

YEARBOOK

Volume XXXVII: 2006



**UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW**

YEARBOOK

Volume XXXVII: 2006



**UNITED NATIONS
New York, 2011**

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

Changes of and additions to wording that appeared in earlier drafts of conventions, model laws and other legal texts are in italics, except in the case of headings to articles, which are in italics as a matter of style.

A/CN.9/SER.A/2006

UNITED NATIONS PUBLICATION Sales No. E..11.V.1 ISBN 978-921-1-133701-3 ISSN 0251-4265
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Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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INTRODUCTION

This is the thirty-seventh volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).¹

The present volume consists of three parts. Part one contains the Commission's report on the work of its thirty-ninth session, which was held in New York, from 19 June-7 July 2006, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two most of the documents considered at the thirty-ninth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the UNCITRAL on 7 July 2006 at its thirty-ninth session, Explanatory Notes on the United Nations Convention on the Use of Electronic Communications in International Contracts, bibliography of recent writings related to the Commission's work, a list of documents before the thirty-ninth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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¹ To date the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No.</i>
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8

Part One

REPORT OF THE COMMISSION
ON ITS ANNUAL SESSION
AND COMMENTS AND ACTION THEREON

I. THE THIRTY-NINTH SESSION (2006)

A. Report of the United Nations Commission on International Trade Law on its thirty-ninth session (New York, 19 June-7 July 2006) (A/61/17) [Original: English]

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-ninth session of the Commission, held in New York from 19 June to 7 July 2006.
2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The thirty-ninth session of the Commission was opened on 19 June 2006.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 16 October 2000 and 17 November 2003, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:¹ Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), the former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308), and 43 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

5. With the exception of Ecuador, Fiji, Israel, Jordan, Lebanon, Mongolia, Rwanda, the former Yugoslav Republic of Macedonia, Tunisia, Uruguay and Zimbabwe, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Bangladesh, Bolivia, Bulgaria, Cape Verde, Côte d'Ivoire, Cuba, Egypt, El Salvador, Finland, Guinea, Holy See, Kuwait, Latvia, Lesotho, New Zealand, Panama, Philippines, Romania, Senegal, Slovenia, Syrian Arab Republic, Tonga, Ukraine and Viet Nam.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank, and United Nations Economic Commission for Europe;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, Banque des États de l'Afrique centrale, European Community, International Cotton Advisory Committee and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Arbitration Association, American Bar Association, Centro de Estudios de Derecho, Economía y Política, Commercial Finance Association, European Law Students Association, Federación Latinoamericana de Bancos, INSOL International, International Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration, International Insolvency Institute, International Women's Insolvency and Restructuring Confederation, Kuala Lumpur Regional Centre for Arbitration, London Court of International Arbitration, Moot Alumni Association, Association of the Bar of the City of New York, Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration, Swiss Arbitration Association and Union internationale des avocats.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chairperson: Stephen Karangizi (Uganda)

Vice-Chairpersons: Álvaro Sandoval (Colombia)
Wisit Wisitsora-At (Thailand)
Vesna Živković (Serbia)

Rapporteur: Alexander Markus (Switzerland)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 812th meeting, on 19 June, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preliminary approval of a draft UNCITRAL legislative guide on secured transactions.
5. Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
6. Procurement: progress report of Working Group I.
7. Transport law: progress report of Working Group III.
8. Possible future work in the area of electronic commerce.
9. Possible future work in the area of insolvency law.
10. Possible future work in the area of commercial fraud.
11. Monitoring implementation of the 1958 New York Convention.
12. Technical assistance to law reform.
13. Status and promotion of UNCITRAL legal texts.
14. Coordination and cooperation:
 - (a) General;
 - (b) Reports of other international organizations.
15. Congress 2007.
16. Willem C. Vis International Commercial Arbitration Moot competition.
17. Relevant General Assembly resolutions.
18. Other business.
19. Date and place of future meetings.
20. Adoption of the report of the Commission.

E. Establishment of two Committees of the Whole

11. The Commission established two Committees of the Whole (Committee I and Committee II) and referred to them for consideration agenda items 4 and 5 respectively. The Commission elected Kathryn Sabo (Canada) Chairperson of Committee I and José Maria Abascal Zamora (Mexico) Chairperson of Committee II. Committee I met from 19 to 26 June and held 11 meetings. Committee II met from 26 to 28 and on 30 June and held 7 meetings.

F. Adoption of the report

12. At its 821st meeting, on 23 June 2006, at its 822nd meeting, on 26 June 2006, at its 828th meeting, on 30 June 2006, and at its 834th meeting, on 7 July 2006, the Commission adopted the present report by consensus.

III. Preliminary approval of a draft UNCITRAL legislative guide on secured transactions

A. Approval of the substance of the recommendations of the draft UNCITRAL legislative guide on secured transactions

13. The Commission expressed its satisfaction with the progress achieved by Working Group VI (Security Interests) in developing a legislative guide on secured transactions. With a view to approving in principle the substance of the recommendations of the draft guide, the Commission considered the recommendations contained in documents A/CN.9/WG.VI/WP.21/Add.3, A/CN.9/WG.VI/WP.24 and Add.5, A/CN.9/WG.VI/WP.26/Add.4-8 and A/CN.9/611 and Add.1 and 2.

1. Key objectives (A/CN.9/WG.VI/WP.26/Add.7)

14. The Commission approved the substance of the key objectives.

2. Scope of application (A/CN.9/WG.VI/WP.26/Add.7)

15. Broad support was expressed for recommendation 2 (parties, security rights, secured obligations and assets covered). With respect to recommendation 3, the view was expressed that it might not be necessary, as it merely listed examples that would be covered in any case by recommendation 2. It was stated, however, that the non-exhaustive list contained in recommendation 3 was useful in providing guidance to States with respect to a number of important issues, such as, for example, whether the same law should cover both possessory and non-possessory security rights. As to subparagraph (g) of recommendation 3, the Commission noted with appreciation the analysis provided in the note with respect to the appropriateness of a qualified rather than an outright exclusion of security rights in securities, immovable property, aircraft, ships and attachments thereto and agreed to leave that question to Working Group VI. As to subparagraph (h) of recommendation 3, it was generally accepted that some reference might be included to future work on security rights in intellectual property rights in line with the decision of the Commission (see paras. 81-84 and 86 below).

16. With respect to recommendation 4, it was noted that the chapeau should be retained without square brackets and that the substance of subparagraphs (a) (securities) and (b) (immovable property) would depend on whether Working Group VI would decide to adopt a qualified rather than an outright exclusion with respect to security rights in securities and immovable property (see para. 15 above). In particular with respect to directly held securities, the hope was expressed that Working Group VI would not exclude them, as security rights in directly held securities was part of significant financing transactions and directly held securities were not part of the work of other organizations. As to subparagraphs (c) (wages) and (d) (assets necessary for the livelihood of a person), it was widely felt that they should be reformulated in broader terms by reference to law other than secured transactions law.

17. After discussion, the Commission approved the substance of the recommendations on scope.

3. Basic approaches to security (A/CN.9/WG.VI/WP.26/Add.7)

18. The Commission approved the substance of the recommendations on the basic approaches to security that enshrined the comprehensive approach and the functional approach that should be followed in a modern secured transactions law.

**4. Creation of the security right (effectiveness as between the parties)
(A/CN.9/WG.VI/WP.26/Add.7, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611
and Add.1)**

19. With respect to subparagraph (d) of recommendation 16 (creation of a security right in a right that secures an assigned receivable, a negotiable instrument or any other obligation), it was stated that neutral terminology should be used that would be suitable for the various legal systems (see A/CN.9/603, para. 23).

20. As to recommendations 33 and 34 (time of creation), it was widely felt that they should be revised to provide that the parties could agree to postpone the time of creation of a security right until after conclusion of the security agreement or dispossession but not that creation could occur at an earlier time. It was also generally thought that those recommendations should be revised to ensure their consistency with recommendation 7 (creation of a security right by agreement).

21. After discussion, the Commission approved the substance of the recommendations on the creation of the security right.

**5. Effectiveness of the security right against third parties and registration
(A/CN.9/WG.VI/WP.26/Add.5, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611
and Add.1)**

22. It was widely felt that recommendation 34 bis (meaning of third-party effectiveness) was useful in particular for States that were not familiar with the distinction between creation and third-party effectiveness of a security right.

23. While one delegation reserved its position with respect to recommendation 35 dealing with registration as the general method for achieving third-party effectiveness of a security right, it was widely felt that registration was essential to ensure transparency with respect to security rights.

24. In response to a question, it was noted that dispossession of the grantor was a method for achieving third-party effectiveness only if a security right had been effectively created, a matter that was dealt with in recommendation 7 (creation of a security right by agreement) and the definition of dispossession (see A/CN.9/WG.VI/WP.27/Add.1, para. 21, subpara. (pp)).

25. There was broad support in the Commission for the deletion of recommendation 39 bis (third-party effectiveness of a non-acquisition security right in low-value consumer goods) on the ground that there were no financing practices that involved security rights in low-value consumer goods. The Commission referred the matter to Working Group VI.

26. With respect to recommendations 41 and 41 bis (third-party effectiveness of security rights in proceeds), it was widely felt that the two alternatives should be referred to

Working Group VI with a view to trying, to the extent possible, to reach agreement on one of them.

27. With respect to recommendation 47 bis (functions of registration in the general security rights registry), the concern was expressed that subparagraphs (a) and (b) essentially addressed the same point. However, it was generally felt that they should be retained as separate subparagraphs, since subparagraph (a) dealt with registration as a third-party effectiveness method, while subparagraph (b) dealt with priority as the legal consequence of registration.

28. As to recommendation 47 quater (design principles), the concern was expressed that a registry system such as the one described in the recommendation was not possible. However, it was widely felt that such efficient registry systems were already well functioning not only in developed but also in developing countries and in countries with economies in transition. It was also generally felt that the use of the registry should be inexpensive to registrants and searchers, while the costs of the establishment of the registry system could be recovered over a reasonably long period of time.

29. With respect to subparagraph (c) of recommendation 48 (speedy, cost-efficient and effective registration and searching), the concern was expressed that free access to the registry could inadvertently result in breach of privacy and unauthorized use of information. In order to address that concern, the suggestion was made that a screening process should be introduced requiring searchers to have, give or justify the reasons for the search.

30. However, it was widely felt that such a screening process was not necessary and that, while it could not effectively prevent unauthorized use of the registry, it could inadvertently add costs and delays, a result that would outweigh any benefits. It was stated that free access to the registry was the logical consequence of third-party effectiveness, and priority being based on registration as a security right could not produce legal consequences against parties that had no access to the registry. In addition, it was said that experience with land registries indicated that free access did not necessarily lead to breach of privacy or abuse of information. Moreover, it was pointed out that verification of the identity of the searcher at the time of payment of a search fee was a sufficient deterrent to unauthorized use. Most importantly, it was stated that the fact that the record would contain only a limited amount of data minimized the risk of breach of privacy or abuse, which would, in any case, be addressed by other law.

31. With respect to recommendation 48 bis (security and integrity of the registry), a number of suggestions were made. With respect to subparagraph (c), it was suggested that an option be included for States to permit the issuance (including by electronic means) by the registrar of a certified copy of the notice. As to subparagraph (e), it was suggested that the commentary should clarify the allocation of responsibility between a governmental supervisory authority and a private entity operating the registry. With respect to subparagraph (f), the suggestion was made that it should be recast to focus on the need for the information on the registry to be capable of reconstitution rather than on how that result could be achieved.

32. In response to a question relating to recommendation 48 ter (liability for loss or damage) on what recourse was available to registering or searching parties for loss or damage caused by an error in the administration or operation of the registration and searching system, it was clarified that the draft guide left it to States to allocate liability based on other law.

33. With respect to recommendation 49 (required content of notice), the concern was expressed that disclosure of the name of the secured creditor, in particular where the secured creditor was a supplier of goods on credit, could make it possible for competitors to find out the list of suppliers of a certain grantor. The concern was also expressed that requiring the inclusion of reference to the maximum amount for which the security right could be enforced in the notice could inadvertently limit the amount of credit available.

34. With respect to recommendations 50 and 51 (sufficiency of grantor name in a notice), it was suggested that, with respect to companies, reference should be made to the name of the company in the company registry. In addition, it was suggested that reference should also be made to the natural persons that were authorized to represent the company. As to whether other identifiers should also be required, it was widely felt that they would not be necessary with respect to corporations, whose name had to be unique to be accepted by the company registry, but would be useful to identify natural persons with the same name.

35. After discussion, the Commission approved the substance of the recommendations on the effectiveness of the security right against third parties and registration.

**6. Priority of the security right over the rights of competing claimants
(A/CN.9/WG.VI/WP.26/Add.6, A/CN.9/WG.VI/WP.26/Add.4 and
A/CN.9/611/Add.1)**

36. With respect to recommendation 62 ter (priority of security rights in future assets), it was widely felt that it should state more clearly that the rule in recommendation 64 (priority between security rights in the same encumbered assets) applied also to security rights in future assets.

37. In response to a question with respect to subparagraphs (b) and (c) of recommendation 69 (rights of buyers, lessees and licensees of encumbered assets), it was clarified that lessees and licensees took their rights under the lease or license agreement respectively free of the security right. It was widely felt that the recommendation or the commentary should clarify that the security right did not cease to exist, but that the right of the secured creditor to enforce its security right was limited to the lessor's or the licensor's interest.

38. With respect to recommendation 78 (priority of a security right in a right to payment of funds credited to a bank account) and 79 (priority of security rights in money), it was generally felt that the commentary should clarify the meaning of the words "transfer of funds". It was stated that the term "transfer of funds" was intended to cover a variety of transfers, including those by cheque and wire transfer.

39. As to recommendations 82 and 83 (priority of a security or other right in attachments to immovable property), it was stated that an alternative approach might be to require registration of attachments to immovable property only in the general security rights registry and that a note be forwarded from that registry to the immovable property registry. In response, it was observed that that approach was very similar to the one recommended in recommendations 82 and 83; the main difference was said to be that, under the proposed alternative approach, security rights in attachments to immovable property would be registered only in the general security rights registry, while under recommendations 82 and 83 registration could take place in either registry. In that connection, it was pointed out that the particular approach to be followed by each State would depend on the structure of its registry systems.

40. After discussion, the Commission approved the substance of the recommendations on the priority of the security right over the rights of competing claimants.

7. Pre-default rights and obligations of the parties (A/CN.9/611 and Add.2)

41. After discussion, the Commission approved the substance of the recommendations on pre-default rights and obligations of the parties.

8. Rights and obligations of third-party obligors (A/CN.9/611 and Add.1)

42. In response to a question with respect to subparagraph (b) of recommendation W (rights and obligations of the depositary bank), it was stated that the depositary bank was under no obligation to respond to requests for information by third parties even if its customer (the grantor of a security right) had consented to a release of information. However, it was observed that that result could be achieved by way of an agreement between the grantor and the depositary bank.

43. After discussion, the Commission approved the substance of the recommendations on the rights and obligations of third-party obligors.

9. Default and enforcement (A/CN.9/611 and Add.1 and 2)

44. In response to a question with respect to recommendation 89 (general standard of conduct), regarding the difference between the principles of “good faith” and “commercial reasonableness”, it was stated that “good faith” was a subjective standard, while “commercial reasonableness” was an objective standard.

45. With respect to recommendation 101 (secured creditor’s right to possession of an encumbered asset), it was widely felt that the recommendation should be revised to state clearly that the secured creditor could take possession of the encumbered assets out of court with the prior consent of the grantor given in the security agreement. It was stated that such a recommendation was necessary since in many States the secured creditor was not allowed to take possession of the encumbered assets without applying to a court or other authority.

46. In that connection, it was stated that, while theoretically no further consent would be required, if, at the time the secured creditor attempted to take possession of the encumbered assets, the grantor objected, the secured creditor would have to refer the matter to a court or other authority as a result of the limitations in recommendations 89 (general standard of conduct), 100 (relief with respect to extrajudicial enforcement) and 101 (secured creditor’s right to possession of an encumbered asset) and in particular the reference in recommendation 101 to the use or threat of force or any other illegal act.

47. The suggestion was made that, in the absence of prior explicit consent, subsequent implicit consent or acquiescence should be sufficient, provided that the secured creditor notified the grantor of its intention to pursue extrajudicial repossession with details as to its time and modalities. That suggestion was referred to Working Group VI.

48. With respect to recommendation 106 (enforcement of a security right in proceeds under an independent undertaking), it was suggested that the first sentence be deleted.

49. With respect to recommendations 110 and 110 bis (disposition of encumbered assets), the suggestion was made that they should be recast to provide for court authorization of an extrajudicial disposition of encumbered assets, at least for the purpose of determining default and in view of the impartiality of courts and the need to avoid abuse of rights on the part of secured creditors.

50. That suggestion was objected to. It was stated that recommendations 110 and 110 bis appropriately reflected the principle that the secured creditor could dispose of the encumbered assets out of court if the grantor, after having been notified (recommendation 111), neither came forward to pay (recommendation 99) nor objected to out-of-court disposition of the encumbered assets (recommendation 100). In addition, it was observed that practice indicated that default was a factual issue that was easily determined on the basis of documents. Moreover, it was pointed out that the real question was not whether an encumbered asset would be disposed in or out of court but rather whether any party had an interest in and requested a judicial disposition. In that connection, it was said that all parties had an interest in maximizing the realization value of encumbered assets in order to satisfy the secured obligation and minimize the amount of the outstanding debt. With respect to the concern about abuse of rights on the part of the secured creditor, it was observed that other law could more effectively deal with such instances.

51. With respect to recommendation 111 (advance notice with respect to extrajudicial disposition of encumbered assets), it was suggested that the notice should be optional as it would otherwise place an undue burden on the secured creditor. That suggestion was objected to. It was widely felt that the notice of intention to pursue extrajudicial disposition was an important safeguard to protect the grantor against abusive behaviour on the part of the secured creditor. In addition, it was stated that the recommendation provided an appropriate balance between the need for efficiency and the need to protect the grantor and third parties. In that connection, it was observed that subparagraph (e) of recommendation 111 provided for situations in which the notice did not need to be given and recommendation 112 provided for the notice to be given in an efficient, timely and reliable way.

52. With respect to subparagraph (c) of recommendation 111, it was agreed that the Working Group should clarify and simplify the words in the parenthesis, dealing with the notice of extrajudicial disposition to the grantor.

53. With respect to recommendation 112, the question was raised as to when the notice to the grantor or other parties would be deemed to have been received. In response, it was stated that, while recommendation 112 provided some guidance, the time and place of receipt of a notice was a matter for other law. In that connection, the Commission noted that article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts² (the “Convention on Electronic Contracts”) provided guidance with respect to the time and place of dispatch and receipt of electronic communications.

54. With respect to recommendations 113 to 115 (acceptance of encumbered assets in satisfaction of the secured obligation), it was agreed that the recommendations should be revised to make it clear that the grantor could also propose to hand over the encumbered asset to the secured creditor in satisfaction of the secured obligation, provided that the interests of third parties were protected. In that connection, it was stated that giving the asset in payment of the secured obligation was like any other payment and thus would not affect the rights of third parties.

55. The suggestion was also made that encumbered assets could be valued by an independent expert prior to their acceptance by the secured creditor in satisfaction of the secured obligation so that objections that typically arose in the exercise of the remedy could be minimized. It was, however, widely felt that the nature of some assets was such

² General Assembly resolution 60/21, annex.

that an accurate valuation could not be made by an expert and the market itself should be left to set the value of the encumbered assets when they were offered for sale.

56. With respect to recommendation 120 (right of prior-ranking secured creditor to take over enforcement), the Commission noted a suggestion that a higher-ranking secured creditor should be entitled to pay off a lower-ranking secured creditor and obtain a release of the asset from that lower-ranking security right. The Commission referred that suggestion to Working Group VI.

57. After discussion, the Commission approved the substance of the recommendations on default and enforcement.

10. Insolvency (A/CN.9/WG.VI/WP.21/Add.3)

58. The Commission noted that the chapter on insolvency contained recommendations taken from the UNCITRAL Legislative Guide on Insolvency Law³ (the “Insolvency Guide”) and a small number of additional recommendations that focused on specific issues relating to the treatment of security rights in the case of insolvency. The Commission expressed its appreciation to experts from both Working Group V (Insolvency Law) and Working Group VI for their contribution to what was generally found to be a comprehensive and balanced treatment of security rights in insolvency proceedings. With respect to the additional recommendations, it was widely felt that they addressed important issues in a thorough and clear way that was consistent with the Insolvency Guide.

59. With respect to recommendation B (non-unitary approach to acquisition financing devices), it was stated that the two sets of bracketed language should be set out in a way that would make it clear that they were alternatives.

60. With respect to recommendation E (effectiveness of security rights in insolvency) and recommendation 46, subparagraphs (b) and (c), in response to a question it was noted that a secured creditor could take steps to make its security right effective against third parties after commencement of insolvency if secured transactions law permitted such rights to be made effective against third parties within specified time periods. It was also stated that the Insolvency Guide addressed the situations where a secured creditor could take steps to enforce its security right.

61. With respect to recommendation G (automatic termination clauses), it was observed that it should clarify that the commencement of insolvency did not invalidate or render unenforceable a contractual clause that relieved a creditor from an obligation to extend credit.

62. After discussion, the Commission approved the substance of the recommendations on insolvency.

11. Acquisition financing devices (A/CN.9/WG.VI/WP.24/Add.5)

63. It was widely felt that the main difference in the approaches recommended in the chapter on acquisition finance was that, in the unitary approach and one of the two versions of the non-unitary approach to enforcement, acquisition security rights were treated as being functionally equivalent to non-acquisition security rights, while, in the other version of the non-unitary approach to enforcement, retention-of-title devices would be treated as ownership devices.

³ United Nations publication, Sales No. E.05.V.10.

64. With respect to recommendation 130 (priority of acquisition security rights in inventory), the concern was expressed that, by requiring registration before delivery of the goods to the grantor and notification of inventory financiers on record, the recommendation imposed an undue burden on acquisition financiers.

65. In response, it was stated that recommendation 130 reflected an appropriate balance of interests. The interests of the acquisition financier were protected to the extent that it could obtain priority over a previously registered non-acquisition security right in inventory. The interests of the non-acquisition financier were protected to the extent that it did not have to check the registry before extending credit against new inventory as security and could rely on notification from the acquisition financier. In that connection, it was noted that registration and notification did not have to take place before each and every delivery of inventory to the grantor. A notice that has been registered could cover several transactions between the same parties over a long period of time and registration could be very quick in particular if it was made through electronic means of communication. Similarly, it was stated, a notification of non-acquisition financiers on record could cover several transactions over a long period of time (see recommendation 131).

66. However, it was observed that the concern expressed (see para. 64 above) remained unaddressed, at least to the extent that the burden of registration and notification was placed on small- and medium-size acquisition financiers rather than on non-acquisition financiers that would typically be large financing institutions. It was also pointed out that that burden would create obstacles to commerce. In addition, it was stated that consideration should be given, at least, to setting aside the requirement for the acquisition inventory financier to notify non-acquisition inventory financiers on record. In response, it was observed that the law should take into account not only the interests of suppliers of goods on credit as opposed to other credit providers but rather the interests of all parties involved, including buyers, and thus of the economy as a whole. In that connection, it was said that it was crucial to create a level playing field that would promote competition among the various credit providers, which could have a beneficial impact on the general availability and the cost of credit.

67. In addition, it was observed that whether acquisition inventory financiers should notify non-acquisition inventory financiers or whether the registry should send out such notices to non-acquisition inventory financiers was a matter of efficiency that could be considered further. In that connection, it was pointed out that both systems could be efficient. After discussion, it was widely felt that, while recommendation 131 was appropriately cast, the issue of notification of non-acquisition inventory financiers on record could be explored further by Working Group VI.

68. With respect to recommendations 130 bis (priority of acquisition security rights over the rights of judgement creditors) and ter (priority of acquisition security rights in attachments to immovable property), the Commission noted that they were in square brackets as they had not yet been considered by Working Group VI. The Commission referred them to the Working Group.

69. As to recommendation 134 (enforcement), the Commission noted that the main difference between the alternatives set out in the recommendation was that the second version of the non-unitary approach resulted in acquisition security rights not being functionally equivalent to non-acquisition security rights. It was stated that, as a result, all the rights and remedies set out in the enforcement chapter of the draft guide would not apply. In addition, it was observed that reference to the regime applicable to ownership rights would inadvertently result in differences from State to State as there was no uniformity in the treatment of ownership devices. On the other hand, it was said that the

non-unitary approach would not make sense if it was not different, at least in some respects, from the unitary approach. It was also pointed out that States might adopt slightly different systems depending on their evaluation of what system was most efficient. After discussion, the Commission approved the substance of the unitary approach and referred the non-unitary approach to Working Group VI for further discussion.

70. After discussion, and subject to the qualifications mentioned above, the Commission approved the substance of the recommendations on acquisition financing devices.

12. Conflict of laws (A/CN.9/WG.VI/WP.24, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611 and Add.1)

71. The question was raised as to the law that would govern security rights in assets that were moved from State A to State B for a few months and then back to State A. In response, it was stated that, if the assets were mobile assets (e.g. cars or trucks), the creation, third-party effectiveness and priority of a security right in them would be governed by the law of the State in which the grantor was located (recommendation 136). In addition, it was observed that, if those assets were export goods or goods in transit, the creation and third-party effectiveness (but not the priority, which would remain subject to the law of the initial location of the assets) of a security right in them would also be governed by the law of the State of their ultimate destination, provided that the assets would reach that destination within a short period of time after creation of the security right (recommendation 142). Moreover, it was said that, in all other cases, the security right would remain effective against third parties for a short period after the assets were moved to State B and thereafter only if the third-party effectiveness requirements under the law of State B were met (recommendation 145).

72. With respect to recommendations 139 (law applicable to a security right in a right to payment of funds credited to a bank account) and 148 (law applicable to the enforcement of a security right), the Commission urged Working Group VI to reach agreement, if at all possible, on one of the alternatives set out in each one of those recommendations.

73. With respect to the law applicable to a security right in an attachment to immovable property, the Commission noted with interest the suggestion for the application of the law of the State in which the immovable property was located. The Commission referred that suggestion to Working Group VI.

74. After discussion, the Commission approved the substance of the recommendations on conflict of laws.

13. Transition (A/CN.9/WG.VI/WP.26/Add.8)

75. With respect to recommendations 156 to 158 (transition period), it was stated that, rather than addressing creation, they should focus on third-party effectiveness to ensure that a security right that was made effective against third parties under the old law would remain effective against third parties during the transition period. If during that period it was made effective against third parties under the new law, it was said, third-party effectiveness should be continuous.

76. With respect to all the recommendations in the chapter on transition, the Commission noted that they were very general and urged Working Group VI to try to refine and add more details to them so as to strike an appropriate balance between the need to enable parties to benefit from the new law and the need to avoid unsettling business relationships established under the old law.

77. After discussion, and subject to the qualifications mentioned above, the Commission approved the substance of the recommendations on transition.

14. Conclusions

78. After conclusion of its discussion of the recommendations of the draft guide, the Commission expressed its appreciation to the Working Group for the results achieved so far in the development of the draft guide and noted that the views expressed and the suggestions made above (see paras. 13-77) would be taken into account in the next version of the draft guide. In addition, the Commission briefly considered the terminology of the draft guide (see A/CN.9/WG.VI/WP.27/Add.1), which was not part of the recommendations but was intended to facilitate their understanding. It was stated that a definition of the term “consumer goods” could be included in the terminology as several recommendations referred to consumer goods. The Commission referred the terminology to Working Group VI.

B. Future work

79. The Commission next considered its future work. It was noted that Working Group VI was expected to hold another two sessions, one in Vienna from 4 to 8 December 2006 and another in New York from 12 to 16 February 2007 and submit the draft guide for approval by the Commission at its fortieth session, in 2007 (see paras. 272 and 273 (f) below).

80. With respect to the presentation of the material, the suggestion was made that, for the sake of clarity and simplicity, the draft guide might highlight the general recommendations or core principles, for the benefit of those States that might not need all the asset-specific recommendations. The suggestion was also made that the materials should be made available to States as far in advance of the next Commission session as possible. In that connection, one delegation expressed a concern about the complexity of the draft guide, which could jeopardize the acceptability of the draft guide.

81. With respect to future work in the field of secured financing law, the Commission noted that intellectual property rights (e.g. copyrights, patents or trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In that connection, it was stated that financing transactions with respect to equipment or inventory often included security rights in intellectual property rights as an essential and valuable component. It was also observed that significant financing transactions involving security rights in all the assets of a grantor would typically include intellectual property rights.

82. In addition, the Commission noted that the recommendations of the draft guide generally applied to security rights in intellectual property rights to the extent they were not inconsistent with intellectual property law (see A/CN.9/WG.VI/WP.26/Add.7, recommendation 3, subparagraph (h)). Moreover, the Commission noted that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft guide made a general recommendation that enacting States might consider making any necessary adjustments to the recommendations to address those issues.

83. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with expertise in the fields of security rights and intellectual property law and in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its

fortieth session, in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft guide. In addition, it was suggested that, in order to obtain expert advice and the input of the relevant industry, the Secretariat should organize expert group meetings and colloquiums as necessary.

84. There was broad support in the Commission for those suggestions. It was stated that particular attention should be paid to the representation of all parts of the relevant industry and experts from various regions of the world. It was also observed that one issue of particular importance related to the enforcement of security rights in intellectual property rights, which was jeopardized by their unauthorized use.

85. The suggestion was also made that other issues should also be the subjects of notes by the Secretariat concerning future work in the field of secured financing law. In that connection, the Commission noted that plans for a congress on international trade law to be held in conjunction with the fortieth anniversary session of UNCITRAL (see paras. 256-258 below) included, inter alia, the consideration of topics for future work in the field of secured financing law.

86. After discussion, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular WIPO, a note discussing the scope of future work by the Commission on intellectual property financing. The Commission also requested the Secretariat to organize a colloquium on intellectual property financing ensuring to the maximum extent possible the participation of relevant international organizations and experts from various regions of the world. (For additional suggestions regarding future work in the field of secured financing law, see paras. 235-251 below).

IV. Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

A. Organization of deliberations

87. The Commission considered the revised version of the draft legislative provisions on interim measures and the form of arbitration agreement, and of a draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)⁴ (the “New York Convention”), adopted by Working Group II (Arbitration and Conciliation) at its forty-fourth session (New York, 23-27 January 2006) (A/CN.9/592). The Commission took note of the summary of the deliberations on the draft provisions and declaration since the thirty-second session of the Working Group (Vienna, 20-31 March 2000) and the background information provided in documents A/CN.9/605, A/CN.9/606 and A/CN.9/607. The Commission also took note of the comments on the draft provisions and declaration that had been submitted by Governments and international organizations, as set out in document A/CN.9/609 and Add.1-6.

⁴ United Nations, *Treaty Series*, vol. 330, No. 4739.

B. Consideration of the draft legislative provisions on interim measures

1. General comments

88. The Commission recalled that the provisions had been drafted in recognition not only that interim measures were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures (see A/CN.9/485 and Corr.1, para. 78). General agreement was expressed as to the need for a harmonized and widely acceptable model legislative regime governing interim measures granted by arbitral tribunals and their enforcement as well as interim measures ordered by courts in support of arbitration. The Commission recalled that the draft legislative provisions on interim measures and preliminary orders were the result of extensive discussion in the Working Group. The Commission recalled as well that the Working Group, at its forty-second session (New York, 10-14 January 2005), had agreed to include a compromise text of the provisions on preliminary orders, on the basis that those provisions would apply unless otherwise agreed by the parties; that it be made clear that preliminary orders had the nature of procedural orders and not of awards; and that no enforcement procedure would be provided for such orders in section 4 (A/CN.9/573, para. 27).

2. Consideration of draft articles

89. The text of the draft legislative provisions considered by the Commission at the current session was as contained in document A/CN.9/605.

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

Paragraph 1

90. It was recalled that paragraph 1 reproduced in part the wording of article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration⁵ (the “Arbitration Model Law”).

91. Paragraph 1 was adopted in substance by the Commission without modification.

Paragraph 2

Subparagraph (b)

92. A question was raised whether the words “or prejudice to the arbitral process itself”, at the end of subparagraph (b), should be retained.

93. It was recalled that the purpose of those words was to clarify that an arbitral tribunal had the power to prevent obstruction or delay of the arbitral process, including by issuing anti-suit injunctions. It was also recalled that, in the Working Group, anti-suit injunctions had given rise to serious reservations on the part of many delegations. In support of deletion, it was stated that anti-suit injunctions did not always have the provisional nature of interim measures but could also relate to substantive matters such as questions relating to the competence of the arbitral tribunal. It was also said that such a provision derogated

⁵ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

from the fundamental principle that a party should not be deprived of any judicial remedy to which it was entitled.

94. In response, the Commission noted that, at previous sessions, the Working Group had expressed a preference for the inclusion of anti-suit injunctions in draft article 17. It was also recalled that the words in question should not be understood as merely covering anti-suit injunctions but rather as more broadly covering injunctions against the large variety of actions that existed and were used in practice to obstruct the arbitral process.

95. After discussion, paragraph 2 was adopted in substance by the Commission without modification.

Exhaustive nature of the list of functions characteristic of interim measures

96. The Commission recalled that the Working Group, at its thirty-sixth (New York, 4-8 March 2002) and thirty-ninth (Vienna, 10-14 November 2003) sessions, had considered whether all possible grounds for which an interim measure might need to be granted were covered by the current formulation under article 17, paragraph 2 (see A/CN.9/508, paras. 70-76, and A/CN.9/545, para. 21). It was recalled that the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph 2, the list could be expressed as exhaustive (A/CN.9/545, para. 21). The Commission decided that clarification of that matter should be included in any explanatory material accompanying article 17.

Article 17 bis. Conditions for granting interim measures

Paragraph 1

General remark

“Urgent need for the measure”

97. The Commission took note of the decision by the Working Group that the need for urgency should not be a general feature of interim measures. The Commission decided that guidance should be provided in explanatory material indicating how urgency impacted on the operation of the provisions in section 1.

Subparagraph (a)

“Substantially”

98. A suggestion was made to delete the word “substantially” for the reason that it might introduce an unnecessary and unclear requirement, making it more difficult for the arbitral tribunal to issue an interim measure. In support of that proposal, it was said that it would be preferable to leave it to arbitral practice over time to determine how the balance of inconvenience reflected in subparagraph (a) should be used as a standard.

99. In response, it was pointed out that the text of subparagraph (a), including the word “substantially” was consistent with existing standards in many judicial systems for the granting of an interim measure.

100. After discussion, the Commission decided to retain the word “substantially”. Subparagraph (a) was adopted in substance by the Commission without modification.

*Subparagraph (b)**“Prima facie”*

101. A proposal was made to delete subparagraph (b) on the basis that interim measures might need to be granted as a matter of urgency and a requirement for an arbitral tribunal to make a determination as to the possibility of success on the merits of the claim might unnecessarily delay matters or appear as a prejudgement of the case. That proposal was not supported for the reason that subparagraph (b) was considered to constitute a necessary safeguard for the granting of interim measures. It was said that that subparagraph was drafted with the intention that the arbitral tribunal would make a preliminary judgement based on the information available to it at the time of its determination.

102. A proposal to add the words “prima facie” to subparagraph (b) so that the arbitral tribunal would not be required to make a full determination on the question of possibility of success on the merits was not supported. In rejecting that proposal, the Commission noted that the term “prima facie” was susceptible to differing interpretations. It was recalled that the Working Group’s intention in drafting that subparagraph was to provide a neutral formulation of the standard of proof.

“provided that”

103. It was observed that the words “provided that” suggested that the second part of the sentence was a condition for the first part and therefore did not reflect the intention of the Working Group. In order to address that concern, a proposal was made to delete those words and split the subparagraph into two sentences.

104. After discussion, it was agreed that subparagraph (b) should read as follows: “There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination”.

Paragraph 2

105. Paragraph 2 was adopted in substance by the Commission without modification.

Section 2. Preliminary orders**Article 17 ter. Applications for preliminary orders and conditions for granting preliminary orders**

106. Article 17 ter was adopted in substance by the Commission without modification.

Article 17 quater. Specific regime for preliminary orders*Paragraph 1*

107. Paragraph 1 was adopted in substance by the Commission without modification.

Paragraph 2

108. It was noted that paragraph 2 required the arbitral tribunal to give the party against whom a preliminary order was directed an opportunity to present its case at the earliest practicable time. It was noted that while paragraph 1 required the arbitral tribunal to give notice to “all parties”, paragraph 2, which referred to “any party against whom a preliminary order is directed to present its case”, appeared to be more limited. A proposal was made to extend the application of paragraph 2 by adding after the word “directed” the

words “or to any other party”. An alternative proposal was made to replace the words “any party against whom a preliminary order is directed”, with “the party affected by the preliminary order”.

109. It was stated in response that the proposed amendments could unnecessarily complicate the arbitral process. Concern was expressed that the addition of wording such as “any affected party” could provide a person that was not a party to the arbitral proceedings, but nevertheless affected by the preliminary order (for example, a bank), with a right to present its case. It was said that the existing text in paragraph 2 was appropriate in that it gave priority to the party most affected by the preliminary order and did not exclude the possibility that other arbitral parties could respond to the preliminary order if they so wished. It was agreed that the substance of paragraph 2 should be retained but that clarification should be included in explanatory material relating thereto. It was proposed that such explanatory material could indicate that, when an arbitral tribunal invited a party against whom the preliminary order was directed to present its case, that invitation should be copied to all parties and, consistent with general arbitration practice, those parties that wished to react to the preliminary order would do so, even in the absence of a specific invitation. It was also suggested that the explanatory material could clarify that paragraph 2 was not intended to extend to persons that were not party to the arbitration.

