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United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 749th meeting
Held at Headquarters, New York, on Monday, 24 June 2002, at 10 a.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 10.10 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/487, A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.1 and Add.1-9)

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

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

1. **Mr. Inoue** (Japan) asked for clarification of article 1, paragraph (8): he wished to know whether the Model Law was considered not to apply to what was termed "court-annexed conciliation", which did not match the definition of conciliation given in article 1, paragraph (2).

2. The Chairman said that paragraph 14 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1) discussed that issue, and that it could be referred to the secretariat in the light of discussions in the drafting group if necessary.

Article 3. Variation by agreement (para. 38 of the draft Guide)

3. **Mr. Jacquet** (France) pointed out that paragraph 38 referred both to the principle of party autonomy and to leaving to the parties almost all matters that could be set by agreement. For the sake of consistency, he suggested that paragraph 38 should instead state that the parties had a general power of derogation over all the articles of the Model Law. That power of derogation was not quite the same as party autonomy, a concept which he thought was best reserved for those articles of the Model Law which contained the phrase "unless otherwise agreed". Operating that distinction would ensure that using the phrase "unless otherwise agreed" was not construed as invalidating article 3 of the Model Law.

4. **The Chairman** said he had understood from his law studies that "derogation" was a term reserved for the legislative authorities, and that the phrase might have to be expanded using a qualifier such as "derogation by the parties" to distinguish it from derogation carried out by the legislative authorities.

5. **Mr. Jacquet** (France) said that the issue which the Chairman had raised was covered by the title of the article itself ("Variation by agreement"); all he wished was to see the body of paragraph 38 of the Guide reflect its own title, and use the terms in that title, rather than refer only to party autonomy.

6. **The Chairman** pointed out that the term "derogation" seemed confined to the French-language version of the draft Model Law and draft Guide. Other languages did not use that term (Spanish used "*modificación mediante acuerdo*").

7. **Mr. Holtzmann** (United States of America) raised several issues in connection with the French delegation's remarks. First, he disagreed with the view that the exercise of party autonomy and the ability to vary the terms of the draft Model Law were two separate matters. He believed that variation was simply an example of exercising party autonomy. Second, with regard to the term "derogation", article 1 of the UNCITRAL Arbitration Rules offered an example of several terms being used to denote the same concept: the first paragraph stated: "… such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing", while the second stipulated that the Rules should apply "except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." As UNCITRAL documents used a variety of terms to describe that phenomenon, he considered that the provisions of the draft Guide were fully adequate, though he was not opposed to further explanation being added to it.

8. Third, he wished to point out that phrases such as "unless otherwise agreed" had been included in some articles and not in others simply for reasons of user-friendliness: the parties would not have to have uppermost in their minds the fact that article 3 of the Model Law applied very nearly across the board. The intention had certainly not been to weaken article 3, but rather to remind the parties of its existence. He suggested that paragraph 38 of the Guide should

explain that where the phrase “unless otherwise agreed” was used in an article of the Model Law, it in no way implied that article 3 of the Model Law failed to apply to those articles from which it was absent.

9. **The Chairman** said that the secretariat would take account of the remarks made when deciding on the wording of the Guide. He had been advised by the secretariat that the positions of the French and United States representatives might not be compatible with each other. There was no technical difference between the general rule set out in article 3 of the draft Model Law and the specific sentence “unless otherwise agreed” added to some of the articles to make them clearer.

10. **Mr. Jacquet** (France) said that his only concern was clarity. Article 3 specified that the parties could agree “to exclude or vary” (“*écarter ou modifier*”) any of the provisions of the Model Law. He would be satisfied if paragraph 38 of the draft Guide made it clearer that those two options existed. “Exclude” denoted “variation by agreement” proper, while “vary” denoted an alteration which the parties had adopted independently.

