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Thirty-fifth session

Summary record of the 748th meeting
Held at Headquarters, New York, on Friday, 21 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 3.10 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; A/CN.9/XXXV/CRP.3)

Draft article 3. Variation by agreement (*continued*)

1. **The Chairman** invited the Commission to resume consideration of France's proposal to include a reference to draft article 15 in draft article 3, making enforceability of the settlement agreement one of the mandatory provisions, which parties could not vary by agreement.

2. **Ms. Moosa** (Singapore) said that, on reflection, her delegation could not agree with the French proposal because it would undermine the principle of party autonomy and would be inconsistent with footnote 4 of draft article 15.

3. **Mr. Shimizu** (Japan) said that his delegation was reluctant to see a reference to draft article 15 included in draft article 3. Draft article 15 had intentionally been left open to State interpretation. Footnote 4 provided that an enacting State might consider the possibility of making a procedure for the enforcement of settlement agreements mandatory. Since the nature of draft article 15 was left open, the decision whether to include a reference to it in draft article 3 should also be left to a State's discretion. A footnote to draft article 3 might be drafted explaining that a reference to draft article 15 would depend on the decision of the enacting State with regard to draft article 15.

4. **Mr. Markus** (Observer for Switzerland) said that his delegation could support the French proposal with the reservations previously stated, namely, that although the parties could not give their settlement agreement a greater degree of enforceability than national laws allowed, they might agree to exclude its enforceability in whole or in part.

5. **Ms. Moosa** (Singapore) pointed out, with reference to Switzerland's position, that it was not necessary to stipulate that parties could not give their settlement agreement a greater degree of enforceability than national laws allowed, because from a practical standpoint the mechanisms for enforcement simply would not exist. As another point in favour of flexibility, there might be circumstances in which a dispute was settled merely by one party tendering an apology and the other accepting it. It was hard to imagine how such a settlement could be enforced.

6. **The Chairman** said that, despite some support for the French proposal, the majority of the members seemed to be in favour of leaving draft article 3 as it stood.

7. *Draft article 3 was provisionally approved.*

Footnote 1 of draft article 1 (A/CN.9/XXXV/CRP.3)

8. **Mr. Sekolec** (Secretary of the Commission) introduced conference room paper A/CN.9/XXXV/CRP.3 setting forth proposed changes in the text in the event that States wished to enact the Model Law to apply to domestic as well as international conciliation. Paragraph 1 of A/CN.9/XXXV/CRP.3 presented proposed draft text for incorporation in footnote 1 of draft article 1, and paragraph 2 contained proposed draft text for inclusion in paragraph 47 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514).

9. The conference room paper was the result of a compromise whereby the body of the Model Law would apply only to international conciliation but the footnote would help countries to adapt it if they wished to apply its provisions domestically. A change in the proposed text for inclusion in paragraph 47 of the draft Guide was necessary in order to bring it into line with the paragraph of the Model Law to which it referred. The reference to a sole or third conciliator in paragraph (5) of draft article 6 on appointment of conciliators had been removed as being too reminiscent of arbitration. Therefore, in the proposed text for paragraph 47, wherever "with respect to a sole or third conciliator" appeared, it should be replaced by "where appropriate". Naturally, all paragraph and article references would be corrected to match the final version of the Model Law.

10. **The Chairman** drew the Commission's attention to the need to choose between two alternatives in footnote 1 in relation to paragraph (5) of draft article 1. The first option was merely to delete the paragraph. The second option was to replace the paragraph with the words, "This Law also applies when the parties so agree".

11. **Mr. Morán Bovio** (Spain) said that the proposed text would be helpful to States that did not already have legislation on domestic conciliation and wished to adapt the Model Law to their needs. With regard to the alternatives mentioned, his delegation thought the second alternative was clearer and extended the effect of the Commission's work.

12. **Ms. Moosa** (Singapore) said that her delegation supported the second alternative, but she proposed an amended wording to make it more evidently parallel to the wording of draft article 1, paragraph (5): "This Law also applies to a commercial conciliation when the parties agree to the applicability of this Law."