110. After discussion, paragraph 2 was adopted in substance by the Commission without modification.

Paragraph 3

111. Paragraph 3 was adopted in substance by the Commission without modification.

Paragraph 4

112. Paragraph 4 was adopted in substance by the Commission without modification.

Paragraph 5

Time when a preliminary order becomes binding

113. A question was raised as to when a preliminary order would become binding on the parties. It was recalled that the arbitral tribunal could, at the same time that it grants a preliminary order, also establish a deadline for the requesting party to put security in place and that this possibility was the reason for the flexible wording “in connection with” under article 17 *sexies*, paragraph 2. It was therefore considered that a preliminary order could become binding on the parties when granted by the arbitral tribunal.

Non-enforceability of preliminary orders

114. The Commission recalled that the Working Group had considered at length whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order and the fact that it could raise practical difficulties, such as whether notification of the preliminary order to the other party should be deferred until after the order had been enforced by a court. Further, it was said that parties usually honour interim measures out of respect for the arbitrators’ authority and a desire not to antagonize them. The Commission noted that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group (see para. 88 above).

Seeking relief in a court

115. The Commission considered a proposal made at the forty-fourth session of the Working Group (New York, 23-27 January 2006) to add the following text, either to paragraph 5 of article 17 quater or in explanatory material: “a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal” (see A/CN.9/592, para. 27). Doubts were expressed as to the need to include such a clarification as it was said that the provision could only operate in exceptional circumstances. It was however pointed out that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. It was suggested that that proposal merely clarified the operation of provisions in respect to preliminary orders.

116. The Commission agreed that wording along the following lines: “a party shall not be prevented from seeking any relief it would otherwise be entitled to seek in a court because it has obtained such a preliminary order from the arbitral tribunal” should be included in any explanatory material.

117. After discussion, paragraph 5 was adopted in substance by the Commission without modification.

Section 3. Provisions applicable to interim measures and preliminary orders**Article 17 quinquies. Modification, suspension, termination**

118. Article 17 quinquies was adopted in substance by the Commission without modification.

Article 17 sexies. Provision of security*Paragraph 1*

119. Paragraph 1 was adopted in substance by the Commission without modification.

Paragraph 2

120. Paragraph 2 was adopted in substance by the Commission without modification.

Article 17 septies. Disclosure*General remarks*

121. The view was expressed that, under many national laws, the obligation for a party to present facts or arguments against its position was unknown. In addition, it was said that that provision did not contain any sanction in case of non-compliance by the party requesting the measure of its disclosure obligation. A proposal was made to delete paragraph 1 and the second sentence of paragraph 2.

122. It was recalled that the two paragraphs of article 17 septies reflected two distinct disclosure obligations that operated in distinct circumstances. Whereas the obligation in paragraph 1 to disclose changed circumstances related to interim measures, the obligation to disclose all “relevant” circumstances in article 17 septies, paragraph 2, was inspired from the rule in existence in certain jurisdictions that counsel had a special obligation to inform the court of all matters, including those that spoke against its position and that it was considered as a fundamental safeguard and an essential condition, namely to the acceptability of preliminary orders. Similarly, in many other legal systems, a comparable obligation arose from the recognized requirement that parties act in good faith. It was

observed that article 17 septies was a result of lengthy discussions in the Working Group and it was recalled that those two paragraphs were carefully drafted, taking account of the type of measures they related to.

123. In support of retaining paragraph 1, it was recalled that the essential purpose of article 17 septies, paragraph 1, was to ensure that a decision to grant an interim measure would be made by the arbitral tribunal on the basis of the most complete record of the facts. Given that the interim measure might be granted at an early stage of the arbitral proceedings, an arbitral tribunal might often be faced with an imperfect record and wish to be informed of any changes concerning the facts on the basis of which the interim measure was granted.

124. Various proposals were made in order to address the objection that the obligation of disclosure contained in article 17 septies, paragraph 1, would be unfamiliar to certain jurisdictions, and therefore difficult to enact in those jurisdictions. In order to provide a more flexible duty of disclosure, adapted to the circumstances of each arbitral proceeding, it was proposed to include as opening words to article 17 septies, paragraph 1, the following words “[i]f so ordered by the arbitral tribunal”.

125. A further proposal was made to replace the words at the end of article 17 septies, paragraph 1, “or granted” with the words “if it becomes aware of such a change”. That proposal was objected to on the ground that it was implicit in article 17 septies that the obligation to disclose would only arise where a party became aware of such a change. As well, it was suggested that inclusion of those words would create difficulties in practice. It was suggested that, if the proposal were retained, additional words were necessary to require the party requesting the interim measure to disclose material changes in circumstances where it should have been aware of such changes.

126. A related proposal was made to amend article 17 septies, paragraph 1, along the following lines: “The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.” The second sentence of paragraph 2 would then be amended as follows: “Thereafter, paragraph 1 of this article shall apply.”

127. After discussion, the Commission adopted the related proposal referred to under paragraph 126 above, and agreed that the explanatory material should clarify the scope of application of the disclosure obligation contained in article 17 septies.

Article 17 octies. Costs and damages

128. Article 17 octies was adopted in substance by the Commission without modification.

Section 4. Recognition and enforcement of interim measures

Article 17 novies. Recognition and enforcement

129. A proposal was made to delete in paragraph 1 the words “unless otherwise provided by the arbitral tribunal”, for the reason that those words introduced an unnecessary condition to enforcement. That proposal did not receive support.

130. Paragraph 1 was adopted in substance by the Commission without modification.

131. Article 17 novies was adopted in substance by the Commission without modification.

Article 17 decies. Grounds for refusing recognition or enforcement*Paragraph 1**Alternative proposal*

132. The Commission considered a proposal made by a delegation, contained in document A/CN.9/609/Add.5, footnote 2 to paragraph 8. It was explained that the proposal was intended to simplify the text and avoid any cross reference to article 36 of the Arbitration Model Law. The application of article 36 to interim measures was said to be of limited relevance in view of the difference in nature between interim measures and award on the merits. Some support was expressed for the proposed shorter draft on the basis that it was concise and set forth rules that were specifically geared to the recognition and enforcement of interim measures, as opposed to the text of draft article 17 decies, which essentially mirrored rules established in the New York Convention in respect of the recognition and enforcement of arbitral awards.

133. However, reservations were expressed against the general policy reflected in the proposed shorter draft, which was said to exclude a number of important details that were set out in draft article 17 decies.

134. After discussion, paragraph 1 was adopted in substance by the Commission without modification.

Paragraph 2

135. It was said that, when a court was called upon to enforce an interim measure, under article 17 decies, paragraph 1 (a)(i) (which referred to the grounds set forth in article 36, sub-subparagraphs 1 (a)(i), (ii), (iii) or (iv)), its decision should not have an effect beyond the limited sphere of recognition and enforcement of the interim measure. The Commission agreed that any explanatory material should clarify that the purpose of article 17 decies, paragraph 2, was to confine the power of a court to the determination of recognition and enforcement of the interim measure only.

136. Paragraph 2 was adopted in substance by the Commission without modification.

Footnote

137. The footnote to article 17 decies was adopted in substance by the Commission without modification.

Section 5. Court-ordered interim measures**Article 17 undecies. Court-ordered interim measures***Drafting proposal*

138. It was suggested that the text of article 17 undecies might be simplified, along the following lines: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in the courts, including in cases where the place of the arbitration proceedings is in a State other than the court's. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

139. That proposal received support. It was clarified that the purpose of article 17 undecies was to preserve the power of courts to issue interim measures in support of arbitration, but should not be understood as expanding the powers of the court

for interfering in the arbitral process. The Commission agreed that that matter should be clarified in any explanatory material to that provision.

“including in cases where the place of the arbitration proceedings is in a State other than the court’s”

140. A suggestion was made that the phrase “where the place of the arbitration proceedings is in a State other than the court’s” appearing in the proposal (see para. 138 above) was unnecessary given the intention to add article 17 undecies to the list of articles contained under article 1, paragraph 2, of the Arbitration Model Law. That suggestion did not receive support because it was considered that those words provided necessary clarification.

141. After discussion, the Commission agreed that article 17 undecies would read as follows: “A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration”. It was explained that that language was more closely aligned to the language used in the Arbitration Model Law and that replacing the words “the court” by the word “courts” at the end of the first sentence was intended to clarify that there was no intention to refer to specific court proceedings, either domestic or foreign. Article 17 undecies was meant to encompass the power of issuing interim measures in relation to court proceedings, domestic or international, as the case may be. However, article 17 undecies did not relate to the function of assistance and supervision of arbitration proceedings (juge d’appui) as referred to in article 6 of the Arbitration Model Law and, consequently, under no circumstances should article 17 undecies be construed as expanding the powers of courts in relation to those functions.

142. The Commission agreed that any explanatory material to article 17 undecies should clarify that the court could exercise jurisdiction on arbitration matters, whether the place of arbitration is located in the enacting State or in another State and that the provision should not be construed as expanding the territorial jurisdiction of courts.

Placement of article 17 undecies

143. The Commission considered whether article 17 undecies should be located elsewhere in another part of the Arbitration Model Law given that it dealt with court-ordered interim measures which might not easily fit into a chapter intended to deal mostly with interim measures granted by arbitral tribunals. One suggestion was to place article 17 undecies following article 9 of the Arbitration Model Law, which dealt with interim measures granted by courts. However, given that article 9 was located within chapter II of the Arbitration Model Law, which related to the arbitration agreement, that option was not considered appropriate. The Commission agreed that a text suggesting that States could place article 17 undecies in the most appropriate part of their enacting legislation could be included in explanatory material accompanying that provision.

3. Consideration of amendment to article 1, paragraph 2, of the Arbitration Model Law

144. The text of the draft amendment to article 1, paragraph 2, of the Arbitration Model Law as considered by the Commission at the current session was as contained in document A/CN.9/605, paragraph 23.

145. The proposed amendment to article 1, paragraph 2, which consisted in adding a reference to articles 17 novies, 17 decies and 17 undecies within the list of excepted articles was adopted by the Commission.

C. Consideration of the draft legislative provision on the form of arbitration agreement

1. General comments

146. The Commission exchanged views on the draft legislative provision recalling that, in order to ensure a uniform interpretation of the form requirement that responded to the needs of international trade, it was desirable to prepare a modification of article 7, paragraph 2, of the Arbitration Model Law, with an accompanying guide to enactment and to formulate a statement addressing the interpretation of article II, paragraph 2, of the New York Convention, that would reflect a broad and liberal understanding of the form requirement.

147. It was recalled that the Working Group's intention in revising article 7 of the Arbitration Model Law was to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. The Commission had before it two texts for consideration, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other omitted the writing requirement altogether (the alternative proposal). The text of the draft legislative provisions considered by the Commission at the current session was as contained in document A/CN.9/606.

2. Consideration of the revised draft article 7

Paragraph 1

148. It was recalled that paragraph 1 reproduced article 7, paragraph 1, of the Arbitration Model Law. A proposal was made to delete the second sentence in that paragraph for the reason that it was considered unnecessary. That proposal was not accepted.

149. After discussion, paragraph 1 was adopted in substance by the Commission without modification.

Paragraph 2

150. Paragraph 2 was adopted in substance by the Commission without modification.

Paragraph 3

151. The Commission noted that paragraph 3 defined the writing requirement and sought to clarify how the writing requirement could be fulfilled.

152. Various proposals were made to amend paragraph 3. One proposal was to add as the opening words of paragraph 3: "Without prejudice to the parties' consent in the arbitration agreement or contract" in order to emphasize the importance of the consent of the parties. A related proposal was made to redraft paragraph 3 as follows: "an arbitration agreement or contract may be concluded orally, by conduct or by any other means of proof which manifest the will of the parties". Another proposal, aimed at clarifying the meaning of paragraph 3 was as follows: "The form prescribed in paragraph 2 is met if the content of the arbitration agreement is recorded in any form, an arbitration agreement is in writing,

whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means". Yet another proposal was made along the lines suggested in document A/CN.9/609. Those proposals did not receive support.

153. The Commission noted that the Working Group, at its forty-fourth session (New York, 23-27 January 2006), had discussed whether the purpose of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement. At that session, it was observed that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement (A/CN.9/592, para. 61). The Commission confirmed that paragraph 3 dealt with the definition of the form of the arbitration agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national legislation. In that context, the Commission took note of a comment that, by contrast with certain national laws under which the written form of the arbitration agreement was prescribed to achieve certainty about the parties' will to arbitrate, the revised text of paragraph 3 achieved a significant change of perspective by shifting the focus of the provision on reaching certainty regarding the substance of the rights and obligations created by the arbitration agreement, including rules that might govern the arbitration proceedings. It was also pointed out that the question of proof of the content of the agreement and that of proof of the consent could not be dissociated from each other, and the writing could only prove existence of the arbitration agreement if at the same time it established the parties' agreement to arbitrate.

154. The Commission confirmed that a mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure were cases that were not intended to be covered by paragraph 3 and that such a clarification should be included in any explanatory material accompanying that paragraph. The Commission agreed that further clarification as to the factual situations that were intended to be covered by paragraph 3 could be included in any explanatory material accompanying that provision.

155. After discussion, paragraph 3 was adopted in substance by the Commission without modification.

Paragraph 4

156. It was observed that paragraph 3 already provided that an arbitration agreement could be concluded "by any other means", and that those words encompassed the conclusion of an arbitration agreement by electronic means referred to under paragraph 4. The need to retain paragraph 4 was therefore questioned.

157. In favour of its deletion, it was said that it was inappropriate for legislation relating to arbitration to contain provisions on electronic communications and that the definitions provided under paragraph 4 were already contained in other UNCITRAL instruments, namely the UNCITRAL Model Law on Electronic Commerce⁶ and the Convention on Electronic Contracts. A proposal was made to delete paragraph 4 and add, at the end of paragraph 3, words along the following lines: "including electronic communications". An alternative proposal was made to retain paragraph 4, but simplify its content by referring in footnotes to the definitions that were already contained in the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts. Those proposals did not receive support.

⁶ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also the accompanying Guide to Enactment.

158. In favour of retaining paragraph 4, it was said that the language used in paragraph 4 was consistent with that used in article 9, paragraph 2, of the Convention on Electronic Contracts, and the definitions of “electronic communication” and “data message” reproduced the definitions contained under subparagraphs (b) and (c) of article 4 of that Convention. It was observed that maintaining consistency between UNCITRAL texts was crucial and that the definitions contained under paragraph 4 would provide useful guidance.

159. After discussion, paragraph 4 was adopted in substance by the Commission without modification.

Paragraph 5

160. A comment was made that the situation addressed by paragraph 5 rarely arose in practice, and that that provision could be deleted as paragraph 3 already contemplated the situation covered under paragraph 5. It was objected that that provision was already part of article 7 of the Arbitration Model Law and deleting it might be misinterpreted as invalidating arbitration agreements concluded by an exchange of statements of claim and defence in which the arbitration agreement was alleged by one party and not denied by the other.

161. After discussion, paragraph 5 was adopted in substance by the Commission without modification.

Paragraph 6

162. Paragraph 6 was adopted by the Commission without modification.

3. Consideration of the alternative proposal to draft article 7

163. The Commission noted that the alternative proposal omitted entirely the writing requirement and thereby recognized oral arbitration agreements as valid.

164. A question was raised whether the alternative proposal should be retained. It was said that the revised draft article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements in order, for example, to recognize the validity of oral arbitration agreements. While the alternative proposal met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries.

165. In support of retention of the alternative proposal, it was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, that removal had not given rise to significant disputes as to the validity of arbitration agreements. In such jurisdictions, it was said that the provision contained in the revised draft article 7 would be unlikely to be adopted and that therefore the alternative proposal should be retained. In addition, it was argued that the trend was towards relaxing the form requirement for the arbitration agreement and that therefore the Arbitration Model Law, with a view to providing a solution for the future, should offer to national legislators the possibility to opt for the alternative proposal.

166. In addition, it was observed that State courts tended to interpret the New York Convention in light of the provisions of the Arbitration Model Law and that the revised draft would indicate to States that the written form requirement contained in article II,

paragraph 2, of the New York Convention should be interpreted in a more liberal manner. It was observed as well that according to article V, paragraph 1 (a), of the New York Convention, the issue of the validity of the arbitration agreement (in the context of a request for enforcement of the arbitral award) was governed by the law of the place where the award was made and that therefore, if the arbitration agreement was valid pursuant to the law of the place of arbitration, the award was enforceable pursuant to the New York Convention in its States parties. It was further observed that State courts could still refer to article VII, paragraph 1, of the New York Convention to apply a more favourable domestic legislation.

167. After discussion, the alternative proposal was adopted in substance by the Commission without modification.

4. Presentation of the revised draft article 7 and the alternative proposal

168. It was questioned whether the revised draft article 7 and the alternative proposal should be presented as options in the Arbitration Model Law. Concern was expressed that presenting options in the Arbitration Model Law would not encourage harmonization of legislation in that field and might potentially create difficulties for enacting States.

169. It was suggested that the alternative proposal could be inserted as a footnote to the revised draft article 7 or in any explanatory material. It was objected that both texts represented two different approaches on the question of definition and form of arbitration agreement, the first to liberalize the writing requirement and the second to suppress that requirement altogether, and presenting the alternative text as a footnote to the revised draft article 7 would therefore be unsatisfactory.

170. After discussion, the Commission decided to present both the revised draft article 7 and the alternative proposal as options in the text of the Arbitration Model Law and to include guidance for enacting States in respect of each option.

5. Consideration of article 35, paragraph 2, of the Arbitration Model Law

171. It was noted that article 35, paragraph 2, of the Arbitration Model Law, which was modelled on article IV of the New York Convention, provided that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, as well as the original arbitration agreement or a duly certified copy thereof. The Commission observed that, in its deliberations regarding the written form of arbitration agreements, the Working Group had considered it necessary to ensure that a modified understanding of the writing requirement (article 7 of the Arbitration Model Law, and article II, para. 2, of the New York Convention) would be reflected in article 35, paragraph 2, of the Arbitration Model Law, through an amendment to that article as envisaged in document A/CN.9/606, paragraph 22.

172. A proposal was made to delete the word “certified” from the first and second sentences in article 35, paragraph 2, for the reason that inclusion of such a requirement had created, in some cases, uncertainty as to who could undertake the certification and what the certification would consist of, which could hinder unnecessarily the enforcement of an award. In that respect, it was noted that the question of the need for certification or similar evidence regarding the authenticity of a text or its translation was a matter that was better left to the general law of evidence, or court rules, and to judicial discretion than dealt with by way of imposed requirements that could be overly cumbersome and open to differing interpretations.

173. After discussion, the Commission agreed that article 35, paragraph 2, should read as follows: “The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language”. It was agreed that, in line with the footnote to article 35, the conditions set forth in that article were intended to set maximum standards and that the explanatory material should clarify that deletion of the certification requirement should not be read as ruling out the possibility that certification might be required by judges, where appropriate and in accordance with local law.

6. Additional provision

174. The Commission considered whether the Arbitration Model Law should include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)⁷ (the “United Nations Sales Convention”), which was designed to facilitate interpretation by reference to internationally accepted principles. The Commission observed that similar provisions were included in other model laws prepared by the Commission, including article 3 of the UNCITRAL Model Law on Electronic Commerce.

175. The Commission agreed that the inclusion of such a provision would be useful and desirable because it would promote a more uniform understanding of the Arbitration Model Law. The Commission agreed that the provision should read as follows:

“Article 2 A. International origin and general principles

“1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

“2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

7. Explanatory material

176. It was noted that recent model laws adopted by UNCITRAL were accompanied by a guide to enactment and use. Such guides were generally regarded as useful instruments for national legislators and other users of UNCITRAL standards. They also furthered the process of harmonization of laws. After discussion, the Commission agreed that it would be useful to prepare a guide to enactment and use for the entire Arbitration Model Law as revised. The Secretariat was requested to prepare a draft guide for consideration at future sessions of the Working Group and the Commission.

D. Consideration of the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention

177. The text of the draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, as considered by the Commission, was contained in paragraph 4 of document A/CN.9/607.

⁷ United Nations, *Treaty Series*, vol. 1489, No. 25567, and United Nations publication, Sales No. E.95.V.12.

178. A question was raised as to whether it was appropriate for the Commission to issue a declaration on the interpretation of a multilateral treaty. The Commission recalled that it had a mandate, as defined in its founding General Assembly resolution 2205 (XXI), *inter alia*, to promote “ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade”.⁸ Therefore, issuing a recommendation that was persuasive rather than binding in nature, for the benefit of users of the treaty, including law-makers, arbitrators, judges and commercial parties, was within the mandate of the Commission. Such a recommendation was said to be appropriate and, in the circumstances, particularly desirable as it would encourage the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encourage States to adopt the revised version of article 7 of the Arbitration Model Law.

179. The Commission noted the discussions of the Working Group on the form of the document, including the question whether the document should take the form of a declaration or a recommendation (A/CN.9/485, paras. 65-69). The Commission agreed that the purpose of the document, in line with the Commission’s mandate, was to propose a harmonizing interpretation of certain provisions of the New York Convention, without interfering with the competence of the State parties to the New York Convention to issue binding declarations regarding the interpretation of that treaty.

180. Against that background, the Commission agreed that the most appropriate form for such a document was that of a recommendation, instead of a declaration which could be misinterpreted as to its nature. The title of the document was amended accordingly. The Commission also agreed to bring forward the reference to its mandate in the opening paragraphs of the recommendation.

E. Adoption of legislative provisions and recommendation

181. The Commission, after considering the text of the draft model legislative provisions relating to the definition and form of arbitration agreements and interim measures, and the text of the draft recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, adopted the following decision at its 834th meeting, on 7 July 2006:

“The United Nations Commission on International Trade Law,

“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

“Recalling also General Assembly resolution 40/72 of 11 December 1985 noting the adoption of the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law and recommending that all States give due consideration to the Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice,

⁸ General Assembly resolution 2205 (XXI), section II, paragraph 8 (d).

“Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

“Recognizing also the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form requirement of arbitration agreement and the granting of interim measures,

“Believing that revised articles of the Model Law on the requirement of written form and interim measures, together with explanatory material relating thereto, will significantly enhance the operation of the Model Law,

“Noting that the preparation of the revised articles of the Model Law was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

“Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely,

“1. Adopts the revised articles of the UNCITRAL Model Law on International Commercial Arbitration as they appear in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;⁹

“2. Recommends that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial arbitration practice;

“3. Adopts the recommendation regarding the interpretation of articles II, paragraph 2, and VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, as it appears in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session.”

F. Future work in the field of settlement of commercial disputes

182. With respect to future work in the field of settlement of commercial disputes, the Commission had before it two notes entitled “Possible future work in the field of settlement of commercial disputes” (A/CN.9/610 and Corr.1) and “Possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules” (A/CN.9/610/Add.1).

183. The Commission took note of suggestions of the Working Group made at its forty-fourth session (New York, 23-27 January 2006) that priority consideration be given to, inter alia, possible revision of the UNCITRAL Arbitration Rules;¹⁰ arbitrability of

⁹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

¹⁰ *Ibid.*, *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); and online dispute resolution (see A/CN.9/592, paras. 89-95).

184. It was agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules. It was observed that the list contained in document A/CN.9/610/Add.1 provided a useful starting point in that respect.

185. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that a study might be undertaken of the question of arbitrability and other forms of alternative dispute resolution in the context of immovable property, unfair competition and insolvency. It was cautioned, however, that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.

186. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts, already accommodated a number of issues arising in the online context. Another topic mentioned was the issue of arbitration in the field of insolvency. Yet another suggestion was to address the impact of anti-suit injunctions on international arbitration. A further suggestion was to consider clarifying the notions used in article I, paragraph 1, of the New York Convention, of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.

187. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should undertake work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic that the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.

V. Procurement: progress report of Working Group I

188. At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004 respectively, the Commission considered the possible updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services¹¹ and its Guide to Enactment, on the basis of notes by the Secretariat (A/CN.9/539 and Add.1 and A/CN.9/553).¹² At its thirty-seventh session, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations. The Commission noted that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.¹³

189. The Working Group commenced its work pursuant to that mandate at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided to proceed with in-depth consideration of the topics suggested in the notes by the Secretariat (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32)¹⁴ in sequence at its future sessions (A/CN.9/568, para. 10).

190. At its thirty-ninth session, the Commission took note of the reports of the eighth (Vienna, 7-11 November 2005) and ninth (New York, 24-28 April 2006) sessions of the Working Group (see A/CN.9/590 and A/CN.9/595, respectively).

191. The Commission was informed that, at its eighth and ninth sessions, the Working Group continued the in-depth consideration of the topics related to the use of electronic communications and technologies in the procurement process. The Commission noted that, pursuant to the Working Group's decision at its seventh session to accommodate the use of electronic communications and technologies (including electronic reverse auctions) in the Model Law (A/CN.9/575, para. 9),¹⁵ the Working Group, at its ninth session, had come to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary in that regard. The Commission also noted that the Working Group had decided that at its subsequent sessions it would proceed with the in-depth consideration of the proposed revisions to the Model Law and the Guide addressing the remaining aspects of electronic reverse auctions and the investigation of abnormally low tenders, and would take up the topics of framework agreements and suppliers' lists (A/CN.9/595, para. 9).

192. The Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law. In the context of its consideration of agenda item 14, Coordination and cooperation, with reference to document A/CN.9/598/Add.1 (see para. 232 below), the Commission recommended that the Working Group, in updating

¹¹ Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I, and United Nations publication, Sales No. E.98.V.13, which contains also the accompanying Guide to Enactment.

¹² Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 225-230 and *ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 79-82.

¹³ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 81-82.

¹⁴ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 171.

¹⁵ Ibid.

the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law. (For the following two sessions of the Working Group, see para. 273 (a) below.)

VI. Transport law: progress report of Working Group III

193. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea, such as the scope of application, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper and transport documents.¹⁶ At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft convention on transport law should cover door-to-door transport operations.¹⁷ At its thirty-sixth, thirty-seventh and thirty-eighth sessions, in 2003, 2004 and 2005, respectively, the Commission noted the complexities involved in the preparation of the draft convention, and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two-week sessions.¹⁸

194. At its thirty-ninth session, the Commission took note with appreciation of the progress made by the Working Group at its sixteenth (Vienna, 28 November-9 December 2005) and seventeenth (New York, 3-13 April 2006) sessions (see A/CN.9/591 and Corr.1 and A/CN.9/594, respectively).

195. The Commission was informed that, at its sixteenth and seventeenth sessions, the Working Group had proceeded with its second reading of the draft convention and had made good progress regarding a number of difficult issues, including those regarding jurisdiction, arbitration obligations of the shipper, delivery of goods, including the period of responsibility of the carrier, the right of control, delivery to the consignee, scope of application and freedom of contract, and transport documents and electronic transport records. Also considered by the Working Group were the topics of transfer of rights and, more generally, the issue of whether any of the substantive topics currently included in the draft convention should be deferred for consideration in a possible future instrument. The Commission was also informed that the Secretariat had facilitated the initiation of consultations that were currently under way between experts from Working Group III (Transport Law) and experts from Working Group II (Arbitration and Conciliation) with the hope that an agreement could be found on the provisions in the draft convention relating to arbitration.

196. The Commission was informed that, with a view to continuing the acceleration of the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft convention, a number of delegations participating in the sixteenth and seventeenth sessions of the Working Group had continued their initiative of holding informal consultations for the continuation of discussion between sessions of the Working Group.

¹⁶ Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

¹⁷ Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

¹⁸ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208; *ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 133; and *ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), para. 238.

197. Some concerns were expressed regarding the treatment in the draft convention of the issues of scope of application and freedom of contract. The freedom given to the parties to volume contracts to derogate from provisions of the draft convention was said to constitute a significant departure from the prevailing regime in transport law conventions. It was argued that, in view of the broad definition of volume contracts in article 1 of the draft convention, freedom of contract might potentially cover almost all carriage of goods by shipping lines falling within the scope of the draft convention. It was further argued that the conditions for valid derogation from the draft convention did not require the express consent to the derogations by both parties, which was said to open up the possibility that standard contracts containing derogating clauses could be submitted to the shippers.

198. There was support for those concerns and for the need for the Working Group to consider them. However, there were also objections to both the criticism of the treatment of freedom of contract as well as to the characterization of the alleged problems created by the draft convention. It was said, in that connection, that freedom of contract was an important element in the overall balance of the draft convention and that the current text reflected an agreement that had emerged in the Working Group after extensive discussions.

199. The Commission took note of the concerns related to the treatment in the draft convention of the issues of scope of application and freedom of contract and of the joint proposal by Australia and France on freedom of contract under volume contracts set out in document A/CN.9/612, as well as the expressions of support for the current draft provisions. The Commission was of the view that the Working Group was the proper forum to consider those substantive points at the present stage and expressed its confidence that the Working Group would deal with those concerns in the ongoing discussions on the draft convention. The Commission noted the views expressed by a number of delegations on the need for the outcome of the deliberations of the Working Group to receive wide international acceptance.

200. With respect to a possible time frame for completion of the draft convention, the Commission was informed that the Working Group planned to complete its second reading of the draft convention at the end of 2006 and the final reading at the end of 2007, with a view to presenting the draft convention for finalization by the Commission in 2008. The Commission agreed that 2008 would be a desirable goal for completion of the project, but that it was not desirable to establish a firm deadline at the present stage. The Commission, noting the complexities and magnitude of the work involved in the preparation of the draft convention, authorized the Working Group to hold its sessions on the basis of two-week sessions. (For the next two sessions of the Working Group, see para. 273 (c) below).

VII. Possible future work in the area of electronic commerce

201. At its thirty-eighth session, in 2005, the Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law (A/CN.9/579).¹⁹ In that note, the Secretariat had summarized the work undertaken by other organizations in various areas related to electronic commerce, which were indicative of the various elements required to establish a favourable legal framework for electronic commerce.²⁰

¹⁹ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 213-215.

²⁰ Ibid., para. 213.

202. The Commission, at that time, welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such a cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. The Commission requested the Secretariat to prepare a more detailed study, for consideration by the Commission at its thirty-ninth session, in 2006, which should include proposals as to the form and nature of a comprehensive reference document, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.²¹

203. At its thirty-ninth session, the Commission had before it a note prepared by the Secretariat following that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues which, although in a more summary fashion, could be included in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime.

204. The Commission welcomed the information and the proposals submitted by the Secretariat. The Commission reiterated its belief that the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures,²² and the Convention on Electronic Contracts, provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues.

205. The Commission heard expressions of support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the topics identified by the Secretariat. Such a document, it was also said, might also assist the Commission to identify areas in which it might itself undertake future harmonization work.

206. However, there was also support for the view that the range of issues identified by the Secretariat was too wide and that the scope of the comprehensive reference document might need to be reduced. Given the variety of issues involved, it was agreed that Member States might need more time, at least to consider the desirability and possible scope of future legislative work on those issues, and that the Commission should postpone a final decision on the topics to be covered until its fortieth session, in 2007. The Commission further agreed that its final decision on that matter might be facilitated if it could review a sample portion of the comprehensive reference document on a discrete topic. The Commission therefore requested the Secretariat to prepare a document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at its fortieth session, in 2007.

²¹ Ibid., para. 214.

²² Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

VIII. Possible future work in the area of insolvency law

207. The Commission had before it a note by the Secretariat (A/CN.9/596) reporting on the international colloquium that took place from 14 to 16 November 2005, in Vienna, to discuss a series of proposals, made to the Commission at its thirty-eighth session, in 2005 (A/CN.9/582 and Add.1-7),²³ for future work in the area of insolvency law, specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency. The Commission also took note of document A/CN.9/597.

208. The Commission expressed its appreciation for the organization of the colloquium, noting the topics that had been discussed and the issues that had been raised. With respect to the proposals made by the Secretariat for possible future work, the Commission recalled, in particular, that treatment of corporate groups in insolvency had arisen in the context of the development of the Insolvency Guide, and that the treatment in the Insolvency Guide was either limited to a brief introduction, as in the case of treatment of corporate groups in insolvency, or limited to domestic insolvency law, as in the case of post-commencement financing. It was acknowledged that undertaking further work on those two topics would build upon and complement the work already completed by the Commission. The Commission also noted that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the Model Law on Cross-Border Insolvency,²⁴ which had been enacted by 11 States and was the subject of increasing interest and discussion. It was therefore appropriate to consider how implementation of the coordination and cooperation provisions of the Model Law could be facilitated by making the legal and judicial experience with respect to the negotiation, use and content of protocols available, in some form, to the international legal community.

209. After consideration, the Commission agreed that:

(a) The treatment of corporate groups in insolvency was sufficiently developed for the topic to be referred to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic;

(b) Post-commencement financing should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic;

(c) Initial work to compile practical experience with respect to negotiating and using cross-border insolvency protocols should be facilitated informally through consultation with judges and insolvency practitioners. A preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007;

²³ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 209 and 210.

²⁴ Ibid., *Fifty-second Session, Supplement No. 17* (A/52/17), annex I, and United Nations publication, Sales No. E.99.V.3, which contains also the accompanying Guide to Enactment.

(d) The Secretariat should have flexibility to organize the work to be undertaken with respect to topics (b) and (c), as appropriate, in view of limited resources;

(e) Work being undertaken by other organizations in relation to the topics of directors' and officers' responsibilities in insolvency and pre-insolvency, and insolvency and commercial fraud should be monitored to facilitate consideration, at some future date, of work that might be undertaken by the Commission.

210. The Commission noted that the topic of arbitrability of insolvency issues and the use of other alternative dispute resolution processes (such as mediation and facilitation) in the context of insolvency had been discussed as a possible topic for future work which would be undertaken by Working Group II (Arbitration and Conciliation), with input from Working Group V (Insolvency Law) (see paras. 183 and 185-187 above).

IX. Possible future work in the area of commercial fraud

211. The Commission had before it a note by the Secretariat (A/CN.9/600) reporting on ongoing and possible future work in the area of commercial fraud. The Commission recalled that it had previously considered the subject of commercial fraud at its thirty-fifth to thirty-eighth sessions, from 2002 to 2005.²⁵

212. It was recalled that, at its thirty-seventh session, in 2004, the Commission had agreed that the Secretariat should facilitate, whenever appropriate, the discussion of examples of commercial fraud in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, with a view towards education, training and prevention, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups should be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in that regard.²⁶

213. At its thirty-eighth session, in 2005, the Commission's attention was drawn to resolution 2004/26 adopted by the Economic and Social Council on 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes".²⁷ At that session, the Commission was advised that, pursuant to that resolution, the United Nations Office on Drugs and Crime had convened an intergovernmental expert group meeting from 17 to 18 March 2005 to prepare a study on fraud and, the criminal misuse and falsification of identity, and to develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The Commission noted that the results of that meeting were reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005;

²⁵ Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112; and *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220.

²⁶ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

²⁷ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

see E/CN.15/2005/11), and that participants at that meeting had agreed that a study of the problem should be undertaken, based on information received in response to a questionnaire on fraud and the criminal misuse and falsification of identity. The Commission was also informed that the UNCITRAL secretariat had participated in the expert group meeting and the Commission expressed its support for the assistance of the UNCITRAL secretariat in the project of the United Nations Office on Drugs and Crime.²⁸

214. At its thirty-ninth session, the Commission heard a progress report of work by the Secretariat on materials listing common features present in typical fraudulent schemes, which had the following main purposes: (a) the formulation of materials that would identify patterns and characteristics of commercial fraud in a manner that would encourage the private sector to mobilize its resources to combat commercial fraud in an organized and systematic manner; (b) to assist governmental bodies in understanding how they might help the public and private sectors to address the problem of commercial fraud; and (c) to assist the criminal law sector in understanding how best to engage the private sector in the battle against commercial fraud. The Commission took note of the suggested format for the preparation of common features of fraudulent schemes as set out in document A/CN.9/600, paragraph 14, and that the materials to be prepared could contain other items, such as a glossary of commonly used terms or explanations of how to effectively perform due diligence (A/CN.9/600, para. 16).

215. The Commission also heard that the United Nations Office on Drugs and Crime had reported on the progress of work on the study on fraud, the criminal misuse and falsification of identity and related crimes to the Commission on Crime Prevention and Criminal Justice at its fifteenth session (Vienna, 24-28 April 2006; see E/CN.15/2006/11 and Corr.1), and that it was anticipated that the study would be submitted to that Commission at its sixteenth session, in 2007. The UNCITRAL secretariat had worked with the secretariat of the Office in the drafting and dissemination of the questionnaire in preparation for that study.

216. Statements were made that commercial fraud deterred legitimate trade and undermined confidence in established contract practices and instruments. Against that background, it was said that the UNCITRAL transactional and private-law perspective and expertise were necessary for the full understanding of the problem of commercial fraud and were most useful in the formulation of measures to fight it. Appreciation was expressed for the work by the UNCITRAL secretariat in that area as well as for its cooperation with the United Nations Office on Drugs and Crime. Statements were made that particular attention should be paid to the increased use by fraudsters of the Internet and to the use of business transactions for money-laundering.

217. The Commission agreed with those statements and concluded that its secretariat should continue its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future session, and that it should continue to cooperate with the United Nations Office on Drugs and Crime in its study on fraud, the criminal misuse and falsification of identity and related crimes, and that it should keep the Commission informed of the progress of that work.

²⁸ Ibid., paras. 218 and 219.