Article 4. Commencement of conciliation proceedings (paras. 39-44 of the draft Guide)

11. **Mr. Holtzmann** (United States of America), referring to the draft footnote to article 4, which proposed an article X regarding the suspension of the limitation period for the claim to which a conciliation proceeding related, said that in earlier discussions it had been suggested that the Guide should alert parties to the fact that if they adopted article X, additional stipulations might be unavoidable in order to cope with potential future difficulties. Such difficulties included determining the exact start and end of the suspension of the limitation period for the claim, since the Model Law, having been left deliberately flexible, contained no such details. Parties would have to weigh up the advantages and disadvantages of adopting an article on suspension of the limitation period, as it would bring adverse consequences, namely, less flexibility and more need for additional stipulations. The Commission should remain neutral, but still point out that adopting an article X was not without implications.

12. **The Chairman** said that he had serious doubts about the United States proposal. The Commission had decided that the Guide should set out the pros and cons of article X, which was a commitment between the parties and therefore did not lend itself to being treated as a derogation. He also found it difficult to reconcile placing in a guide covering an UNCITRAL text which had been agreed upon, and was intended for adoption as a model, a suggestion that that very text might be imprecise or in need of change. Paragraphs 21 and 22 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1) had thoroughly covered the arguments regarding article X, and a decision had been taken accordingly.

13. **Mr. Holtzmann** (United States of America), said that his delegation had not wished to suggest that the existing text of the Guide was in any way imprecise or in need of change. Its point was that the text was flexible, and that the Guide should contain a balanced discussion on the subject of article X, as it did on other subjects. His recollection was that the Commission had concluded that if article X was included in a footnote to article 4, the Guide should contain a balanced assessment of the kind his delegation was suggesting. He said that his delegation’s reasoning and that advanced by the Chairman were not incompatible, and that the secretariat could take them into account.

14. **Mr. García Feraud** (Observer for Ecuador) said that in his view, the agreement reached following the Commission’s discussion of article X should be adhered to. That discussion had certainly revealed doubts about the wisdom of providing, in a footnote, for the option to adopt article X, but the opposite point of view had also been expressed: not providing for the approach offered by article X would have had the effect of leaving the limitation period on claims handled through conciliation to run out, with no prospect of halting that period. He urged that there should be no break with past practice, and that the Commission should remain neutral.

15. **Mr. Heger** (Germany) said that in his view paragraph 44 of the draft Guide could be considered to have covered the balanced argument favoured by the United States representative, and he did not see how the text could go any further.

16. **The Chairman** said that the secretariat would take into account the remarks made, paragraph 44 of the draft Guide, and paragraphs 21 and 22 of addendum 1 to the draft Report on the thirty-fifth session (A/CN.9/XXXV/CRP.1/Add.1), to present a neutral and

balanced picture of the advantages and disadvantages of article X in the Guide.

Article 5. Number of conciliators; Article 6. Appointment of conciliators (paras. 45-48 of the draft Guide)

17. **Mr. Holtzmann** (United States of America), referring to the first line of paragraph 47 of the draft Guide, dealing with article 6, questioned the use of the phrase "has to be had". In his opinion, the phrase should be modified, as it currently suggested that there was a strict requirement for reference to an institution or third person. If parties did not reach an agreement on the appointment of a conciliator, they might choose to seek assistance, or they might determine that they did not wish to conciliate since an agreement could not be reached on a conciliator. Furthermore, they could also agree to proceed with two conciliators, since it was already established practice that, in conciliation, an even number of conciliators was not essential.

18. His delegation agreed that provisions in article 6, paragraph (6), on disclosure, were not intended to establish new grounds over and above what was provided under existing contract law, and that there was indeed a need to establish that fact within the text of the draft Guide. His delegation also supported the inclusion of the proposed text, contained in paragraph 2 of document A/CN.9/XXXV/CRP.3, for inclusion in paragraph 47 of the draft Guide.

19. **Mr. Marsh** (United Kingdom) recalled that an earlier version of the article dealing with the appointment of conciliators had operated on the basis that each party would choose between two conciliators. In multiparty disputes, it had been agreed that a joint approach would be taken. It appeared that paragraph 46 of the draft Guide reflected the previous, and not the current, principle. A substantial degree of amendment was therefore required.

