III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT, THE DRAFT UNCITRAL MODEL LAW ON ELECTRONIC DATA INTERCHANGE AND RELATED MEANS OF COMMUNICATION AND THE DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Summary record (partial)* of the 547th meeting

Tuesday, 2 May 1995, at 10 a.m.

[A/CN.9/SR.547]

Temporary Chairman: Mr. CORELL (Under-Secretary-General, Legal Counsel)

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit: Mr. GAUTHIER (Canada)

The discussion covered in the summary record began at 10.50 a.m.

ELECTION OF OFFICERS

1. The TEMPORARY CHAIRMAN invited nominations for the office of Chairman of the Commission.

2. Mr. SHISHIDO (Japan) nominated Mr. Goh Phai Cheng (Singapore).

3. *Mr. Goh (Singapore) was elected Chairman.*

4. *Mr. Goh (Singapore) took the Chair.*

5. The CHAIRMAN suggested that Mr. Jacques Gauthier (Canada), Chairman of the Working Group on International Contract Practices, should be elected, in his personal capacity, Chairman of the Committee of Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit.

6. *It was so decided.*

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (A.CN.9/405, A/CN.9/408, A/CN.9/411)

Organization of work

7. The CHAIRMAN suggested that, in view of the highly technical nature of the discussion on the draft Convention on Independent Guarantees and Stand-by Letters of Credit, the meeting should be chaired by the Chairman of the Committee of the Whole.

8. *It was so decided.*

9. *Mr. Gauthier (Chairman of the Committee of the Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit) took the Chair.*

10. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to consider the articles of the Draft Convention on Independent Guarantees and Stand-by Letters of Credit as revised at the twenty-third session of the Working Group on International Contract Practices (A/CN.9/408, annex). After a long discussion the Working Group had confirmed the working assumption that the final text would take the form of a convention and not a model law. Draft final clauses had therefore been formulated (A/CN.9/411). He would give a brief general introduction to each article for the benefit of delegations that had not attended the meetings of the Working Group. A drafting group would be set up by the Secretariat to deal with any suggestions for improving the text. An understanding had been reached in the Working Group that time did not allow for the submission of written comments. Since some States had none the less sent in written comments to the Secretariat, he suggested that the representatives of those States should present them orally. Papers would not usually be distributed unless the Commission decided that it wished to see a long proposal in writing.

Article 1

11. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing article 1, pointed out that according to paragraph (1) the Convention applied to an international undertaking. "Undertaking" was defined in article 2, "international" in article 4. Subparagraphs *(a)* and *(b)* of paragraph (1) specified the

*No summary record was prepared for the first part of the meeting.

conditions to be met for the Convention to be applicable. The last part of the paragraph provided for the possibility of opting out.

12. Paragraph (2), applying to the commercial letter of credit, was an opting-in provision, which the Working Group had discussed and chosen to retain.

13. Paragraph (3), referring to the conflict of laws rules, was a reminder that those rules would apply even if the international undertaking was not covered by paragraph (1).

14. He invited comments on the article paragraph by paragraph.

Paragraph (1)

15. Mr. LAMBERTZ (Observer for Sweden) proposed that the *chapeau* of paragraph (1) be amended to refer to "international undertakings" in the plural rather than "an international undertaking" in the singular. That would be a more elegant wording and was also more usual in legal parlance.

16. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the question should be referred to the drafting group.

17. *It was so decided.*

18. Mr. MARKUS (Observer for Switzerland) introduced a joint amendment to paragraph (1)*(a)* by Sweden and Switzerland, which was intended to cover cases where an instrument was issued at a place other than the place of business of the guarantor. Paragraph (1)*(a)* should be amended to read: "If the place of business of the guarantor/issuer is in a Contracting State or, if the guarantor/issuer has more than one place of business, the place of business from which the issuance of the undertaking is directed is in a Contracting State, or".

19. Mr. GAUTHIER (Chairman of the Committee of the Whole) thought that the point raised by Sweden and Switzerland might be covered by the words "at which the undertaking is issued". In the absence of support for the proposal, he would take it that the Commission was happy with the existing wording.

20. Ms. CZERWENKA (Germany) was in favour of making the text a model law, which would be more flexible than a convention and make the scope of application easier to define. The Swedish-Swiss proposal showed that the definition of the scope of application gave rise to problems. Moreover, now that the Working Group had decided not to include rules on jurisdiction in the text, it was unnecessary to give it the form of a convention.

21. Mr. VASSEUR (Observer for Monaco) endorsed that view, pointing out that the title "Convention" had been agreed upon by the Working Group at a very late stage of its deliberations, when many of its members had left.

22. Mr. GAUTHIER (Chairman of the Committee of the Whole) observed that, as shown in paragraph 93 of the report of the Working Group on its twentieth session (A/CN.9/388), the Working Group had later confirmed the assumption that the final text would take the form of a convention. However, it was up to the Commission to decide the matter.

23. Mr. CHOUKRI SBAI (Observer for Morocco) noted that the Working Group had introduced the element of the observance of good faith into the text of the draft Convention (article 5). He considered that the purpose of the independent guarantees in question should be specified. Their duration, if not otherwise stipulated, should be for a maximum of three rather than six years. He was opposed to the text being adopted in the form of a model law, since that would detract from its binding force, an advantage possessed by other UNCITRAL conventions already existing in the field of commerce. With regard to paragraph (1)*(a)* of article 1, he felt that the existing wording did not satisfactorily cover situations where the place of business of the guarantor/issuer was in more than one Contracting State. In such cases, would the location of the head office of the guarantor/issuer determine the applicable place of business? As far as paragraph (2) was concerned, the Convention should only apply to stand-by letters of credit, since otherwise a party which was in a stronger economic position might be able to oblige a weaker partner to waive national or international private law.