X. Monitoring implementation of the New York Convention

218. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.²⁹ It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005 (A/CN.9/585), which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project.³⁰

219. It was further recalled that, at that session, the Commission welcomed the progress reflected in the interim report, noting that the general outline of replies received served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States parties or further studies could be undertaken. It was suggested that one possible future step could be the development of a legislative guide to limit the risk that State practice would diverge from the spirit of the New York Convention.³¹

220. At its thirty-ninth session, the Commission took note of an oral presentation by the Secretariat on additional questions it proposed to put to States (as noted in document A/CN.9/585, para. 73) in order to obtain more comprehensive information regarding various aspects of implementation of the New York Convention, including legislation, case law and practice. The Commission agreed that the project should aim at the development of a legislative guide, with a view to promoting a uniform interpretation of the New York Convention. After discussion, the Commission reaffirmed the decisions made at its thirty-eighth session, in 2005, that a level of flexibility should be left to the Secretariat in determining the time frame for completion of the project and the level of detail that should be reflected in the report that the Secretariat would present for consideration by the Commission in due course.³²

XI. Technical assistance to law reform

A. Technical assistance activities

221. The Commission had before it a note by the Secretariat (A/CN.9/599) describing the technical assistance activities undertaken subsequent to the date of the note on technical assistance submitted to the Commission at its thirty-eighth session, in 2005 (A/CN.9/586). The Commission emphasized the importance of such technical cooperation and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/599, paragraphs 8-14.

222. The Commission noted that the continuing ability to provide technical assistance in response to specific requests of States was dependent upon the availability of funds to meet associated UNCITRAL costs and reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions,

²⁹ Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

³⁰ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 189.

³¹ Ibid., paras. 190-191.

³² Ibid., para. 191.

or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance. The Commission expressed its appreciation to those States that had contributed to the fund since the thirty-eighth session, namely Mexico and Singapore, and also to organizations that had contributed to the programme by providing funds or staff or by hosting seminars.

223. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission, noting that no contributions to the trust fund for travel assistance had been received since the thirty-eighth session.

B. Technical assistance resources

224. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). As at 4 April 2006, 54 issues of CLOUT had been prepared for publication, dealing with 604 cases, relating mainly to the United Nations Sales Convention and the Arbitration Model Law.

225. It was widely agreed that CLOUT continued to be an important aspect of the overall technical assistance activities undertaken by UNCITRAL and that the broad dissemination of CLOUT, in all six official languages of the United Nations, promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents for their work in selecting decisions and preparing case abstracts.

226. The Commission noted that the digest of case law on the United Nations Sales Convention, published in December 2004, was being reviewed and edited and that the first draft of a digest of case law relating to the Arbitration Model Law was being finalized for publication.

227. The Commission also noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall programme of information and technical assistance activities, expressing its appreciation for its availability in the six official languages of the United Nations and encouraging the Secretariat to further maintain and upgrade it in accordance with existing guidelines.

228. The Commission took note of developments with respect to the UNCITRAL Law Library and UNCITRAL publications. With respect to the UNCITRAL Yearbook, the Commission encouraged the Secretariat to take steps to reduce the costs and time delays associated with its publication, noting the importance of the Yearbook as a means of disseminating information on the work of UNCITRAL.

C. Future activities

229. The Commission noted that permanent missions to the United Nations located in Vienna had been briefed on the objectives and planning of UNCITRAL's technical assistance activities and that the Secretariat was taking further steps to strengthen links with those permanent missions to facilitate identification of national and regional needs for technical assistance.

XII. Status and promotion of UNCITRAL legal texts

230. The Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/601), as updated by information available on the UNCITRAL website. The Commission noted with appreciation the new actions and enactments of States and jurisdictions since its thirty-eighth session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974).³³ New action by Liberia; number of States parties: 26;

(b) Convention on the Limitation Period in the International Sale of Goods, as amended (New York, 1980).³⁴ New action by Liberia; number of States parties: 19;

(c) United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).³⁵ New actions by Liberia and Paraguay; number of States parties: 31;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Liberia and Paraguay; number of States parties: 67;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).³⁶ New action by Liberia; number of States parties: five;

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).³⁷ New action by Paraguay; number of States parties: four;

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).³⁸ New action by Liberia; number of States parties: eight;

(h) United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).³⁹ New action by Liberia; number of States parties: one;

(i) United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). New actions by the Central African Republic, Lebanon and Senegal;⁴⁰

³³ United Nations, *Treaty Series*, vol. 1511, No. 26119.

³⁴ Ibid., No. 26121, and United Nations publication, Sales No. E.95.V.13.

³⁵ Ibid., vol. 1695, No. 29215, and United Nations publication (Sales No. E.95.V.14).

³⁶ General Assembly resolution 43/165, annex, and United Nations publication, Sales No. E.95.V.16.

³⁷ *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

³⁸ United Nations, *Treaty Series*, vol. 2169, No. 38030, and United Nations publication (Sales No. E.97.V.12).

³⁹ General Assembly resolution 56/81, annex, and United Nations publication, Sales No. E.04.V.14.

⁴⁰ General Assembly resolution 60/21, annex. For actions by China, Singapore and Sri Lanka during the special event on 6 July 2006, held in conjunction with the thirty-ninth session of the Commission, which included the ceremony of the signing of the Convention on Electronic Contracts, see paragraph 266 of the present report.

(j) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions by Liberia and Pakistan; number of States parties: 137;

(k) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that had enacted legislation based on the Model Law: Austria, Denmark, Nicaragua, Norway, Poland, Turkey and, within the United States of America, the state of Louisiana;

(l) UNCITRAL Model Law on Electronic Commerce (1996). New jurisdictions that had enacted legislation based on the Model Law: China, within Canada, the state of Alberta, Sri Lanka and, within the United States, the states of Alaska and South Carolina;

(m) UNCITRAL Model Law on Cross-Border Insolvency (1997). New jurisdictions that had enacted legislation based on the Model Law: Serbia, United Kingdom of Great Britain and Northern Ireland and the British Virgin Islands (overseas territory of the United Kingdom);

(n) UNCITRAL Model Law on Electronic Signatures (2001). New jurisdictions that had enacted legislation based on the Model Law: China;

(o) UNCITRAL Model Law on International Commercial Conciliation (2002).⁴¹ New jurisdictions that had enacted legislation based on the Model Law: Canada, Croatia, Hungary and Nicaragua; uniform state legislation based on the Model Law had been prepared in the United States and enacted, within the United States, by the states of Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington.

231. The Commission noted the finalization by the Secretariat of the explanatory note relating to the Convention on Electronic Contracts (A/CN.9/608 and Add.1-4). The Commission expressed its appreciation for that explanatory note and requested the Secretariat to publish and widely circulate it, possibly as a sales publication.

XIII. Coordination and cooperation

A. General

232. At its thirty-ninth session, the Commission had before it a note by the Secretariat (A/CN.9/598) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work, as well as two additional notes addressing specific areas of activity, procurement (A/CN.9/598/Add.1) and security interests (A/CN.9/598/Add.2) (for an account of the discussion, see para. 192 above and paras. 235-251 below). The Commission commended the Secretariat for the preparation of those reports, recognizing their value to coordination of the activities of international organizations in the field of international trade law, and welcomed the revision of the survey on an annual basis.

233. It was recalled that the Commission had generally agreed at its thirty-seventh session, in 2004, that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role.⁴² Recalling the endorsement by the General Assembly, most recently in its resolution 60/20 of 23 November 2005, paragraph 4, of UNCITRAL efforts and initiatives towards coordination of activities of international organizations in

⁴¹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I, and United Nations publication, Sales No. E.05.V.4.

⁴² *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 113-115.

the field of international trade law (see para. 260 below), the Commission noted with appreciation that the secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Common Market for Eastern and Southern Africa, the Hague Conference on Private International Law, the International Council for Commercial Arbitration, the International Institute for the Unification of Private Law (Unidroit), the International Law Institute, the International Monetary Fund, the Organization of American States (OAS), and the World Bank. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

234. In response to a request from Unidroit, the Secretariat proposed that the current edition of the Unidroit Principles of International Commercial Contracts⁴³ might be circulated to States with a view to possible endorsement by the Commission at its fortieth session, in 2007. After discussion, the Commission agreed to that proposal, noting that the circulation would facilitate coordination between the two organizations and would be of assistance to States that were not members of Unidroit and to other users in using the Unidroit Principles in their legislative and other work.

B. Coordination and cooperation in the field of secured financing law

235. The Commission had before it a note by the Secretariat on current activities of international organizations related to the harmonization and unification of security interests law (A/CN.9/598/Add.2).

1. Draft Unidroit convention on substantive rules regarding intermediated securities

236. The Commission noted with appreciation the cooperation between the secretariat of Unidroit and the UNCITRAL secretariat with a view to ensuring consistency between the draft Unidroit convention on substantive rules regarding intermediated securities (the “draft Unidroit securities convention”) and the draft UNCITRAL legislative guide on secured transactions (see chap. III above). Noting its earlier decision to generally exclude the taking of security rights in investment securities, the Commission discussed certain exceptions that could be considered by its Working Group VI (Security Interests). It was stated that the proposal contained in paragraph 11 of document A/CN.9/598/Add.2 needed to be formulated more narrowly so as to be limited to the exceptions to be approved by the Commission.

237. In particular, it was noted that a security right in securities, as original encumbered assets or as proceeds, created and made effective against third parties under the draft Unidroit securities convention, would have priority over a competing security right in the securities as proceeds of an asset falling within the scope of legislation based on the draft UNCITRAL legislative guide on secured transactions. Similarly, it was noted that a security right in a receivable or other asset within the scope of the draft UNCITRAL legislative guide as an original encumbered asset should have priority over a competing security right in such a receivable or other asset as proceeds of securities. It was also noted that a security right in securities securing a receivable, negotiable instrument or other

⁴³ Available as at the date of the preparation of the present report at <http://www.unidroit.org/english/principles/contracts/main.htm>.

obligation would follow the receivable that it secured, provided that third-party rights, priority and enforcement were not affected.

238. It was widely felt that the points mentioned above formed an acceptable basis for discussion between the two secretariats and experts from the relevant Unidroit and UNCITRAL working groups with a view to reaching agreement on the coverage of cross-over issues in the two texts and on a qualified exclusion of securities from the scope of the draft UNCITRAL legislative guide on secured transactions. It was stated that one of the advantages of such an approach might be the avoidance of excluding from the draft UNCITRAL legislative guide matters not addressed in the draft Unidroit securities convention, such as security rights in directly held securities. It was stated that, for practical reasons, security rights in bank accounts and security rights in securities accounts should be treated as far as possible in the same manner and with the same result.

2. Draft Unidroit model law on leasing

239. The Commission noted that Unidroit was preparing a draft model law on leasing (the “draft Unidroit model law”) that would cover both operating and financial leases (i.e. leases serving security purposes), which were addressed in the draft UNCITRAL legislative guide on secured transactions as acquisition financing devices. In addition, it was noted that discussions between the two secretariats showed some preference for ensuring that the draft Unidroit model law would defer to secured transactions law with respect to financial leases and be coordinated with the draft UNCITRAL legislative guide to avoid creating obstacles to legislation based on the draft UNCITRAL legislative guide. In addition, it was stated that the draft Unidroit model law would be of particular benefit to countries in the African region in view of the need for infrastructure improvements.

240. Broad support was expressed for the coordination of efforts by Unidroit and the Commission with a view to ensuring harmony between the draft Unidroit model law and the draft UNCITRAL legislative guide on secured transactions. It was widely felt that the cooperation of the two secretariats was a useful step in the right direction in identifying a common approach to be proposed to States.

241. After discussion, the Commission requested the Secretariat to continue its efforts of coordination with Unidroit with a view to ensuring harmony between the draft Unidroit model law and the draft UNCITRAL legislative guide on secured transactions.

3. European Bank for Reconstruction and Development Guiding Principles for the Development of a Charges Registry

242. The Commission noted with interest the publication by the European Bank for Reconstruction and Development of a set of principles dealing with security rights registries. It was stated that the Commission should also prepare such a set of principles, taking into account the European Bank Principles, as well as other similar sets of principles.

4. European Commission proposal for a regulation on the law applicable to contractual obligations (Rome I)

243. With respect to the relationship between the European Commission’s proposal for a regulation on the law applicable to contractual obligations (the “proposed Rome I Regulation”) and the United Nations Convention on the Assignment of Receivables in International Trade (the “United Nations Assignment Convention”), the Commission noted with appreciation that the European Commission shared the concerns expressed in the note

by the Secretariat (see A/CN.9/598/Add.2, para. 34) and admitted that the adoption in a European Union binding instrument of an approach to the law applicable to third-party effects of assignments that would be different from the approach taken in the United Nations Assignment Convention would undermine the certainty reached at the international level and might have a negative impact on the availability and the cost of credit. In addition, the Commission noted with appreciation that the European Commission had expressed its willingness to cooperate closely with the UNCITRAL secretariat to ensure, as far as possible, coherence between the two instruments and the facilitation of ratification of the United Nations Assignment Convention by European Union member States.

244. Strong support was expressed in the Commission for close cooperation with the European Commission with a view to ensuring consistency between the two texts and enabling ratification of the United Nations Assignment Convention by European Union member States. It was widely felt that an internationally uniform rule on the law applicable to third-party effects of assignment would enhance certainty of law with regard to important financial transactions and promote the availability of lower-cost credit throughout the world.

245. It was stated that, for the proposed Rome I Regulation to be consistent with the United Nations Assignment Convention, a number of issues might be usefully clarified, including that the branch rule in article 18, paragraph 1, of the proposed Rome I Regulation would not apply to the situations covered in article 13, paragraph 3, of the proposed Rome I Regulation.

246. In that connection, a concern was expressed that, while it was appropriate for the Secretariat to express comments, it was not for the Commission to make suggestions with respect to a draft regulation of the European Union at such an early stage in the process. In response, it was stated that, far from wishing to interfere with the legislative process of the European Union, the Commission had a legitimate interest not only to ensure wide ratification of a text that emanated from its work but mainly to avoid a situation where, because of inconsistencies between the two texts, lack of harmony and lack of certainty with respect to the law applicable to important financing transactions, the whole work of the Commission in that area would be undermined, a result that could disrupt international financial markets and have a negative impact on the availability and the cost of credit. It was also observed that, in the context of work by the Commission, many States had accepted to change their laws in order to benefit from the harmonization and unification of international trade law. In addition, it was said that the timing of the consideration of the matter by the Commission was most appropriate as the proposed regulation was still in draft form and any comments could still be taken into account. For the reasons mentioned above, coordination was generally considered appropriate and useful.

247. The delegations of Canada and the United States stated that they were jointly taking steps to implement and ratify the United Nations Assignment Convention. In that context, it was stated that those States were examining the differences between the United Nations Assignment Convention and their laws, as well as the changes that they needed to make in their laws (in particular with respect to the definition of "location") to benefit from the uniform law rules of the United Nations Assignment Convention. It was also observed that, in the spirit of coordination, those States looked forward to discussing those issues with other States.

248. The Commission requested the Secretariat to continue cooperating closely with the European Commission to ensure consistency between the proposed Rome I Regulation and the United Nations Assignment Convention.

5. Organization of American States project on security rights registries

249. The Commission noted with interest a new project of OAS with respect to the preparation of rules and regulations for the registration of notices in security rights registries, which could be applied to national, subregional or regional registries that might be utilized by more than one State. It was stated that interested experts, upon invitation by the OAS secretariat, could participate in an Internet-based forum discussing these matters. The Commission requested the Secretariat to follow the OAS project and report to the Commission in due course.

6. World Intellectual Property Organization work on intellectual property financing

250. Recalling its discussion about future work in the field of intellectual property financing (see paras. 81-84 and 86 above), the Commission took note with appreciation of the cooperation between the WIPO secretariat and the UNCITRAL secretariat with respect to intellectual property financing.

7. World Bank manual on secured financing

251. The Commission noted plans by the Investment Climate Unit of the World Bank to prepare a manual on secured transactions and requested the Secretariat to monitor developments and report to the Commission in due course with a view to avoiding duplication of efforts, overlap and conflicts between that text and the draft UNCITRAL legislative guide on secured transactions being prepared by the Commission.

C. Reports of other international organizations**1. International Institute for the Unification of Private Law (Unidroit)**

252. The Commission heard a statement on behalf of Unidroit, reporting on progress with a number of projects, including the following:

(a) The Protocol to the Cape Town Convention on Matters Specific to Aircraft Equipment (Cape Town, 2001)⁴⁴ had entered into force on 1 March 2006 and the registry function under that Convention was operable and being supervised by the International Civil Aviation Organization;

(b) Adoption of the second protocol to the Cape Town Convention, dealing with the financing of railway rolling stock, was expected in early 2007; negotiation of a third protocol, dealing with space assets was continuing; and work on a possible fourth protocol dealing with agricultural, construction and mining equipment was under way;

(c) A third version of the Unidroit Principles of International Commercial Contracts was under consideration, with completion and adoption expected in 2010;

(d) A further meeting of experts on the draft convention on substantive rules regarding intermediated securities (see para. 236 above) was to be held in 2006, with possible adoption or, depending on progress, a further round of consultations, in 2007;

⁴⁴ Available as at the date of the preparation of the present report at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>.

(e) A uniform contract law prepared for States parties to the Treaty on the Harmonization of Business Law in Africa⁴⁵ was ready for adoption;

(f) Adoption of a model law on leasing was also foreshadowed (see para. 239 above).

253. The Commission heard that Lithuania had become the sixty-first member of Unidroit.

2. United Nations Convention on Contracts for the International Sale of Goods Advisory Council

254. The Commission heard a presentation from the CISG Advisory Council, a private international initiative aimed at promoting uniform interpretation of the United Nations Sales Convention pursuant to article 7 of the Convention. The Commission heard that advisory opinions of the Council on the Convention were given either on request or at the initiative of the Council itself, with five advisory opinions already having been issued and several more being prepared.

3. Banque des Etats de l'Afrique Centrale

255. The Commission was informed that the Banque des Etats de l'Afrique Centrale was a subregional central bank under the jurisdiction of the Economic and Monetary Community of Central Africa (CEMAC), which included six member States. It was noted that the CEMAC member States were also members of the Organization for the Harmonization of Business Law in Africa (OHADA). The Commission noted that CEMAC and OHADA were undertaking modernization of trade laws, in particular in the areas of insolvency, securities and means of payment and, like other regional legal integration institutions, had a mandate to cooperate with UNCITRAL.

XIV. Congress 2007

256. The Commission recalled that, at its thirty-eighth session, in 2005, it had approved a plan, in the context of the fortieth annual session of the Commission in Vienna, in 2007, to hold a congress similar to the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century (New York, 18-22 May 1992).⁴⁶ The Commission had envisaged that the congress would review the results of the past work programme of UNCITRAL, as well as related work of other organizations active in the field of international trade law, assess current work programmes and consider and evaluate topics for future work programmes.⁴⁷

257. At its thirty-ninth session, the Commission had before it a proposal by the Secretariat regarding a suggested programme outline for the congress, contained in a conference room paper A/CN.9/XXXIX/CRP.2. It was understood that the congress would not formulate conclusions or collective recommendations but rather that the Commission would be able

⁴⁵ Available as at the date of the preparation of the present report at <http://www.ohada.com/traite.php?categorie=10>.

⁴⁶ For the proceedings of the Congress, see *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992*, United Nations publication, Sales No. E.94.V.14 (A/CN.9/SER.D/1).

⁴⁷ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 231.

to draw inspiration from views expressed at the congress as it deemed appropriate. The Commission welcomed the proposals by the Secretariat and heard expressions of support for the overall concept of the congress. However, concerns were also expressed about the proposed duration of the congress (five days), in particular in view of the overall duration of the Commission's fortieth session (see para. 272 below). Concerns were also expressed that some of the topics outlined for the congress (e.g., corporate governance; foreign investment; methods and institutional arrangements for commercial law reform; and the role of the judiciary in ensuring a stable framework for commercial transactions: predictability of law and legal interpretation) were not directly related to the current work programme of the Commission. The Secretariat was encouraged to consider limiting the number of topics proposed to be covered and to focus on matters directly related to the Commission's line of work. The Commission also encouraged Member States to transmit their views on the proposed programme to the Secretariat, with a view to the finalization of the programme before the end of 2006.

258. The Commission, after having discussed the duration of the congress also in connection with the overall duration of the Commission session, adopted the view that every effort should be made to shorten the duration of the formal deliberations on the agenda at its next session to a maximum of two weeks and that the congress, which should commence after the completion of the formal deliberations in the Commission, should not exceed four days. (For the dates of the Commission's session, including the congress, see para. 272 below).

XV. Relevant General Assembly resolutions

259. The Commission took note with appreciation of General Assembly resolutions 60/20, on the report of the Commission on the work of its thirty-eighth session, and 60/21, on the United Nations Convention on the Use of Electronic Communications in International Contracts, both of 23 November 2005.

260. Particular note was taken of paragraph 4 of General Assembly resolution 60/20, by which the Assembly endorsed the efforts and initiatives of the Commission aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and appealed to those organizations to coordinate their legal activities with those of the Commission.

261. With reference to paragraphs 5 and 6 of resolution 60/20, the Commission appreciated the General Assembly's calls for support by all concerned to the Commission's technical assistance programme and for contributions to the UNCITRAL Trust Fund for Symposia (from which legislative technical assistance was financed) and to the trust fund established to provide travel assistance to developing countries that were members of the Commission to attend the sessions of the Commission and its working groups.

XVI. Other business

A. Willem C. Vis International Commercial Arbitration Moot

262. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Thirteenth Willem C. Vis International Commercial Arbitration Moot in Vienna, from 7 to 13 April 2006. As in

previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Thirteenth Moot had been based on the United Nations Sales Convention, the Arbitration Rules of the Chicago International Dispute Resolution Association,⁴⁸ the Arbitration Model Law and the New York Convention. A total of 156 teams from law schools in 49 countries had participated in the Thirteenth Moot. The best team in oral arguments was that of Queen Mary, University of London, followed by Stetson University, Florida, United States. The Fourteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna, from 30 March to 5 April 2007.

263. The Commission heard a report about the history, growth and features of the Moot. Statements were made highlighting the importance of the Moot as a means of introducing law students to the work of UNCITRAL and to its uniform legal texts, in particular in the areas of contract law and arbitration. The Commission noted the positive impact that the Moot had on law students, professors and practitioners around the world. It was widely felt that the annual Moot, with its extensive oral and written competition and its broad international participation, presented an excellent opportunity to disseminate information about UNCITRAL and its legal texts and for teaching international trade law. A suggestion was made that information about the Moot should be more broadly circulated in law schools and universities and that the Moot should be considered as an important part of the UNCITRAL technical assistance programme.

264. The Commission expressed its gratitude to the organizers and sponsors of the Moot, including Pace University, the Austrian Federal Economic Chamber and the Law Faculty of the University of Vienna, for their efforts to make the Moot successful. It was hoped that the international outreach and positive impact of the Moot would continue growing. Special appreciation was expressed to Eric E. Bergsten, former Secretary of the Commission, for the development and direction of the Moot since its inception in 1993-1994.

B. Special event, including the ceremony of the signing of the United Nations Convention on the Use of Electronic Communications in International Contracts

265. The Commission heard a report on the special event that took place on 6 July 2006 at United Nations Headquarters, in New York, which included the ceremony of the signing of the Convention on Electronic Contracts. The Secretariat had organized the event with a view to promoting participation in the Convention and to disseminating information about its provisions.

266. The Commission expressed its appreciation to the Governments of China, Singapore and Sri Lanka for having signed the Convention, and to the Governments of Colombia, Iran (Islamic Republic of), Mexico, Paraguay, Russian Federation, Spain and the United States for the expressions of strong support for the Convention made during the special event.

⁴⁸ Available as at the date of the preparation of the present report at <http://www.cidra.org/rules.htm>.

C. Internship

267. An oral report was presented on the internship programme in the Commission's secretariat. While general appreciation was expressed for the programme, it was observed that only a small proportion of interns originated from developing countries. A suggestion was made that consideration should be given to establishing the financial means of supporting wider participation by young lawyers from developing countries, possibly by way of a trust fund, which could be established by the General Assembly.

D. Bibliography

268. The Commission noted with appreciation the bibliography of recent writings related to its work (A/CN.9/602). The Commission was informed that the bibliography was being updated on the UNCITRAL website on an ongoing basis. The Commission stressed that it was important for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of relevant publications to the UNCITRAL secretariat.

XVII. Date and place of future meetings

A. General discussion on the duration of sessions

269. At its thirty-sixth session, in 2003, the Commission agreed (a) that working groups should normally meet for a one-week session twice a year; (b) that extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) that if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.⁴⁹

270. In view of the magnitude and complexities of the project before Working Group III (Transport Law), the Commission decided to authorize two week sessions of the Working Group to be held in the autumn of 2006 and the spring of 2007 (see para. 273 (c) below), utilizing the entitlement of Working Group IV (Electronic Commerce), which would not meet before the Commission's fortieth session (see para. 273 (d) below).

271. In the light of the new project in the area of insolvency law to be undertaken by Working Group V (Insolvency Law) (see para. 209 above), the Commission agreed that the Working Group would meet for its thirty-first and thirty-second sessions in the autumn of 2006 and in the spring of 2007 (see para. 273 (e) below). In addition, the Commission noted that tentative arrangements had been made for a session in the autumn of 2007 (see para. 274 (d) below), which could be used to accommodate the need for a session of either Working Group V (Insolvency Law) or of Working Group IV (Electronic Commerce), depending on the needs of the working groups and subject to the Commission's decision at its next session, in 2007. The Commission further noted that the resulted saving of one

⁴⁹ *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

week of conference services in the autumn of 2007 would allow holding the twentieth session of Working Group III (Transport Law) for two weeks (see para. 274 (c) below).

B. Fortieth session of the Commission

272. The Commission approved the holding of its fortieth session in Vienna, from 25 June to 12 July 2007. It was agreed that the congress (see paras. 256-258 above) would be held during the last week of the session, from 9 to 12 July 2007.

C. Sessions of working groups up to the fortieth session of the Commission

273. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its tenth session in Vienna from 25 to 29 September 2006 and its eleventh session in New York from 21 to 25 May 2007;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-fifth session in Vienna from 11 to 15 September 2006 and its forty-sixth session in New York from 5 to 9 February 2007;

(c) Working Group III (Transport Law) would hold its eighteenth session in Vienna from 6 to 17 November 2006 and its nineteenth session in New York from 16 to 27 April 2007;

(d) No session of Working Group IV (Electronic Commerce) was envisaged;

(e) Working Group V (Insolvency Law) would hold its thirty-first session in Vienna from 11 to 15 December 2006 and its thirty-second session in New York from 14 to 18 May 2007;

(f) Working Group VI (Security Interests) would hold its eleventh session in Vienna from 4 to 8 December 2006 and its twelfth session in New York from 12 to 16 February 2007.

D. Sessions of working groups in 2007 after the fortieth session of the Commission

274. The Commission noted that tentative arrangements had been made for working group meetings in 2007 after its fortieth session (the arrangements were subject to the approval of the Commission at its fortieth session):

(a) Working Group I (Procurement) would hold its twelfth session in Vienna from 3 to 7 September 2007;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-seventh session in Vienna from 10 to 14 September 2007;

(c) Working Group III (Transport Law) would hold its twentieth session in Vienna from 15 to 25 October 2007 (the United Nations offices in Vienna would be closed on 26 October);

(d) Tentative arrangements had been made for a session to be held in Vienna from 5 to 9 November 2007, which could be used for the forty-fifth session of Working

Group IV (Electronic Commerce) or for the thirty-third session of Working Group V (Insolvency Law) (see para. 271 above);

(e) Working Group VI (Security Interests) would hold its thirteenth session in Vienna from 24 to 28 September 2007.

ANNEX I

Revised articles of the UNCITRAL Model Law on International Commercial Arbitration

[Annex I is reproduced in part three, I of this *Yearbook*.]

ANNEX II

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

[Annex II is reproduced in part three, II of this *Yearbook*.]

ANNEX III

List of documents before the Commission at its thirty-ninth session

[Annex III is reproduced in part three, V of this *Yearbook*.]

**B. United Nations Conference on Trade and Development (UNCTAD):
extract from the report of the Trade and Development Board
on its fifty-third session**

(TD/B/53/8 (Vol. I))

**Progressive development of the law of international trade:
thirty-ninth annual report of the United Nations Commission
on International Trade Law**

At its 997th plenary meeting, on 10 October 2006, the Board took note of
the report of UNCITRAL on its thirty-ninth session (A/61/17).

C. General Assembly: Report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (A/61/453)

Rapporteur: Mr. Mamadou Moustapha Loum (Senegal)

I. Introduction

1. At its 2nd plenary meeting, on 13 September 2006, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-first session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 1st, 2nd and 15th meetings, on 10, 11 and 30 October 2006. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/61/SR.1, 2 and 15).
3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session.¹
4. At the 1st meeting, on 10 October, the Chairman of the United Nations Commission on International Trade Law at its thirty-ninth session introduced the report of the Commission on the work of that session.

II. Consideration of Proposals

A. Draft resolution A/C.6/61/L.7

5. At the 15th meeting, on 30 October, the representative of Austria, on behalf of Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mexico, Mongolia, the Netherlands, Norway, the Philippines, Poland, Portugal, Romania, the Russian Federation, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland and Uruguay, subsequently joined by Morocco, introduced and orally revised a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session” (A/C.6/61/L.7).
6. At its 15th meeting, on 30 October, the Committee adopted draft resolution A/C.6/61/L.7, as orally revised, without a vote (see para. 9, draft resolution I).

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17).*

B. Draft resolution A/C.6/61/L.8

7. At the 15th meeting, on 30 October, the representative of Malaysia introduced a draft resolution entitled “Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958” (A/C.6/61/L.8).

8. At its 15th meeting, on 30 October, the Committee adopted draft resolution A/C.6/61/L.8 without a vote (see para. 9, draft resolution II).

III. Recommendations of the Sixth Committee

9. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

[The text of the draft resolutions is not reproduced in this section. The draft resolutions were adopted, with editorial changes, as General Assembly resolutions 61/32 and 61/33 (see section D below).]

D. General Assembly resolutions 61/32 and 61/33 of 4 December 2006

Resolutions adopted by the General Assembly on the report of the Sixth Committee (A/61/453)

61/32. Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Reaffirming its belief that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Having considered the report of the Commission on the work of its thirty-ninth session,¹

Reiterating its concern that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

Reaffirming the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;¹

2. *Commends* the Commission for the finalization and adoption of revised articles² of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law³ on the form of the arbitration agreement and interim measures, and of the recommendation regarding the interpretation of article II,

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

² *Ibid.*, chap. IV, para. 181, and annex I.

³ *Ibid.*, *Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

paragraph 2, and article VII, paragraph 1,⁴ of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958;⁵

3. *Also commends* the Commission for the approval of the substance of the recommendations of the draft legislative guide on secured transactions, which has been designed to facilitate secured financing, thus promoting increased access to low-cost credit and enhancing national and international trade;

4. *Welcomes* the progress made by the Commission in its work on a revision of its Model Law on Procurement of Goods, Construction and Services,⁶ and on a draft instrument on transport law, and endorses the decision of the Commission to take up new topics in the areas of arbitration and insolvency law;

5. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law, as well as promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

6. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical assistance and cooperation in the field of international trade law reform and development, and in this connection:

(a) *Welcomes* the initiatives of the Commission towards expanding, through its secretariat, its technical assistance and cooperation programme;

(b) *Expresses* its appreciation to the Commission for carrying out technical assistance and cooperation activities in Belarus, Benin (for the United Nations Conference on Trade and Development/World Trade Organization International Trade Centre seminar), Colombia, Egypt, the Republic of Korea, Singapore, Slovakia and Switzerland (for the United Nations Conference on Trade and Development/World Trade Organization International Trade Centre symposium on multilateral trade treaties and developing countries) and for providing assistance with legislative drafting in the field of international trade law to China, Georgia, Greece, Malaysia, Peru, Rwanda (through the joint project with the International Law Institute), Serbia, Slovenia and the former Yugoslav Republic of Macedonia, and to the Commonwealth Telecommunications Organisation;

(c) *Expresses* its appreciation to the Governments whose contributions enabled the technical assistance and cooperation activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, to the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical assistance activities, in particular in developing countries;

(d) *Reiterates* its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional

⁴ Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), chap. IV, para. 181, and annex II.

⁵ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁶ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

development banks, as well as to Governments in their bilateral aid programmes, to support the technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission, in the light of the relevance and importance of the work and programmes of the Commission to the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

7. *Takes note with regret* that, since the thirty-sixth session of the Commission, no contributions have been made to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General,⁷ stresses the need for contributions to the trust fund in order to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in the field of international trade law in those countries to facilitate the development of international trade and the promotion of foreign investment, and reiterates its appeal to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund;

8. *Decides*, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-first session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

9. *Recalls* that the responsibility for the work of the Commission lies with the meetings of the Commission and its intergovernmental working groups, and stresses in this regard that information should be provided regarding meetings of experts, which bring an essential contribution to the work of the Commission;

10. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,⁸ and in this regard encourages the Commission to further explore different approaches to the use of partnerships with non-State actors in the implementation of its mandate, in particular in the area of technical assistance, in accordance with the applicable principles and guidelines and in cooperation and coordination with other relevant offices of the Secretariat, including the Global Compact Office;

11. *Reiterates its request* to the Secretary-General, in conformity with the General Assembly resolutions on documentation-related matters,⁹ which, in particular, emphasize that any reduction in the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and work of the Commission in implementing page limits with respect to the documentation of the Commission;

12. *Requests* the Secretary-General to continue providing summary records of the meetings of the Commission relating to the formulation of normative texts;

13. *Recalls* its resolution approving the establishment of the *Yearbook of the United Nations Commission on International Trade Law*, with the aim of making the work of the Commission more widely known and readily available,¹⁰ expresses its concern

⁷ Resolution 48/32, para. 5.

⁸ Resolutions 55/215, 56/76, 58/129 and 60/215.

⁹ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁰ Resolution 2502 (XXIV), para. 7.

regarding the timeliness of the publication of the *Yearbook*, and requests the Secretary-General to explore options to facilitate the timely publication of the *Yearbook*;

14. *Stresses* the importance of bringing into effect the conventions emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to those conventions;

15. *Welcomes* the preparation of digests of case law relating to the texts of the Commission, such as a digest of case law relating to the United Nations Convention on Contracts for the International Sale of Goods¹¹ and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,³ with the aim of assisting in dissemination of information on those texts and promoting their use, enactment and uniform interpretation;

16. *Welcomes also* the decision of the Commission to hold, in the context of its fortieth session in 2007, a congress on international trade law in Vienna, with a view to reviewing the results of the past work of the Commission as well as related work of other organizations active in the field of international trade law, assessing current work programmes and considering topics and areas for future work, and acknowledges the importance of holding such a congress for the coordination and promotion of activities aimed at the modernization and harmonization of international trade law;

17. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,¹² commends the restructured website of the Commission in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website in accordance with the applicable guidelines.

*64th plenary meeting
4 December 2006*

¹¹ United Nations, *Treaty Series*, vol. 1489, No. 25567.

¹² Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; and 60/109 B, sect. IV, paras. 66-80.

61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,¹³

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,¹⁴ is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,¹⁵ and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York,

¹³ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

¹⁴ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹⁵ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

10 June 1958,¹⁴ the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;¹⁵

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

*64th plenary meeting
4 December 2006*

Part Two

STUDIES AND REPORTS ON
SPECIFIC SUBJECTS

I. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its eighth session (Vienna, 5-9 September 2005)

(A/CN.9/588) [Original: English]

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I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.¹ The Commission's decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.²

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its eighth session in Vienna from 5 to 9 September 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, Colombia, Czech Republic, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Poland, Republic of Korea, Russian Federation, Spain, Sweden, Switzerland, Thailand, Tunisia, Uganda and United States of America.

3. The session was attended by observers from the following States: Dominican Republic, Greece, Hungary, Indonesia, Iraq, Ireland, Latvia, Malaysia, Peru, Philippines, Romania, Senegal and Slovakia.

4. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Monetary Fund, World Bank and World Intellectual Property Organization; and

(b) *International non-governmental organizations invited by the Commission*: American Bar Association, Center for International Legal Studies, Commercial Finance Association, EUROPAFACTORING, Forum for International Arbitration, International Federation of Insolvency Practitioners, Hague Conference on Private International Law, International Chamber of Commerce, International Insolvency Institute, International Swaps and Derivatives Association, International Working Group on European Security Rights, Max-Planck-Institute for Foreign and Private International Law, the Association of the Bar of the City of New York, the Cairo Regional Centre for International Commercial Arbitration and the European Law Student's Association.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358. For a history of the project, see A/CN.9/WG.VI/WP.22. The reports of the first to the seventh sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543 and A/CN.9/549, A/CN.9/570 and A/CN.9/574. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222), A/59/17 (paras. 75-78) and A/60/17 (paras. 185-187).

² *Ibid.*, *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 347.

5. The Working Group elected the following officers:
Chairman: Ms. Kathryn SABO (Canada)
Rapporteur: Mr. Madhukar Rangnath UMARJI (India).
6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.21 and Addenda 1 to 5 (Recommendations), A/CN.9/WG.VI/WP.22 (Background remarks) and A/CN.9/WG.VI/WP.22/Add.1 (Introduction and key objectives).
7. The Working Group adopted the following agenda:
 1. Opening of the session and scheduling of meetings.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Preparation of legislative guide on secured transactions.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

8. The Working Group considered recommendations in chapters VII (Pre-default rights and obligations), VIII (Default and enforcement), IX (Insolvency), X (Acquisition financing) and XI (Conflict of laws). It also considered terminology and recommendations related to: (i) negotiable instruments and negotiable documents (definitions (w) and (x), as well as recommendations 3 (d) and 24); (ii) proceeds from a drawing under an independent undertaking (definitions (y), (z), (aa) and (bb), as well as recommendations 25, 49, 62, 106 and 138); and intellectual property rights (definition (dd), and recommendation 3 (h)). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise those chapters, definitions and asset-specific recommendations to reflect the deliberations and decisions of the Working Group.