20. He also questioned the wording of paragraph 46, as it seemed to suggest that, in discussions on the preparation of the draft Model Law, an approach in which each party appointed its own conciliator was inherently better. It would be inappropriate to retain such wording, as that particular approach had not been adopted as a feature of the draft Model Law.

21. **Ms. Renfors** (Sweden) endorsed the views expressed by the United Kingdom representative with respect to the need for paragraph 46 to be modified in order to reflect the changes made to the article dealing with the appointment of conciliators.

Article 7. Conduct of conciliation (paras. 49-53 of the draft Guide)

22. **Mr. Holtzmann** (United States of America) drew attention to the first line of paragraph 51, which stated that the draft Model Law "does not set out a standard of conduct". He believed, on the contrary, that the Model Law did just that. He further stated that although the second sentence accurately reflected the discussion which had ensued, it should be deleted. The draft Guide should not appear to give instructions to States, or imply that paragraph (3) could be used as grounds for upsetting an award. Similarly, paragraph 52 should be deleted, as there was no need to focus on UNCITRAL Conciliation Rules or to enter into a discussion on national laws.

23. **Mr. Sorieul** (International Trade Law Branch) drew attention to the fact that the current discussion was based on documents A/CN.9/XXV/CRP.1/Add.1 and 2, and that addenda 3, 4 and 5 had already been issued. Changes to the draft Guide had derived from substantive discussions of the text.

24. **The Chairman** recalled that a decision had been taken to retain, in the draft Guide, language which would indicate that the draft Model Law was not creating new grounds for setting aside a conciliation settlement (A/CN.9/XXXV/CRP.1/Add.2).

25. If he heard no objection, he would take it that paragraph 52 of the draft Guide should be deleted.

26. *It was so decided*.

Article 8. Communication between conciliator and parties (paras. 54-55 of the draft Guide)

27. **Mr. Zanker** (Observer for Australia), drawing attention to the first line of paragraph 55, said that he wished to question the mention of "equal treatment" since, in his recollection, the only reference to standard of conduct discussed in the preparation of the draft Model Law had been in the context of fair treatment of the parties by the conciliator. He believed that paragraph 55 was not particularly useful and could therefore be omitted entirely.

28. **Mr. Holtzmann** (United States of America) said he supported the view expressed by the Observer for Australia that paragraph 55 should be deleted. If it had

to be retained, however, it would be more appropriately placed within the context of the discussion on article 7, paragraph (3). He believed that details on the conduct of conciliation should be left to the discretion of the conciliator.

29. **Mr. Jacquet** (France) said that he strongly favoured the retention of paragraph 55, as it was particularly useful. The conciliator was not required to adhere to a mathematical calculation of equality of treatment and of time set aside for each of the parties. He conceded that the first sentence could be regarded as ambiguous, but that the rest of the paragraph served to clarify the nuances in the interpretation of article 8.

30. **The Chairman** recalled that doubts had been raised when the subject was discussed in the Working Group, but that it had been considered worthwhile to include paragraph 55 in the draft Guide.

31. **Mr. Zanker** (Observer for Australia) said that even after taking the entire paragraph into consideration, he returned to the conclusion that paragraph 55 should be deleted. He found nothing in document A/CN.9/XXXV/CRP.1/Add.2 or article 8 that dealt with the issue of time. The issue at hand involved the principle of meetings between the conciliator and the parties, either collectively or separately.

32. **The Chairman** suggested that there had been considerable debate on those issues in the Working Group and suggested that further examination of document A/CN.9/506 might be appropriate.

33. **Mr. Soreuil** (International Trade Law Branch) referred the Commission to the report of the Working Group on Arbitration on the work of its thirty-fourth session (A/CN.9/487), in particular to paragraph 129, which summarized the discussion surrounding introduction of the reference to "equal treatment" in draft article 8. A note of caution had been struck about introducing an operative rule that might result in the imposition of excessive formalism.