13. **Mr. Markus** (Observer for Switzerland) said that he wondered what cases were envisaged in which the parties could agree to the applicability of the Model Law. If the Law applied strictly to international conciliation, the parties could agree, pursuant to article 1, paragraph (5), that the conciliation was to be regarded as international or that the Law should apply irrespective of the domestic nature of the conciliation. However, if the Law applied to both domestic and international conciliation, the need for such an agreement fell away. At an earlier stage the decision had been made in the Working Group to rule out applicability to private international law. The only possibility that suggested itself was that the parties might agree that the Law should apply even if their dispute was non-commercial in nature.

14. **Mr. Sekolec** (Secretary of the Commission) said that the drafting of the second alternative had been based on two considerations. First, in very informal conciliations, there might be some doubt whether the Model Law applied, unless the parties agreed that it was applicable. Second, the place of conciliation was often hard to determine, so that agreement by the parties would supply the choice of law. Applicability to non-commercial conciliation had not been considered.

15. **Ms. Renfors** (Sweden) said that it was important not to give the impression that the Model Law applied to non-commercial conciliation.

16. **Mr. Sekolec** (Secretary of the Commission) said that the question of whether parties to non-commercial disputes might agree to the applicability of the Law was not one the Law itself should resolve. That was a matter of public policy in the country concerned. However, the formulation suggested by Singapore might answer Sweden's concern.

17. **Mr. Holtzmann** (United States of America) said that there might be borderline situations in which parties were in doubt whether their transaction fell within the definition of commercial contained in footnote 2 of draft article 1, and an agreement between parties would remove all doubt. There was a value in allowing parties to opt in to the Law, and for that very reason Singapore's formulation was less attractive.

18. **Ms. Moosa** (Singapore) said that in the light of the remarks by the representative of the United States, she withdrew her proposal. She had noted that there was no reference to "commercial" conciliation in the remainder of the text.

19. **The Chairman** suggested the Commission approve the text of A/CN.9/XXXV/CRP.3, with the second alternative wording in paragraph 1: "Replace paragraph 5 of article 1 with the words 'This Law also applies when the parties so agree.'"

20. **Mr. Shimizu** (Japan) said he had difficulty in understanding the observation by the United States representative, namely, that that wording would enable the parties to apply the Model Law in cases where they were unsure about the nature of the conciliation. On an objective judgement, a conciliation must be either commercial or non-commercial. If it was the former, there would be no need for a separate agreement; if the latter, the Model Law could apply by agreement, but was that really the intention in the draft?

21. **The Chairman** said the problem did not lie in the footnote; it had arisen in connection with draft article 1, paragraph (5). It might need some elucidation in the Guide to Enactment.

22. **Mr. Heger** (Germany) said it was apparent that the Model Law was intended to apply in cases where the parties agreed it should. However, according to draft article 1, paragraph (1), it was supposed to apply only to commercial conciliations. He was puzzled why it was now being proposed that the parties should have the power to decide that their conciliation would be subject to the Model Law even though the dispute was not a commercial one.

23. **Mr. Sekolec** (Secretary of the Commission) said that, according to footnote 2 to the draft Model Law (A/CN.9/506, annex), the term "commercial" was to be given a wide interpretation. Because the relationships to be regarded as commercial fell into different categories, some conciliations might well fall into a

grey area, so it would be useful to provide some certainty. If the wording of draft article 1 was adopted without the proposed footnote, the Model Law would apply to both international and domestic commercial conciliations. If the proposed footnote were approved, the words "to a commercial conciliation" in draft article 1, paragraph (5), should be deleted. That would be in line with the Model Law on International Commercial Arbitration, whereby the parties could agree that a relationship was international if they were unsure whether it was or not.

