scope. It must be clear that parties could submit letters of credit other than stand-by letters of credit to the rule if they wished.

54. Mr. AL-NASSER (Saudi Arabia) said that his country's banks and chambers of commerce, had discussed paragraph (2) and had concluded that it was ambiguous; some had even thought that it provided a choice between applying the rules of the International Chamber of Commerce and applying those of the Convention. Like the representative of Spain, he believed the paragraph should be reworded in order to dispel its ambiguity. Its effect should be to refer only to documentary credits. In the absence of satisfactory new wording, the paragraph should be deleted.

55. Mr. LAMBERTZ (Observer for Sweden) said it seemed the general view that a bank should be able to issue a guarantee or a stand-by letter of credit governed by the Convention, and that the Convention should say so expressly—not because that was necessary, but because it would be useful. If the present wording was misleading, an acceptable solution might be to adopt the suggestion made by Germany to replace the reference to an international letter of credit other than a stand-by letter of credit by a reference to all undertakings not covered by article 2. Paragraph (2) would then read along the following lines: "This Convention applies also to undertakings other than those referred to in article 2 if they expressly state that they are subject to the Convention".

56. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the expression "international letter of credit other than a stand-by letter of credit" had been adopted by the Working Group as being the only alternative to the term "undertaking" itself. If the German suggestion was adopted, the text would become meaningless, since an "undertaking" was something defined in article 2, and therefore the "undertaking" in article 1(2)—in effect an undertaking "other than an undertaking"—would not be an undertaking within the meaning of the Convention.

57. Ms. ZHANG Yuejiao (China) was in favour of keeping paragraph (2), which had the virtue of flexibility.

58. Ms. BAZAROVA (Russian Federation) said that paragraph (2) aimed at permitting issuers of commercial letters of credit to apply the Convention to those instruments. She therefore favoured its inclusion, although the text could be worded more clearly. She endorsed the observations of Spain and Saudi Arabia on that point.

59. Ms. ASTOLA (Finland) said that her delegation could accept the article with or without paragraph (2). If it was retained it might usefully be redrafted. She found merit in the German suggestion, which as she understood it, was that the paragraph would refer to an international letter of credit other than that defined in article 2, not that it would refer to undertakings other than those defined in the Convention. A simple alternative would be to say that the Convention applied also to a commercial letter of credit if the document so stated. That would avoid the problems raised by linking paragraph (2) to article 2.

60. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted the general agreement that paragraph (2) was acceptable in its principle—namely, that the Convention could be applied to commercial letters of credit by means of a stipulation in the instrument to that effect—as well as the idea that its text should be clarified. As to the exact wording, the approach suggested by the representative of Germany was to speak of an international letter of credit other than an undertaking as defined in article 2. Unless he heard any objection, he would take it that the Commission referred the paragraph to the drafting group on that understanding.

61. *It was so agreed.*

The meeting rose at 5.05 p.m.

Summary record of the 549th meeting

Wednesday, 3 May 1995, at 9.30 a.m.

[A/CN.9/SR.549]

Chairman: Mr. GOH (Singapore)

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

The meeting was called to order at 9.35 a.m.

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

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

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that paragraph (3) of article 1 was intended to indicate that the two provisions on conflict of laws would apply even if the international undertaking was not covered by paragraph (1).

2. Mr. EDWARDS (Australia) said his delegation would prefer the reader of article 1 to have his attention immediately drawn to the fact that exclusion of the application of the Convention could not apply to the choice of law regime referred to in articles 21 and 22. That should be made clear in paragraph (1).

3. Mr. SHISHIDO (Japan) asked whether the internationality of the undertakings referred to in paragraph (3) was the same as that defined by article 4. He also wondered whether an international letter of credit other than a stand-by letter of credit, as referred to in paragraph (2), was also included in the undertakings referred to in paragraph (3).