IV. Preparation of a legislative guide on secured transactions

Chapter VIII. Default and enforcement (A/CN.9/WG.VI/WP.22/Add.2, reccs. 88-124)

Purpose

9. The Working Group approved the substance of the purpose section unchanged.

Recommendation 88 (scope)

10. Differing views were expressed as to whether recommendation 88 should be retained. One view was that the rule in recommendation 88 was superfluous and confusing, as the draft Guide would, in any case, apply to security devices and only where so provided by way of exception to non-security devices. Another view was that recommendation 88 was useful in that it drew a distinction between situations where the grantor was not liable for a deficiency and situations where the grantor was liable, which,

if it were not made clear in recommendation 88, would need to be made clear in several recommendations in that chapter. The Working Group decided to review that matter once it had completed its consideration of the chapter on default and enforcement.

Recommendation 89 (general standard of conduct)

11. The Working Group approved the substance of recommendation 89 unchanged and decided to consider its application to other chapters of the draft Guide in the context of its discussion of each of those chapters.

Recommendations 90 and 91 (party autonomy)

12. It was agreed that the words “at any time” should be added at the end of the first sentence of recommendation 90. Subject to that change, the Working Group approved the substance of recommendation 90.

13. While there was broad support for the substance of recommendation 91, differing views were expressed as to whether recommendation 91 should also provide that a disposition in accordance with a method provided for in the security agreement was commercially reasonable unless the objecting party established that it was manifestly unreasonable. One view was that such a provision would be useful in that it would provide *ex ante* certainty (i.e. advance certainty before the conclusion of an agreement) in referring to the agreement of the parties in particular for methods of disposition about the reasonableness of which there might be some doubt, at least for a court looking at the matter once a dispute had arisen. Another view was that such a provision would be harmful in that it would change not only the burden of proof but also the general standard of conduct established in recommendation 89 and would be difficult to apply. After discussion, the Working Group approved the substance of recommendation 91 unchanged.

Recommendations 92 (rights and remedies after default), 93 (secured creditor remedies) and 94 (grantor remedies)

14. It was agreed that, at the beginning of recommendations 92 to 94, language along the following lines should be added: “As more specifically provided in subsequent recommendations of this Chapter”. Subject to that change, the Working Group approved the substance of recommendations 92 to 94.

Recommendation 95 (election of remedies)

15. The Working Group agreed that the commentary should list situations to which recommendation 95 was intended to apply (including the simultaneous exercise of remedies, for example, against the grantor and against a guarantor). Subject to that clarification to be made in the commentary, the Working Group approved the substance of recommendation 95 unchanged.

Recommendation 96 (other remedies)

16. It was agreed that recommendation 96 should also apply to the converse situation (i.e. where a remedy had been exercised first with respect to the secured obligation). Subject to that change, the Working Group approved the substance of recommendation 96.

Recommendation 97 (release of the encumbered assets after full payment)

17. The Working Group approved the substance of recommendation 97 unchanged.

Recommendation 98 (judicial and extra-judicial enforcement)

18. It was agreed that the change agreed upon with respect to recommendations 92 to 94 (see para. 14 above) should be made also in recommendation 98. In addition, it was agreed that recommendation 98 should also provide for a mixed-process method of enforcement (i.e. partly judicial and partly extra-judicial enforcement). Subject to those changes, the Working Group approved the substance of recommendation 98.

Recommendation 99 (notice of intention to pursue extra-judicial enforcement)

19. Differing views were expressed as to whether recommendation 99 should be retained. One view was that recommendation 99 should be deleted. It was stated that a general advance notice of extra-judicial enforcement would cause unnecessary cost, delay, error and litigation in the case of a good-faith grantor, as such a grantor would be aware of and would comply with its obligations even without such a notice. In addition, it was observed that, in the case of a grantor acting in bad faith, such a general notice could inadvertently result in compromising the ability of the secured creditor to enforce its security right as the grantor could conceal the encumbered assets or move them beyond the reach of the secured creditor. Another view was that recommendation 99 should be retained mainly on the grounds that unnecessary cost, delay, error and litigation would not be caused. It was also stated that a notice of enforcement before repossession of the encumbered assets by the secured creditor would be essential in particular for those jurisdictions in which extra-judicial enforcement was not known. In addition, it was observed that recommendation 99 made no specific recommendation but rather raised a point that the legislator should consider. Moreover, it was said that subparagraph (f) of recommendation 99 provided for an exception in situations in which advance notice might not be useful or might be harmful. After discussion, it was agreed that recommendation 99 should be retained in square brackets.

20. The Working Group next considered whether recommendation 99 should be merged with recommendation 111 on advance notice with respect to extra-judicial disposition of encumbered assets. One view was that, as there was significant overlap between those recommendations, they should be merged. Another view was that, while there was some overlap, there were also significant differences between the two recommendations. It was stated that, unlike recommendation 111, recommendation 99 dealt with notice before repossession of the encumbered assets and with all methods of enforcement. After discussion, the Working Group decided that recommendations 99 and 111 should not be merged.

Recommendation 100 (objections to extra-judicial enforcement)

21. The Working Group approved the substance of recommendation 100 unchanged.

Recommendation 101 (dispossession of the debtor)

22. It was agreed that recommendation 101 should make it clear that it referred to actual possession of tangibles. Subject to that change, the Working Group approved the substance of recommendation 101.

Recommendations 102 and 103 (collection of receivables)

23. It was agreed that recommendation 102 should make it clear that the secured creditor had the right, not only to instruct the account debtor to pay the secured creditor, but also to seek and to obtain payment of a receivable directly from the account debtor. Subject to that change, the Working Group approved the substance of recommendation 102.

24. It was agreed that whether the reference to guarantees in recommendation 103 should be limited to accessory guarantees only would need to be reviewed after the Working Group had the opportunity to consider the recommendations on security rights in proceeds from a drawing under an independent undertaking. Subject to later consideration of that matter, the Working Group approved the substance of recommendation 103.

Recommendations 104 and 105 (negotiable instruments)

25. The Working Group approved the substance of recommendation 104 unchanged. As to recommendation 105, the Working Group approved its substance subject to the same reservation made with respect to recommendation 103 (see para. 24 above).

Recommendation 106 (proceeds from drawings under independent undertakings)

26. The Working Group decided to postpone consideration of recommendation 106 until it had the opportunity to consider at one time all the recommendations dealing with security rights in proceeds from drawings under independent undertakings (see para. 83 below).

Recommendations 107 and 108 (bank accounts)

27. It was agreed that the second sentence of recommendation 107 should be deleted. It was stated that requiring the secured creditor to resort to court proceedings in order to enforce a security right in a bank account where the grantor was a consumer and the security right had been given for consumer purposes might be inconsistent with law applicable to set-off, receivables or even consumer-protection law. Subject to that change, the Working Group approved the substance of recommendation 107.

28. It was agreed that recommendation 108 should provide that a court order would be necessary for the enforcement of a security right in a bank account unless the depository bank consented to enforcement without a court order. Subject to that change, the Working Group approved the substance of recommendation 108.

Recommendation 109 (negotiable documents)

29. It was agreed that recommendation 109 should refer to the rights of a holder of a negotiable document against the issuer or any other person obligated on the document. Subject to that change, the Working Group approved the substance of recommendation 109.

Recommendation 110 (disposition of encumbered assets)

30. Subject to the change made in recommendations 92 to 94 and 98 (see paras. 14 and 18 above), the Working Group approved the substance of recommendation 110.

Recommendations 111 and 112 (advance notice with respect to extra-judicial disposition of encumbered assets)

31. The Working Group considered a proposal to include in recommendation 111 language along the lines of subparagraph (d) of recommendation 99 (registration of notice) for consistency reasons. That proposal was objected to. It was observed that, while registration of the notice referred to in recommendation 99 was a suggestion for consideration rather than a recommendation, such a suggestion was not appropriate in recommendation 111 as it would unnecessarily create the risk of costs, delays, errors and litigation and should be deleted even in recommendation 99. It was also pointed out that, unlike recommendation 99, which was expressed in general terms, recommendation 111 might be reformulated to be more specific. As a matter of drafting, it was suggested that recommendation 111 might be rearranged in separate paragraphs. Subject to those changes, the Working Group approved the substance of recommendation 111.

32. The Working Group approved the substance of recommendation 112 unchanged.

Recommendations 113-115 (acceptance of encumbered assets in satisfaction of the secured obligation)

33. It was agreed that the relationship among recommendations 113, 114 and 115 should be clarified. It was also agreed that registration of the notice with the proposal of the secured creditor to accept the encumbered assets in total or partial satisfaction of the secured obligation in the security rights registry was not necessary, since the grantor and other interested persons could protect their rights by simply objecting to the proposal of the secured creditor.

34. A number of proposals were made. One proposal was that the notice with the proposal of the secured creditor to accept the encumbered assets in total or partial satisfaction of the secured obligation should specify the amount owed and the amount to be paid. It was stated that such specificity would provide the grantor and notified third parties with the information they needed to determine whether to accept or to object to the proposal. It was agreed that the commentary could clarify that a good faith estimate of the amount owed would be sufficient. While some reservation was expressed as to the need for such specificity in the notice on the grounds that, in the absence of sufficient information, the grantor or any notified third party could object and thus deprive the secured creditor of that remedy, there was sufficient support in the Working Group for the proposal.

35. Another proposal was that, in the case of partial satisfaction of the secured obligation, actual consent by the grantor should be required and not just the absence of any objection by the grantor within a short period of time after notice was given. It was stated that actual consent by the grantor might be more appropriate to protect the grantor from the risk of error or misunderstanding of the notice. That proposal did not attract sufficient support. It was stated that there was no reason to require actual consent of the grantor and, if such a requirement were added, it should apply to both the grantor and notified third parties.

36. Yet another proposal was that the last sentence of recommendation 115, providing for a judicial or other official review of the reasonableness of the objections of the grantor and notified third parties, should be deleted. It was stated that acceptance of the encumbered assets by the secured creditor in total or partial satisfaction of the secured obligation was a voluntary, extra-judicial remedy that should not be unnecessarily burdened with the delay and cost involved in any judicial or other official process. In addition, it was observed that the reasonableness of any objection was a practical matter for the parties and not a legal matter to be addressed by a court. While there was some objection mainly on the grounds that recourse to courts should and, in some countries, would, in any case, always be available, the proposal was met with sufficient support by the Working Group.

37. Yet another proposal was that, at least, the secured creditor should be given the right to accept the encumbered assets at a fixed market price even over the objection of the grantor or a notified third party. It was stated that such an approach would not prejudice the rights of the grantor or notified third parties as the secured creditor would, in any case, pay the market price. That proposal was objected to. It was observed that such a provision was unnecessary since, if there were a fixed market price (which should be carefully defined), interested parties would normally accept the proposal of the secured creditor. It was also observed that, if interested parties objected to the proposal, the secured creditor could still sell the encumbered assets at the market price.

38. Yet another proposal was that the last words of the first sentence of recommendation 115 (“but ... dispositions”) should be deleted. It was stated that, if the proposal of the secured creditor to accept the encumbered assets in satisfaction of the secured obligation was found by the grantor or any notified third party to be objectionable, the secured creditor should have all the other available remedies as if the proposal had never been made. There was sufficient support for that proposal.

39. After discussion, subject to the above-mentioned changes, the Working Group approved the substance of recommendations 113 to 115.

Recommendations 116 to 119 (surplus and shortfall)

40. With respect to recommendation 116, it was agreed that the net proceeds (i.e. after deduction of the costs of enforcement) should be applied to the secured obligation. With respect to recommendations 117 and 118, it was agreed that they should be revised to ensure that the priority status of the various competing claimants under the priority rules of the secured transactions law would not be changed as a result of the application of procedural rules. With respect to recommendation 119, it was agreed that it should be revised to ensure that a non-debtor grantor would not be liable for any shortfall. Subject to those changes, the Working Group approved the substance of recommendations 116 to 119.

Recommendation 120 (right of prior-ranking secured creditor to take over enforcement)

41. The Working Group approved the substance of recommendation 120 unchanged. It was suggested that the principle that prior-ranking secured creditors prevailed was a general principle that applied to other rights beyond enforcement and should be included in the general provisions of the draft Guide. The Working Group decided to postpone

consideration of that proposal until it had the opportunity to consider the general provisions of the draft Guide.

Recommendation 121 (title or other right acquired through non-judicial disposition)

42. It was agreed that the commentary should clarify that reference was made in recommendation 121 to “title or other right” since: according to recommendation 110 the secured creditor could “sell, lease, license or otherwise dispose of encumbered assets”; and the encumbered assets themselves might be a partial right as the right of a lessee or a licensee. It was also agreed that the commentary should clarify that the reference to good faith was meant to apply to situations, in which the disposition was not in accordance with the general standard of conduct set forth in recommendation 89, so as to protect the buyer who had no knowledge of that fact. After discussion, the Working Group approved the substance of recommendation 121 unchanged.

Recommendation 122 (title or other right acquired through judicial disposition)

43. The Working Group approved the substance of recommendation 122 unchanged.

Recommendation 123 (intersection of movable and immovable secured transactions law)

44. It was agreed that subparagraph (b) should be revised to provide that, if movables and immovables were disposed of in the same disposition, the movables might be disposed of in accordance with either the law of security rights in movables or the law of security rights in immovables. Subject to that change, the Working Group approved the substance of recommendation 123.

Recommendation 124 (coordination with other law)

45. The Working Group approved the substance of recommendation 124 unchanged.

**Chapter VII. Pre-default rights and obligations of the parties
(A/CN.9/WG.VI/WP.21/Add.2, recs. 86-87)**

Purpose section

46. The Working Group approved the substance of the purpose section unchanged.

Recommendation 86 (party autonomy)

47. It was agreed that alternative B of recommendation 86 was preferable and should be placed in the context of the general provisions of the draft Guide as the principle of party autonomy applied throughout the draft Guide. In view of the importance of that principle for the relationship between the parties, it was also agreed that it should be sufficiently elaborated in the commentary of chapter VII. In addition, it was agreed that, to avoid diluting the principle of party autonomy, any exceptions to that principle should be clearly specified, limited and aimed at protecting the grantor. Moreover, despite some doubt initially expressed, it was agreed that the rights of third parties were appropriately set out as the limits of party autonomy. It was also agreed that the general principle of party autonomy should be coordinated with the specific expressions of that principle included in

chapters of the draft Guide (e.g. recommendations 90 and 91). After discussion, the Working Group approved the substance of alternative B of recommendation 86 and decided that alternative A should be deleted.

Recommendation 87 (suppletive rules)

48. The Working Group approved the substance of recommendation 87 unchanged.

**Chapter X. Acquisition financing devices
(A/CN.9/WG.VI/WP.21/Add.4, recs. 125-135)**

Purpose

49. The Working Group approved the substance of subparagraph (a) of the purpose section unchanged. With respect to subparagraph (b), it was agreed that discussion of the alternatives reflected therein be postponed until all the recommendations relating to acquisition financing devices had been considered.

Recommendation 125 (equivalence of acquisition financing devices to security rights)

50. It was agreed that discussion of the alternatives set out in recommendation 125 with respect to the non-unitary approach be postponed until all the recommendations relating to acquisition financing devices had been considered.

Recommendation 126 (creation of acquisition security rights)

51. There was general support in the Working Group for the substance of recommendation 126, which was based on a unitary approach. It was agreed that a parallel recommendation should be prepared for States wishing to follow a non-unitary approach. It was widely felt that, in line with the decision of the Working Group at its seventh session that all providers of acquisition financing should be treated equally (see A/CN.9/574,

para. 35), such recommendation should provide the same requirements and the same results for all aspects of acquisition financing devices. It was also generally felt that, for such recommendation to be readily understood and implemented in States in which retention of title and similar devices were the prevalent functional equivalents of security devices, the recommendation should be based on terminology and concepts familiar in such systems. In that context, it was stated that, in the case of retention of title, both the seller and the buyer might have ownership rights and no one granted a right to the other, and the intent to be bound could be reflected in the general terms and conditions of the seller or the buyer. In the same vein, it was observed that, if the form requirements of a sale with a retention-of-title clause were not met, the seller would remain the owner. Moreover, it was agreed that recommendation 126 should be retained only if it were different from the general recommendation on form requirements (i.e. recommendation 8 in document A/CN.9/WG.VI/WP.21, which remained to be discussed).

Recommendation 127 (effectiveness of acquisition security rights against third parties)

52. There was general agreement in the Working Group with the substance of recommendation 127, which was based on a unitary approach. It was also agreed that a parallel recommendation should be prepared following a non-unitary approach. As to whether the same rule should apply in both cases, differing views were expressed. One view was that, if a non-unitary approach were followed, registration should not be required or, alternatively, a longer grace period should be granted to accommodate retention of title and similar devices. It was stated that registration could add cost and bureaucracy and thus undermine the efficiency of important retention-of-title transactions. However, the prevailing view was that all devices performing security functions should be subject to registration. It was stated that the availability and the cost of credit would be negatively affected if all providers of acquisition financing were not treated equally. It was also observed that the efficiency of any registration system would be seriously compromised if all transactions serving security purposes were not subject to registration. In addition, it was said that registration enhanced transparency, discouraged hidden security rights and promoted certainty in secured financing.

53. As a matter of drafting, it was agreed that the second sentence of recommendation 127 should be revised to ensure that the rights registered were effective not only as against third parties whose rights arose between the time the acquisition security right was created and registration but also as against third parties whose rights were registered subsequently.

54. After discussion, the Working Group, recalling its decision at its seventh session (see A/CN.9/574, para. 46), decided that, whether a State followed a unitary or a non-unitary approach, all acquisition financing devices should be subject to registration and the grace period should be as short as possible.

Recommendation 128 (exceptions to the principle of registration)

55. It was agreed that acquisition financing transactions relating to consumer goods should not be subject to registration, whether the consumer goods had a resale value or not. It was also agreed that that exception did not affect registration in specialized registries or title certificate systems. Subject to those changes, the Working Group approved the substance of recommendation 128.

Recommendation 129 (priority of acquisition security rights over pre-registered non-acquisition security rights in future goods other than inventory)

56. There was general agreement in the Working Group that recommendation 129 was sufficient for the purposes of a unitary approach. As a matter of drafting, in order to avoid confusion with a security right registered before its creation, it was agreed that reference should be made, not to pre-registered security rights, but rather to security rights registered earlier. While some doubt was expressed as to whether subparagraph (i) would be appropriate in the context of a recommendation reflecting the non-unitary approach, it was widely felt that a purchase-money lender and a retention-of-title seller would have super-priority (i.e. priority even over a security right that had been registered earlier) if they retained actual possession of the goods, registered a notice in the security rights registry within a certain period of time after actual delivery of the goods to the grantor or buyer, or upon creation of the security right if no registration was required under recommendation 128 (subject to compliance with any other applicable registration system,

such as for vehicles). Subject to the above-mentioned change, the Working Group approved the substance of recommendation 129 reflecting a unitary approach and requested the Secretariat to draft a parallel recommendation to implement a non-unitary approach.

Recommendations 130 and 131 (priority of acquisition security rights over pre-registered non-acquisition security rights in future inventory)

57. It was agreed that the change made in recommendation 129 (concerning the reference to “pre-registration”) should be made in recommendation 130 as well (see para. 56 above). After discussion, it was also agreed that it was not necessary for the notice to refer to the priority rank of the acquisition security right. It was stated that the notice should be easy for business people to formulate and, in any case, acquisition financiers did not have to give, in essence, to inventory financiers on record legal advice about the priority status of acquisition security rights. Subject to those changes, the Working Group approved the substance of recommendation 130 as part of a unitary approach.

58. It was also agreed that that a parallel recommendation should be prepared for States wishing to follow a non-unitary approach. It was stated that such recommendation would need to deal not with priority but rather with the question whether the retention-of-title seller could set up its ownership rights against third parties (it was clarified that that point applied to recommendation 129 as well).

59. In that connection, the suggestion was made that, in order to avoid creating delays, costs and unnecessary formalities for retention-of-title transactions, they should not be subject to registration or, at least, be subject to registration within a sufficiently long grace period (3-6 months), without treating inventory differently from goods other than inventory. It was stated that registration could undermine retention-of-title transactions that were based on concepts shared by a number of European countries and reflected in European Union legislation. That suggestion was objected to for the same reasons given at the discussion of that matter at the seventh session of the Working Group (see A/CN.9/574, paras. 55 and 56). It was observed that the Working Group should bear in mind the interests of all States and not just of any region in particular. It was also pointed out that law and practice of retention of title differed widely even among countries of the same region, and that European Union legislation on retention of title referred it to national legislation.

60. It was widely felt, however, that, in order to make recommendation 130 more easily understandable to civil law lawyers, the commentary could explain their impact. The commentary could explain, in particular, that, once security rights in future assets were made possible, conflicts that could currently arise only in very few retention-of-title jurisdictions that permitted the sale of future assets with retention of title, could arise between a retention-of-title seller and a lender. The commentary could also explain that, under the system of the draft Guide, retention-of-title sellers would be able to register and notify for a period of five years, covering multiple sales transactions between the same parties, and thus ensure that their rights would be effective against third parties and have priority even over the rights of parties that had made an earlier registration.

61. After discussion, the Working Group approved the substance of recommendation 131 unchanged and requested the Secretariat to prepare a parallel recommendation for a non-unitary approach.

Recommendation 132 (cross-collateralization)

62. It was stated that recommendation 132 dealt with multiple security rights rather than cross-collateralization. It was also observed that recommendation 132 might not be necessary as there was nothing in the draft Guide to suggest that an acquisition financier was not an acquisition financier merely because it also had a non-acquisition security right in the goods covered by the acquisition security right or the acquisition security right also secured other obligations. After discussion, it was agreed that recommendation 132 could be deleted and the matter could be addressed in the commentary.

Recommendation 133 (priority of acquisition security rights in proceeds of inventory)

63. It was agreed that recommendation 133 should make it clear that the notice referred to in the proviso clause with respect to proceeds of inventory could be given at the same time it was given to an inventory financier on record under recommendation 130 (i.e. before actual delivery of the inventory to the grantor). It was also agreed that, in any case, that notice ought to be given no later than the time the proceeds arose.

64. In response to a query, it was stated that, by requiring that notification be given to financiers on record with a right in the same kind of assets as the proceeds, such as receivables, recommendation 133 eased the burden on the searcher who would know to search for security rights in both inventory and receivables of the grantor. It was agreed that the commentary could elaborate on the concept and the effect of the notice.

65. Subject to those changes, the Working Group approved the substance of recommendation 133 and requested the Secretariat to prepare a parallel recommendation following a non-unitary approach, as well as a similar recommendation (without the proviso clause) on priority of security rights in proceeds of equipment.

Recommendation 134 (enforcement)

66. It was agreed that the alternative of recommendation 134 addressing the unitary approach should refer to all remedies of an acquisition financier (including the acceptance of the assets in total or partial satisfaction of the secured obligation and collection of receivables) and not only to the right to repossess and dispose of the assets. Subject to that change, the Working Group approved the substance of the unitary approach-related alternative of recommendation 134.

67. With respect to the alternative of recommendation 134 addressing the non-unitary approach, a number of concerns were expressed. One concern was that the rights and remedies of a retention-of-title seller could not be the same as those of a purchase-money lender. Another concern was that no reference was made to obligations. Yet another concern was that the words “to the maximum extent possible” might not be sufficient to produce the desired equivalence in the treatment of all acquisition financing devices, whether a unitary or a non-unitary approach was followed. Yet another concern was that the current text might not be sufficient for States that might introduce the notion of an acquisition security right for lenders while preserving retention of title for sellers and lessors. In order to address those concerns, several suggestions were made. One suggestion was that the recommendation based on a unitary approach could apply equally to a non-unitary approach. That suggestion was objected to. It was stated that, while the preconditions and the results should be the same, the rights and remedies (or the way to achieve the desired equivalence) were different. Another suggestion was that the

recommendation could read along the following lines: “The law should provide that, in the case of default on the part of the buyer, grantor or financial lessee, an acquisition security right should be enforced in such a manner that: (i) the same principles and objectives as those governing enforcement of security rights generally are complied with; and (ii) the same results are obtained.” As there was sufficient support for that suggestion, the Working Group requested the Secretariat to revise the non-unitary approach-related alternative of recommendation 134 along those lines.

Recommendations on the treatment of acquisition financing devices in the case of insolvency

68. The Working Group decided to defer consideration of the recommendations dealing with acquisition financing devices in the case of insolvency until it had the opportunity to consider all insolvency-related recommendations.

Recommendation 135 (conflict of laws)

69. It was agreed that all conflict-of-laws recommendations should apply to acquisition financing rights, including those relating to security rights in intangibles, so as to cover proceeds of tangibles subject to an acquisition financing right that could be intangibles. Subject to that change, the Working Group approved the substance of recommendation 135.

Intellectual property rights (A/CN.9/WG.VI/WP.21, rec. 3 (h) and A/CN.9/WG.VI/WP.22/Add.1, paras. 13-14 and 21 (dd))

70. The Working Group first considered the question whether security rights in intellectual property rights should be included in the scope of the draft Guide. It was widely felt that intellectual property rights should be included in the scope of the draft Guide. It was stated that it was important to facilitate the use of intellectual property rights as a source of credit and to recognize the growing importance and value of intellectual property rights as business assets, particularly to small- and medium-size enterprises throughout the world. In addition, it was observed that intellectual property rights were so inter-connected with other assets, such as equipment and inventory, that it would be extremely difficult to separate them from those assets and exclude them from the draft Guide. Moreover, it was said that exclusion of intellectual property rights from a secured transactions regime would not only impede access to credit in respect of intellectual property but would also limit the benefits of the draft Guide and leave States with no guidance on security rights in intellectual property rights.

71. On behalf of the World Intellectual Property Organization (WIPO), it was stated that WIPO supported UNCITRAL in that endeavour, and was prepared to provide assistance to the Working Group on the basis of WIPO’s mandate and expertise in the field of intellectual property. In addition, it was observed that intellectual property should be included in the scope of the draft Guide for the reasons mentioned above. However, the issue that needed to be addressed was that the draft Guide made recommendations that might require adjustment so as to avoid a negative impact on intellectual property industry, as well as the finance community, and any conflict following the implementation of the recommendations of the draft Guide on pre-existing intellectual property laws and treaty obligations, and the business practices that had developed over time to give effect to those

laws and obligations. While recognizing the need for modernization of secured transactions laws, WIPO urged the Working Group to be sensitive to the need in doing so to avoid a negative effect on the exercise of intellectual property rights. WIPO recognized the need to give States and legislators guidance on issues of intellectual property and security rights and to review the draft Guide's recommendations to identify where adjustments to those recommendations might be needed, why those adjustments might be necessary and how they might be made. It was observed that that guidance was not given in the draft Guide in its current state.

72. It was, therefore, announced that WIPO would undertake a process of consultation with a specially constituted working group of intellectual property experts at WIPO to report and give guidance to States on intellectual property and security rights, to review the recommendations of the draft Guide to ensure that they were appropriate for intellectual property assets and to suggest adjustments to those recommendations where necessary. In particular, it was mentioned that the WIPO initiative would seek to enhance awareness of the use of intellectual property in secured transactions in countries where familiarity and understanding of those issues was relatively undeveloped. It was also stated that WIPO would communicate with UNCITRAL, to ensure that that cooperation was appropriately managed to ensure that WIPO's work was effectively coordinated with the work of the Working Group, so as to provide maximum assistance and guidance to States in reforming law relating to intellectual property and security rights.

73. After discussion, the Working Group agreed that intellectual property rights should be included in the scope of the draft Guide.

Recommendation 3 (h) (A/CN.9/WG.VI/WP.21)

74. The Working Group next turned to the formulation of recommendation 3 (h), noting that it was discussed in paragraphs 13 and 14 of chapter I, Introduction, while intellectual property rights were defined in paragraph 21 (dd) of chapter I (A/CN.9/WG.VI/WP.22/Add.1). It was generally thought that the recommendation was appropriately formulated to ensure that the draft Guide would generally apply to security rights in intellectual property rights not only without the need for the Working Group to examine the application of each and every recommendation to security rights in intellectual property, which was generally thought to be a task that went beyond the current project, but also without interfering with intellectual property legislation. The suggestion to defer not only to intellectual property law, whether national or international, but also to business practices was not met with support. It was stated that such an unqualified reference to all business practices would be too broad and could inadvertently result in excluding intellectual property rights from secured transactions legislation altogether. It was also observed that, if necessary, reference could be made in the commentary to certain business practices that were generally acceptable, widely used and reflected in legislation. After discussion, the Working Group approved the substance of recommendations 3 (h) unchanged.

**Proceeds from drawings under independent undertakings
(A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb),
A/CN.9/WG.VI/WP.21, rec. 25, A/CN.9/WG.VI/WP.21/Add.1,
recs. 49 and 62, A/CN.9/WG.VI/WP.21/Add.2, rec. 106,
A/CN.9/WG.VI/WP.21/Add.5, rec. 138)**

75. It was generally agreed that the draft Guide should deal with security rights in proceeds from drawings under independent undertakings (i.e. commercial and standby letters of credit and independent guarantees). It was stated that such an approach would reflect the wide acceptance of proceeds of drawings under independent undertakings as a source of credit. In addition, it was observed that the draft Guide would supplement other international efforts to unify the law relating to independent undertakings, particularly the work of the International Chamber of Commerce (ICC). As to the asset that would be subject to the security right, it was agreed that it should not be the independent undertaking itself nor the right to demand payment under an independent undertaking, but rather the right to receive such payment. In that connection, a view was expressed that, while proceeds from drawings under independent undertakings could be addressed in the draft Guide, there was no need to elaborate specific recommendations since the recommendations applicable to general receivables could apply. However, the Working Group noted that the right to receive payment under an independent undertaking should be treated, like the right to receive payment of the balance in a bank account, as a special kind of receivable subject to certain asset-specific recommendations reflecting the needs of parties to the relevant transactions.

Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb))

76. The Working Group next turned to the definitions of the relevant terms (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb)). It was stated that the words “subject to law other than secured transactions law” in the definition of “independent undertaking” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y)) were not necessary as there was sufficient reference to the relevant body of law and, in any case, the definition was not intended to set forth a rule.

77. A number of proposals were made regarding the definition of the term “proceeds from a drawing under an independent undertaking” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (z)). One proposal was that the term “payment made” be replaced by “payment due or to become due”, the words “a deferred payment obligation incurred” be deleted and the words “to be” be added before the word “delivered”. Another proposal was that use of the word “proceeds” in the defined term itself should be replaced by language along the lines “the right to receive payment under an independent undertaking”. It was stated that use of the term “proceeds” might create confusion in view of the fact that it was used in the draft Guide in the sense of “whatever was received in respect of an encumbered asset” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (ee)). Yet another proposal was that the term “receivable” could be used instead. In response to both proposals, it was observed that the term “proceeds from the drawing under an independent undertaking” was more familiar to the relevant industry and was used in relevant texts. It was also stated that, in view of the relevant law and practice, use of the term “receivable” would be inappropriate.

78. It was suggested that in the definition of “guarantor/issuer” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (aa)) reference should also be made to counter-guarantors.

79. After discussion, the Working Group requested the Secretariat to revise the definitions, taking into account the views expressed and the suggestions made.

Recommendation 25 (A/CN.9/WG.VI/WP.21)

80. There was general support in the Working Group for recommendation 25.

Recommendation 49 (A/CN.9/WG.VI/WP.21/Add.1)

81. A number of suggestions were made. One suggestion was that the definition in the note to recommendation 49 could replace the definition of “control” with respect to independent undertakings (and a similar wording could replace the definition of “control” with respect to bank accounts). Another suggestion was that the definition of “control” should refer to the right to dispose. Yet another suggestion was that a separate recommendation might be necessary to ensure that, irrespective of the creation, third-party effectiveness or priority of a security right in proceeds from the drawing under an independent undertaking, the guarantor/issuer did not have to pay the secured creditor against its will. Yet another suggestion was that subparagraph (d) should be revised since an independent undertaking did not automatically follow the receivable, the payment of which it supported. It was stated that a separate act of transfer was necessary under article 10 (1) of the United Nations Assignment Convention. After discussion, the Working Group requested the Secretariat to revise recommendation 49, taking into account the views expressed and the suggestions made.

Recommendation 62 (A/CN.9/WG.VI/WP.21/Add.1)

82. A number of suggestions were made. One suggestion was that subparagraph (b) should be deleted as acknowledgement was a form of control already covered in subparagraph (a). It was stated that the element of inconsistent acknowledgements could be incorporated in subparagraph (a). Another suggestion was that subparagraph (c) should be limited to situations envisaged in recommendation 49 (b) in which possession was a condition to payment. Yet another suggestion was that, if registration were to be preserved as a method of achieving third-party effectiveness, a priority rule should be introduced in recommendation 62 to address the priority of registered security rights. Yet another suggestion was that subparagraph (d) should be deleted since a fundamental aspect of the independent character of an undertaking was that it did not follow the receivables the payment of which it supported. It was stated, however, that the expectation of the parties would be that supporting obligations would follow the receivable. In an effort to bridge the gap between those views, it was observed that in either case, absent its consent, the guarantor/issuer or nominated person would not have to pay the secured creditor, as provided in recommendation 106 (A/CN.9/WG.VI/WP.21/Add.2). In that connection, it was suggested that recommendation 106 should be recast as a principle of general application even outside enforcement. After discussion, the Working Group requested the Secretariat to revise recommendation 62, taking into account the views expressed and the suggestions made.

Recommendation 106 (A/CN.9/WG.VI/WP.21/Add.2)

83. There was general support in the Working Group for the substance of recommendation 106. The suggestion to recast it as a general principle applicable to all chapters of the draft Guide was reiterated.

Chapter XI. Conflict of laws (A/CN.9/WG.VI/WP.21/Add.5, recs. 136-149)**Purpose**

84. It was agreed that the words “as appropriate” in the second paragraph of the purpose section should be deleted. It was also agreed that the examples given in that paragraph should be separated as transfer of title was a security right in both unitary and non-unitary systems, while the situation was different with respect to retention of title and financial leases in a non-unitary system.

Recommendation 136 (security rights in tangible property)

85. The Working Group agreed that recommendation 136 appropriately applied to security rights in negotiable instruments and negotiable documents. It was suggested, however, that the third-party effectiveness of a non-possessory security right in a negotiable instrument should be subject to the law of the State of the grantor’s location (i.e. the law provided for in recommendation 137). It was widely felt that that approach was appropriate, since a secured creditor could refer to the law of one jurisdiction to make effective against third parties security rights in negotiable instruments issued in various countries.

86. The suggestion was made that recommendation 136 should be reformulated to refer to the law of the location of the asset all issues relating to a security right and not just its creation, third-party effectiveness and priority. It was stated that exceptions should be limited and clearly stated. There was no sufficient support for that suggestion. It was observed that the draft Guide was divided in those categories of issues. It was also said that any issue not covered in recommendation 136 (e.g. enforcement) was addressed in subsequent recommendations (e.g. 149).

87. With respect to mobile assets, it was observed that the rule in the second sentence of recommendation 136 would not apply if they were subject to specialized registration systems, which, as provided in the third-party effectiveness chapter, were to be preserved.

88. After discussion, the Working Group approved the substance of recommendation 136 unchanged, and requested the Secretariat to include in the commentary appropriate explanation of the matters addressed above. The Secretariat was also requested to prepare a draft recommendation referring the third-party effectiveness of a non-possessory security right in a negotiable instrument to the law of the grantor’s location.

Recommendation 137 (security rights in intangible property)

89. It was questioned whether recommendation 137 should apply to intellectual property rights. It was agreed that the commentary could clarify that matter. On behalf of WIPO, it was stated that recommendation 137 was among the recommendations that required

adjustments so as to apply to intellectual property rights. After discussion, the Working Group approved the substance of recommendation 137 unchanged.

Recommendation 138 (security rights in proceeds from a drawing under an independent undertaking)

90. A number of suggestions were made. One suggestion was that the reference to enforcement in subparagraph (a) should be deleted. It was stated that the enforcement of a security right in proceeds from a drawing under an independent undertaking should be subject to the law applicable to enforcement (recommendation 149), and not to the law of the grantor's location. Another suggestion was that subparagraph (b) should be recast as a recommendation dealing with the law applicable to the obligations of the guarantor/issuer or nominated person and coordinated with subparagraph (c). It was stated that the new provision should track, to the extent possible, the language of recommendation 148 dealing with the relationship between the account debtor and the assignee. Yet another suggestion was that a recommendation along the lines of recommendation 140 should be prepared for security rights in proceeds from a drawing under an independent undertaking. After discussion, the Working Group requested the Secretariat to revise recommendation 138, taking into account the views expressed and the suggestions made.

Recommendations 139 and 140 (security rights in bank accounts)

91. Differing views were expressed with regard to the alternatives presented in recommendation 139. In support of alternative A, it was stated that the rule applicable to securities under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary (i.e. the law governing the account) was preferable since bank accounts and securities accounts were very similar and it was difficult to distinguish between the two particularly when a bank provided both services to its customers. In addition, it was observed that such an approach would provide certainty and predictability as lenders would expect to receive a copy of the account agreement (or even obtain a control agreement) before extending credit on the basis of a bank account. Moreover, it was said that alternative C (the law of the location of the bank where the account was held and the "closest connection" test) would cause uncertainty as there was no universally acceptable system to locate bank accounts and the closest connection test was vague. It was also mentioned that application of the law governing the bank account would not cause any changes in practice since banks already applied that rule with respect to securities accounts.