34. **Mr. Komarov** (Russian Federation) said that his delegation supported the comments made by the representative of France. Paragraph 55 of the draft Guide should be retained for the benefit of legislators. It was important to stress that equal treatment should be a matter not only of form, but also of substance.

35. **Mr. Marsh** (United Kingdom) said that the reference to equal treatment would be more appropriate to article 7 (Conduct of conciliation), since a party would be more likely to look to that article to provide the basis for a complaint in that regard.

36. **Mr. Tang** Houzhi (China) said that the paragraph should not be deleted, since it reflected the considered view of the Working Group. Equal treatment was an important principle of natural justice, on which the success of any conciliation process depended.

37. **Mr. Holtzmann** (United States of America) said that his delegation wished to propose a compromise solution. The words "The conciliator should afford the parties equal treatment, which however" should be replaced with the words "This provision".

38. **Mr. Tang** Houzhi (China) said that no further compromise solution was necessary, since the text had already been agreed by the Working Group.

39. **Mr. García Feraud** (Observer for Ecuador) said that paragraph 55 as currently drafted was justified, since it alerted the conciliator to the importance of ensuring that the parties did not doubt the fairness of the conciliation process. Mistrust in such situations was common.

40. **The Chairman** said that according to paragraph 129 of the above-mentioned report, the Working Group had agreed at its thirty-fourth session that a reference to the equality of treatment to be given by the conciliator to both parties would be better reflected in draft article 7 (Conduct of conciliation). He thus took it that the reference in question should be included in the draft Guide under article 7.

41. *It was so decided*.

Article 9. Disclosure of information between the parties (para. 57 of the draft Guide)

42. **Ms. Moosa** (Singapore), supported by **Mr. Marsh** (United Kingdom), said that the final sentence of paragraph 56 of the draft Guide was overstated. In some countries, including Singapore, the practice of requiring a party's consent before information could be given to the other party had been found to be conducive to conciliation, since it encouraged both parties to be more forthcoming to the conciliator.

43. **Mr. Sekolec** (Secretary of the Commission) suggested that a reference could be made to the fact that practices such as the ones described by the representative of Singapore that were enshrined in the

mediation or conciliation rules of various providers of such services would be valid if agreed upon, and that the Model Law as drafted would not impede such practices or such agreements, although the default position was the one established in the Model Law.

44. **Mr. Inoue** (Japan) said that the meaning and importance of the term "substance" should be clarified in the draft Guide.

45. **Mr. Zanker** (Observer for Australia), expressing support for the views of the representative of Singapore, drew attention to paragraph 30 of document A/CN.9/XXXV/CRP.1/Add.2, which stated that the draft Guide should contain a clear recommendation to conciliators that they should inform the parties that information communicated to a conciliator might be revealed unless the conciliator was specifically instructed otherwise. The draft should thus be modified accordingly. In Australia, confidentiality was observed in all cases by conciliators, contrary to the practice laid down in the Model Law.

46. **Mr. Holtzmann** (United States of America) said that his delegation appreciated the comments made by Singapore, the United Kingdom, Japan and Australia and associated itself with them. The title of article 9 was confusing, in that it referred to information between the parties, whereas the article dealt mainly with communication between the parties and the conciliator, not between the parties themselves. He suggested, therefore, that the Secretariat should reconsider the sentence in paragraph 56 which read, "The intent is to foster open and frank communication of information between parties", as it did not seem to reflect the thrust of the article.

47. **Ms. Moosa** (Singapore) expressed appreciation to the Secretary of the Commission for his suggestion, which was acceptable to her delegation. It was very important to have that statement, as the practice was becoming increasingly popular.

48. **Mr. Marsh** (United Kingdom) welcomed the Secretary's suggestion on amending the final sentence of paragraph 56. It seemed to go farther, however, than merely suggesting that what was regarded as a best practice should be relegated to the default position. While he did not wish to undermine the agreed wording of the article, he wondered whether a way might be found to suggest in the Guide that the practice could be an acceptable alternative.