4. Mr. HERRMANN (Secretary of the Commission) said that the term "international" would have to be understood as defined in article 4. But whether that was the correct definition with respect to the scope of application of articles 21 and 22 was another matter. The question of choosing between the laws of different States arose in a general international context, for which the definition in article 4 might be too narrow. If so, the remedy would be to include an appropriate definition in articles 21 and 22. Paragraph (3) as at present drafted was a negative rule; the language

could alternatively be drafted in positive terms by stating that the rule of article 1, paragraph (1), defining the scope of application applied only to articles 2 to 20.

5. As to the second question raised by Japan, the undertakings to which article 1, paragraph (3), and all other provisions of the Convention applied were those defined in article 2. It had been specifically decided that article 2 should not include commercial letters of credit. The term "undertaking" as used anywhere in the Convention, therefore, did not as such apply to them. The provisions were, however, drafted in such a way that they could be applied to commercial letters of credit if the parties so desired. It was then up to them to opt in, under article 1, paragraph (2). If it was wished to have a Convention that applied specifically to such instruments from the outset, the text would have to be redrafted.

6. Mr. SHIMIZU (Japan) said he could not understand the logical basis for the application of the Convention. It was designed to apply to the undertakings defined in article 2, but could be extended to other instruments not covered by that article. For the undertakings defined in article 2 to be governed by the Convention, it would not suffice for the parties to state that they wanted it to apply, because the conditions set forth in paragraph (1)*(a)* and *(b)* would also have to be met. With commercial or other letters of credit, on the other hand, it would suffice for the parties to state expressly that they wished for the application of the Convention; the conditions in paragraph (1)*(a)* and *(b)* would not have to be met.

7. Mr. HERRMANN (Secretary of the Commission) said that it would be impossible to specify all types of instruments that could possibly be brought under the umbrella of the Convention by choice of the parties, as the Commission did not even know all the types in existence. Whatever types of instruments might be mentioned, that would not mean that other types could not be opted in. When the parties chose to opt in, that was a matter for them. There was no reason why the conditions in paragraph (1)*(a)* and *(b)* should be met if the parties did not think it necessary. That was only necessary if the Convention was to apply automatically under article 1, paragraph (1).

8. Ms. CZERWENKA (Germany) said she was in favour of redrafting the article, as paragraph (3) sounded adversarial in its present wording. It would be preferable to have a positive wording regarding the scope of application of articles 21 and 22. Thus paragraph (1) might begin "This Convention applies to an international undertaking referred to in article 2; articles 5 to 20, however, only:". Subparagraphs *(a)* and *(b)* would follow, and paragraph (3) would then be deleted. As to the term "international", it would cause problems to have two definitions. The only definition should be the one in article 4, which should also apply with regard to the application of articles 21 and 22.

9. Mr. FAYERS (United Kingdom) said that article 1, paragraph (3), was intended to let the judge know which private international law principles he should apply when paragraph (1)*(b)* was at issue. Paragraph (3) could be redrafted to state that for the purposes of paragraph (1)*(b)*, the rules of private international law would be those set out in articles 21 and 22; it was not necessary to continue with the phrase "irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article".

10. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that paragraph (3) was in fact intended to be broader than the representative of the United Kingdom had indicated. The text was not just a further explanation of how to understand paragraph (1)*(b)*.

11. Mr. HERRMANN (Secretary of the Commission) said that articles 21 and 22 were like a second Convention; they constituted an independent set of rules for a court in a Contracting State if the question of conflict of laws arose. Where the place of business of the guarantor/issuer was not in a Contracting State, but there was an international context, it was necessary to know which law to apply. In article 22, there was a positive and binding rule of private international law which must be applied by the court in a Contracting State and was also binding if it led to the law of a non-Contracting State.

12. Mr. CHOUKRI SBAI (Observer for Morocco) proposed the following wording for the text: "Notwithstanding the rules of the Convention, the provisions of articles 21 and 22 apply to international undertakings as defined in article 2."