92. In favour of alternative C, it was stated that the law applicable to security rights in bank accounts should be different from the law applicable to such rights in securities accounts, since bank accounts were different from securities accounts both conceptually and operationally. The bank account, it was stated, involved a bilateral relationship between the customer and the bank and not the intermediated multi-tier holding systems that were found in securities accounts. It was also stated that, although cash could be held also in securities accounts, it was considered to be ancillary to the securities account and was held temporarily in separate sub-accounts for specific purposes, such as for the purchase of securities or the deposit of dividends. It was further said that the Hague Convention was not designed for bank accounts and, while studies were being conducted on the impact of the rules on securities accounts, there was no information as to any parallel studies with respect to the impact of similar provisions on bank accounts. The

scope of the Hague Convention, it was observed, extended to dematerialized securities whose operation was much more complex than bank accounts.

93. In addition, it was observed that a bank account could be traced to a specific branch with relative ease, so a rule based on that connecting factor would provide *ex ante* certainty (advance certainty, i.e. before a transaction had been concluded)). To the contrary, it was said, it would be difficult for third parties to ascertain the choice of law in an account agreement because those documents were usually confidential. It was further observed that application of the law of the account agreement could have serious adverse effects on banking practice, since the rights and duties of the bank or enforcement would be made subject to a law other than that of its location. It was also mentioned that third parties would have no way of determining the law applicable to the account as the account agreement would be protected by bank secrecy. It was also said that party autonomy was not appropriate in the case of proprietary law issues. In response, it was stated that, whatever the law applicable to bank accounts might be, it would not affect the law applicable to regulatory, tax, accounting or criminal law issues, which would remain subject to the law of the bank's relevant location. It was also said that bank secrecy was not an issue since borrowers were prepared to give lenders copies of the bank account agreements so as to obtain credit on the basis of those agreements, and often lenders would obtain a control agreement with the consent of the depositary bank. In addition, it was observed that analysis based on the principle of party autonomy was not very helpful, since alternative B referred to some objective connecting factors and alternative C eventually involved some degree of choice by the parties as to the location of an account.

94. In the discussion, the question was raised as to whether recommendation 139 would apply to transfers of accounts. In response, it was noted that it would apply to conflicts of priority involving transfers of bank accounts by virtue of the definition of "competing claimant", which included a transferee (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (gg)). For the same reason, the priority recommendations of the draft Guide would apply to a conflict involving a transferee of a bank account. However, whether the draft Guide as a whole applied to transfers of bank accounts was questionable since, while recommendation 3 (f) (see A/CN.9/WG.VI/WP.21) provided that in general outright transfers of receivables were within the scope of the draft Guide, bank accounts were excluded from the definition of "receivable" (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (o)).

95. After discussion, the Working Group decided to retain in recommendation 139 alternative B (which reflected the approach taken in alternative A in a concise way which was more suitable to the draft Guide) and alternative C (without the reference to the "closest connection test"). It was widely felt that as the choice between those alternatives depended on whether, as a matter of fact or practice, the location of bank accounts could be easily determined, information about the relevant practices should be collected and introduced into the discussion. As to recommendation 140 and the reference to it in the chapeau of recommendation 139, the Working Group decided that they should be retained outside square brackets.

Recommendation 141 (proceeds)

96. The Working Group approved the substance of recommendation 141 unchanged.

Recommendation 142 (goods in transit and export goods)

97. It was noted that a security right in goods in transit and export goods could be created and made effective against third parties, under recommendation 136, in accordance with the law of the country of their origin, or, under recommendation 142, in accordance with the law of the country of their ultimate destination. It was widely felt that there was no need to refer in recommendation 142 to negotiable documents. It was stated that in the normal situation in which the documents would travel with the goods, recommendation 142 was sufficient. It was also observed that recommendation 142 was sufficient also for situations where the goods travelled but not the documents. As to the rare situation in which the goods were not in transit but the documents were, it was said that recommendation 136 would apply to provide for the application of the law of the location of the encumbered asset (i.e. the document). After discussion, the Working Group agreed that the matters discussed above could be usefully clarified in the commentary and approved the substance of recommendation 142 unchanged.

Recommendation 143 (meaning of “location” of the grantor)

98. The Working Group approved the substance of recommendation 143 unchanged.

Recommendation 144 (relevant time when determining location)

99. It was agreed that priority disputes exclusively among claims created before relocation of the assets or the grantor should be subject to the law of the original location and not to the law of their location at the time the conflict of priority arose. Subject to that limited change, the Working Group approved the substance of recommendation 144.

Recommendation 145 (continued third-party effectiveness upon change of location)

100. It was agreed that, at the end of recommendation 145, language should be added along the following lines: “and, in determining priority under the law of the enacting State, for the purposes of any rule in which time of registration or other method of achieving third-party effectiveness is relevant, that time is the time at which that event occurred under the law of that other State.”. It was stated that the effect of that wording would be to clarify the time third-party effectiveness had been achieved. It was also agreed that the reference to the “enacting State” might be revised to avoid an implication that the other State would be a State that had not enacted the recommendations. It was explained that the recommendation had been drafted from the point of view of the receiving State, as the law of that State would normally apply, and on the basis of the assumption that that State would be an enacting State as, otherwise, the recommendations would not apply. Subject to those changes, the Working Group approved the substance of recommendation 145.

Recommendation 146 (*renvoi*)

101. It was stated that the title of recommendation 146 should be revised to indicate that *renvoi* was excluded (e.g. exclusion of *renvoi* or no *renvoi*). It was also observed that the commentary could explain the reference to the “law in force”. Subject to those changes, the Working Group approved the substance of recommendation 146.

Recommendation 147 (law governing the rights and obligations of the grantor and the secured creditor)

102. The Working Group agreed to retain outside square brackets the phrase “with respect to the security right” to align the scope of that provision to the subject matter of the draft Guide, by making the rule applicable to the parties’ rights and obligations that related to the security right. The Working Group also agreed to retain outside square brackets the words “by law” to make the rule applicable to rights and obligations relating to the security right which, although originating from the creation of the security right (and in that sense having an origin in the security agreement), arose from law in that they were not expressly or impliedly dealt with in the security agreement but became part of the security right as a matter of law. An example given was the nature and extent of the secured party’s duty to care for the collateral while it was in its possession, an obligation not strictly arising from the security agreement but being part of the security right as a matter of law.

103. As to the fallback rule applicable in the absence of a choice of law by the parties, differing views were expressed. One view was that no fallback rule should be provided on the assumption that one would not be needed since in most cases parties to secured transactions would include a choice-of-law clause in their agreements. Another view was that, in the absence of a choice of law by the parties, reference should be made to the law of the grantor’s location. However, the prevailing view was that the law applicable to the rights and obligations of the parties should be aligned with the law applicable to the purely contractual rights and obligations, an approach that would most likely be in line with the expectations of the parties. After discussion, the Working Group decided that the reference to the law governing the security agreement should be retained and the reference to the law of the grantor’s location should be deleted. Subject to the changes mentioned above, the Working Group approved the substance of recommendation 147.

104. In the discussion, the suggestion was made that, to recognize rules of practice and usages, reference should be made to “rules of law”. That suggestion did not attract support.

Recommendation 148 (law governing the rights and obligations of the account debtor and the assignee)

105. It was agreed that the parts of the recommendations on security rights in proceeds from drawings under independent undertakings and in bank accounts that dealt with the relationship between the account debtor and the assignee should be, to the extent possible, aligned with recommendation 148. After discussion, the Working Group approved the substance of recommendation 148 unchanged.

Recommendation 149 (enforcement matters)

106. There was support in the Working Group for both alternatives A and B. In support of alternative A, it was stated that enforcement involved procedural matters that should be subject to the law of the place of enforcement. It was observed, however, that such a rule could result in the application of more than one law where enforcement action, including out-of-court measures, was taken in various jurisdictions. In the same vein, it was mentioned that it was not easy to determine the place of enforcement with respect to intangibles, but even with respect to tangibles in particular when an action from a different place was required (e.g. the mailing of a notice). In support of alternative B, it was observed that it was suitable to address both court and out-of-court measures in various countries and sufficient to preserve legitimate interests of the forum in case of repossession

of the assets by the secured creditor or inconsistency between an enforcement measure and mandatory law or public policy of the forum. On the other hand, it was stated that, while party autonomy could work in the case of extra-judicial enforcement, it was not appropriate in the case of judicial enforcement. It was also observed that enforcement of intangibles would take place in the “location” of the receivable (i.e. the account debtor) and would typically involve a request for payment by the creditor to the account debtor.

107. As a matter of drafting, it was suggested that the words “outside insolvency proceeding” be deleted as they might cause confusion as to whether they required that an insolvency proceeding had been opened or not. The suggestion attracted support, provided that some other way was found to avoid interference with the insolvency-related recommendations. It was also suggested that the mandatory law and public policy exceptions in alternative B were applicable to all the conflict-of-laws recommendations and should be reformulated as such. That suggestion was met with interest, subject to a determination of the impact of those exceptions to the conflict-of-laws recommendations.

108. After discussion, the Working Group decided that both alternatives should be retained for the continuation of the discussion. The Secretariat was requested to prepare drafts to address the suggestions made.

Impact of insolvency on conflict-of-laws rules

109. The Working Group agreed to defer discussion of the insolvency-related conflict-of-laws recommendations until it had an opportunity to consider all the insolvency-related recommendations.

Multi-Unit States

110. The Secretariat was requested to prepare recommendations to address the application of the conflict-of-laws recommendations in multi-unit States.

Chapter IX. Insolvency (A/CN.9/WG.VI/WP.21/Add.3)

Insolvency Guide recommendations

111. With respect to the recommendations of the Insolvency Guide included in the Secured Transactions Guide, the Working Group decided that they should all be retained with appropriate explanations in the commentary. It was also agreed that some additional definitions from the Insolvency Guide (e.g. on financial contracts) might be usefully included in the Insolvency Chapter of the Secured Transactions Guide and any differences with the definitions of the Secured Transactions Guide explained.

Draft additional recommendations

Recommendations A and B

112. The Working Group agreed that both approaches be retained. It was widely felt that, in the context of a non-unitary approach, application of the principle of equivalence should lead to the various acquisition financing devices being treated in the same way. It was also agreed that in recommendation B a reference to the purchase-money lender should be added to reflect the equivalence principle. But it was also agreed that the characteristics of acquisition financing rights in law and practice should be respected. In addition, it was

generally thought that the commentary should explain with examples the treatment of acquisition financiers both in the unitary and the non-unitary approach. Moreover, it was agreed that the commentary should clarify the terminology in particular with respect to the non-unitary approach.

Recommendations C to E and G to K

113. The Working Group retained recommendations C and D unchanged.

Recommendation F

114. It was agreed that recommendation F should make it clear that the insolvency representative would be entitled to recover costs and expenses on a first priority basis. Subject to that change, the Working Group retained recommendation F.

Negotiable instruments and negotiable documents (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (w) and (x), and A/CN.9/WG.VI/WP.21, recs. 3 (d) and 24)

The Working Group approved the substance of the definitions of “negotiable instrument” and “negotiable document”, subject to the deletion of the reference to other law.

Recommendation 3 (d) (A/CN.9/WG.VI/WP.21, rec. 3 (d))

115. The Working Group approved the substance of recommendation 3 (d) and agreed that all the square brackets be deleted.

Recommendation 24 (A/CN.9/WG.VI/WP.21)

116. The Working Group approved the substance of recommendation 24, reserving final decision on whether the recommendation should be based on the characterization of the right as accessory or independent. It was also agreed that the recommendation should deal only with negotiable instruments and not with other payment obligations.

V. Future work

117. The Working Group noted that its ninth session was scheduled to take place in New York from 30 January to 3 February 2006 and that the following session was scheduled to take place in Vienna from 18 to 22 September 2006, the latter dates being subject to approval by the Commission at its thirty-ninth session scheduled to take place in New York from 19 June to 7 July 2006. In addition, the Working Group noted that it could have an additional session in New York from 1 to 5 May 2006, which was subject to a decision by the Working Group in January 2006.

A/CN.9/WG.VI/WP.21

**B. Note by the Secretariat on security interests: recommendations of
the draft Legislative Guide on Secured Transactions, submitted to
the Working Group on Security Interests at its eighth session**

(A/CN.9/WG.VI/WP.21 and Add.1-5) [Original: English]

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**Recommendations of the draft Legislative Guide on Secured
Transactions**

I. Key objectives

Purpose

The purpose of the recommendations on key objectives is to provide a broad policy framework for the establishment and development of an effective and efficient secured transactions law. These recommendations could be included in a preamble of the secured transactions law as a guide to the underlying legislative policies to be taken into account in the interpretation of the law (hereinafter referred to as “the law”).

Key objectives

1. The following key objectives should be considered:
 - (a) Promote secured credit;
 - (b) Allow utilization of the full value inherent in assets to support credit in a broad array of credit transactions;
 - (c) Obtain security rights in a simple and efficient manner;
 - (d) Recognize party autonomy;
 - (e) Provide for equal treatment of diverse sources of credit;
 - (f) Validate non-possessory security rights;
 - (g) Encourage responsible behaviour on the part of all parties by enhancing predictability and transparency;
 - (h) Establish clear and predictable priority rules;

- (i) Facilitate enforcement of creditor's rights in a predictable and efficient manner;
- (j) Balance the interests of affected persons; and
- (k) Harmonize secured transactions laws, including conflict-of-laws rules.

II. Scope of application

Purpose

The purpose of the scope provisions of the law is to specify the parties, the security rights, the secured obligations and the assets to which the law applies.

Parties, security rights, secured obligations and assets covered

2. The law should apply to all parties and types of security rights, secured obligations and encumbered assets. Any exceptions should be limited and clearly stated in the law.

3. In particular, the law should provide that it applies to:

(a) Legal and natural persons, including consumers, without, however, affecting their rights under consumer-protection legislation;

(b) Property rights created contractually to secure all types of obligations, including future obligations, fluctuating obligations and obligations described in a generic way;

(c) Possessory and non-possessory security rights in movable property and fixtures securing payment or other performance of one or more obligations, present or future, determined or determinable;

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, [negotiable instruments (such as cheques, bills of exchange and promissory notes), negotiable documents (such as bills of lading),] bank accounts [proceeds from the drawing under an independent undertaking and intellectual property rights];

[Note to the Working Group: Negotiable instruments, negotiable documents, independent undertakings and intellectual property rights are within square brackets as the Working Group has not decided yet that they should be included in the scope of the Guide. If the Working Group decides that such types of asset should be covered in the Guide, it may wish to review the recommendations to ensure that both the recommendations applicable to all types of asset and the asset-specific recommendations are appropriate for those assets.]

(e) Security rights acquired by way of transfer of title and all other types of rights securing the payment or other performance of one or more obligations, irrespective of the form of the relevant transaction and whether ownership of the encumbered assets is held by the secured creditor or the grantor, including the various forms of retention of title, financial leases and hire-purchase agreements;

(f) Generally, absolute transfers of receivables;

(g) Aircraft, ships and fixtures to the extent that the recommendations of this law are not inconsistent with existing laws or international obligations of the State relating to

these assets. Where a direct inconsistency exists, the State's secured transactions law should expressly confirm that the other law and international obligations govern those assets to the extent of that inconsistency;

[(h) Intellectual property rights to the extent that the recommendations of this law are not inconsistent with existing laws or international obligations of the State relating to these assets. A State enacting secured transactions legislation in accordance with this Guide should consider whether it might be appropriate to adjust certain of the recommendations as they apply to security rights in intellectual property. In this regard, a State should examine its existing intellectual property laws and the State's obligations under intellectual property treaties, conventions and other international agreements and, in the event that the recommendations of the Guide are directly inconsistent with any such existing laws or obligations, the State's secured transactions law should expressly confirm that those existing intellectual property laws and obligations govern such issues to the extent of the inconsistency. In considering whether any adjustments of the recommendations as they apply to security rights in intellectual property are appropriate, a State should analyse each circumstance on an issue-by-issue basis and should have proper regard both to establishing an efficient secured transactions regime and to ensuring the protection and exercise of intellectual property rights in accordance with international conventions and national laws.]

4. The law should not apply to security rights in:
 - (a) Securities;
 - (b) Real property, with the exception of fixtures;
 - (c) Wages;
 - (d) [...].

III. Basic approaches to security

Purpose

The purpose of the recommendations on basic approaches to security is to ensure that the law covers in a comprehensive and consistent manner all forms of transactions that function as security.

Comprehensive approach

5. The law should include a comprehensive and consistent set of provisions on non-possessory security rights in tangibles and intangibles. The law should also provide for possessory security rights in tangibles.

Functional approach

6. The law should treat all devices that perform security functions as secured transactions, including the transfer of title to tangibles or the assignment of intangibles for security purposes, retention of title, financial leases and hire-purchase agreements, except to the extent otherwise contemplated in recommendation 7 .

Unitary and non-unitary approach

7. The law could subsume all devices that perform security functions into a unitary notion of security rights or preserve retention of title and similar devices as separate devices under other law but provide that the same rules applicable to security devices apply to the maximum extent possible.

IV. Creation of the security right (effectiveness as between the parties)

Purpose

The purpose of the provisions of the law dealing with creation is to specify the way in which a security right in movable property is created.

[Note to the Working Group: As the recommendations follow a unitary approach, the Working Group may wish to include at the end of each chapter alternative recommendations that follow a non-unitary approach as contemplated in recommendation 7 or a general recommendation drawing the attention of legislators to the need to adjust the recommendations if they decide to follow a non-unitary approach.]

Creation of a security right by agreement

8. The law should specify that a security right is created by agreement between the grantor and the secured creditor which is in writing [signed by the grantor in accordance with recommendation 12] [that evidences the intent of the grantor to grant a security right] or is accompanied by delivery of possession pursuant to the agreement and in accordance with recommendation 9.

Delivery of possession

9. The law should provide that the delivery of possession of the assets to be encumbered is to the secured creditor or a third person (other than the grantor or an agent or employee of the grantor) that holds the assets on behalf of the secured creditor.

Minimum contents of the security agreement

10. The law should provide that the security agreement must, at a minimum, identify the secured creditor and the grantor, and reasonably describe the secured obligation and the assets to be encumbered. A generic description of the secured obligation and the encumbered assets should be sufficient.

Form

11. The law should specify that a writing requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce).

12. [The law should also specify that, unless the law provides otherwise, where the law requires a signature of a person, that requirement is satisfied in relation to an electronic communication if:

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the electronic communication message; and

(b) That method is as reliable as was appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement (see article 7 of the UNCITRAL Model Law on Electronic Commerce).]

Assets and obligations subject to a security agreement

13. The law should specify that a security right may secure all types of obligation, including future, conditional and fluctuating obligations. It should also specify that a security right may be given in all types of asset, including parts of assets and undivided interests in assets and assets which, at the time of the security agreement, the grantor may not yet own or have the power to dispose of, or which may not yet exist, as well as in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

Receivables

Effectiveness of an assignment as between the assignor and the assignee and as against the account debtor

14. The law should provide that the assignment of receivables that are not specifically identified, future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee and as against the account debtor, as long as, at the time of the assignment or, in the case of future receivables, at the time they arise, they can be identified to the assignment to which they relate.

[Note to the Working Group: Article 8 of the United Nations Assignment Convention.]

Effectiveness of an assignment made despite an anti-assignment clause

15. The law should provide that:

(a) An assignment is effective as between the assignor and the assignee and as against the account debtor notwithstanding an agreement between the initial or any subsequent assignor and the account debtor or subsequent assignee limiting in any way the assignor's right to assign its receivables;

(b) If other law creates any obligation or liability of the assignor for breach of such an agreement, the other party to such an agreement may not avoid the contract from which the assigned receivables arise or the assignment contract on the sole ground of that breach;

(c) A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

[Note to the Working Group: The Working Group may wish to consider whether recommendation 15, which is based on article 9 of the United Nations Assignment Convention should apply only to receivables listed in article 9 (3) of the Convention, i.e. receivables:

- (a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;*
- (b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;*
- (c) Representing the payment obligation for a credit card transaction; or*
- (d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.]*

Transfer of rights securing the assigned receivables

16. The law should provide that:

- (a) Personal or property rights securing or supporting payment of the assigned receivable are transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee;

[Note to the Working Group: The Working Group may wish to note that the commentary to this recommendation would clarify that the first sentence reflects the rule that accessory security rights follow the secured obligation automatically and the second sentence means that independent rights, if transferable, require a separate act of transfer.]

- (b) A right securing payment of the assigned receivable may be transferred notwithstanding any agreement between the assignor and the account debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable;

- (c) If other law creates any obligation or liability of the assignor for breach of such an agreement, the other party to such an agreement may not avoid the contract from which the assigned receivables arise or the assignment contract on the sole ground of that breach;

- (d) A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

[Note to the Working Group: The Working Group may wish to consider whether recommendation 16, which is based on article 10 of the United Nations Assignment Convention should apply only to receivables listed in article 10 (4) of the Convention (identical with the list in article 9 (3) reproduced under recommendation 15 above.)]

Principle of account debtor protection

[Note to the Working Group: Recommendations 17 to 23 are based on articles 15-21 of the United Nations Assignment Convention.]

17. The law should provide that:

- (a) Except as otherwise provided in this law, an assignment does not, without the consent of the account debtor, affect the rights and obligations of the account debtor, including the payment terms contained in the original contract;

(b) A payment instruction may change the person, address or account to which the account debtor is required to make payment, but may not change:

- (i) The currency of payment specified in the original contract; or
- (ii) The State specified in the original contract in which payment is to be made to a State other than that in which the account debtor is located.

Notification of the account debtor

18. The law should provide that:

(a) Notification of the assignment or a payment instruction is effective when received by the account debtor if it is in a language that is reasonably expected to inform the account debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract;

(b) Notification of the assignment or a payment instruction may relate to receivables arising after notification and that notification of a subsequent assignment constitutes notification of all prior assignments.

Discharge of the account debtor by payment

19. The law should provide that:

(a) Until the account debtor receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract;

(b) After the account debtor receives notification of the assignment, subject to paragraphs (c) to (h) of this recommendation, it is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the account debtor, in accordance with such payment instruction;

(c) If the account debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment;

(d) If the account debtor receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received;

(e) If the account debtor receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments;

(f) If the account debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this recommendation as if the account debtor had not received the notification. If the account debtor pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

(g) If the account debtor receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the account debtor is discharged by paying in accordance with this recommendation as if the

notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

(h) This recommendation does not affect any other ground on which payment by the account debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the account debtor.

Defences and rights of set-off of the account debtor

20. The law should provide that:

(a) In a claim by the assignee against the account debtor for payment of the assigned receivable, the account debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the account debtor could avail itself as if the assignment had not been made and such claim were made by the assignor;

(b) The account debtor may raise against the assignee any other right of set-off, provided that it was available to the account debtor at the time notification of the assignment was received by the account debtor;

(c) Notwithstanding paragraphs (a) and (b) of this recommendation, defences and rights of set-off that the account debtor may raise pursuant to recommendations 15 and 16 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the account debtor against the assignee.

Agreement not to raise defences or rights of set-off

21. The law should provide that:

(a) The account debtor may agree with the assignor in a writing signed by the account debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to recommendation 20. Such an agreement precludes the account debtor from raising against the assignee those defences and rights of set-off;

(b) The account debtor may not waive defences:

- (i) Arising from fraudulent acts on the part of the assignee; or
- (ii) Based on the account debtor's incapacity;

(c) Such an agreement may be modified only by an agreement in a writing signed by the account debtor. The effect of such a modification as against the assignee is determined by recommendation 22, paragraph (b).

[Note to the Working Group: Recommendation 21 is based on article 19 of the United Nations Assignment Convention, which refers to a signed writing only for a waiver of defences or its modification. If the Working Group decides not to refer to signature in recommendation 8, it may wish to reconsider the reference to signature in recommendation 21.]

Modification of the original contract

22. The law should provide that:

(a) An agreement concluded before notification of the assignment between the assignor and the account debtor that affects the assignee's rights is effective as against the

assignee, and the assignee acquires corresponding rights;

(b) An agreement concluded after notification of the assignment between the assignor and the account debtor that affects the assignee's rights is ineffective as against the assignee unless:

(i) The assignee consents to it; or

(ii) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(c) Paragraphs (a) and (b) of this recommendation do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Recovery of payments

23. The law should provide that failure of the assignor to perform the original contract does not entitle the account debtor to recover from the assignee a sum paid by the account debtor to the assignor or the assignee.

[Negotiable instruments [and other non-payment obligations]

24. The law should provide that, if a security right has been effectively created in a negotiable instrument, the secured creditor also has a security right in accessory rights with respect to the negotiable instrument without a new act of transfer. Such accessory rights may include:

(a) Rights against guarantors with respect to the negotiable instrument; and

(b) Security rights securing the obligation of the obligor on the negotiable instrument.]

[Note to the Working Group: Under recommendation 24, if A gets a note from B guaranteed by C and then grants a security right in the note to D, D gets a security right in the guarantee as well.]

[Independent undertakings

25. The law should provide that a beneficiary may grant a security right in proceeds from a drawing under an independent undertaking.]

[Note to the Working Group: "Proceeds from a drawing under an independent undertaking" is a defined term.]

Bank accounts

26. The law should provide that a security right in a bank account is effective as between the secured creditor and the grantor notwithstanding an agreement between the grantor and the depositary bank limiting in any way the grantor's right to create a security right in its bank accounts. However, the security right is not effective against the depositary bank, the depositary bank has no duty to recognize the secured creditor and no obligations are otherwise imposed on the depositary bank with respect to the security right, without the depositary bank's consent.

27. Consistent with consumer-protection laws and policies, the law should deal with the question whether and to what extent a security right in a bank account may be created [or be subject to enforcement proceedings under this law] by an individual grantor if the funds

in the bank account or the credit extended to the individual grantor is for the grantor's personal, family or household purposes.

[Negotiable documents of title]

28. The law should provide that a security right in a negotiable document is also a security right in the goods represented by the document [, provided that the issuer is in possession of the document, directly or indirectly, at the time the security right in the document is created].

[Note to the Working Group: The commentary may clarify that recommendation 28 is intended to negate that a separate security right needs to be created in the goods.]]

Proceeds

29. The law should provide that, unless otherwise agreed by the parties to the security agreement, the security right in the encumbered assets extends to the proceeds to the extent that the proceeds are identifiable in accordance with rules dealing with tracing that are also included in the law.

30. [The law should provide that, notwithstanding recommendation 29, the security right extends to civil and natural fruits of encumbered assets, such as [...], only if the parties so provide in the security agreement.]

[Note to the Working Group: In order to reflect the normal expectations of parties, recommendation 30 introduces a different approach as to civil and natural fruits of encumbered assets from the approach taken in recommendation 29 with respect to other types of proceeds (the notion of "proceeds", as defined in the terminology section, includes civil and natural fruits).]

Fixtures

31. The law should provide that a security right may be created or continue in fixtures in immovables under this law or real property law or fixtures in movables that have not lost their identity.

Products or masses of goods

32. The law should also provide that a security right may not be created in goods that are physically united with other goods in such a way that their identity is lost in another product or mass. However, if encumbered assets become part of another product or mass, the security right becomes a security right in the product or mass [proportionately] [up to the value of the encumbered assets at the time they are physically united with other goods].

[Note to the Working Group: Under the first alternative, if the value of the flour is 5 and the value of the sugar is 5, while the value of the cake is 100, the secured creditors share the value of the cake 50 and 50. Under the second alternative, if the value of product or mass is higher than the value of the goods, the security right extends only to the value of the goods before commingling (i.e. each gets 5, while the remaining value of 90 is preserved for the grantor and its unsecured creditors). If the value of the product or mass is lower than the value of the goods, the secured creditors share the loss proportionately (e.g. if the value of the cake is 8, each secured creditor gets 4).]

Time of creation

33. The law should provide that, unless the parties otherwise agree, a security right becomes effective as between the parties at the time the security agreement is concluded or at the time the encumbered assets are delivered to the secured creditor.

34. The law should also provide that, unless the parties otherwise agree, a security right in future property is created when the grantor acquires rights or the right to transfer rights in such property.

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Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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V. Effectiveness of the security right against third parties

Purpose

The purpose of the provisions of the law on the effectiveness of a security right against third parties is to require an additional step before a security right may become effective against third parties so as to:

- (a) Alert third parties dealing with the movable assets of the grantor of the risk that those assets may be encumbered by a security right; and
- (b) Provide a temporal event for ordering priority among secured creditors and between a secured creditor and other classes of competing claimants.

Methods for achieving third-party effectiveness

35. The law should provide that a security right is effective against third parties only when one of the following events occurs:

- (a) Registration of a notice of the security right in a general security rights registry;
- (b) Dispossession of the grantor if the encumbered assets are specific items of tangible movable property;
- [(c) Transfer of control to the secured creditor if the encumbered assets are [certain intangible obligations, other than receivables, owing to the grantor by a third person] [a bank account];]
- (d) Registration of a notice of the security right in a specialized title registry if the encumbered assets are specific items of movable property for which title is established, under other law of the enacting State, by registration in such a registry; (e) Entry of a notation of the security right on the title certificate if the encumbered assets are specific items of tangible movable property for which, under other law of the enacting State, title is evidenced by a title certificate; [or
- (f) ...].

[Note to the Working Group: The Working Group may wish to consider additional methods for achieving third-party effectiveness (e.g. automatic third-party effectiveness upon creation of a security right in consumer goods. The Working Group may also wish to consider whether, in the case of assets subject to registration in a specialized registry or to

a title certificate registration system, in addition to registration in a specialized title registry or a title certificate, registration of a notice in the general security rights registry should also be required. The advantage of such an additional registration requirement would be that a search in the security rights registry would reveal all security rights in a wide range of assets, including those that are subject to a specialized registration system.]

36. The law should confirm that different methods for achieving third-party effectiveness may be used for different items or kinds of encumbered assets, whether or not they are encumbered by the same security agreement or by separate security agreements.

Establishment and characteristics of a general security rights registry

37. The law should provide for the establishment of a general security rights registry having the following characteristics:

- (a) Registration is effected by filing a notice of the security right as opposed to a copy of the security documentation;
- (b) The record of the registry is centralized; that is, it contains all notices of security rights registered under the secured transactions law of the enacting State;
- (c) The registration system is set up to permit the indexing and retrieval of notices according to the name of the grantor or according to some other reliable identifier of the grantor;
- (d) The registry is open to the public;
- (e) Reasonable public access to the registry is assured through such measures as:
 - (i) Setting fees for registration and searching at a cost-recovery level; and
 - (ii) Making available remote modes or points of access;
- (f) The registration system is administered and organized to facilitate efficient registration and searching. In particular:
 - (i) A notice may be registered without verification or scrutiny of the sufficiency of its content;
 - (ii) If the financial and infrastructural capacity of the enacting State permits, notices are stored in electronic form in a computer database;
 - (iii) If the financial and infrastructural capacity of the enacting State permits, registrants and searchers have access to the registry record by electronic or similar means, including electronic data interchange, electronic mail, telex, telephone or telecopy; and
- (g) The law provides rules on the allocation of liability for loss or damage caused by an error in the administration or operation of the registration and searching system.

Required content of registered notice

38. To constitute a legally effective registration, the law should require the registered notice to contain only:

- (a) The names (or other reliable identifiers) of the grantor and the secured creditor, and their addresses;
- (b) A description of the movable property covered by the notice;

(c) The term of the registration; and

[(d) A statement of the maximum monetary amount for which the security right may be enforced [if a State elects that such information is necessary to facilitate subordinate lending].]

Legal sufficiency of grantor name in a registered notice

39. The law should provide that the name or other identifier of the grantor entered on a registered notice is legally sufficient if the notice can be retrieved by searching the registry record according to the correct legal name or other identifier of the grantor. For this purpose, the law should specify rules for determining the correct legal name or other identifier of individuals and entities.

Legal sufficiency of description of assets covered by a registered notice

40. The law should provide that a description of the assets covered by a registered notice is legally sufficient if it enables a third person to identify the assets covered by the notice separate from other assets of the grantor.

41. If the assets covered by the notice consist of a generic category or categories of movable property, the law should confirm that a generic description is legally sufficient.

42. If the assets covered by the notice are all the present and after-acquired movable property of the grantor, the law should confirm that it is legally sufficient to describe the charged assets as “all movable property” or by using equivalent language.

Advance registration

43. The law should confirm that a registration may be made before or after the creation of the security right to which it relates.

One registration for multiple security agreements between the same parties

44. The law should confirm that a single registration is sufficient for security rights created by all security agreements entered into between the same parties to the extent they cover items or kinds of movable property that fall within the description contained in the registered notice.

Duration and renewal of registration

45. The law should specify the duration of registration or permit the duration to be selected by the registrant at the time of registration. The law should provide for the right to successively renew the term of a registration.

[Note to the Working Group: The Working Group may wish to note that, if the registration system permits paper notices or requires that a notice, whether in paper or electronic form, needs to be checked or verified before being entered into the record, there will be some delay between receipt of the notice by the registrar and the time the notice will be entered into the record and become available to searchers. In such circumstances, the question arises as to the time when the registration should be effective, the time of receipt of the notice by the registrar or the time the notice is entered into the record and becomes available to searchers. If the registration is effective when received by the registrar, a search will not disclose all legally effective registrations. If the registration is effective as of the time the notice is entered into the record and made available to searchers, the registering party has the risk associated with any delay. In a fully electronic

system that requires no verification of registered data by the registrar, the time difference between receipt of the data by the registrar and their availability to searchers is minimal and this problem is significantly reduced.]

Discharge of registration

46. The law should adopt a summary procedure to enable the grantor to compel discharge of a registration if no security agreement has been completed between the parties or if the security right has been terminated by full payment or performance of all of the secured obligations. The law should also permit discharge of a registration by agreement of the secured creditor and the grantor.

Additional rights subject to registration

47. The law should provide that the following rights are effective against third parties only if notice of the right is registered in the general security rights registry:

[(a) The title of a creditor who retains title to goods to secure payment of the purchase price of the goods or its economic equivalent under a financial lease or hire-purchase agreement;] and

(b) The right of an assignee under an outright assignment of receivables;

[(c) The law may also permit registration of a notice in respect of the following rights for purposes of achieving third-party effectiveness:

(i) A lessor under a lease that is not a financing lease but which extends for a term of more than one year;

(ii) A consignor under a commercial consignment in which the goods are consigned to a consignee as agent for sale other than an auctioneer or that a consignee who does not act as a consignee in the ordinary course of business; and

(iii) A buyer under a sale of goods outside the ordinary course of the seller's business where the seller remains in possession of the goods for more than [thirty] [sixty] [ninety] days;]

Dispossession of the grantor

48. The law should provide that, for a possessory security right to be effective against third parties, dispossession of the grantor should be actual and not constructive, fictive or symbolic. Dispossession of the grantor is sufficient only if an objective third person can conclude that the encumbered assets are not in the actual possession of the grantor. Possession by a third person constitutes sufficient dispossession only if the third person is not an agent or employee of the grantor and holds possession for or on behalf of the secured creditor.

[Note to the Working Group: The Working Group may wish to note that no recommendation is included on third-party effectiveness of security rights in negotiable instruments. Asset-specific recommendations are included only where the general recommendations are not applicable to certain types of asset (with the exception of recommendation 70 which is included for the sake of completeness of the recommendations on priority of security rights in fixtures). The recommendations on negotiable instruments, independent undertakings and negotiable documents appear within square brackets as the Working Group has not decided yet that those types of asset should be addressed in the Guide.]

Independent undertakings

49. [The law should provide that a security right in the proceeds from the drawing under an independent undertaking may be made effective against third parties by:

- (a) Control;
- (b) Possession of the original text of the independent undertaking if presentation of it is a condition to payment;
- (c) Registration of a notice in the security rights registry with respect to the proceeds or the underlying receivable; or
- (d) Automatically upon creation of a security right in the receivable supported by an independent undertaking.]

[Note to the Working Group: Under the definition of control in the terminology section, the secured creditor has control of an independent undertaking where: (i) the issuer/guarantor or nominated person paying the proceeds is the secured creditor; (ii) the issuer/guarantor or nominated person paying the proceeds has acknowledged the security right in the proceeds from the drawing under an independent undertaking; or (iii) the secured creditor is the beneficiary. Under the third method of obtaining control, as between the issuer/guarantor or nominated person paying the proceeds and the secured creditor, the secured creditor is the beneficiary of the independent undertaking. It may be that, as between the grantor and the secured creditor, the secured creditor has agreed to treat the proceeds as encumbered assets. Any such agreement does not affect the relationship between the issuer/guarantor or nominated person paying the proceeds and the beneficiary (the secured creditor). It only gives the secured creditor "control" for purposes of the effectiveness of its rights against third parties.]

Bank accounts

50. The law should provide that a security right in a bank account may be made effective against third parties through registration of a notice in the security rights registry or through the control of the bank account.

51. If the secured creditor and the depositary institution are the same person, the law should provide that the secured creditor automatically has control upon the creation of the security right.

Negotiable documents of title

52. [The law should provide that, for a possessory security right in tangibles represented by a negotiable document of title to be effective against third parties, delivery of the document to the secured creditor constitutes effective dispossession of the grantor during the time that the tangibles are covered by the document.

53. The law should provide that, if a security right in a negotiable document is effective against third parties, the corresponding security right in the goods represented by the document is also effective against third parties.]