24. **Mr. Lefebvre** (Canada) thought it would be best to take a pragmatic approach, leaving it to the parties to decide whether the Model Law would apply. Courts should not have to determine whether a dispute was commercial in nature.

25. **The Chairman** said that the effect of deleting paragraph (5) of draft article 1, while retaining the proposed footnote, would be that countries which adopted the Model Law could bring non-commercial conciliations within its reach.

26. In reply to a query by Mr. Jacquet (France), he confirmed that that was in fact what the Commission was now considering.

27. **Mr. Jacquet** (France) pointed out that draft article 1 dealt entirely with international conciliations, and would have to be significantly amended as a result, as would draft article 2. He emphasized that the latter required the Model Law to be interpreted bearing in mind its international origin, for the sake of ensuring uniformity of interpretation.

28. **The Chairman** said that the Model Law on International Commercial Arbitration had been incorporated into Mexican law to apply equally to domestic and international arbitrations. However, the legislators now felt they had made a mistake in omitting an interpretation clause from the Mexican arbitration law. Without draft article 2, the effects of the Model Law could differ as between domestic and international proceedings; with it, uniformity of interpretation could be achieved by reference to the "international origin" of the Law.

29. **Mr. Kovar** (United States of America) said it was important to clarify the issues under discussion. The Commission was dealing with two possible alternative formulations for draft article 1, paragraph (5), but was unclear about the consequences of choosing the second option. Did it mean that a dispute, in order to be conciliated, need not be commercial in character, because the parties could opt for conciliation anyway, or that the requirement of a commercial character would continue to apply? If paragraph (5) were deleted and replaced by "This Law also applies when the parties so agree", that would mean that the domestic application of the Law would not necessarily require the commercial standard to be met. If that was not the Commission's intention, some redrafting would be necessary.

30. **The Chairman** said the secretariat was proposing the replacement of paragraph (5) of draft article 1 by: "This Law also applies to commercial conciliations when the parties so agree". The interpretation of paragraph (5) could be elucidated in the Guide to Enactment. Meanwhile, a decision had to be made between the two alternative wordings, as set out in the proposed footnote (A/CN.9/XXXV/CRP.3).

31. **Mr. Shimizu** (Japan) said his delegation preferred the first of the two options for paragraph (5), because paragraph (7) allowed parties to exclude the application of the Model Law.

32. **The Chairman** said a possible solution would be to delete paragraph (5) altogether.

33. **Mr. Heger** (Germany), supported by **Mr. Markus** (Observer for Switzerland), **Mr. Zanker** (Australia), **Mr. Renfors** (Sweden) and **Mr. Jacquet** (France) agreed with the representative of Japan in preferring the first option. The second option would open the possibility of the Model Law applying to non-commercial conciliations, which did not properly fall within its scope.

34. **The Chairman** said he took it that the Commission approved the footnote to draft article 1, as amended, and decided to delete paragraph (5) of draft article 1.

35. *It was so decided*.

36. **Mr. Kovar** (United States of America) asked whether there was any need to revise draft article 2, paragraph (1), in light of the domestic applicability of the Model Law.

37. **The Chairman** said that both the Model Law on Electronic Commerce and the Model Law on Cross-Border Insolvency contained provisions enabling the text to be applied to both domestic and international

cases. It would be very regrettable if the articles of the new Model Law were given a different interpretation in the two contexts.

38. **Mr. Morán Bovio** (Spain) said the emphasis on the international origin of the text was intended to avoid differences in the jurisprudence of countries which adopted it. That emphasis should be retained, to ensure a unitary approach to the application of the Model Law.

The meeting was suspended at 4.20 p.m. and resumed at 5.05 p.m.

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514)

39. **Mr. Sekolec** (Secretary of the Commission) said that the draft Guide to Enactment and Use had been based on the draft text of the Model Law that appeared in the annex to document A/CN.9/506, and would require redrafting in the light of the changes made at the current session. Based on the recommendations of the Commission, the final text would be prepared and published subsequently by the secretariat. It would not come before the Commission for adoption. Earlier model laws had been accompanied by guides to enactment, which had been addressed solely at legislators. The expanded name "Guide to Enactment and Use" reflected the fact that it was also designed to help those using and interpreting the text.