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) said the Commission did not seem to be opposed to the objective of paragraph (3) but to feel that it could be stated more clearly. It might be that the text could not be significantly altered without modifying the principle behind it. However, he took it that the Commission wished to record its agreement as to the substance and to ask the drafting group to explore ways of improving the text.

14. *It was so decided.*

Article 2 (A/CN.9/408, annex)

15. Mr. GAUTHIER (Chairman of the Committee of the Whole) called for comments on paragraph (1).

16. Mr. HERRMANN (Secretary of the Commission) drew attention to the fact that the phrase "or upon presentation of other documents" in the fourth line had been added fairly recently in order to make it clear that the demand must itself take the form of a document. The Working Group had not wanted an instrument that would allow an oral demand to suffice. The question of oral demands had been discussed at an early stage in the work, and it had been suggested that the text should include an explicit rule declaring an oral demand alone to be invalid. According to the current draft, an instrument allowing an oral demand would not fall within the Convention's scope of application. Referring them to a query raised by the ICC, he said that the common case of a demand accompanied by some documents could be clearly covered, if there was a need for more clarity, by replacing the word "other" by the word "additional".

17. Mr. CHOUKRI SBAI (Observer for Morocco) suggested, firstly, that in view of its length and range of content, article 2 should be split into two separate articles, the first containing the definition of an undertaking, as in the present paragraph (1), and the second dealing with questions of substance and payment. It would then be possible to expand the definition of an undertaking. Secondly, he proposed that the word "immediately" be added after the words "to pay" in the third line of paragraph (1). Moreover, since the phrase "upon simple demand" might be ambiguous, the demand should be considered valid only if submitted within the period laid down in article 12*(c)*, that is to say, six years. In other words, payment should be immediate if the demand was submitted in time. Thirdly, he suggested adding an extra paragraph to the effect that the objective of the undertaking must be defined; the beneficiary could have several objectives and aims, whereas a letter of credit was issued for a single objective, which should therefore be stated in the guarantee, in order to avoid disputes or conflicts.

18. Mr. FAYERS (United Kingdom) said that although it seemed that the United Kingdom and the ICC were alone in interpreting the phrase "upon simple demand or upon presentation

of other documents" as not including demands needing to be accompanied by other documents, he would like the drafting group to be authorized to add words that would make it clear that such documents were in fact included.

19. Mr. STOUFFLET (France) said that article 2, paragraph (1), listed certain categories of institutions or persons able to issue an independent commitment. Although the Secretary had assured the Commission that the listing did not carry any implication in regard to capacity or authority to give such an independent commitment, he felt that it would be preferable to insert the words "authorized to do so according to the law to which it or he is subject" after the words "other institution or person ('guarantor/issuer')".

20. Mr. AL-NASSER (Saudi Arabia) said that representatives of Saudi Arabian banks had misgivings concerning the institutions authorized to issue independent commitments. He therefore supported the amendment proposed by the representative of France.

21. Ms. FENG Aimin (China) expressed her agreement with the explanation offered by the Secretary, but asked for clarification with reference to article 19.

22. Mr. SHISHIDO (Japan) asked whether or not article 2 excluded commercial letters of credit. Secondly, he wondered whether it would be possible to delete the words "usually referred to as an independent guarantee or as a stand-by letter of credit", since that terminology did not exist in Japanese law and would cause problems.

23. Mr. CHOUKRI SBAI (Observer for Morocco) said that a proper definition was very important for the independence of the commitment. It had to be independent of the link between the principal and the bank or guarantor as well as of that between the principal and the beneficiary. To ensure that the guarantee led to immediate payment of a certain sum to satisfy the objective in question, there must be no sign of any linkage.