Proceeds

54. The law should provide that, if a security right in encumbered assets is effective against third parties, the security right in the proceeds is effective against third parties as soon as the right in the proceeds is created provided that:

(a) The security right in the encumbered assets was made effective against third parties by registration [and the proceeds are a kind of asset in which a security right may be made effective against third parties by registration];

[Note to the Working Group: Paragraph (a) would not apply, for example, to a security right in inventory which was made effective against third parties by possession, although the security right in the proceeds in the form of receivables would have to be registered.]

(b) The proceeds take the form of money, [negotiable instruments, negotiable documents of title] or bank accounts;

(c) If neither (a) nor (b) applies, the security right in the proceeds is effective against third parties for [...] days and continuously thereafter if it is made effective against third parties by one of the methods referred to in recommendation 35.

Fixtures

55. The law should provide that a security right in fixtures in immovables or in movables becomes effective against third parties by one of the methods referred to in recommendation 35. With respect to security rights in fixtures in immovables, the law should provide that registration under this law does not preclude registration under real property law.

[Note to the Working Group: With respect to security rights in fixtures in immovables, the Working Group may wish to consider whether a notation in the real property registry should be required.]

56. If a security right is effective against third parties at the time when the encumbered assets become fixtures in movables, the security right in the encumbered assets remains effective against third parties.

Products or masses of goods

57. If a security right is effective against third parties at the time the encumbered assets are physically united with other goods in such a way that their identity is lost in a product or mass of goods, the security right in the product or mass remains effective against third parties.

VI. Priority of the security right over the rights of competing claimants

Purpose

The purpose of the provisions of the law on priority is to:

(a) Enable a potential secured creditor to determine, in an efficient manner and with a high degree of certainty prior to extending credit, the priority that the security rights would have over competing claimants; and

(b) Enable grantors to create more than one security right in the same asset and to thereby use the full value of their assets to facilitate obtaining credit.

Scope of priority rules

58. The law should have a complete set of priority rules covering all possible priority conflicts.

Secured obligations affected

59. The law should provide that the priority accorded to a security right:

(a) Extends to all monetary and non-monetary obligations owed to the secured creditor [up to a maximum monetary amount set forth in the registered notice], including principal, costs, interest and fees, to the extent secured by the security right; and

(b) Is unaffected by the date on which an advance or other obligation secured by the security right is made or incurred (i.e. a security right may secure future advances under a credit facility with the same priority as advances made under the credit facility at the time the security right is made effective against third parties).

Priority in after-acquired property

60. The law should specify that a security right in after-acquired or after-created assets of the grantor has the same priority as a security right in assets of the grantor owned or existing at the time the security right is made effective against third parties.

Negotiable instruments

61. [The law should provide that a security right in a negotiable instrument that has been made effective against third parties by a method other than possession of the instrument by the secured creditor is subordinate to the rights of a buyer, another secured creditor or other transferee in a consensual transaction who either:

(a) Qualifies as a protected holder under the law governing negotiable instruments; or

(b) Otherwise takes possession of the negotiable instrument in good faith and without knowledge that the transfer was in violation of the rights of the holder of the security right.]

Independent undertakings

62. [The law should provide that a security right in the proceeds from the drawing under an independent undertaking that has been made effective against third parties:

(a) By control has priority over the rights of all other secured creditors;

(b) By acknowledgement has priority over a security right made effective by any method other than control to the extent the proceeds are payable under and pursuant to the terms of that acknowledgement; in the case of inconsistent acknowledgements given by the same person, the first secured creditor to obtain an acknowledgement from that person has priority;

(c) By possession has priority over a security right made effective against third parties automatically upon creation or by registration; and

(d) Automatically upon creation has priority, in accordance with its priority in the underlying receivable and in the proceeds from the drawing under an independent undertaking, over a security right made effective against third parties by registration.]

Bank accounts

63. The law should provide that a security right in a bank account which has been made effective against third parties by control has priority over a security right in that bank account which has been made effective against third parties by another method. If the secured creditor is the depositary bank, the depositary bank's security right has priority over any other security right.

64. The law should provide that the depositary bank's right to set-off against the bank account obligations owed to the depositary bank by the grantor has priority over the security right of another secured creditor other than a secured creditor who has acquired control of the bank account by becoming the customer of the depositary bank with respect to the bank account.

65. In the case of a funds transfer from a bank account initiated by the grantor, the transferee of funds takes free of a security right in the funds of the bank account [unless the transferee has knowledge that the transfer violates the terms of the security agreement and the transfer is outside the ordinary course of business of the grantor].

Negotiable documents

66. [The law should provide that, while goods are in the possession of a person who has issued a negotiable document with respect to them, a security right in those goods that became effective against third parties by making a security right in the negotiable document effective against third parties has priority over another security right in the goods that was made effective against third parties by a different method [while the goods were in the possession of the issuer or [...]] [while the document of title is outstanding].

67. The law should provide that a security right in a negotiable document and the goods represented thereby is subject to the rights under the law governing negotiable documents of a person to whom the negotiable document has been duly negotiated.]

Proceeds

68. The law should provide that a secured creditor's priority with respect to an encumbered asset extends to the proceeds of the asset subject to the requirements of recommendation 54.

Fixtures and products or masses of goods

69. The law should provide that a secured creditor with a security right in fixtures in immovables that has been made effective against third parties under real property law has priority over a secured creditor with a security right in those fixtures that has been made effective against third parties by one of the methods referred to in recommendation 55.

70. The law should provide that the priority of security rights in fixtures in movables is governed by the general rules applicable to movable property.

71. The law should set forth rules governing the priority of security rights in goods that are physically united with other goods in such a way that their identity is lost in a product or mass of goods.

Continuity in priority in the case achieving third-party effectiveness by various methods

72. The law should provide that, if a security right is made effective against third parties by one method, it is also made effective against third parties by another method, priority dates as of the time the first method is completed [provided that there was no time gap between completion of the first and the second method].

Priority of security rights that are not effective against third parties**Unsecured creditors**

73. The law should provide that a secured creditor with a security right that is not effective against third parties has [towards third parties no right other than as an unsecured creditor] [priority over unsecured creditors unless the unsecured creditor has taken steps to reduce its claim to a judgement or the grantor has become insolvent].

Secured creditors

74. The law should provide that:

(a) A security right in an asset that is not effective against third parties is subordinate to a security right in the same asset that is effective against third parties, without regard to the order in which the security rights were created; and

(b) Priority among security rights that are not effective against third parties is determined by the order in which they were created.

Priority of security rights that are effective against third parties**Unsecured creditors**

75. The law should provide that a security right that is effective against third parties has priority over the rights of unsecured creditors.

Secured creditors

76. The law should provide that:

(a) As between two security rights in the same encumbered asset that are effective against third parties, except as provided in recommendation [on priority of acquisition financing devices], priority is determined by the order in which their respective third-party effectiveness steps occurred, even if one or more of the requirements for the creation of a security right was not satisfied at such time. If one of the security rights is made effective against third parties by possession or control of the encumbered asset, the holder of that security right will have the burden of establishing when it obtained possession or control;

(b) Where a security right may be made effective against third parties by control, that security right has priority over a security right made effective against third parties by any other method.

Judgement creditors

77. The law should provide that, if, under applicable law, a judgement creditor, who has taken steps to enforce the judgement, acquires rights in assets of the judgement debtor, a security right that is effective against third parties has priority over the right of the judgement creditor that is registered after the security right has become effective against

third parties, except with respect to amounts advanced by the secured creditor subsequent to a specified number of days after the date on which the judgement creditor registers a notice of its rights.

Buyers of encumbered assets

78. The law should provide that the right of a buyer of goods is subject to a security right that has become effective against third parties before the sale, unless the secured creditor authorized the sale. However, a buyer of inventory, who buys encumbered inventory in the ordinary course of business of the seller (and anyone whose rights to the encumbered inventory derive from that buyer), takes free of a security right that is effective against third parties in that inventory, even if such buyer has knowledge of the existence of the security right.

Reclamation claims

79. If the law provides that suppliers of goods have the right to reclaim the goods within a specified time after the buyer becomes insolvent, the law should also provide that such specified time is short, and that the right to reclaim the goods is subordinate to security rights in such goods granted by the buyer that are effective against third parties.

Lessees

80. The law should address the priority of a security right in a leased asset that is effective against third parties as against the rights of a lessee of such asset.

Holders of promissory notes and negotiable documents

81. The law should provide that the rights of a [person who by other law takes rights in a promissory note or negotiable document free of claims to it] [holder in due course of a promissory note or negotiable document] takes such asset free of a security right that is effective against third parties.

Holders of rights in money

82. The law should provide that a person in possession of money holds the money free of a security right in the money [if that person gives value for the money or has no knowledge that the transfer of the money to that person violates the terms of the security agreement. This recommendation does not lessen the rights of holders of money under law other than this law].

Statutory (preferential) creditors

83. The law should limit, both in number and amount, preferential claims that have priority over security rights that are effective against third parties, and to the extent preferential claims exist, they should be described in the law in a clear and specific way.

Holders of rights in assets for improving and storing the assets

84. If applicable law gives rights equivalent to security rights to a creditor who has added value to goods (e.g. by repairing them) or preserved the value of goods (e.g. by storing them), such rights should be limited to the goods whose value has been improved or preserved that are in the possession of such creditor, and should have priority over pre-existing security rights in the goods that are effective against third parties only to the

extent that the value added by the improvement or preservation directly benefits the holders of the pre-existing security rights.

Creditors in insolvency proceedings

[Note to the Working Group: See recommendation I in the recommendations of this Guide on Insolvency: “The insolvency law should specify that, if a security right is entitled to priority under law other than the insolvency law, that priority continues unimpaired in insolvency proceedings except if, pursuant to the insolvency law, another claim is given priority. Such exceptions should be minimal and clearly set forth in the insolvency law. This recommendation is subject to Recommendation 88 of the Insolvency Guide.”]

Subordination agreements

85. The law should provide that a holder of a security right entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future competing claimant.

[Note to the Working Group: As to subordination agreements in the case of the grantor’s insolvency, see recommendation J in the recommendations of this Guide on Insolvency: “The insolvency law should provide that if a holder of a security right in an asset of the insolvency estate has subordinated its priority unilaterally or by agreement in favour of any existing or future competing claimant, such subordination is binding in insolvency proceedings with respect to the grantor.”]

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VII. Pre-default rights and obligations of the parties**Purpose**

The purpose of the provisions of the law on pre-default rights and obligations of the parties is to:

- (a) Provide rules on additional terms for a security agreement with a view to rendering secured transactions more efficient and predictable;
- (b) Reduce transaction costs by eliminating the need to negotiate and draft terms to be included in the security agreement where the rules provide an acceptable basis for agreement;
- (c) Reduce potential disputes;
- (d) Provide a drafting aid or checklist of issues the parties may wish to address at the time of negotiation and conclusion of the security agreement; and
- (e) Encourage party autonomy.

Party autonomy

86.

Alternative A

The law should allow the parties to waive or vary their rights and obligations unless such waiver or variation is against public policy or fails to adequately protect third parties.

Alternative B

The law should provide that, except as otherwise provided in [specify the provisions that may not be derogated from or varied by agreement], the secured creditor and the grantor may derogate from or vary by agreement its provisions relating to their respective rights and obligations. Such an agreement should not affect the rights of any person who is not a party to the agreement.

[Note to the Working Group: The Working Group may wish to consider the formulation of the recommendation on party autonomy and whether it should be placed in

this Chapter or in the Chapter on scope and general provisions. The Working Group may also wish to consider together with this recommendation the recommendations on party autonomy in Chapter VIII.]

Suppletive rules

87. The law should include suppletive, non-mandatory rules that would apply in the absence of contrary agreement of the parties. Such rules should, *inter alia*:

- (a) Provide for the care of the encumbered assets by either the grantor or the secured creditor in possession of the encumbered assets;
- (b) Preserve the security rights in the encumbered assets, including the right to proceeds or civil fruits derived from the encumbered assets;
- (c) Provide for the right of the grantor to continue the operation of its business including the right to use, commingle and dispose of the encumbered assets in the ordinary course of its business; and
- (d) Secure the discharge of a security right once the obligation it secures has been paid or otherwise performed.

VIII. Default and enforcement

Purpose

The purpose of the provisions of the law on default and enforcement is to:

- (a) Provide clear and simple procedures for the enforcement of security rights after debtor default in a predictable and efficient manner;
- (b) Provide procedures that maximize the potential realization value of the encumbered assets for the grantor, the secured creditor and other creditors of the grantor;
- (c) Provide for expeditious judicial and, subject to appropriate safeguards, non-judicial methods for the secured creditor to realize the value of the encumbered assets;
- (d) Coordinate the secured transactions enforcement regime with other law governing the enforcement of claims in encumbered assets, including insolvency law.

Scope

88. The law should provide that this Chapter does not apply to an absolute transfer of receivables, except to the extent that there is recourse to the transferor for a payment default of the account debtor.

[Note to the Working Group: Recommendation 88 is intended to clarify that this Chapter applies only to assignments that serve security purposes.]

General standard of conduct

89. The law should provide that all parties must enforce their rights and perform their obligations under the rules recommended of this Chapter in good faith and in a commercially reasonable manner. Any party that fails to comply with the rules of this Chapter is liable for any loss caused by that failure.

[Note to Working Group: The Working Group may wish to consider whether the principle in recommendation 89 should be applied, as appropriate, in the exercise of rights and performance of duties under all Chapters of the Guide.]

Party autonomy

90. The law should provide that the general standard of conduct set forth in recommendation 89 cannot be waived or varied. No other rule recommended in this Chapter that gives rights to the grantor or to any other person or imposes obligations on the secured creditor may be waived or varied by agreement prior to the debtor's default.

91. Subject to recommendations 89 and 90, the law should permit parties to the security agreement or any other person to waive or vary by agreement rules recommended of this Chapter after the debtor's default. Such an agreement does not affect the rights of a person not party to the agreement. The person challenging such an agreement has the burden of showing that the agreement was made prior to default or was inconsistent with recommendations 89 or 90.

[Note to the Working Group: The words "subject to ..." are intended to clarify that the general standard of conduct provided in recommendation 89 is applicable and cannot be waived or varied. No reference is made to public policy as the standard set forth in recommendation 89 will reflect the public policy of the State enacting these recommendations. The Working Group may also wish to consider including the following additional text in recommendation 91: "The law should provide that a disposition of encumbered assets in accordance with a method provided in the security agreement is commercially reasonable unless the objecting party establishes that it was manifestly unreasonable." Such an agreement can take place before or after default and its objective would be to indicate how a secured creditor is to meet the obligation to dispose of an encumbered asset in a commercially reasonable way.]

Rights and remedies after default

92. The law should provide that after default the grantor and the secured creditor have the rights and remedies provided in the rules recommended in this Chapter, in the security agreement (except to the extent inconsistent with the rules recommended in this Chapter) and in any other law.

Secured creditor remedies

93. The law should provide that after default the secured creditor may exercise one or more of the following remedies:

- (a) Obtain possession of tangible encumbered assets;
- (b) Collect on encumbered assets that are receivables, negotiable instruments, bank accounts or proceeds from drawings under independent undertakings;
- (c) Enforce rights under negotiable documents;
- (d) Sell, lease, license, or otherwise dispose of encumbered assets;
- (e) Propose to the grantor that the secured creditor accept the encumbered assets in total or partial satisfaction of the secured obligations; and
- (f) Any other remedy provided in the security agreement (except to the extent inconsistent with the rules recommended in this Chapter) or any other law.

Grantor remedies

94. The law should provide that after default the grantor may exercise one or more of the following remedies:

(a) At any time after default and until the disposition, acceptance or collection of the encumbered assets by the secured creditor, pay in full the secured obligation, including interests and costs of enforcement up to the time of full payment, and obtain a release of the encumbered assets from the security right;

(b) Apply to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the rules recommended in this Chapter with respect to extrajudicial enforcement;

(c) Reject the proposal of the secured creditor to obtain the encumbered assets in total or partial satisfaction of the secured obligations within the time limits prescribed by the rules recommended in this Chapter; and

(d) Any other remedy provided in the security agreement (except to the extent prohibited by the rules recommended in this Chapter) or any other law.

Election of remedies

95. The law should provide that the exercise of a remedy does not prevent the exercise of another remedy.

[Note to Working Group: This recommendation relates to both the situation where exercise of one or more remedies has not resulted in the complete satisfaction of the secured obligation and the situation where a creditor or grantor has commenced the exercise of a remedy and later commences the exercise of a different remedy. For example, a creditor has given the notice for an auction and later chooses instead to pursue a judicial remedy.]

Other remedies

96. The law should provide that the exercise of remedies with respect to the encumbered assets under this law does not prevent any party from exercising its remedies with respect to the secured obligation.

Release of the encumbered assets after full payment

97. The law should provide that, after default and until a disposition, acceptance or collection of the encumbered assets by the secured creditor, the debtor, the grantor or any other interested party (e.g. a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) is entitled to pay in full the secured obligation, including interest and the costs of enforcement up to the time of full payment. The law should specify that the effect of such payment is to release the encumbered assets from the security right, or, to the extent provided in other law, to subrogate any other interested party that makes the payment to the rights of the secured creditor.

Judicial and extrajudicial enforcement

98. The law should enable the secured creditor after default to:

(a) Resort to court or other authority to enforce its security right; or

- (b) Enforce its security right without resorting to court or other authority.

[Notice of intention to pursue extrajudicial enforcement]

99. The law should:

(a) Address whether, when and to whom a secured creditor is required to give notice of its intention to pursue extrajudicial enforcement of a security right following default;

(b) State the manner in which the notice is to be given, its timing, and its minimum contents, including whether the notice [to the grantor] should contain an accounting of the amount then owed and a description of the steps the debtor or the grantor must take to obtain the release of the encumbered assets from the security right under recommendation 97;

(c) Provide that the notice should be in a language that is reasonably expected to inform its recipients about its contents, such as the language of the security agreement;

(d) Address whether the notice must be registered in the security rights registry;

(e) Address the legal consequences of insufficient or erroneous notices of intention to pursue extrajudicial enforcement; and

(f) List circumstances in which the notice need not be given in order to avoid a negative effect on the realization value of the encumbered assets (e.g. perishable tangibles).]

[Note to the Working Group: The Working Group may wish to consider recommendation 99 together with recommendations 111 and 112. The Working Group may also wish to consider whether, while recommendation 99 may be appropriate in the case of consumer grantors or security rights in immovable property, it might inadvertently give a business grantor the opportunity to move movable encumbered assets beyond the reach of the secured creditor and thus frustrate the purpose of the security right. If the Working Group finds that assumption to be correct, it may wish to replace recommendation 99 by text addressing notices to consumer grantors or leave the matter to consumer-protection law.]

Objections to extrajudicial enforcement

100. The law should provide that nothing in the law prevents the debtor, the grantor or other interested parties (e.g. a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) from applying to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the rules recommended in this Chapter. The law should build safeguards into the process to discourage unfounded applications and to prevent any improper interference with or undue delay of the secured creditor's ability to realize on encumbered assets.

Dispossession of the debtor

101. The law should provide that after default the secured creditor is entitled to obtain possession of the encumbered assets either without resorting to a court or other authority, or with the assistance of a court or other authority. In either case, the law should provide an expedited process enabling a secured creditor to obtain, upon ex parte application, a court order obliging the grantor either to permit the secured party to take possession of the

encumbered assets or to keep the encumbered assets in their present location and condition until further court order, and to permit service of the order on the grantor concurrently with or prior to the giving of notice of the application and any other notice required under the rules recommended in this Chapter.

[Note to the Working Group: Any person entitled to seek relief under recommendation 100 may do so.]

Collection of receivables

102. The law should provide that after default the secured creditor may instruct any account debtor on a receivable that is an encumbered asset to pay the receivable directly to the secured creditor or, if otherwise instructed in the notification of the assignment by the secured creditor in a writing received by the account debtor, in accordance with such payment instruction (for the rights of account debtors, see recommendations 17-23 in A/CN.9/WG.VI/WP.21).

[Note to the Working Group: Recommendation 102 tracks the language of article 17 (2) of the United Nations Assignment Convention.]

103. The law should provide that the secured creditor's right to collect a receivable includes the right to enforce any right supporting payment or performance of the receivable, such as a guarantee or security right.

Negotiable instruments

104. The law should provide that after default the secured creditor has the right to enforce a negotiable instrument against a person obligated on that instrument. However, as between the secured creditor and the person obligated on the negotiable instrument or other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments.

[Note to Working Group: The commentary will include the following examples of such persons:

(a) The person obligated on the negotiable instrument may be obligated to pay only a holder or other person entitled to enforce the instrument under the law governing negotiable instruments; and

(b) The right of the person obligated on the instrument to raise defences to that obligation is determined by the law governing negotiable instruments.]

105. The law should provide that the secured creditor's right to enforce a negotiable instrument includes the right to enforce any right supporting payment or performance of the negotiable instrument, such as a guarantee or security right.

Proceeds from drawings under independent undertakings

106. The law should provide that a secured creditor's post-default enforcement rights in the proceeds from a drawing under an independent undertaking are subject to the rights, under the law and practice governing independent undertakings, of the issuer/guarantor or nominated person and of any other beneficiary named in the undertaking or to whom a transfer of drawing rights has been effected. Neither an issuer/guarantor nor a nominated bank is obligated to pay any person other than the named beneficiary, an acknowledged

transferee beneficiary, a nominated bank, or an acknowledged assignee of proceeds. The law should provide that a secured creditor that is an acknowledged assignee of the proceeds from a drawing under an independent undertaking has the right to enforce the acknowledgement against an issuer/guarantor or nominated person that withholds assigned proceeds contrary to its acknowledgement.

[Note to the Working Group: To emphasize that this is a type of original encumbered assets and not proceeds from a different type of encumbered assets, the Working Group may wish to consider replacing the words “proceeds from the drawing from an independent undertaking” with words along the lines “the beneficiary’s right to payment resulting from a drawing under an independent undertaking”.]

Bank accounts

107. The law should provide that after default a secured creditor who has control of a bank account (see recommendation 50 in A/CN.9/WG.VI/WP.21/Add.1) is entitled to enforce its security right in accordance with the terms of the agreement with the bank establishing control without having to resort to a court or other authority. However, with respect to a bank account where the grantor is an individual and the obligation secured by the security right in the bank account was incurred for the grantor’s personal, family or household purposes, the secured creditor may enforce its security right only by resorting to a court or other authority, whether or not it has control of the bank account.

108. The law should provide that a secured creditor who does not have control of a bank account is entitled to enforce the security right only pursuant to a court order.

Negotiable documents

109. The law should provide that after default the secured creditor has the right to enforce a negotiable document against the issuer. However, as between the secured creditor and the issuer, the obligation of the issuer is determined by the law governing negotiable documents.

[Note to Working Group: The commentary will include the example that the issuer may be obligated to deliver the goods only to a holder of the negotiable document with respect to them.]

Disposition of encumbered assets

110. The law should provide that a secured creditor after default is entitled to sell, lease, license or otherwise dispose of encumbered assets:

- (a) By resort to court or other authority; or
- (b) Without resorting to court or other authority.

Advance notice with respect to extrajudicial disposition of encumbered assets

111. The law should:

- (a) Address whether, when and to whom a secured creditor is required to give notice with respect to extrajudicial disposition of an encumbered asset after default;
- (b) State the manner in which any such notice is to be given, its timing, and its minimum contents, including whether the notice [to the grantor] should contain an accounting of the amount then owed and the right of the debtor or the grantor to obtain the

release of the encumbered assets from the security right under recommendation 97;

(c) Provide that any such notice should be in a language that is reasonably expected to inform its recipients about its contents (it is sufficient if the notice is in the language of the security agreement);

(d) Address the legal consequences of insufficient or erroneous notices of with respect to extrajudicial dispositions; and

(e) List circumstances in which any such notice need not be given in order to avoid a negative effect on the realization value of the encumbered assets (e.g. perishable tangibles).

112. The law should provide rules ensuring that the notice can be given in an efficient, timely and reliable way so as to protect the debtor, the grantor or other interested parties, while, at the same time, avoiding having a negative impact on the secured creditor's remedies and the potential realization value of the encumbered assets.

[Note to Working Group: As there is a significant amount of overlap between recommendation 111 and recommendation 99 (which may be appropriate only for consumer grantors), the Working Group may wish to consider whether recommendation 99 should be retained. If recommendation 99 is retained, the Working Group may wish to consider whether it should be aligned with recommendations 111 and 112.]

Acceptance of encumbered assets in satisfaction of the secured obligation

113. The law should provide that after default a secured creditor may propose to accept, without resorting to a court or other authority, one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

114. The law should provide that a secured creditor who proposes to accept an encumbered asset in total or partial satisfaction of the secured obligation must give advance notice of the proposal to:

(a) The grantor, the debtor and any other person who owes payment of the secured obligation (e.g. a guarantor);

(b) Any person with rights in the encumbered asset who, prior to the sending of the notice by the secured creditor, has notified in writing the secured creditor of those rights; and

(c) Any other secured creditor who has registered a notice of a security right in the encumbered asset in the name of the grantor or who was in possession of the encumbered asset at the time it was seized by the secured creditor.

115. The law should provide that, if a person entitled to notice under recommendation 114 objects in writing to a proposal [within a short time period, such as 20 days, of the date notice is given] to accept the encumbered assets in total or partial satisfaction of the secured obligation, the secured creditor may not proceed with the proposal but must dispose of the encumbered assets in accordance with the rules governing dispositions. However, the secured creditor should be entitled to apply to a court or other authority for a determination of the reasonableness of the objection.

Surplus and shortfall

116. The law should provide that the enforcing secured creditor must apply any proceeds of its enforcement (including costs of enforcement) to the secured obligations. Except as provided in recommendation 117, the enforcing secured creditor must pay any surplus remaining after such application to subordinate competing claimants, who, prior to any distribution of the surplus, gave written notice of their claims to any surplus to the enforcing secured creditor. Any balance remaining must be remitted to the grantor.

117. The law should also provide that whether or not there is any dispute as to the entitlement of any claimant or as to the priority of payment, the enforcing secured creditor may pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution in accordance with generally applicable procedural rules.

[Note to the Working Group: The reference to “a competent judicial or other authority, or to a public deposit fund” in the last sentence tracks the language in the United Nations Assignment Convention, article 17(8).]

118. The law should provide that distribution of the proceeds realized by a judicial disposition or other officially administered process is to be made in accordance with general rules of the State governing execution proceedings.

119. The law should provide that the grantor and any other person who owes payment of the secured obligation are liable for any shortfall still owing after application of the proceeds of enforcement to the secured obligation.

Right of prior-ranking secured creditor to take over enforcement

120. The law should provide that a prior-ranking secured creditor is entitled to take control of enforcement initiated by a subordinate competing claimant at any time before final disposition, acceptance or collection of the encumbered assets. The right to take control includes the right to choose whether or not any disposition will be administered by a court or other authority.

Title or other right acquired through non-judicial disposition

121. The law should provide that, if a secured creditor elects to dispose of an encumbered asset without resorting to a court or other authority, the person that acquires title or other right in the asset in good faith acquires its right in the asset subject to prior-ranking rights but takes free of the rights of the grantor, the enforcing secured creditor and any subordinate competing claimant. The same rule applies to the title or other right acquired by a secured creditor who has accepted the encumbered assets in total or partial satisfaction of the secured obligation.

[Note to the Working Group: Reference is made to “title or other right” since, according to recommendation 110 the secured creditor may “sell, lease, license or otherwise dispose of encumbered assets.”]

Title or other right acquired through judicial disposition

122. The law should provide that, if a secured creditor disposes of the encumbered assets through a judicial or other officially administered process, the title or other right acquired by the transferee should be determined by the general rules of the State governing

execution proceedings (for the distribution of the money realized by the disposition, see recommendation 118).

Intersection of movable and immovable secured transactions law

123. The law should provide that:

(a) A security right in fixtures in immovables may be enforced in accordance with either this law or the law governing enforcement of encumbrances on immovable property; and

(b) If a secured obligation is secured by both a security right in a movable and an encumbrance on an immovable, the security right in the movable may be enforced in accordance with this law or the law governing enforcement of encumbrances on immovable property.

Coordination with other law

124. The law should be coordinated with general civil procedure law to provide a right for secured creditors to intervene in court proceedings initiated by other creditors of the grantor so as to protect security rights and to ensure the same priority status of security rights as under the law.

A/CN.9/WG.VI/WP.21/Add.3

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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Introduction

1. This note includes recommendations taken from the UNCITRAL Legislative Guide on Insolvency Law (the Insolvency Guide), indicated by numbers in parentheses (the numbers reflect the numbers of the Insolvency Guide), and recommendations A-K, which are new and therefore additional to the recommendations in the Insolvency Guide.

2. The recommendations included from the Insolvency Guide are those that specifically address issues relevant to the treatment of secured creditors and their rights in insolvency, as well as those recommendations regarded as necessary to explain that treatment. So, for example, the definition of “assets of the debtor” is included to explain the scope of the insolvency estate formed on commencement of the insolvency proceedings and thus the assets that will be affected by the commencement of those proceedings.

IX. Insolvency**Recommendations**

The following definitions are taken from the glossary of the Insolvency Guide (Introduction, paragraph 12):

12. (b) “Assets of the debtor”³: property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third party-owned assets;

12. (pp) “Security interest”: a right in an asset to secure payment or other performance of one or more obligations.

³ For the purposes of this chapter, the term “debtor” as used in the recommendations taken from the Insolvency Guide should be read as referring to a person who meets the requirements for the commencement of insolvency proceedings (see Insolvency Guide, part two, chapter I, section A, paras. 1-11 and recommendation 8). Where the security right at issue (which secures the debtor’s obligation) is granted by the debtor, the term “debtor” also refers to the grantor. However, where the security right at issue is granted not by the debtor but by a third party (e.g. on the basis of some contractual arrangement with the debtor), the term “debtor” refers to the third-party grantor, since only in that third-party grantor’s insolvency is the secured creditor a secured creditor with a proprietary right in the encumbered assets. In the insolvency of a non-grantor debtor, the creditor is an unsecured creditor with an unsecured claim against the non-grantor debtor.

[*Note to the Working Group: The insolvency chapter will need to address other terms used in the Insolvency Guide and the Secured Transactions Guide; the definition of “security interest” and “security right”, for example, differ in the two texts.*]

Insolvency Guide recommendations

Key objectives of an efficient and effective insolvency law

(1) In order to establish and develop an effective insolvency law, the following key objectives should be considered:

- (a) Provide certainty in the market to promote economic stability and growth;
- (b) Maximize value of assets;
- (c) Strike a balance between liquidation and reorganization;
- (d) Ensure equitable treatment of similarly situated creditors;
- (e) Provide for timely, efficient and impartial resolution of insolvency;
- (f) Preserve the insolvency estate to allow equitable distribution to creditors;
- (g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
- (h) Recognize existing creditors rights and establish clear rules for ranking of priority claims.

(4) The insolvency law should specify that where a security interest is effective and enforceable under law other than the insolvency law, it will be recognized in insolvency proceedings as effective and enforceable.

(7) In order to design an effective and efficient insolvency law, the following common features should be considered:

- (a)-(d) ...
- (e) Protection of the insolvency estate against the actions of creditors, the debtor itself and the insolvency representative, and where the protective measures apply to secured creditors, the manner in which the economic value of the security interest will be protected during the insolvency proceedings;
- (f)-(r) ...

Law applicable to validity and effectiveness of rights and claims

(30) The law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings should be determined by the private international law rules of the State in which insolvency proceedings are commenced.

Law applicable in insolvency proceedings: lex fori concursus

(31) The insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects. These may include, for example:

- (a)-(i) ...

- (j) Treatment of secured creditors;
- (k)-(n) ...
- (o) Ranking of claims;
- (p)-(s) ...

Assets constituting the estate

(35) The insolvency law should specify that the estate should include:

- (a) Assets of the debtor, including the debtor's interest in encumbered assets and in third party-owned assets;
- (b)-(c) ...

Draft additional recommendations

Unitary approach

A. The insolvency law should provide that, in the case of the insolvency proceedings of the grantor, the acquisition financier has the rights and duties of a holder of a security right.

Non-unitary approach

B. [The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer under a title retention arrangement, a grantor or a financial lessee, the seller, purchase-money lender or financial lessor has the rights and duties of a holder of a security right.] [The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer under a title retention arrangement, a grantor or a financial lessee, the seller or financial lessor has the rights and duties of a third-party owner of the asset under the UNCITRAL Legislative Guide on Insolvency Law.]

Treatment of assets acquired after commencement

C. Except as provided in [D], the insolvency law should provide that an asset of the estate acquired after the commencement of an insolvency proceeding is not subject to a security right created by the grantor before the commencement of the insolvency proceeding.

D. The insolvency law should provide that an asset of the estate acquired after the commencement of an insolvency proceeding with respect to the grantor is subject to a security right created by the grantor before the commencement of the insolvency proceeding to the extent the asset is proceeds (whether cash or non-cash) of an encumbered asset which was an asset of the grantor before the commencement of the proceeding.

Insolvency Guide recommendations

Provisional measures

(39) The insolvency law should specify that the court may grant relief of a provisional nature, at the request of the debtor, creditors or third parties, where relief is needed to protect and preserve the value of the assets of the debtor or the interests of creditors, between the time an application to commence insolvency proceedings is made and commencement of the proceedings, including:

(a) Staying execution against the assets of the debtor, including actions to make security interests effective against third parties and enforcement of security interests;

(b)-(d) ...

Measures applicable on commencement

(46) The insolvency law should specify that, on commencement of insolvency proceedings [add: a, b, c, d, e]:

(a) Commencement or continuation of individual actions or proceedings concerning the assets of the debtor, and the rights, obligations or liabilities of the debtor are stayed;

(b) Actions to make security interests effective against third parties and to enforce security interests are stayed;

(c) Execution or other enforcement against the assets of the estate is stayed;

(d) The right of a counterparty to terminate any contract with the debtor is suspended; and

(e) The right to transfer, encumber or otherwise dispose of any assets of the estate is suspended.

Draft additional recommendation

Effectiveness of security rights in insolvency

E. The insolvency law should provide that, if a security right was effective against third parties at the time of the commencement of insolvency proceedings, action may be taken after the commencement of the insolvency proceedings to continue, preserve or maintain the effectiveness against third parties of the security right to the extent and in the manner permitted under the secured transactions law.⁴

Insolvency Guide recommendations

Duration of measures automatically applicable on commencement

(49) The insolvency law should specify that the measures applicable on commencement of insolvency proceedings remain effective throughout those proceedings until:

(a) The court grants relief from the measures;

(b) In reorganization proceedings, a reorganization plan becomes effective; or

⁴ See footnote to recommendation 46(b) of the Insolvency Guide, which provides that: "If law other than the insolvency law permits those security interests to be made effective within certain specified time periods, it is desirable that the insolvency law recognize those periods and permit the interest to be made effective where the commencement of insolvency proceedings occurs before expiry of the specified time period. Where law other than the insolvency law does not include such time periods, the stay applicable on commencement would operate to prevent the security interest being made effective."

(c) In the case of secured creditors in liquidation proceedings, a fixed time period specified in the law expires, unless it is extended by the court for a further period on a showing that:

- (i) An extension is necessary to maximize the value of assets for the benefit of creditors; and
- (ii) The secured creditor will be protected against diminution of the value of the encumbered asset in which it has a security interest.

Protection from diminution of the value of encumbered assets

(50) The insolvency law should specify that, upon application to the court, a secured creditor should be entitled to protection of the value of the assets in which it has a security interest. The court may grant appropriate measures of protection that may include:

- (a) Cash payments by the estate;
- (b) Provision of additional security interests; or
- (c) Such other means as the court determines.

Relief from measures applicable on commencement

(51) The insolvency law should specify that a secured creditor may request the court to grant relief from the measures applicable on commencement of insolvency proceedings on grounds that may include that:

- (a) The encumbered asset is not necessary to a prospective reorganization or sale of the debtor's business;
- (b) The value of the encumbered asset is diminishing as a result of the commencement of insolvency proceedings and the secured creditor is not protected against that diminution of value; and
- (c) In reorganization, a plan is not approved within any applicable time limits.

Power to use and dispose of assets of the estate

(52) The insolvency law should permit:

- (a) The use and disposal of assets of the estate (including encumbered assets) in the ordinary course of business, except cash proceeds; and
- (b) The use and disposal of assets of the estate (including encumbered assets) outside the ordinary course of business, subject to the requirements of recommendations 55 and 58.

Draft additional recommendation

Costs and expenses of maintaining value of the encumbered asset

F. The insolvency law should provide that the insolvency representative is entitled to recover from the value of an encumbered asset reasonable costs or expenses (including overhead as appropriate) incurred by the insolvency representative in maintaining, preserving or increasing the value of the encumbered asset for the benefit of the secured creditor.

Insolvency Guide recommendations

Further encumbrance of encumbered assets

(53) The insolvency law should specify that encumbered assets may be further encumbered, subject to the requirements of recommendations 65, 66 and 67.

Use of third-party-owned assets

(54) The insolvency law should specify that the insolvency representative may use an asset owned by a third party and in the possession of the debtor provided specified conditions are satisfied, including:

- (a) The interests of the third party will be protected against diminution in the value of the asset; and
- (b) The costs under the contract of continued performance of the contract and use of the asset will be paid as an administrative expense.

Ability to sell assets of the estate free and clear of encumbrances and other interests

(58) The insolvency law should permit the insolvency representative to sell assets that are encumbered or subject to other interests free and clear of those encumbrances and other interests, outside the ordinary course of business, provided that:

- (a) The insolvency representative gives notice of the proposed sale to the holders of encumbrances or other interests;
- (b) The holders are given the opportunity to be heard by the court where they object to the proposed sale;
- (c) Relief from the stay has not been granted; and
- (d) The priority of interests in the proceeds of sale of the asset is preserved.

