force of the Model Law. It was already clear that the minimalist approach of including in the Guide to Enactment a comment on the practice of combining arbitration and conciliation would be widely acceptable, but not to China. The only other alternative would be a footnote to draft article 1. However, the former draft article 16 could not be reincorporated in that guise, because it was a statement of a rule. Any footnote must be purely descriptive, indicating merely that some countries admitted the practice of combining arbitration and conciliation.

43. **Mr. Markus** (Observer for Switzerland) said he was reluctant to endorse the proposal to have the former draft article 16 included as a footnote either to article 1, paragraph (8), or to article 6, since that could cause problems for the scope of application of the Model Law. According to draft article 1, paragraph (8), the Model Law did not apply to cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement. That exclusion had been decided upon by the Working Group because, in such cases, the rules in the Model Law would be inappropriate. It did not however mean that conduct of that kind by an arbitrator would be prohibited. Local arbitration rules, or those of the International Bar Association, might prevent an arbitrator from acting as a conciliator, but the Model Law itself was completely neutral on the question. It would therefore be highly problematic to place the former draft article 16 in a footnote. To do so might also create a conflict with draft article 13. Moreover, the former draft article 16 was about arbitration, not conciliation, and did not belong in the Model Law. He therefore agreed with the United States representative that it would be best to deal with the problem in the context of the Guide to Enactment.

44. **Mr. Zanker** (Observer for Australia) said he agreed with the remarks by the representative of the United States and the Observer for Switzerland. He did not support the Chinese proposal.

45. **Mr. Correia** (Observer for Portugal) said he sympathized with the position of the Chinese delegation, but of two possible scenarios — a conciliator being prohibited to act subsequently as an arbitrator, and an arbitrator acting as a conciliator having already begun an arbitration procedure — the Model Law was concerned only with the first. When the former draft article 16 was under discussion, it had been decided not to include it in the Model Law for the very reason that it dealt with arbitration proceedings. He therefore endorsed the views of the representative of France and the Observer for Switzerland. Draft article 13 should be left as it was. He could however agree to the inclusion in the Guide to Enactment of a note explaining the practice of combining arbitration

and conciliation, in the context of article 1, paragraph (8).

46. **Mr. Reyes** (Colombia) said that in view of the rule in draft article 1, paragraph (8), a footnote along the lines proposed by China would prove confusing. For the sake of meeting the concerns of that delegation, he could support the proposal to clarify the problem in the Guide to Enactment, including a reference to draft article 1.

47. **Mr. Cosman** (Canada) said there appeared to be a mistaken notion that his jurisdiction admitted the practice of combining mediation with arbitration; it did not. Nor did he support the notion of reviving the former draft article 16 in the form of a footnote.

48. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said draft article 13 was a statement of a standard rule prohibiting the combination of two contradictory practices. He was attracted by the compromise solution suggested by the representative of France. A footnote could perhaps be included to draft article 13, merely stating as a fact that some countries did admit the practice. The title of draft article 13 should be reviewed by the drafting group. “Conciliator acting as arbitrator” seemed an unsuitable wording, given that the purpose of the article was to prohibit conciliators from doing so.

49. **The Chairman** said the title would be reviewed by the drafting group.

50. **Mr. Marsh** (United Kingdom) said he agreed with the remarks by the United States representative, noting that they had been supported by other delegations. If a reference to the problem was included in the Guide to Enactment, the best place for it would be in the commentary to article 13, rather than the commentary to article 1. Article 1 dealt with the scope of application of the Model Law, not with matters of practice or what conciliators and arbitrators could and could not do.

51. **Mr. Barsy** (Sudan) said he could not support the Chinese proposal. The former draft article 16 ran directly counter to the provision in draft article 1, paragraph (8).

52. **Mr. Tang** Houzhi (China) said he understood that the Commission had to take a neutral position on the question and was anxious to promote the development of international conciliation in commercial matters. However, to the best of his recollection, when the Working Group was discussing draft article 16 no objections had been raised to its content. The decision to leave it out of the Model Law had been made because the role of arbitrators was not supposed to be dealt with in the text. However, at least four of the draft articles did mention arbitrators, so there seemed to be no valid reason why they should not be mentioned as in the former article 16. To his knowledge, over 20 countries had an interest in the relationship between arbitration and conciliation. The two practices went hand in hand, and should both be taken into consideration in the Model Law.

53. **The Chairman** said the matter had been thoroughly discussed in the Working Group, which had offered, as a compromise, to include in the Guide to Enactment a statement explaining that some countries allowed the roles of conciliator and arbitrator to be combined. It was not the Commission’s policy to prohibit that practice.

The meeting rose at 6 p.m.