24. Mr. KOZOLCHYK (United States of America), referring to the question of an oral demand, said that two possible situations could arise. Firstly, an oral demand might be expressly required, but that happened so rarely that there was no need for the Convention to prohibit such an undertaking. Secondly, the wording of an undertaking might be ambiguous, calling only for a "demand" without specifying that it needed to be in writing. In his view, however, that possibility was covered by article 15 and therefore did not need to be addressed. He expressed his support for the request made by the representative of the United Kingdom that the drafting group should be asked to find a form of words to cover the apparent gap created when a demand was accompanied by additional documents. As for the proposal put forward by the representatives of France and Saudi Arabia, he agreed in principle with their position, but considered that the question should be approached in such a way that it did not give rise to a possible defence based on ultra vires or lack of authority by the issuer. The wording proposed by the representative of France might allow room for such a defence. Should the Commission decide to deal with the question, it might be preferable to include an affirmative statement to the effect that the Convention itself did not give the authority to issue such an undertaking.

The meeting was suspended at 10.50 a.m. and resumed at 11.20 a.m.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole), referring to the question of whether to include wording regarding capacity to enter into the commitments covered by the text, noted that some considered such wording would be acceptable as long as it did not give rise to a defence of *ultra vires*. In his view, the defence that someone was incapable at law always existed and the text did not grant or deny capacity. However, if wording on capacity was to be included, the question would have to be discussed in greater detail. He asked members to give careful thought to that matter before amending the text.

26. A suggestion had been made to include a description of the purpose for which the instrument was issued. That possibility had been examined by the Working Group, but had been considered divisive and unlikely to receive support.

27. Turning to the proposed amendments, he said that on the question of "simple demand" it was not the Working Group's intention to exclude demands accompanied by documents. It seemed, however, that it was possible to construe the present drafting, in English at least, as meaning that such a demand would not be an undertaking within the terms of the Convention. He suggested that the matter be referred to the drafting group to ensure that that risk was eliminated.

28. *It was so agreed.*

29. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew attention to the point raised concerning oral demands. His understanding was that they were not covered by the Convention. After inviting comment, he noted that there did not seem to be any support for including a provision in the Convention to regulate such demands.

30. After inviting comment, he noted that there did not seem to be any support for the proposal to include the word "immediately" before "pay to the beneficiary".

31. After inviting comment, he noted that there did not seem to be any support for the proposal to include, after the word "person", the words "having the legal capacity in accordance with the law of the country applicable to that person".

32. After inviting comment, he noted that there did not seem to be any support for the proposal to introduce a term describing the purpose for which the instrument was issued.

33. On the question of whether commercial letters of credit were covered by article 2, he understood that, given the context of the whole Convention—including article 1(2)—and the words "usually referred to as an independent guarantee or as a stand-by letter of credit", commercial letters of credit were not automatically covered. For them to be covered, the parties would have to make the fact explicit in the undertaking.

34. As to the suggestion that the terms "independent guarantee" or "stand-by letter of credit" might not be clear because they were not widely used in certain market-places, he pointed out that was why the word "usually" had been included.

35. He asked whether there was support for the deletion of the words "usually referred to as an independent guarantee or as a stand-by letter of credit".

36. Mr. CHOUKRI SBAI (Observer for Morocco) said that since the independence of the undertaking was defined in article 3, there should be no problem with the wording of article 2(1).

37. Mr. SHISHIDO (Japan) said that his delegation's problem was not with the terms "independent guarantee" or "stand-by letter of credit", but with the words "usually referred to as". However, Japanese legal requirements would be met if the issuer were required to use the words "independent guarantee" or "stand-by letter of credit".

38. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his country too would have problems with the word "usually",

which was not a legal term. Perhaps the wording "an undertaking is an independent commitment referring to an independent guarantee or stand-by letter of credit" might meet the case.

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) observed that the reason for the inclusion by the Working Group of the words "usually referred to as" was that at one time the words "in the form of a bank guarantee or stand-by letter of credit" had been considered and rejected, because it had been realized that there was no agreed form used in banking circles. The Working Group had then looked at the concept known as the "safe haven", which meant that to be covered by the Convention the instrument would have to be formally entitled "independent guarantee" or "stand-by letter of credit". That solution has been considered unsatisfactory by the Working Group because again there was no formula in widespread use. The word "usually" had therefore been included to take account of market practice.