Use of cash proceeds

(59) The insolvency law should permit the insolvency representative to use and dispose of cash proceeds if:

- (a) The secured creditor with a security interest in those cash proceeds consents to such use or disposal; or
- (b) The secured creditor was given notice of the proposed use or disposal and an opportunity to be heard by the court; and
- (c) The interests of the secured creditor will be protected against diminution in the value of the cash proceeds.

Burdensome assets

(62) The insolvency law should permit the insolvency representative to determine the treatment of any assets that are burdensome to the estate. In particular, the insolvency law may permit the insolvency representative to relinquish burdensome assets following the provision of notice to creditors and the opportunity for creditors to object to the proposed action, except that where a secured claim exceeds the value of the encumbered asset, and the asset is not required for a reorganization or sale of the business as going concern, the insolvency law may permit the insolvency representative to relinquish the asset to the secured creditor without notice to other creditors.

Security for post-commencement finance

(65) The insolvency law should enable a security interest to be granted for repayment of post-commencement finance, including a security interest on unencumbered assets, including after-acquired assets, or a junior or lower priority security interest on already encumbered assets of the estate.

(66) The law should specify that a security interest over the assets of the estate to secure post-commencement finance does not have priority ahead of any existing security interest over the same assets unless the insolvency representative obtains the agreement of the existing secured creditor(s) or follows the procedure in recommendation 67.

(67) The insolvency law should specify that, where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interests provided specified conditions are satisfied, including:

- (a) The existing secured creditor was given the opportunity to be heard by the court;
- (b) The debtor can prove that it cannot obtain the finance in any other way; and
- (c) The interests of the existing secured creditor will be protected.

Effect of conversion on post-commencement finance

(68) The insolvency law should specify that where reorganization proceedings are converted to liquidation, any priority accorded to post-commencement finance in the reorganization should continue to be recognized in the liquidation.

Automatic termination and acceleration clauses

(70) The insolvency law should specify that any contract clause that automatically terminates or accelerates a contract upon the occurrence of any of the following events is unenforceable as against the insolvency representative and the debtor:

- (a) An application for commencement, or commencement, of insolvency proceedings;
- (b) The appointment of an insolvency representative.

(71) The insolvency law should specify the contracts that are exempt from the operation of recommendation 70, such as financial contracts, or subject to special rules, such as labour contracts.

(72) The insolvency law should specify that the insolvency representative may decide to continue the performance of a contract of which it is aware where continuation would be beneficial to the insolvency estate. The insolvency law should specify that:

- (a) The right to continue applies to the contract as a whole; and
- (b) The effect of continuation is that all terms of the contract are enforceable.

Performance prior to continuation or rejection

(80) The insolvency law should specify that the insolvency representative may accept or require performance from the counterparty to a contract prior to continuation or rejection of the contract. Claims of the counterparty arising from performance accepted or required by the insolvency representative prior to continuation or rejection of the contract should be payable as an administrative expense:

(a) ...

(b) If the insolvency representative uses assets owned by a third party that are in the possession of the debtor subject to contract, that party should be protected against diminution of the value of those assets and have an administrative claim in accordance with subparagraph (a).

[Note to the Working Group: The commentary will make it clear that rejection of a credit agreement does not terminate the security agreement and does not extinguish the security right.]

Draft additional recommendation**Automatic termination clauses**

G. If the insolvency law provides that a contract clause which, upon the commencement of insolvency proceedings or the occurrence of another insolvency-related event, automatically terminates any obligation under a contract or accelerates the maturity of any obligation under a contract, is unenforceable as against the insolvency representative or the debtor, then the insolvency law should specify that such provision does not render unenforceable or invalidate a contract clause relieving a creditor from an obligation to make a loan or otherwise extend credit or other financial accommodations to or for the benefit of the debtor.

Insolvency Guide recommendations*Avoidance of security interests*

(88) The insolvency law should specify that notwithstanding that a security interest is effective and enforceable under law other than the insolvency law, it may be subject to the avoidance provisions of insolvency law on the same grounds as other transactions.

Financial contracts

(103) Once the financial contracts of the debtor have been terminated, the insolvency law should permit counterparties to enforce and apply their security interest to obligations arising out of financial contracts. Financial contracts should be exempt from any stay under the insolvency law that applies to the enforcement of a security interest.

Participation by creditors

(126) The insolvency law should specify that creditors, both secured and unsecured, are entitled to participate in insolvency proceedings and identify what that participation may involve in terms of the functions that may be performed.

Right to be heard and to request review

(137) The insolvency law should specify that a party in interest have a right to be heard on any issue in the insolvency proceedings that affects its rights, obligations or interests. For example, a party in interest should be entitled to:

- (a) Object to any act that requires court approval;
- (b) Request review by the court of any act for which court approval was not required or not requested; and
- (c) Request any relief available to it in insolvency proceedings.

Right of appeal

(138) The insolvency law should specify that a party in interest may appeal from any order of the court in the insolvency proceedings that affects its rights, obligations or interests.

Approval by classes

(150) Where voting on approval of the plan is conducted by reference to classes, the insolvency law should specify how the vote achieved in each class would be treated for the purposes of approval of the plan. Different approaches may be taken, including requiring approval by all classes or approval by a specified majority of the classes, but at least one class of creditors whose rights are modified or affected by the plan must approve the plan.

(151) Where the insolvency law does not require a plan to be approved by all classes, the insolvency law should address the treatment of those classes which do not vote to approve a plan that is otherwise approved by the requisite classes. That treatment should be consistent with the grounds set forth in recommendation 152.

Confirmation of an approved plan

(152) Where the insolvency law requires court confirmation of an approved plan, the insolvency law should require the court to confirm the plan if the following conditions are satisfied:

- (a) The requisite approvals have been obtained and the approval process was properly conducted;
- (b) Creditors will receive at least as much under the plan as they would have received in liquidation, unless they have specifically agreed to receive lesser treatment;
- (c) The plan does not contain provisions contrary to law;
- (d) Administrative claims and expenses will be paid in full, except to the extent that the holder of the claim or expense agrees to different treatment; and
- (e) Except to the extent that affected classes of creditors have agreed otherwise, if a class of creditors has voted against the plan, that class shall receive under the plan full recognition of its ranking under the insolvency law and the distribution to that class under the plan should conform to that ranking.

Challenges to approval (where there is no requirement for confirmation)

(153) Where a plan becomes binding on approval by creditors, without requiring confirmation by the court, the insolvency law should permit parties in interest, including

the debtor, to challenge the approval of the plan. The insolvency law should specify criteria against which a challenge can be assessed, which should include:

- (a) Whether the grounds set forth in recommendation 152 are satisfied; and
- (b) Fraud, in which case the requirements of recommendation 154 should apply.

Draft additional recommendation

Valuation of encumbered assets in reorganization proceedings

H. The insolvency law should provide that, in determining the liquidation value of encumbered assets in a reorganization proceeding, consideration should be given to the use of those assets and the purpose of the valuation. The liquidation value of those assets may be based on their value as part of a going concern.

[Note to the Working Group: The commentary will note that the Insolvency Guide commentary provides the same rule for all assets, see paragraph 66, part two, chapter II, section B.]

Insolvency Guide recommendations

Secured claims

(172) The insolvency law should specify whether secured creditors are required to submit claims.

Admission or denial of claims

- Valuation of secured claims

(179) The insolvency law should provide that the insolvency representative may determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset.

Secured claims

(188) The insolvency law should specify that secured claims should be satisfied from the encumbered asset in liquidation or pursuant to a reorganization plan, subject to claims that are superior in priority to the secured claim, if any. Claims superior in priority to secured claims should be minimized and clearly set forth in the insolvency law. To the extent that the value of the encumbered asset is insufficient to satisfy the secured creditor's claim, the secured creditor may participate as an ordinary unsecured creditor.

Draft additional recommendations

Priority of a security right in insolvency proceedings

I. The insolvency law should specify that, if a security right is entitled to priority under law other than the insolvency law, that priority continues unimpaired in insolvency proceedings except if, pursuant to the insolvency law, another claim is given priority. Such exceptions should be minimal and clearly set forth in the insolvency law. This recommendation is subject to Recommendation 88 of the Insolvency Guide.

[Note to the Working Group: The commentary will provide examples of exceptions, such as post-commencement priority financings and privileged claims.]

Effect of a subordination agreement in insolvency proceedings

J. The insolvency law should provide that, if a holder of a security right in an asset of the insolvency estate has subordinated its priority unilaterally or by agreement in favour of any existing or future competing claimant, such subordination is binding in insolvency proceedings with respect to the grantor.

[Note to the Working Group: See recommendation 85 (see WP.21/Add.1), which sets forth the general rule on subordination applicable in the absence of insolvency proceedings.]

Impact of insolvency on conflict-of-laws rules

K. The law should provide that, notwithstanding the commencement of an insolvency proceeding, the creation, effectiveness against third parties, priority and enforcement of a security right are governed by the law that would be applicable in the absence of the insolvency proceeding. This recommendation does not affect the application of any insolvency rules, including any rules relating to avoidance, priority, or enforcement of security rights.

[Note to the Working Group: The commentary will clarify the relationship among this recommendation and recommendations 30 and 31 of the Insolvency Guide. The commentary will also explain that this recommendation refers to insolvency rules without regard to whether they are characterized for any purpose as procedural, substantive, jurisdictional or otherwise.]

A/CN.9/WG.VI/WP.21/Add.4

Recommendations of the draft Legislative Guide on Secured Transactions

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X. Acquisition financing devices

Purpose

The purpose of the provisions of the law on acquisition financing devices (sales with a retention of title arrangement, purchase-money security devices and financial leases) is to:

- (a) Recognize the importance of acquisition financing as a source of affordable credit, in particular for small- and medium-size businesses; and
- (b) Provide for equal treatment of all providers of acquisition financing, by subjecting them to the rules governing security rights or to [a different but equivalent set of rules] [certain of the rules governing security rights].

Equivalence of acquisition financing devices to security rights

125. The law should treat acquisition rights arising under transactions, such as sales with retention of title arrangements, purchase-money lending arrangements and financial leases, as security rights by including such rights within the definition of “security rights” and, thus, applying the rules governing security rights to these rights directly (“unitary approach”). Alternatively, the law might exclude such rights (or some of them) from the definition of “security rights”, but subject them to [a different but equivalent set of rules] [certain of the rules governing security rights] (“non-unitary approach”). In either case, the recommendations applicable to acquisition security rights should apply, as supplemented by the recommendations applicable to non-acquisition security rights.

Creation of acquisition security rights

126. The law should specify that a security right is created by agreement between the buyer, grantor or financial lessee (hereinafter referred to as “the grantor”) and the seller, secured creditor or financial lessor (hereinafter referred to as “the acquisition financier”) which is in writing and evidences the intent of the grantor to grant a security right or is accompanied by delivery of possession pursuant to the agreement and in accordance with recommendation 9. Writing includes a purchase order, invoice, general terms and conditions and the like. It also includes an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce).

[Note to the Working Group: Recommendation 126 is based on recommendation 8 (see A/CN.9/WG.VI/WP.21) and is, in essence, consistent with the previous version of this recommendation (see A/CN.9/WG.VI/WP.17/Add.1, Rec. 2). The Working Group may wish to include a note to States that prefer to follow a non-unitary approach that could read along the following lines: "States that prefer to follow a non-unitary approach may wish to maintain the specific terminology (e.g. buyer, seller, financial lessee, financial lessor, etc.)."]

Effectiveness of acquisition security rights against third parties

127. The law should provide that, in order for a non-possessory acquisition security right to be effective against third parties, the acquisition financier has to register a notice covering its right in the relevant security rights registry. If the acquisition financier registers the notice not later than [specify a short time period, such as 20 or 30 days] from the time of actual delivery of the goods to the grantor, the right should also be effective against third parties whose rights arose between the time the acquisition security right was created and its registration. If the acquisition financier registers the notice after the expiration of that period, the acquisition security right is effective against third parties from the time the notice is registered.

Exceptions to the principle of registration

128. The law should provide that non-possessory acquisition security rights in consumer goods with resale value, such as motor vehicles, trailers, boats and aircraft, are effective against third parties when they are created and need not be registered in the security rights registry.

Priority of acquisition security rights over pre-registered non-acquisition security rights in future goods other than inventory

129. In the case of goods other than inventory, the law should provide that an acquisition security right has priority over a pre-registered security right in the same goods (even if a notice covering that pre-registered security right was registered in the security rights registry before the acquisition security right was registered) if: (i) the acquisition financier retains actual possession of the goods; (ii) notice of the acquisition security right was registered within a period of [the same number of days specified in recommendation 127] from the actual delivery of the goods to the grantor; or (iii) the acquisition security right became effective against third parties under recommendation 128 at the time it was created.

Priority of acquisition security rights over pre-registered non-acquisition security rights in future inventory

130. The law should provide that an acquisition security right has priority over a pre-registered security right in the grantor's inventory (even if that pre-registered right became effective against third parties before the acquisition security right became effective against third parties) if: (i) the acquisition financier retains actual possession of the goods; or (ii) before actual delivery of the inventory to the grantor, the acquisition financier: (a) registers a notice covering its right in the relevant security rights registry; and (b) notifies the holder of the pre-registered security right in writing that the acquisition financier intends to enter into one or more transactions pursuant to which that person will have a higher-ranking acquisition security right with respect to the additional inventory of the grantor described in the notification.

131. The law should provide that notification to holders of pre-registered security rights may cover multiple acquisition transactions between the same parties. However, the notification should be effective only for acquisition security rights created within a period of [specify time, such as five years] after the notification is given.

Cross-collateralization

132. The law should provide that an acquisition security right is subject to the recommendations in this Chapter regarding effectiveness against third parties and priority even if the acquisition financier: (i) also has a security right in the goods securing non-acquisition obligations of the grantor; or (ii) has a security right in other assets of the grantor securing the payment obligation relating to the acquisition security right.

Priority of acquisition security rights in proceeds of inventory

133. The law should provide that the priority, provided under recommendation 130, for an acquisition security right in inventory over a pre-registered security right in the same goods applies to the proceeds of such inventory, provided that the acquisition financier notified pre-registered financiers with a security right in assets of the same kind as the proceeds.

Enforcement

134.

Unitary approach

The law should provide that, in the case of default on the part of the grantor, the acquisition financier is entitled to repossess and dispose of the goods subject to the same rules applicable to security rights generally.

Non-unitary approach

The law should provide that, in the case of default on the part of the buyer, grantor or financial lessee, the seller, purchase-money secured creditor or financial lessor has, to the maximum extent possible, the same rights and remedies as the holder of a security right.

Insolvency

[Note to the Working Group: See recommendations A and B in the recommendations of this Guide on Insolvency:]

Unitary approach

A. The insolvency law should provide that, in the case of the insolvency proceedings of the grantor, the acquisition financier has the rights and duties of a holder of a security right.

Non-unitary approach

B. [The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer under a title retention arrangement, a grantor or a financial lessee, the seller, purchase-money lender or financial lessor has the rights and duties of a holder of a security right.] [The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer under a title retention arrangement, a grantor or a

financial lessee, the seller or financial lessor has the rights and duties of a third-party owner of the asset under the UNCITRAL Legislative Guide on Insolvency Law.]

[Note to the Working Group: The two alternatives in recommendation B reflect different approaches that States may take with respect to the extent acquisition financing devices will be treated fully or only to some extent in the same way as purchase-money security rights.]

Conflict of laws

135. The law should provide that the conflict-of-laws recommendation apply to acquisition financing devices with the exception of recommendation 137.

A/CN.9/WG.VI/WP.21/Add.5

Recommendations of the draft Legislative Guide on Secured Transactions

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XI. Conflict of laws***Purpose**

The purpose of conflict-of-laws rules is to determine the law applicable to each of the following issues: the creation of a security right; the pre-default rights and obligations between the secured creditor and the grantor; the effectiveness of a security right against third parties; the priority of a security right over the rights of competing claimants; and the enforcement of a security right.

These rules should also be applicable, as appropriate, to rights that are not classified as “security rights” but which fulfil a similar economic function and are susceptible of competing with security rights, such as the rights of a transferee of receivables, a supplier of goods who retains title to the goods in a retention-of-title arrangement or a financial lessor.

[Note to the Working Group: The Working Group may wish to note that the words “as appropriate” are intended to provide some flexibility for States following a non-unitary approach as to the manner in which they might assimilate acquisition financing devices to security devices (see A/CN.9/574, para. 34). The Working Group may also wish to recall that the words “between the parties” had been added after the word “creation” to clarify the distinction made in the Guide between “effectiveness between the parties” and “effectiveness against third parties”. However, there are no two types or two times of creation, but only two types of effectiveness. Therefore, the recommendations no longer refer to creation “as between the parties”. The Working Group may wish to include a footnote to the first paragraph of the purpose section that “The meaning of these terms is elaborated in chapters IV, V, VI, VII and VIII respectively”.]

Security rights in tangible property

136. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in tangible property are governed by the law of the State in which the encumbered asset is located (for goods in transit and export goods, see also recommendation 142). However, with respect to security rights in tangible property of a type ordinarily used in more than one State, the law should

* Recommendations prepared in close cooperation with the Hague Conference on Private International Law.

provide that such issues are governed by the law of the State in which the grantor is located.

[Note to the Working Group: The Working Group may wish to consider that recommendation 136 should apply to negotiable documents. As to negotiable instruments, the Working Group may wish to consider whether recommendation 136 should apply, except to the extent they are subject to a non-possessory security right in which case recommendation 137 should apply.]

Security rights in intangible property

137. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are governed by the law of the State in which the grantor is located.

Security rights in proceeds from a drawing under an independent undertaking

138. [The law should provide that:

(a) Subject to subparagraphs (b) and (c), the creation, the effectiveness against third parties, the priority over the rights of competing claimants and the enforcement of a security right in the proceeds from a drawing under an independent undertaking are governed by the law of the State in which the grantor is located;

(b) To the extent that payment is sought from the issuer/guarantor or nominated person or made under an acknowledgement by the issuer/guarantor or nominated person, the effectiveness against third parties, the priority over the rights of competing claimants and the enforcement of a security right in the proceeds from a drawing under an independent undertaking are governed by the law of the State where the [relevant branch of the] payor of the proceeds is located; and

(c) The rights and duties of an issuer/guarantor or nominated person to act or not act on a request for an acknowledgement of an assignment of proceeds or on an acknowledgement made by it are governed by the law that is chosen in that person's acknowledgement or, absent an acknowledgement or a choice of law therein, by the law of the State in which that person is located and without regard to the law governing the independent undertaking itself.]

[Note to the Working Group: The Working Group may wish to consider whether: (i) subparagraph (a) is necessary as it repeats the rule in recommendation 137; (ii) subparagraph (b) is necessary as it deals with the issue of account debtor protection addressed in recommendation 147; (iii) subparagraph (c) is necessary since it deals with a contractual matter. The Working Group may also wish to specify the meaning of location of a person for the purposes of this recommendation.]

Security rights in bank accounts

139. [Except as otherwise provided in recommendation 140,] the law should provide that the creation, the effectiveness against third parties, the priority over the rights of competing claimants, the rights and duties of the depositary bank with respect to the security right and the enforcement of the security right in a bank account are governed by

Alternative A

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. However, the law designated in this recommendation applies only if the depositary bank has, at the time of the account agreement, an office in that State which is engaged in the regular activity of maintaining bank accounts.

[Note to the Working Group: Alternative A is based on article 4.1 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With An Intermediary, “the Hague Convention”.]

139 bis. If the applicable law is not determined under recommendation 139, but it is expressly and unambiguously stated in a written account agreement that the bank entered into the account agreement through a particular office, the law should provide that the law applicable to all the issues specified in recommendation 139 is the law in force in the State in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of recommendation 139.

[Note to the Working Group: This recommendation is based on article 5.1 of the Hague Convention.]

139 ter. If the applicable law is not determined under recommendation 139 or 139 bis, that law is the law in force in the State under whose law the depositary bank is incorporated or otherwise organized at the time the written account agreement is entered into or, if there is no such agreement, at the time the bank account was opened.

[Note to the Working Group: This recommendation is based on article 5.2 of the Hague Convention.]

139 quater. If the applicable law is not determined under any of recommendations 139, 139 bis or 139 ter, that law is the law in force in the State in which the depositary bank has its place of business, or, if the depositary bank has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the bank account was opened.

[Note to the Working Group: This recommendation is based on article 5.3 of the Hague Convention.]

Alternative B

Same as alternative A but without recommendations 139 bis, 139 ter and 139 quater which could be replaced by language along the following lines: “If the applicable law is not determined under recommendation 139, the law should specify fallback rules based on article 5 of the Hague Convention.”

[Note to the Working Group: Alternative B is a simplified version of alternative A. The commentary could include the detailed fallback rules of the Hague Convention with sufficient explanation. A variation of alternative B would be to leave out of the recommendation any reference to fallback rules but instead to include and explain them sufficiently in the commentary.]

Alternative C

the law of the State [with the closest connection to the depositary bank with which] [where] the bank account is held.

[Note to the Working Group: Alternative C has been added at the request of the Working Group (see A/CN.9/574, para. 80). It is based on the assumption that the location of a bank account can be easily determined (for example, through an international bank account number which contains both the account number and the code of the bank with which the account is held.)]

140. [If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a bank account, the law of that State determines the effectiveness against third parties of a security right in a bank account achieved by registration.]

[Note to the Working Group: As requested by the Working Group (see A/CN.9/574, para. 80), recommendation 140 has been added within square brackets. This recommendation would supplement recommendation 139 (regardless of which alternative is adopted) to provide that, if the State in which the grantor is located recognizes registration as a method of achieving third-party effectiveness, the effectiveness against third parties of a security right in a bank account achieved by registration would be governed by the law of the State in which the grantor is located. If adopted, this suggestion would, under those circumstances, enable a secured creditor to register a security right in a bank account in the same State in which it registers a security right in other intangible property. Recommendation 140 applies only to third-party effectiveness achieved by registration. Third-party effectiveness achieved by control or any other method would be governed by the law designated in recommendation 139 (under recommendation 63 in A/CN.9/WG.VI/ WP.21/Add.1, a security right in a bank account made effective against third parties achieved by control has priority over a security right in a bank account made effective against third parties by registration).]

Proceeds

141. The law should provide that:

(a) The creation of a security right in proceeds is governed by the law governing the creation of the security right in the original encumbered asset from which the proceeds arose; and

(b) The effectiveness against third parties and the priority over the rights of competing claimants of a security right in proceeds are governed by the same law as the law governing the effectiveness against third parties and the priority over the rights of competing claimants of a security right in original encumbered assets of the same kind as the proceeds.

Goods in transit and export goods

142. The law should provide that a security right in tangible property (other than negotiable instruments or negotiable documents) in transit or to be exported from the State in which it is located at the time of the creation of the security right may also be created and made effective against third parties under the law of the State of the ultimate destination, provided that the property reaches that State within a specified short time period after the time of creation of the security right.

[Note to the Working Group: As they provided for the application of the same law, the recommendations on goods in transit and export goods have been merged. The Working Group may wish to consider whether recommendation 142 should apply to all

types of “tangible property”, a term defined in the Guide to include negotiable instruments and negotiable documents.]

Meaning of “location” of the grantor

143. The law should provide that, for the purposes of the recommendations in this chapter, the grantor is located in the State in which it has its place of business. If the grantor has a place of business in more than one State, the grantor’s place of business is that place where the central administration of the grantor is exercised. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

Relevant time when determining location

144. The law should provide that references to the location of the assets or of the grantor in the recommendations in this chapter refer, for creation issues, to that location at the time of the creation of the security right and, for third-party effectiveness and priority issues, to that location at the time the issue arises.

[Note to the Working Group: Under recommendation 144, in the event of a change in the location of the assets or the grantor (as the case may be) after creation of a security right, third-party effectiveness and priority of the security right are governed by the law of the State in which the assets or the grantor are currently located even if all the competing claims were also created before the relocation. The Working Group may wish to consider whether an exception should be introduced pursuant to which such priority disputes would continue to be governed by the law of the original location provided that the secured creditor has taken whatever steps are necessary under that law to make its security right effective against third parties.]

Continued third-party effectiveness upon change of location

145. The law should provide that, if a security right in encumbered assets is effective against third parties under the law of a State other than the enacting State and the location of the encumbered assets or the grantor (as relevant under the recommendations in this chapter) changes to the enacting State, the security right continues to be effective against third parties under the law of the enacting State for a period of [to be specified] days after the location of the encumbered assets or the grantor (as relevant under the recommendations in this chapter) has changed to the enacting State. If the requirements of the enacting State to make the security right effective against third parties are satisfied prior to the end of that period, the security right continues to be effective against third parties thereafter under the law of the enacting State.

[Note to the Working Group: For the purpose of clarifying the application of recommendation 145 in the context of a priority dispute, the Working Group may wish to consider adding the following text at the end of recommendation 145: “, and, in determining priority under the law of the enacting State, for the purposes of any rule in which time of registration or other method of achieving third-party effectiveness is relevant, that time is the time at which that event occurred under the law of that other State”.]

Renvoi

146. The law should provide that the reference to “the law” of another State as the law governing an issue refers to the law in force in that State other than its conflict-of-laws rules.

Law governing the rights and obligations of the grantor and the secured creditor

147. The law should provide that the mutual rights and obligations of the grantor and the secured creditor [with respect to the security right] [, whether] arising from the security agreement [or by law,] are governed by the law chosen by them [and, in the absence of a choice of law, by the law governing the security agreement] [of the State in which the grantor is located at the time the security right was created].

[Note to the Working Group: The Working Group may wish to note that three changes are proposed to recommendation 147, which is based on article 28 of the United Nations Assignment Convention. The phrase “with respect to the security right” aligns the scope of this provision to the subject matter of the Guide, by making the rule applicable to the parties’ rights and obligations that relate to the security right. The addition of “by law” makes the rule applicable to rights and obligations relating to the security right which, although originating from the creation of the security right (and in this sense having an origin in the security agreement), arise from law in that they are not expressly or impliedly dealt with in the security agreement but become part of the security right as a matter of law. If this phrase is not added, the Guide provides no conflict-of-laws rule to determine which State’s law governs this class of rights and obligations. An example would be the nature and extent of the secured party’s duty to care for the collateral while it is in its possession, an obligation not strictly arising from the security agreement but part of the security right as a matter of law. As to the fallback rule applicable in the absence of a choice of law by the parties, recommendation 147 presents three alternatives. The first alternative is to provide no fallback rule on the assumption that one would not be needed since in most cases parties to secured transactions would include a choice-of-law clause in their agreements. The second alternative would be to align the law applicable to the rights and obligations of the parties with the law applicable to the purely contractual rights and obligations, an approach that would most likely be in line with the expectations of the parties. The third alternative refers to the grantor’s location (which might or might not be the connecting factor under the second alternative). This third alternative might appear to provide more certainty; it might result in different laws governing the rights and obligations of the parties covered by recommendation 147 and the purely contractual rights and obligations of the parties.]

Law governing the rights and obligations of the account debtor and the assignee

148. The law should provide that the relationship between an account debtor and the assignee of an assigned receivable, and between the transferee and the obligor under a negotiable instrument, the conditions under which an assignment of a receivable can be invoked against the account debtor or the obligor under a negotiable instrument and the determination of whether the account debtor’s or obligor’s obligations have been discharged are governed by the law governing the receivable or the negotiable instrument.

[Note to the Working Group: The purpose of this recommendation is to avoid any implication that recommendation 149, which deals with the law governing enforcement of the security right against the grantor, determines the law governing enforcement by the secured creditor against the account debtor of an assigned receivable (or the obligor

under a negotiable instrument). However, recommendation 148, which is based on article 29 of the United Nations Assignment Convention, applies to the entire relationship between the account debtor of an assigned receivable or the obligor under a negotiable instrument and the secured creditor, matters including but not limited to enforcement.]

Enforcement matters

149. The law should provide that:

Alternative A

Matters affecting the enforcement of a security right outside insolvency proceedings are governed by the law of the State where enforcement takes place.

Alternative B

Matters affecting the enforcement of a security right outside insolvency proceedings are governed by the law governing the security agreement [determined in accordance with recommendation 147]. However:

(a) A secured creditor may take possession of tangible encumbered assets without the consent of the person in possession of them only in accordance with the law of the State in which those assets are located at the time the secured creditor takes possession of them;

(b) A forum may apply those provisions of its own law which, irrespective of rules of conflict of laws, must be applied even to international situations; and

(c) The application of the law determined under the first sentence of this recommendation may be refused by the forum only if the effects of its application would be manifestly contrary to the public policy of the forum.

[Note to the Working Group: Subparagraphs (b) and (c) are derived from article 11 of the Hague Convention. Subparagraph (c) refers only to the first sentence of this recommendation and not to subparagraph (a) as parties to the security agreement and third parties in the State in which the encumbered assets are located should always be able to rely on and be protected by the law of the place where the repossession of tangible encumbered assets occurs to govern such conduct and the lex fori should not override the lex situs.]

Impact of insolvency on conflict-of-laws rules

[Note to the Working Group: See recommendation K and note in the recommendations of this Guide on Insolvency, A/CN.9/WG.VI/WP.21/Add.3, which read as follows: "The law should provide that, notwithstanding the commencement of an insolvency proceeding, the creation, effectiveness against third parties, priority and enforcement of a security right are governed by the law that would be applicable in the absence of the insolvency proceeding. This recommendation does not affect the application of any insolvency rules, including any rules relating to avoidance, priority or enforcement of security rights.

[Note to the Working Group: See also recommendations 30 and 31 of the Insolvency Guide. The commentary will clarify the relation between this recommendation, on the one hand, and recommendations 30 and 31 of the Insolvency Guide on the other hand. The commentary will also explain that this recommendation covers procedural, substantive, jurisdictional, etc., rules.]"

Multi-unit States

[Note to the Working Group: The Working Group may wish to consider whether an additional recommendation is needed to provide for the application of the recommendations in this chapter in a Multi-unit State.]

XII. Transition**Purpose**

The purpose of transition provisions of the law is to provide a fair and efficient transition from the regime before the enactment of the law to the regime after the enactment of the law.

Effective date

150. The law should specify a date or a mechanism by which a date may be specified, subsequent to its enactment, as of which it will enter into force (the “effective date”) in view of:

- (a) The impact of the effective date on credit decisions and in particular the maximization of benefits to be derived from the law;
- (b) The necessary regulatory, institutional, educational and other arrangements or infrastructure improvements to be made by the State; the status of the pre-existing law and other infrastructure;
- (c) The harmonization of the law with other legislation; and
- (d) The content of constitutional rules with respect to pre-effective date transactions; and standard or convenient practice for the entry into force of legislation (e.g. on the first day of a month); and
- (e) The need to give affected persons sufficient time to prepare for the law.

Transition period

151. The law should provide a period of time after the effective date (the “transition period”), during which creditors with security rights effective against the grantor and third parties under the previous regime may take steps to assure that those rights are effective against the grantor and third parties under the law. If those steps are taken during the transition period, the law should provide that the effectiveness of the creditor’s rights against those parties is continuous.

Priority

152. The law should provide clear rules for resolving:

- (a) Which law applies to the priority between post-effective date security rights;
 - (b) Which law applies to the priority between pre-effective date security rights;
- and
- (c) Which law applies to the priority between pre-effective date and post-effective date security rights.

153. The law should provide that priority between post-effective date security rights is governed by the law.

154. The law should provide generally that priority between pre-effective date security rights is governed by the former legal regime. The law should also provide, however, that application of those former rules will occur only if no event occurs after the effective date that would have changed the priority under the former regime. If such an event occurs, the law should determine priority.

155. With respect to priority between pre-effective date security rights and post-effective date security rights, the law should provide that it will apply as long as the holder of a pre-effective date right may, during the transition period, ensure priority under the law by taking whatever steps are necessary under the law. During the transition period, the priority of the pre-effective date right should continue as though the law had not become effective. If the appropriate steps are taken during the transition period, the holder of the pre-effective date right should have priority to the same extent as would have been the case had the law been effective at the time of the original transaction and those steps had been taken at that time.

156. When a dispute is in litigation (or a comparable dispute resolution system) or the secured creditor has taken steps towards enforcing its rights at the effective date of the law, the law should specify that it does not apply to the rights and obligations of the parties.

157. The law should deal with the transition from a regime in which no filing is required to a regime where filing is a condition for ensuring the effectiveness of security rights as against third parties.

158. The law should ensure that the transition should not entail any cost other than the nominal cost of registration.

**C. Note by the Secretariat on the draft Legislative Guide
on Secured Transactions, submitted to the Working Group
on Security Interests at its eighth session**

(A/CN.9/WG.VI/WP.22 and Add.1) [Original: English]

Background remarks

1. At its thirty-third session in 2000, the Commission considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.⁵

2. At its thirty-fourth session in 2001, the Commission considered a further report by the Secretariat (A/CN.9/496). At that session, the Commission agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.⁶

3. While some concerns were expressed with respect to the feasibility of work in the field of secured credit law, the Commission noted that those concerns were not widely

⁵ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

⁶ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 351.

shared and went on to consider the scope of work.⁷ It was widely felt that work should focus on security interests in goods involved in a commercial activity, including inventory. It was also agreed that securities and intellectual property should not be dealt with. As to intellectual property, it was stated that there was less need for work in that area, the issues were extremely complex and any efforts to address them should be coordinated with other organizations, such as the World Intellectual Property Organization (WIPO).⁸ As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.⁹

4. After discussion, the Commission decided to entrust a working group with the task of developing “an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral ...”.¹⁰ Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry and practice, the Commission recommended that a two- to three-day colloquium be held.¹¹

5. At its first session (New York, 20-24 May 2002), Working Group VI (Security Interests) had before it a first, preliminary draft legislative guide on secured transactions, prepared by the Secretariat (A/CN.9/WG.VI/WP.2 and Add.1-12), a report on an UNCITRAL-CFA international colloquium, held in Vienna from 20 to 22 March 2002 (A/CN.9/WG.VI/WP.3), and comments by the European Bank for Reconstruction and Development (EBRD) (A/CN.9/WG.VI/WP.4). At that session, the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10), and requested the Secretariat to revise these chapters (A/CN.9/512, para. 12). At the same session, the Working Group agreed on the need to ensure, in cooperation with Working Group V (Insolvency Law), that issues relating to the treatment of security rights in insolvency proceedings would be addressed consistently with the conclusions of Working Group V on the intersection of the work of Working Group V and Working Group VI (see A/CN.9/512, para. 88 and A/CN.9/511, paras. 126-127).

6. At its thirty-fifth session in 2002, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission expressed its appreciation to the Working Group for the progress made in its work. It was widely felt that, with that legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations.¹²

7. In addition, the feeling was widely shared that the timing of the Commission’s initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission’s own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group V (Insolvency Law) and Working

⁷ Ibid., paras. 352-354.

⁸ Ibid., paras. 354-356.

⁹ Ibid., para. 357.

¹⁰ Ibid., para. 358.

¹¹ Ibid., para. 359.

¹² Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 202.

Group VI towards coordinating their work on a subject of common interest such as the treatment of security interests in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance with respect to the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise the insolvency chapter of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the secretariat to consider organizing a joint session of the two Working Groups in December 2002.¹³

8. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security interests in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.¹⁴

9. At its second session (Vienna, 17-20 December 2002), the Working Group considered chapters VI, VII and IX (A/CN.9/WG.VI/WP.2 and Add.6, 7 and 9) of the first preliminary draft guide on secured transactions, prepared by the Secretariat. At that session, the Working Group requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/531, para. 15). In conjunction with that session and in accordance with suggestions made at the first session of the Working Group (see A/CN.9/512, para. 65), an informal presentation of the registration systems of security rights in movable property of New Zealand and Norway was held. Immediately before that session, Working Groups V (Insolvency Law) and VI (Security Interests) held their first joint session (Vienna, 16-17 December 2002), during which the revised version of former chapter X (new chapter IX; A/CN.9/WG.VI/WP.6/Add.5) on insolvency was considered. At that session, the Secretariat was requested to prepare a revised version of that chapter (see A/CN.9/535, para. 8).

10. At its third session (New York, 3-7 March 2003), the Working Group considered chapters VIII, XI and XII of the first preliminary draft guide on secured transactions and chapters II and III of the second version of the draft Guide (A/CN.9/WG.VI/WP.2/Add.8, A/CN.9/WG.VI/WP.2/Add.11, A/CN.9/WG.VI/WP.2/Add.12, A/CN.9/WG.VI/WP.6/Add.2 and A/CN.9/WG.VI/WP.6/Add.3) and requested the Secretariat to prepare revised versions (A/CN.9/532, para. 13). In conjunction with that session, an informal presentation was made of the recently completed secured transactions law in the Slovak Republic, which was supported by the World Bank and by EBRD.

11. At its thirty-sixth session in 2003, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its second and third sessions (A/CN.9/531 and A/CN.9/532), as well as the report of the first joint session of Working Group V and VI (A/CN.9/535). The Commission commended the Working Group for the progress in its work and expressed its appreciation to Working Group V and Working Group VI for the coordination of their work in relation to the treatment of security rights in insolvency proceedings. The Commission also noted with appreciation the presentation of modern registration systems of security rights in movable property and the plan of the Secretariat to prepare a paper addressing technical registration-related issues.¹⁵

¹³ Ibid., para. 203.

¹⁴ Ibid., para. 204.

¹⁵ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 217.