Purpose of the Guide (paras. 1-4 of the draft Guide)

40. **Mr. Holtzmann** (United States of America) said that paragraph 4 would need to be amended to reflect the fact that the Guide was not due to be adopted by the Commission.

Introduction to the Model Law (paras. 5-25 of the draft Guide)

41. **Mr. Holtzmann** (United States of America) said that the definition of conciliation given in paragraph 5 failed to include the key element of the request made by parties for a third person to assist them in settling a dispute. In paragraph 6, it should be clarified that the degree of control that parties retained over the process differed from one part of the Model Law to another. Under some but not all provisions, one party might be entitled to act alone, and according to other provisions, the conciliator controlled the procedure unless the parties stated otherwise. Even though the phrase "alternative dispute resolution" was sometimes taken to include arbitration, the definition given in paragraph 7 excluded it completely. If a definition of the phrase was given at all, it should at least be a more accurate reflection of the two interpretations.

42. The material in paragraphs 5 to 10 should be reorganized with a view to emphasizing the advantages of conciliation. There were a variety of reasons why conciliation could be presented as an attractive alternative, but they needed to be brought out more clearly in the Guide. In paragraph 9, it was inaccurate to state that the admissibility of evidence could be governed by sets of rules such as the UNCITRAL Conciliation Rules. Only laws could guide the courts in determining questions of admissibility.

43. **Mr. Jacquet** (France) said that, in his view, it did not encourage parties to use conciliation to refer to it as "alternative" or "non-adjudicative" dispute resolution. While the definition given in paragraph 7 was not totally inaccurate, it could be redrafted to present conciliation as a more attractive alternative.

44. **Mr. Holtzmann** (United States of America) said that it was debatable whether the Model Law would help to increase stability in the market place, as suggested in paragraph 13, even though conciliation presented a number of other advantages, such as friendliness and cost efficiency. Similarly, it was an exaggeration to describe the objectives of the Model Law as essential for international trade, and paragraph 14 should be amended accordingly. Too much historical detail was given in paragraphs 16 and 17, particularly in relation to arbitration, which tended to constitute a distraction from the focus of the Guide.

45. **Mr. Morán Bovio** (Spain), commenting on the suggestion made by the United States delegation, said that although the section on background and history could be shortened somewhat, it should include a summary of the key moments in the history of the text. A historical overview would be very helpful to legislators who might wish to seek further information on the UNCITRAL web page, look for specific documents or consult with national delegates. It would also be helpful in that it would show a timeline of the Commission's work on the Model Law.

46. **Mr. Zanker** (Observer for Australia) said he agreed with the United States delegation that paragraphs 16 and 17 distracted attention, and it would be better to leave them out. If material relating to the development of texts was to be included, it would be better to show it in tabular form and place it at the back of the document. The table could include cross-references to the papers that had been generated by the Working Group in the course of its discussions.

47. **Mr. Holtzmann** (United States of America) said that the section on structure of the Model Law should be redrafted to focus on avoiding spillover, in other words to deal with what happened with information that was elicited during conciliation if the conciliation did not succeed. That emphasis could be inserted somewhere in paragraphs 20-23, perhaps paragraph 22.

Article-by-article remarks

Article 1. Scope of application (paras. 26-35 of the draft Guide)

48. **Mr. Kovar** (United States of America) recalled that in the discussions on article 1, paragraph (2), his delegation had stressed the importance of clarifying whether a particular series of events constituted a conciliation within the definition of article 1, paragraph (2). A court should consider any evidence that the parties did or did not have an understanding that conciliation existed and that there was a consequent expectation that the provisions of the Model Law would apply.