40. Mr. FAYERS (United Kingdom) proposed that in article 2, paragraph (1), the words "usually referred to as" be replaced by "commonly known as".

41. Mr. CHOUKRI SBAI (Observer for Morocco) pointed out that the use of the terms "independent guarantee" and "stand-by letter of credit" appeared in the title of the draft Convention. The way those terms were used, moreover, varied from country to country. Hence, the specific reference to them in paragraph (1) of article 2 was both superfluous and open to ambiguous interpretation. He therefore suggested that the words "usually referred to as an independent guarantee or as a stand-by letter of credit" be omitted.

42. Ms. BAZAROVA (Russian Federation) said that the word "usually" had a clear meaning in the Russian language. She felt that its deletion from article 2, paragraph (1), would avoid the problem of different usages of the terms in some countries. It was standard practice in the Russian Federation to refer to letters of credit.

43. Mr. GAUTHIER (Chairman of the Committee of the Whole) warned that, if the adverb "usually" were deleted, the verb "referred to" could imply that the undertaking necessarily bore a specific heading. He suggested that the Commission might consider adopting the expression "commonly known as", as proposed by the United Kingdom representative.

44. Mr. EDWARDS (Australia) said that, while he could go along with the expression "commonly known as", it implied wide acceptance, which was not the case in some civil-law countries. He therefore suggested that "known in some legal systems as" might be a suitable alternative.

45. Ms. ZHANG Yuejiao (China) considered that, because the expression "commonly known as" was capable of different interpretations, it would be difficult to make a judgement on the matter.

46. Mr. FAYERS (United Kingdom), referring to the remarks made by the representative of Australia, said that, since an undertaking was commonly known in the market as an independent guarantee or a stand-by letter of credit, perhaps the phrase "in the ordinary course of business known as" might be a more appropriate formulation.

47. Mr. ILLESCAS (Spain) said that, in the Spanish version of article 2, paragraph (1), the phrase *"conocida en la práctica como"* ("known in practice as"), was used to render the English words "usually referred to". It had the dual merit of avoiding the problematic adverb "usually" and of referring to the context of business dealings in a general sense. The English phrasing could possibly be brought into line with the Spanish text at that point.

48. Mr. CHOUKRI SBAI (Observer for Morocco) wondered whether the problem presented by the word "usually" might be overcome by its inclusion in a footnote or square brackets.

49. Mr. LAMBERTZ (Observer for Sweden) said that he favoured the wording "in the ordinary course of business", suggested by the United Kingdom representative, since it made a reference to market practice while avoiding the definition of an absolute rule. He felt that the matter might be left to the drafting group.

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, on the basis of past experience, he would prefer the Commission to find an acceptable solution itself rather than refer the matter to the drafting group.

51. Mr. AL-ZEID (Observer for Kuwait) said that the proposed replacement of "usually referred to as" by "commonly known as" was not fully satisfactory as far as the Arabic version was concerned. He agreed with the representative of Japan and the observer for Morocco that the phrase "usually referred to as ... credit" was both superfluous and potentially confusing. If that phrase were deleted, the definition of undertaking in article 2, paragraph (1), would remain sufficiently clear and encompass other commercial letters of credit.

52. Mr. SHISHIDO (Japan), while expressing a preference for the expression "in the ordinary course of business", said that the addition of a phrase that defined the area of jurisdiction applicable would render the formulation more acceptable in Japanese law.

53. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission was concerned rather with the concept of a widely-shared practice in the international marketplace. Attempts to narrow the definition to the practice of a particular group, such as lawyers or other specialists, should be avoided.

54. Mr. STOUFFLET (France) said that reference to international practice in a text for application at the level of States was inadvisable. The term "demand guarantee", which was employed in uniform rules drawn up by the ICC, a body recognized as a qualified interpreter of practice, could perhaps be added to the terms "independent guarantee" and "stand-by letter of credit".

The meeting rose at 12.30 p.m.