24. Mr. SHISHIDO (Japan), endorsing the remarks made by the representative of Germany, said that his delegation supported the adoption of the text in the form of a model law.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the Commission should revert to the question of the final form of the text later.

26. Mr. EDWARDS (Australia) wondered whether the connection between paragraphs (1) and (3) of article 1 was expressed as felicitously as it might be. However, that matter could possibly be referred to the drafting group.

27. Mr. SHISHIDO (Japan), noting that the right of the parties to exclude the Convention as a whole was provided for in the last line of paragraph (1), said that they should, in his view, be permitted to opt out of individual provisions. If the final form of the text adopted were to be that of a convention, his delegation would prefer to see the inclusion of a provision allowing party autonomy, on the lines of article 6 of the United Nations Convention on Contracts for the International Sale of Goods (the 1980 Vienna Sales Convention).

28. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that while it would be possible to include a general provision on party autonomy, the possibility of "opting out" of individual provisions was often dealt with in the provision itself. Expressions such as "unless otherwise stipulated" were to be found throughout the text.

29. Mr. FAYERS (United Kingdom of Great Britain and Northern Ireland) agreed with the representative of Japan. Since there was an opting-out provision in the Vienna Sales Convention, it might be thought odd if the draft Convention did not include similar wording.

30. Mr. HERRMANN (Secretary of the Commission) pointed out that the structure of the two texts was different. The conditions under which the Sales Convention would apply were set forth in article 1. Article 6 then stated, as an exception: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." That text combined two different kinds of rules in a single article, one relating to exclusion of the Convention as a whole, the effect of which was that another law was applicable, and the other to derogation from certain of its provisions. The present draft Convention could follow the same approach, in which case it would be necessary to specify which provisions were to be mandatory and thus not subject to derogation. The place to do that, however, was not in the article on scope of application, which was concerned with whether the Convention applied as such. It would not make sense to say, before it had been established that the Convention applied, that the parties had derogated from or varied certain of its provisions. The two issues were separate and should be dealt with separately.

31. Mr. LAMBERTZ (Observer for Sweden) said that he would have supported a proposal to delete the clause "unless the undertaking excludes the application of the Convention". What would happen if the Convention had already been incorporated into national legislation as an internationally binding obligation and was then excluded by the parties? Would they also have excluded the national law, or not? According to the Secretary, that would depend on whether the implementation of the Convention was based on a binding obligation for the State, in which case the parties that excluded its application would also have excluded the national law implementing the Convention. Other delegations had another interpretation, namely, that excluding the application of the Convention never meant at the same time excluding the application of the national law which implemented it. If so, he did not see the reason for that wording. That was a logical problem, which should be clarified.

32. Ms. CZERWENKA (Germany) said the Commission should concentrate on the substance of the Convention, as it was not assumed to know about national law. The provision in question simply stated the conditions under which the Convention would not apply, but said nothing regarding what would apply if the Convention were excluded, which was up to national legislators.

33. As to the proposal by Japan, Germany had always favoured a set of non-mandatory rules which would stipulate where deviation was possible. The Convention should not follow the approach taken in article 6 of the Vienna Sales Convention; it was sufficient to say that the parties could exclude the application of the Convention as a whole.

The meeting rose at 12.30 p.m.

Summary record of the 548th meeting

Tuesday, 2 May 1995, at 2 p.m.

[A/CN.9/SR.548]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 2.05 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT *(continued)* (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

Article 1 (continued) (A/CN.9/408, annex)

Paragraph 1 (continued)

1. The CHAIRMAN, speaking as representative of Singapore, associated himself with the remarks made by the German delegation at the previous meeting. The Convention could only state what it applied to and what it did not apply to, but could not dictate to the legislature of a Contracting State. However, it was to be assumed that, if a Contracting State introduced legislation to implement the Convention (or model law), it would probably comply with the requirements of the Convention.

2. Ms. ZHANG Yuejiao (China) shared the view of the German delegation. A convention was preferable to a model law.

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, if there were no comments on the question raised by Sweden regarding the effect of the clause "unless the undertaking excludes the application of the Convention", he would assume that the Commission accepted the draft of article 1(1)*(a)* as it stood.

4. *It was so agreed.*

5. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew the Commission's attention to the Japanese suggestion that the Convention might include a provision similar to that in article 6 of the Vienna Sales Convention. In view of the Secretary's earlier remarks on the matter and bearing in mind that the text mentioned possible choices other than those provided for in the Convention, he thought that the Commission might not wish to accept the Japanese proposal.

6. *It was so agreed.*

7. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to discuss whether the product of its deliberations should be a convention or a model law.

8. The CHAIRMAN, speaking as representative of Singapore, asked whether the United Nations would have to convene a diplomatic conference if the text adopted took the form of a draft convention.

9. Mr. HERRMANN (Secretary of the Commission) said that a diplomatic conference would not necessarily have to be convened. He reminded the Commission that the General Assembly had constituted itself as a diplomatic conference to adopt the United Nations Convention on International Bills of Exchange and International Promissory Notes in 1988.

10. Informal talks had been held with those in charge of the programme of work for the Sixth Committee at the fiftieth session of the General Assembly, from which it appeared that, as consideration of one major agenda item had been postponed, there was a possibility that the draft Convention might be considered at that session.

11. Mr. BYRNE (United States of America) said that the Working Group had assumed that the text would take the form of a convention and not of a model law, in view of the need to harmonize international practice. The very flexibility of a model law would militate against international harmony, and a recognized legal regime was needed with regard to international instruments. The difficult and dangerous area of fraud could not be covered by