49. Under the terms of article 1, paragraph (7), the Law would apply to a conciliation conducted by a court. Under paragraph (8), the law would not apply to cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement. In the discussion of article 1, paragraph (8), paragraph 35 of the Guide did not reproduce the wording “attempts to facilitate a settlement” but rather spoke of the court undertaking “a conciliatory process”. The Guide should reflect the difference between the situation in which a court or judge acted not as a conciliator but rather as a facilitator of a settlement and the situation where a judge or arbitrator acted as a conciliator. In the case where a judge did not act as a conciliator, the law did not apply; however, when he put on the hat of a conciliator, the law did apply. The difference could be determined by the fact that in the circumstance of paragraph (8), the court acted on its own initiative or at the request of one party, perhaps, but not of both parties. If a court, acting on its own motion, attempted to facilitate a settlement, it was not acting as a conciliator; however, the moment the two parties came to the judge and requested assistance, the judge then became a conciliator, and he then was governed by the provisions of the Model Law. The matter should be clarified in the Guide.

50. **Mr. Shimizu** (Japan) suggested that the following wording should be included in paragraph 31: “Article 1 is not intended to interfere with the operation of the rules of private international law.”

51. **Mr. Tang** Houzhi (China) said that his delegation agreed with the content of article 1, paragraph (8). The Model Law did not apply to procedural questions such as the number of conciliators that were needed or how they should be designated. It was important to stress the neutrality of the Model Law on procedural questions. He suggested that the following sentence should be included in paragraph 35 or some other appropriate place in the Guide: “The Model Law is not intended to indicate whether or not a judge or an arbitrator may conduct conciliation in the course of court or arbitration proceedings.”

52. **Mr. Zanker** (Observer for Australia) noted that paragraph 27 stated that the term “commercial” was defined in footnote 2 to article 1, paragraph (1); later on, however, that same paragraph went on to say that no strict definition of “commercial” was provided in the Model Law. In order to avoid confusion, it would be preferable to stick to the “illustrative list” terminology rather than using the word “definition” in referring to the footnote.

53. **Mr. Sekolec** (Secretary of the Commission) asked the United States delegation for clarification of his remarks regarding the second sentence of paragraph 35. In the course of drafting the Model Law, it had been established that the process of facilitating a settlement could be carried out by a judge either at the request of the parties or in the exercise of the judge’s prerogative, in other words, on his or her own motion. He was not sure whether he had understood correctly that the United States had suggested that article 1, paragraph (8), should be restricted only to cases where the judge acted on his or her own motion.

54. **Mr. Holtzmann** (United States of America) responding to the Secretary’s request for clarification, said that as he recalled the discussion on article 1,

paragraph (8), the phrase “to facilitate a settlement” had been used in order to avoid using the word “conciliation”. That had been done because when a judge or arbitrator put on the hat of a conciliator, he or she was subject to the Model Law while performing the functions of a conciliator. Under the Chinese system, the arbitrator could become a conciliator for a while and then go back to being an arbitrator. Whether the provisions of the Model Law relating to spillover, confidentiality and related provisions applied or not depended on which hat the judge or arbitrator was wearing. When he was wearing the hat of one who attempted to facilitate a settlement, he was wearing a judge or arbitrator’s hat.

55. The text called for a difference, and the difference was found in the definition of conciliation in article 1, paragraph (2). That definition meant that, if both parties requested, and the judge or arbitrator said “yes”, then the judge’s action fell within the scope of conciliation and all the provisions of the law which governed and protected parties in the event of conciliation applied. But if the elements of the definition were not met, then the provisions of the Model Law did not apply. It was useful to alert parties, judges and others that the phrase “facilitate a settlement” had a different meaning than “conciliation” and that reference must therefore be made to the definition of “conciliation”. His delegation agreed with the Chinese delegation that it should be clearly established that the Model Law did not prevent an arbitrator from changing hats back and forth. Practices differed in different systems, and the Model Law was neutral on that point. That should be noted later on in connection with draft article 13, on the conciliator acting as arbitrator.

The meeting rose at 6 p.m.