49. **Mr. Tang** Houzhi (China) said that his delegation supported the statement made by Singapore and requested the secretariat to improve on the paragraph.

50. **The Chairman** said he took it that there were no objections to adopting either the Singaporean proposal or the secretariat's suggestion.

51. **Mr. Sekolec** (Secretary of the Commission) drew attention to the discussions in the Working Group on Insolvency Law, which was preparing a legislative guide on national insolvency law. Several references had been made in those discussions to non-judicial settlement of disputes that arose in the context of insolvency proceedings or efforts to avoid the initiation of such proceedings. Recent positive experience showed the usefulness of mediation and conciliation as a means of facilitating the resolution of disputes that arose in the context of or preceding insolvency proceedings involving commercial enterprises. He therefore proposed to insert in the Guide the following draft text:

> Experience in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral. Notable examples of these are disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor's contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations.

52. **The Chairman** said that, if he heard no objections, he would take it that the Commission wished to adopt the secretariat's recommendation, taking into account that it was based on the views of another expert group.

53. **Mr. Barraco** (Italy) requested the Chairman to clarify his understanding that, at a previous meeting, the Commission had adopted a French proposal to change the title of article 9 to "Disclosure of information by the conciliator". The Singaporean proposal made more sense with that title.

54. **The Chairman** said he recalled that there had been such an agreement, but as the text currently before the Commission was the one prepared by the Working Group, it reflected the previous title.

55. **Mr. Zanker** (Observer for Australia) drew attention to paragraph 25 of document A/CN.9/XXXV/CRP.1/Add.2, wherein it was stated that, as the title of the draft article inadequately reflected the scope of the provision, it should, in line with article 10 of the UNCITRAL Conciliation Rules, read "Disclosure of information".

56. **Mr. Tang** Houzhi (China) said it was to be hoped that the secretariat would make the appropriate changes.

57. **Mr. Kovar** (United States of America) said that his delegation generally supported the wide use of conciliation and would be pleased to see the Model Law applied to a wide variety of commercial situations. However, as the proposal had just been presented, his delegation would appreciate an opportunity to consult with insolvency experts on details of the text.

58. **The Chairman** said that the request by the United States to have time for consultations was entirely appropriate; it meant, however, that the Commission could not take a final decision on the proposal at the current meeting. It would be helpful if the United States and other delegations which found themselves in a similar situation could communicate their response to the secretariat by the end of the day.

59. **Mr. Marsh** (United Kingdom) said that, while the secretariat's suggestion was extremely useful, he was concerned at the possibility that providing an example from only one field, namely, insolvency, might create an impression that the use of conciliation was limited to that field. Currently, only a small percentage of commercial conciliations dealt with insolvency issues, whether at the international or national level.

60. **The Chairman** said that, having drafted the first Mexican insolvency law, he could state that it would have been very helpful to be able to refer to the Model Law, together with the Guide and commentaries, as well as the paragraph proposed by the secretariat, even though it referred to only one example.

61. **Ms. Brelier** (France) requested clarification from the secretariat as to where the draft text was to be inserted. Her delegation associated itself with the reserved attitude shown by the United Kingdom and the United States regarding the reference to the discussions in the Working Group on Insolvency Law. It was impossible to foresee what the consequences of such a reference might be; she wondered, however, whether it might pose the risk of a proliferation of extrajudicial remedies.

62. **Mr. Tang** Houzhi (China) said that, in his country, insolvency disputes had to be resolved in court, as no conciliation regime existed; however, there was no law against resolving such disputes through conciliation procedures. The World Trade Organization attached importance to such procedures because of their flexibility.

Election of officers (*continued*)

63. **Ms. Virbickate** (Lithuania), speaking on behalf of the Group of Eastern European countries, nominated Mr. Milassin (Hungary) for the office of Vice-Chairman.

64. *Mr. Milassin (Hungary) was elected Vice-Chairman by acclamation.*

The meeting rose at 1 p.m.