12. In addition, the Commission emphasized the importance of coordination with organizations with interest and expertise in the field of secured transactions law, such as Unidroit, the Hague Conference on Private International Law, the World Bank, the International Monetary Fund, EBRD and the Asian Development Bank. Reference was made to the current work of Unidroit on security rights in securities, to the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems to the extent they concerned secured transactions, to the Model Law on Secured Transactions and the Principles of EBRD, to the Asian Development Bank's Guide to Movables Registries and to the Inter-American Model Law on Secured Transactions of 2002 prepared by the Organization of American States. Reference was also made to the need to coordinate with the Hague Conference with respect to the conflict-of-laws chapter of the draft legislative guide on secured transactions, in particular with respect to the law applicable to the enforcement of security rights in the case of insolvency.¹⁶

13. With respect to the scope of work, the Commission noted suggestions that the Working Group should consider covering, in addition to goods (including inventory), trade receivables, letters of credit, deposit accounts and intellectual property rights in view of their economic importance as security for credit. As to the substance of the draft legislative guide, the Commission noted statements that, while the draft guide should discuss various workable approaches, it should also include recommendations and, that if alternative recommendations had to be prepared, their relative merits, in particular for developing countries and for countries with economies in transition, should also be discussed.¹⁷

14. After discussion, the Commission confirmed the mandate given to Working Group VI at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory, and its decision at its thirty-fifth session that the mandate should be interpreted widely to ensure an appropriate work product, which should take the form of a legislative guide. The Commission also confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights should be covered in the draft legislative guide.¹⁸

15. At its fourth session (Vienna, 8-12 September 2003), the Working Group considered chapters I (Introduction), II (Key Objectives), IV (Creation), IX (Insolvency) and paragraphs 1 to 41 of chapter VII (Priority), and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/543, para. 15).

16. At its fifth session (New York, 22-25 March 2004), the Working Group considered the summary and recommendations of chapters V (Publicity), VI (Priority), X (Conflicts of Laws) and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/549, para. 16).

17. At their second joint session (New York, 26 and 29 March 2004), Working Groups V (Insolvency Law) and VI (Security Interests) considered the treatment of security interests in the draft Legislative Guide on Insolvency Law on the basis of document A/CN.9/WG.V/WP.71 (see A/CN.9/550, para. 11).

18. At its thirty-seventh session in 2004, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its fourth and fifth sessions (A/CN.9/543 and A/CN.9/549), as well as the report of the second joint session of

¹⁶ Ibid., para. 218.

¹⁷ Ibid., paras. 220-221.

¹⁸ Ibid., para. 222.

Working Groups V and VI (A/CN.9/550). The Commission commended the Working Group for the progress achieved so far and expressed its appreciation to Working Groups V and VI for the progress made during their second joint session, at which they had considered pending issues of common interest.¹⁹

19. In addition, the Commission noted with appreciation the progress made by the Working Group in the coordination of its work on conflict of laws with the Hague Conference on Private International Law and in particular the plans for a joint meeting of experts. The Commission also commended the efforts to coordinate with the International Institute for the Unification of Private Law (Unidroit), which was preparing a text on security interests in securities. The Commission also expressed its appreciation for the coordination with the World Bank, which was preparing principles and guidelines for effective insolvency and creditor rights systems, and in particular for the agreement that the World Bank text would form with the draft legislative guide on secured transactions a single international standard.²⁰

20. The Commission noted with interest that a preliminary consolidated set of recommendations might be ready by early 2005. The Commission also welcomed the preparation of additional chapters on various types of asset, such as negotiable instruments and documents, bank accounts, letters of credit and intellectual property rights. In that connection, while the importance of those types of asset was generally recognized, it was stated that including them in the draft guide should not be at the expense of slowing down work with respect to the core assets within the scope of the draft guide (i.e. goods, including inventory, and receivables).²¹

21. After discussion, the Commission confirmed the mandate given to Working Group VI at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth and thirty-sixth sessions. The Commission also requested the Working Group to expedite its work so as to submit the draft guide to the Commission for final adoption as soon as possible and, hopefully, in 2006.²²

22. At its sixth session (Vienna, 27 September-1 October 2004), the Working Group considered chapters I and II (Introduction and key objectives), III (Basic approaches to security), IV (Creation), V (Effectiveness against third parties), VII (Pre-default rights and obligations), VIII (Default and enforcement), X (Conflict of laws) and XI (Transition) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/570, para. 8). At that session, the Working Group noted with appreciation that the conflicts-of-laws chapter of the Guide was being prepared in close cooperation with the Hague Conference on Private International Law (A/CN.9/570, para. 75).

23. At its seventh session (New York, 24-28 January 2005), the Working Group considered chapters X (Conflict of laws), XII (Acquisition financing devices) and XVI (Security rights in bank accounts) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/574, para. 8).

¹⁹ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 75.

²⁰ Ibid., para. 76.

²¹ Ibid., para. 77.

²² Ibid., para. 78.

A/CN.9/WG.VI/WP.22/Add.1

Draft Legislative Guide on Secured Transactions

ADDENDUM

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I. Introduction

A. Purpose

1. The purpose of this Guide is to assist States in the development of modern secured transactions laws with a view to promoting the availability of low-cost secured credit. The Guide is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to review or modernize them, or to harmonize or coordinate their laws with those of other States.
2. The Guide is based on the premise that sound secured transactions laws can have significant economic benefits for States that adopt them, including attracting credit from domestic and foreign lenders and other credit providers, promoting the development and growth of domestic businesses (particularly small and medium-size enterprises), and generally increasing trade. Such laws also benefit consumers by lowering prices for goods and services and making low-cost consumer credit more readily available. To be effective, such laws must be supported by efficient and effective judicial systems and other enforcement mechanisms. They must also be supported by insolvency laws that respect rights derived from secured transactions laws (see UNCITRAL Legislative Guide on Insolvency Law).
3. The Guide seeks to rise above differences among legal regimes to suggest pragmatic and proven solutions that can be accepted and implemented in States having divergent legal traditions. The focus of the Guide is on developing laws that achieve practical economic benefits for States that adopt them. While it is possible that States will have to incur predictable, yet limited, costs to develop and implement these laws, substantial experience suggests that the resulting short- and long-term benefits to such States should greatly outweigh the costs.
4. All businesses, whether manufacturers, distributors, service providers or retailers, require working capital to operate, to grow and to compete successfully in the marketplace. It is well established, through studies conducted by such organizations as the International Bank for Reconstruction and Development (the World Bank), the International Monetary Fund, the Asian Development Bank and the European Bank for Reconstruction and Development (EBRD), that one of the most effective means of providing working capital to commercial enterprises is through secured credit.
5. The key to the effectiveness of secured credit is that it allows businesses to use the value inherent in their assets as a means of reducing risk for the creditor. Risk is reduced because credit secured by assets gives creditors access to the assets as another source of payment in the event of non-payment of the secured obligation. As the risk of non-payment is reduced, the availability of credit increases and the cost of credit falls.
6. A legal system that supports secured credit transactions is critical to reducing the perceived risks of credit transactions and promoting the availability of secured credit. Secured credit is more readily available to businesses in States that have efficient and effective laws that provide for consistent, predictable outcomes for creditors in the event of non-performance by debtors. On the other hand, in States that do not have efficient and effective laws, where creditors perceive the legal risks associated with credit transactions to be high, the cost of credit increases as creditors require increased compensation to evaluate and assume the increased risk. In some States, the absence of an efficient and effective secured transactions regime, or of an insolvency law regime under which security

rights are recognized, has resulted in the virtual elimination of credit for small and medium-size commercial enterprises, as well as for consumers.

7. By aiding in the cultivation and growth of individual businesses, creating a legal regime that promotes secured credit can have a positive effect upon the general economic prosperity of a State. Thus, States that do not have an efficient and effective secured transactions regime may deny themselves a valuable economic benefit.

8. To best promote the availability of low-cost secured credit, the Guide suggests that secured transactions laws should be structured to enable businesses to utilize the value inherent in their property to the maximum extent possible to obtain credit. In this regard, the Guide adopts two of the most essential concepts of successful secured transactions laws, the concepts of priority and effectiveness against third parties. The concept of priority, which allows for the concurrent existence of security rights having different priority status in the same assets, makes it possible for a business to utilize the value of its assets to the maximum extent possible by obtaining secured credit from more than one creditor using the same assets as security with transparent rules allowing each creditor to know the priority of its security right. The concept of effectiveness against third parties, in the form of a system allowing, *inter alia*, the registration of a notice concerning security rights, is designed to promote legal certainty with regard to the relative priority status of creditors and thus to reduce the risks and costs associated with secured transactions.

B. Scope

9. The Guide deals with consensual security rights. However, it contains references to non-consensual rights, such as those provided by statute or judicial process, when the same property is subject to both consensual and non-consensual security rights and the law must provide for the relative priority of such rights (see A/CN.9/WG.VI/WP.14/Add.1, paras. 56-61 and 82-85). The primary focus of the Guide is on core commercial assets, such as commercial goods (inventory and equipment) and trade receivables. However, the Guide proposes that all types of asset are capable of being the object of a security right, including all present and future assets of a business, and covers all assets, both tangible and intangible, with the exception of assets specifically excluded.

10. Real property, securities and wages are types of asset that are subject to an outright exclusion. Real property (with the exception of fixtures, which are covered by the Guide and can be subjected to security rights) is excluded as it raises different issues and is subject to a special title registration system indexed by asset and not by grantor. In addition, the Guide does not cover security rights in securities as original encumbered assets because the nature of securities and their importance for the functioning of financial markets raise a broad range of issues that merit special legislative treatment. The substantive law issues relating to security and other rights in securities held with an intermediary are dealt with in a draft Convention being prepared by the International Institute for the Unification of Private Law (Unidroit). The private international law issues with respect to that subject matter are not addressed in this Guide since they are dealt with in the Hague Convention on the Law applicable to Certain Rights in Respect of Securities (The Hague, December 2002). The Guide is structured in such a way that the State enacting legislation based on the regime envisaged in the Guide can, at the same time, implement the texts prepared by Unidroit and the Hague Conference, as well as relevant texts prepared by UNCITRAL, such as the United Nations Convention on the Assignment of Receivables in International Trade (New York, December 2001; herein after referred to

as “the United Nations Assignment Convention”) and the UNCITRAL Legislative Guide on Insolvency Law.

[Note to the Working Group: The Working Group may wish to consider whether security rights in directly-held securities, whether certificated or uncertificated, should be addressed in the Guide. The Working Group may also wish to address the question of which regime applies to securities as proceeds of types of asset that are within the scope of the Guide, their special regime or the general regime of the Guide applicable to proceeds. A related question that the Working Group may wish to address is whether proceeds from drawings of independent undertakings are subject only to the special rules in the Guide or also to the rules applicable to proceeds generally. The same question arises with respect to receivables, negotiable instruments, negotiable documents and bank accounts.]

11. Security rights in wages are excluded based on the policy of protecting individual and family life. Any additional exclusions based on competing policy objectives should be limited in number and in scope, should be clearly stated in the law and should be adopted only after their potential benefit has been carefully weighed against the social and economic policy underlying the secured transactions law of promoting the availability of low-cost credit.

12. Some assets, such as ships, aircraft [and intellectual property rights] are in whole or in part subject to special laws. Security rights in such assets are not excluded but, in the case of any inconsistency between such a special law and secured transactions law, the special law (e.g. the special registration system) prevails.

13. [In particular, the Guide does not address issues specific to security rights in intellectual property rights and it does not make recommendations concerning those issues. However, in developing its secured transactions law, a State should take account of the increasing importance and economic value of intellectual property assets to companies seeking to obtain low-cost secured credit. Subject to the limitations discussed in the following paragraph, the secured transactions law would apply to security interests in intellectual property rights.

14. When adopting a secured transaction regime, a State should take into account the particular characteristics of, and national laws applicable to, intellectual property, as well as the State’s obligations under international intellectual property treaties, conventions and other international agreements. Accordingly, when implementing the recommendations of the Guide, a State should give careful consideration to situations in which the existing legal regime and characteristics of intellectual property are sufficiently unique as to justify the adjustment of those recommendations when the encumbered assets include intellectual property rights. If upon examination there is found to be a direct inconsistency between the State’s intellectual property laws or obligations under intellectual property treaties, conventions and other international agreements, in particular insofar as they establish a rule for the creation, effectiveness against third parties, priority or enforcement of security rights in intellectual property, then the State’s secured transactions law should provide that the intellectual property laws and obligations will govern such issues to the extent of any inconsistency.]

[Note to the Working Group: The Working Group may wish to note that references to negotiable instruments, negotiable documents, intellectual property rights and proceeds from drawings under independent undertakings appear within square brackets pending a decision of the Working Group as to whether they should be included in the Guide. After all of the substantive recommendations of the Guide have been completed, the Working Group may wish to align the recommendations on scope with the substantive recommendations.]

15. The Guide stresses the need to enable a grantor to create security rights not only in its existing assets but also in its future assets (i.e. assets acquired or created after the conclusion of the security agreement), without requiring the grantor or secured creditor to execute any additional documents or to take any additional action at the time such assets are acquired or created. This approach is consistent, for example, with the United Nations Assignment Convention, which provides for the creation of security rights in future receivables without requiring any additional steps to be taken. In addition, the Guide recommends recognition of a security right in all existing and future assets of a business grantor through a single security agreement such as already exists in some legal systems as an “enterprise mortgage” or as a combination of fixed and floating charges.

16. The Guide also recommends that a broad range of obligations, monetary and non-monetary may be secured, and that both physical and legal persons may be parties to a secured transaction, including consumers, subject to consumer-protection laws. In addition, the Guide is intended to cover a broad range of transactions that serve security functions, including those related to possessory and non-possessory security rights, as well as transactions not denominated as secured transactions (such as retention of title, transfer of title for security purposes, assignment of receivables for security purposes, financial leases, and sale and leaseback transactions and the like).

17. The legal regime envisaged in the Guide is a purely domestic regime. The recommendations of the Guide are addressed to national legislators considering reform of domestic secured transactions laws. However, because secured transactions often involve parties and assets located in different jurisdictions, the Guide also seeks to address the recognition of security rights and title-based security devices, such as retention of title and financial leases, effectively created in other jurisdictions. This would represent a marked improvement for the holders of those rights over the laws currently in effect in many States, under which such rights often are lost once an encumbered asset is transported across national borders, and would go far toward encouraging creditors to extend credit in cross-border transactions (see A/CN.9/WG.VI/WP.14/Add.4, paras. 21-25).

18. Throughout, the Guide seeks to establish a balance among the interests of debtors, creditors (whether secured, privileged or unsecured), affected third persons, buyers and other transferees, and the State. In so doing, the Guide adopts the premise, supported by substantial empirical evidence, that all creditors will accept such a balanced approach, and will thereby be encouraged to extend credit, as long as the laws (and supporting legal and governmental infrastructure) are effective to enable the creditors to assess their risks with a high level of predictability and with confidence that they will ultimately realize the economic value of the encumbered assets. Essential to this balance is a close coordination between the secured transactions and insolvency law regimes, including provisions pertaining to the treatment of security rights in the event of a reorganization or liquidation of a business. Additionally, certain debtors, such as consumer debtors, require additional protections. Thus, although the regime envisioned by the Guide will apply to many forms of consumer transactions, it is not intended to override consumer-protection laws or to discuss consumer-protection policies, since this matter does not lend itself to unification.

19. In the same spirit, the Guide also addresses concerns that have been expressed with respect to secured credit. One such concern is that providing a creditor with a priority claim to all or substantially all of a person’s assets may appear to limit the ability of that person to obtain financing from other sources. Another concern is the potential ability of a secured creditor to exercise influence over a business, to the extent that the creditor may seize, or threaten seizure of, the encumbered assets of that business upon default. Yet another concern is that in some cases secured creditors may take most or all of a person’s assets in the case of insolvency and leave little for unsecured creditors, some of whom are

not in a position to bargain for a security right in those assets. The Guide discusses these concerns and, in those situations where the concerns appear to have merit, suggests solutions.

20. The Guide builds on the work of UNCITRAL and other organizations. Such work includes: the United Nations Assignment Convention; the UNCITRAL Legislative Guide on Insolvency Law; the Convention on International Interests in Mobile Equipment, approved in November 2001; the EBRD Model Law on Secured Transactions, completed in 1994; the EBRD General principles of a modern secured transactions law, completed in 1997; the study on Secured Transactions Law Reform in Asia, prepared by the Asian Development Bank in 2000; the Organization of American States (OAS) Model Inter-American Law on Secured Transactions, prepared in 2002; and the OHADA Uniform Act Organizing Securities, prepared in 1997 [...].

C. Terminology

21. This Guide adopts terminology to express the concepts that underlie an effective secured transactions regime. The terms used are not drawn from any particular legal system. Even when a particular term appears to be the same as that found in a particular national law, the meaning given to the term may differ. This approach is taken to provide readers with a common vocabulary and conceptual framework and to encourage harmonization of the law governing security rights. The following paragraphs therefore identify the principal terms used and the core meaning given to them in this Guide. The meaning of those terms is further refined when they are used in subsequent chapters. Those chapters also define and use additional terms.

(a) “Security right” means a consensual property right in movable property and fixtures that secures payment or other performance of one or more obligations.

(b) “Acquisition security right” means a security right in an asset that secures the obligation to pay any unpaid portion of the purchase price of the asset or other obligation incurred to enable the grantor to acquire the asset. Acquisition security rights include those that are denominated as security rights, as well as those that are denominated as retention of title, arrangements and financial leases.

(c) “Secured obligation” means the obligation secured by a security right.

(d) “Secured creditor” means a creditor that has a security right.

(e) “Debtor” means a person that owes performance of the secured obligation [and includes secondary obligors, such as guarantors of a secured obligation]. The debtor may or may not be the person that grants the security right to a secured creditor (see grantor).

(f) “Grantor” means a person that creates a security right in one or more of its assets in favour of a secured creditor to secure either its own obligation or that of another person (see debtor).

(g) “Security agreement” means an agreement between a grantor and a creditor, in whatever form or terminology, that creates a security right.

(h) “Encumbered asset” means property that is subject to a security right. The property may be tangible or intangible. Each of these two general types of property includes various categories, some of which fall within particular defined terms used in the Guide.

(i) “Tangibles” means all forms of corporeal movable property. Among the categories of tangibles are inventory, equipment, fixtures, negotiable instruments and negotiable documents.

(j) “Inventory” means a stock of tangibles (other than negotiable instruments and negotiable documents) held for sale or lease in the ordinary course of business and also raw and semi-processed materials (work-in-process).

(k) “Equipment” means tangibles (other than negotiable instruments, negotiable documents and inventory), used by a person in the operation of its business.

(l) “Fixtures in immovables” means tangibles (other than negotiable instruments and negotiable documents), that can become subject to separate security rights even though they are so closely attached to or associated with immovable property as to be treated as immovable property under the law of the State where the immovable property is located. “Fixtures in movables” means tangibles (other than negotiable instruments and negotiable documents) that can become subject to separate security rights even though they are closely associated with other movable property, without however losing their identity. “Mass or product” means tangibles (other than negotiable instruments or documents) that are so closely associated with each other that they cannot become subject to separate security rights.

(m) “Intangibles” means all forms of movable property other than tangibles. Among the categories of intangibles are claims and receivables.

(n) “Claim” means a right to the performance of a non-monetary obligation other than a right in tangibles under a negotiable document.

(o) “Receivable” means a right to the payment of a monetary obligation, excluding, however, rights to payment evidenced by a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay with respect to a bank account.

(p) “Assignment” means the creation of a security right in a receivable or the transfer of a receivable, whether the transfer is for security purposes or is an [absolute] [outright] transfer. [Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

(q) “Assignor” means the person that makes an assignment of a receivable. [Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

(r) “Assignee” means the person to which an assignment of a receivable is made. [Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

(s) “Subsequent assignment” means an assignment by the initial or any other assignee. In the case of a subsequent assignment, the person that makes that assignment is the assignor and the person to which that assignment is made is the assignee. [Note to the Working Group: Article 2 (b) of the United Nations Assignment Convention.]

(t) “Account debtor” means a person liable for payment of a receivable. [Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

(u) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivables and the assignee [Note to the Working Group: Article 5 (d) of the United Nations Assignment Convention.]

(v) “Original contract” in the context of an assignment means the contract between the assignor and the account debtor from which the assigned receivable arises.

[*Note to the Working Group: Article 5 (a) of the United Nations Assignment Convention.*]

(w) “Negotiable instrument” means, subject to law other than secured transactions law, an instrument that embodies a right to payment, such as a promissory note or a bill of exchange, which satisfies the requirements for negotiability under the law governing negotiable instruments.

(x) “Negotiable document” means, subject to law other than secured transactions law, a document that embodies a right for delivery of tangibles, such as a warehouse receipt or a bill of lading, which satisfies the requirements for negotiability under the law governing negotiable documents.

(y) [“Independent undertaking” means, subject to law other than secured transactions law, a letter of credit (commercial or standby), independent guarantee (demand, first demand, or bank guarantee), and other undertaking recognized as independent by law or practice rules, such as the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits, the International Standby Practices, and the Uniform Rules of Demand Guarantees.

(z) “Proceeds from a drawing under an independent undertaking” means the beneficiary-grantor’s right to receive a payment made, a draft accepted, a deferred payment obligation incurred, or other item of value delivered by the issuer/guarantor in honouring, or by a nominated person in giving value for, a drawing under an independent undertaking. The term does not include the beneficiary-grantor’s right to draw under an independent undertaking.

(aa) “Guarantor/Issuer” means a bank or other person that issues an independent undertaking. The term includes a bank or other person that confirms the independent undertaking (“confirmer”).

(bb) “Nominated person” means a bank or other person that is identified in an independent undertaking by name or type (e.g. “any bank in country X”) as being nominated to give value, i.e. to purchase or pay upon presentation of documents, and that acts pursuant to that nomination. The term includes a confirmer that is nominated to confirm and that confirms pursuant to the nomination.]

(cc) “Bank account” means, subject to law other than secured transactions law, an account maintained by a bank into which funds may be deposited. The term includes checking, saving and time-deposit accounts.

(dd) [“Intellectual property right” includes, subject to law other than the secured transactions law, patents, trademarks, service marks, trade secrets, copyright and related rights and designs. It also includes rights under licences of such rights.]

(ee) “Proceeds” means whatever is received in respect of encumbered assets, including what is received as a result of sale, lease or other disposition or collection, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from damage or loss, and tort or warranty claims. [It does not include proceeds from drawings under independent undertakings or types of asset excluded from the scope of the Guide as original encumbered assets.]

(ff) “Priority” means the right of a person to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant.

(gg) “Competing claimant” means:

- (i) Another secured creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);
- (ii) The seller or financial lessor of the same encumbered asset that has retained title to it pursuant to an acquisition security right;
- (iii) Another creditor of the grantor asserting a right in the same encumbered asset (e.g. by operation of law, attachment or seizure or a similar process);
- (iv) The insolvency representative in the insolvency of the grantor; or
- (v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset.

(hh) “Control” means the legal authority of a secured creditor to direct the disposition of an encumbered asset that is either a bank account or a right to proceeds under an independent undertaking without the need of any further consent or other action by the grantor.

(ii) “Possessory security right” means a security right in tangibles that are in the actual possession of the secured creditor or of another person (other than the debtor or other grantor) holding the asset for the secured creditor.

(jj) “Non-possessory security right” means a security right in: (i) tangibles that are not in the actual possession of the secured creditor or another person holding the tangibles for the benefit of the secured creditor, or (ii) intangibles.

(kk) “Insolvency court” means a judicial or other authority competent to control or supervise an insolvency proceeding.

(ll) “Insolvency estate” means assets and rights of the debtor that are controlled or supervised by the insolvency representative and subject to the insolvency proceedings.

(mm) “Insolvency proceedings” means collective judicial or administrative proceedings for the purposes of either reorganization or liquidation of the debtor’s business conducted according to the insolvency law.

(nn) “Insolvency representative” means a person or body responsible for administering the insolvency estate.

(oo) “Buyer in the ordinary course of business” means a person that buys inventory in the ordinary course from a person in the business of selling tangibles of that kind and without knowledge that the sale violates the security rights or other rights of another person in the tangibles.

D. Examples of financing practices covered in the Guide

22. Set forth below are short examples of the types of secured credit transactions that the Guide is designed to encourage, and to which reference will be made throughout the Guide to illustrate specific points. These examples represent only a few of the numerous forms of secured credit transactions currently in use, and an effective secured transactions regime must be sufficiently flexible to accommodate many existing methods of financing, as well as methods that may evolve in the future.

1. Inventory and equipment acquisition financing

23. Businesses often obtain financing for specific purchases of inventory or equipment. In many cases, the financing is provided by the seller of the tangibles (inventory and equipment) purchased. In other cases, the financing is provided by a lender. Sometimes the lender is an independent third party, but in other cases the lender may be an affiliate of the seller. The seller retains title or the lender is granted a security right in the tangibles purchased to secure the repayment of the credit or loan.

24. Here is an illustration of acquisition financing: ABC Manufacturing Company (ABC), a manufacturer of furniture, wishes to acquire certain inventory and equipment for use in manufacturing operations. ABC desires to purchase paint (constituting raw materials and, therefore, inventory) from Vendor A. ABC also wishes to purchase certain drill presses (constituting equipment) from Vendor B and certain conveyor equipment from Vendor C. Finally, ABC wishes to lease certain computer equipment from Lessor A.

25. Under the purchase agreement with Vendor A, ABC is required to pay the purchase price for the paint within thirty days of Vendor's A invoice to ABC, and ABC grants to Vendor A a security right in the paint to secure the purchase price. Under the purchase agreement with Vendor B, ABC is required to pay the purchase price for the drill presses within ten days after they are delivered to ABC's plant. ABC obtains a loan from Lender A to finance the purchase of the drill presses from Vendor B, secured by a security right in the drill presses. ABC also maintains a bank account with Lender A and has granted Lender A a security right in the bank account as additional security for the repayment of the loan.

26. Under the purchase agreement with Vendor C, ABC is required to pay the purchase price for the conveyor equipment when it is installed in ABC's plant and rendered operational. ABC obtains a loan from Lender B to finance the purchase and installation of the conveyor equipment from Vendor C, secured by a security right in the conveyor equipment.

27. Under the lease agreement with Lessor A, ABC leases the computer equipment from Lessor A for a period of two years. ABC is required to make monthly lease payments during the lease term. ABC has the option (but not the obligation) to purchase the equipment for a nominal purchase price at the end of the lease term. Lessor A retains title to the equipment during the lease term but title will be transferred to ABC at the end of the lease term if ABC exercises the purchase option. This type of lease is often referred to as a "financial lease". Under some forms of financial lease, title to the leased property is transferred to the lessee automatically at the end of the lease term. A financial lease is to be distinguished from what is usually called an "operating lease". Under an operating lease, the leased property is expected to have a remaining useful life at the end of the lease term and the lessee does not have an option to purchase the leased property at the end of the lease term for a nominal price, nor is title to the leased property transferred to the lessee automatically at the end of the lease term.

28. In each of the above four cases, the acquisitions are made possible by means of acquisition financing provided by another person (seller, lender or financial lessor) who holds rights in the acquired property for the purpose of securing the acquisition financing granted. As the illustrations make clear, acquisition financing can occur with respect to both inventory and equipment.

2. Inventory and receivable revolving loan financing

29. Businesses generally have to expend capital before they are able to generate and collect revenues. For example, before a typical manufacturer can generate receivables and collect payments, the manufacturer must expend capital to purchase raw materials, to convert the raw materials into finished goods and to sell the finished goods. Depending on the type of business, this process may take up to several months. Access to working capital is critical to bridge the period between cash expenditures and revenue collections.

30. One highly effective method of providing such working capital is a revolving loan facility. Under this type of credit facility, loans secured by the borrower's existing and future inventory and receivables are made from time to time at the request of the borrower to fund the borrower's working capital needs (see also A/CN.9/WG.VI/WP.11/Add.2, para. 12). The borrower typically requests loans when it needs to purchase and manufacture inventory, and repays the loans when the inventory is sold and the sales price is collected. Thus, borrowings and repayments are frequent (though not necessarily regular) and the amount of the credit is constantly fluctuating. Because the revolving loan structure matches borrowings to the borrower's cash conversion cycle (that is, acquiring inventory, selling inventory, creating receivables, receiving payment and acquiring more inventory to begin the cycle again), this structure is, from an economic standpoint, highly efficient and beneficial to the borrower, and helps the borrower to avoid borrowing more than it actually needs.

31. Here is an illustration of this type of financing: It typically takes four months for ABC to manufacture, sell and collect the sales price for its products. Lender B agrees to provide a revolving loan facility to ABC to finance this process. Under the line of credit, ABC may obtain loans from time to time in an aggregate amount of up to 50 per cent of the value of its inventory that Lender B deems to be acceptable for borrowing (based upon its type and quality, as well as other criteria) and of up to 80 per cent of the value of its receivables that Lender B deems to be acceptable for borrowing (based upon criteria such as the creditworthiness of the account debtors). ABC is expected to repay these loans from time to time as it receives payments from its customers. The line of credit is secured by all of ABC's existing and future inventory and receivables. In this type of financing, it is also common for the lender to obtain a security right in the bank account into which customer payments (i.e. the proceeds of inventory and receivables) are deposited.

3. Term-loan financing

32. Businesses often need financing for large, non-ordinary-course expenditures, such as the acquisition of equipment or the acquisition of a business. In these situations, businesses generally seek financing that such loans are repaid over a fixed period of time (with principal being repaid in monthly or quarterly instalments pursuant to an agreed-upon schedule or in a single payment at the end of the loan term).

33. For businesses that do not have strong, well-established credit ratings, term loan financing will generally be available only if the business is able to grant security rights in its assets to secure the financing. The amount of the financing will be based in part on the creditor's estimate of the net realizable value of the assets to be encumbered. In many States, real property is the only type of asset that is accepted by lenders to typically secures term loan financing. This is most likely the case in States whose secured transactions regime is not up to date. However, many businesses, particularly newly-established businesses, do not own any real property and, therefore, may not have access to term-loan financing. In other States, term loans secured by movables other assets, such as equipment and even intellectual property, are common.

34. Here is an illustration of this type of financing: ABC desires to expand its operations and purchase a business in State Y. ABC obtains a loan from Lender C to finance such acquisition. The loan is repayable in equal monthly instalments over a period of ten years and is secured by existing and future assets of ABC and the entity being acquired.

4. Transfer of title for security purposes

35. In States that honour a form of transfer of ownership even when it does not entail a transfer of possession and is done for financing purposes, a transaction denominated as a transfer of title by way of security (or sometimes as a “fiduciary” transfer of title) is recognized. These transactions are essentially non-possessory security rights, and they are primarily used in States where the secured transactions law has not yet appropriately recognized non-possessory security rights.

5. Sale and leaseback transactions

36. A “sale and leaseback transaction” provides a method by which a company can obtain credit based upon its existing tangibles (usually equipment) while still retaining possession and the right to use the tangibles in the operation of its business. In a sale and leaseback transaction, the company will sell its assets to another person for a specific sum (which it may then use as working capital, to make capital expenditures or for other purposes). Simultaneously with the sale, the company will lease the equipment back from that other person for a lease term and at a rental rate specified in the lease agreement. Often, the lease is a “financial lease” as opposed to an “operating lease” (see para. 27 for a definition of both terms).

II. Key objectives of an effective and efficient secured transactions regime

37. In the spirit of providing practical, effective solutions, the Guide explores and develops the following key objectives and themes of an effective and efficient secured transactions regime.

A. Promote secured credit

38. The primary overall objective of the Guide is to promote low-cost secured credit for persons in jurisdictions that adopt legislation based on the Guide’s recommendations, thereby enabling such persons and the economy as a whole to obtain the economic benefits that flow from access to such credit (see para. 2).

B. Allow utilization of the full value inherent in assets to support credit in a broad array of credit transactions

39. A key to a successful legal regime governing secured transactions is to enable a broad array of businesses to utilize the full value inherent in their assets to obtain credit in a broad array of credit transactions. In order to achieve this objective, the Guide emphasizes the importance of comprehensiveness, by: (i) permitting a broad range of assets to serve as encumbered assets (including present and future assets); (ii) permitting a broad range of obligations (including future and conditional obligations) to be secured by

security rights in encumbered assets; and (iii) extending the benefits of the regime to a broad array of debtors, creditors and credit transactions.

C. Obtain security rights in a simple and efficient manner

40. The cost of credit will be reduced if security rights can be obtained in an efficient manner. For this reason, the Guide suggests methods for streamlining the procedures for obtaining security rights and otherwise reducing transaction costs. These methods include: eliminating unnecessary formalities; providing for a single method for creating security rights rather than a multiplicity of security devices for different kinds of encumbered assets; and permitting security rights in future assets and for future advances of credit without any additional documentation or actions by the parties.

D. Recognize party autonomy

41. Because an effective secured transactions regime should provide maximum flexibility and durability to encompass a broad array of credit transactions, and also accommodate new and evolving forms of credit transactions, the Guide stresses the need to keep mandatory rules to a minimum so that parties may tailor their credit transactions to their specific needs. At the same time, the Guide takes into account that other legislation may protect the legitimate interests of consumers or other persons and specifies that a secured transactions regime should not override such legislation.

E. Provide for equal treatment of diverse sources of credit

42. Because healthy competition among all potential creditors is an effective way of reducing the cost of credit, the Guide recommends that the secured transactions regime apply equally to various creditors, including banks and other financial institutions, as well as domestic and non-domestic creditors.

F. Validate non-possessory security rights

43. Because the granting of a security right should not make it difficult or impossible for the debtor or other grantor to continue to operate its business, the Guide recommends that the legal regime provide for non-possessory security rights in a broad range of assets coupled with mechanisms for publicizing the existence of such security rights.

G. Encourage responsible behaviour on the part of all parties by enhancing predictability and transparency

44. Because an effective secured transactions regime should also encourage responsible behaviour by all parties to a credit transaction, the Guide seeks to promote predictability and transparency to enable the parties to assess all relevant legal issues and to establish appropriate consequences for non-compliance with applicable rules, while at the same time respecting and addressing confidentiality concerns.

H. Establish clear and predictable priority rules

45. A security right will have little or no value to a creditor unless the creditor is able to ascertain, at the time a transaction takes place, its priority in the property relative to other creditors (including an insolvency representative). Thus, the Guide proposes the establishment of a system for registering public notices with respect to security rights and, based on that system, clear rules that allow creditors to determine the priority of their security rights at the outset of the transaction in a reliable, timely and cost-efficient manner.

I. Facilitate enforcement of creditor's rights in a predictable and efficient manner

46. A security right will also have little or no value to a creditor unless the creditor is able to enforce the security right in a predictable and efficient manner. Thus, the Guide proposes procedures that allow creditors to so enforce their security rights, subject to judicial or other official control, supervision or review when appropriate. The Guide also recommends that there be a close coordination between a State's secured transactions laws and its insolvency laws with a view to respecting the pre-insolvency effectiveness and priority, as well as the economic value, of a security right subject to the appropriate rules of insolvency law.

J. Balance the interests of the affected persons

47. Because secured transactions affect the interests of various persons, including the debtor, other grantors, competing creditors, such as secured, privileged and unsecured creditors, purchasers and other transferees, and the State, the Guide proposes rules that take into account their legitimate interests and seek to achieve, in a balanced way, all the objectives mentioned above.

K. Harmonize secured transactions laws, including conflict-of-laws rules

48. Adoption of legislation based on the recommendations contained in the Guide will result in harmonization of secured transactions laws (through the adoption of similar substantive laws which will facilitate the cross-border recognition of security rights). This result in itself will promote the financing of international trade and the movement of goods and services across national borders. Furthermore, to the extent complete harmonization of national secured transactions laws might not be achieved, conflict rules would be particularly useful to facilitate cross-border transactions. In any event, conflict-of-laws rules would be useful in order, for example, to help secured creditors determine how to make their security rights effective against third parties.

D. Report of the Working Group on Security Interests on the work of its ninth session (New York, 30 January-3 February 2006)

(A/CN.9/593) [Original: English]

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I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.²³ The Commission's decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.²⁴

²³ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358. For a history of the project, see A/CN.9/WG.VI/WP.22. The reports of the first to the seventh sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543 and A/CN.9/549, A/CN.9/570 and A/CN.9/574. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222), A/59/17 (paras. 75-78) and A/60/17 (paras. 185-187).

²⁴ *Ibid.*, *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 347.

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its ninth session in New York from 30 January to 3 February 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belgium, Cameroon, Canada, China, Colombia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Madagascar, Mexico, Nigeria, Pakistan, Poland, Republic of Korea, Russian Federation, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America and Zimbabwe.

3. The session was attended by observers from the following States: Guinea, Ireland, Malaysia, Panama and Philippines.

4. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Monetary Fund, World Bank and World Intellectual Property Organization;

(b) *Intergovernmental organizations*: European Commission;

(c) *International non-governmental organizations invited by the Commission*: American Bar Association, Center for International Legal Studies, Commercial Finance Association, Forum for International Commercial Arbitration, Independent Film & Television Alliance, International Federation of Insolvency Practitioners, International Chamber of Commerce, International Insolvency Institute, International Law Institute, International Trademark Association, International Working Group on European Security Rights, Max-Planck-Institute for Foreign and Private International Law, National Law Center for Inter-American Free Trade, the Association of European Trademark Owners, the Association of the Bar of the City of New York and the European Law Student's Association.

5. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Pornchai ASAWAWATTANAPORN (Thailand).

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.21 and Addenda 1 and 2 (Recommendations), A/CN.9/WG.VI/WP.22 (Background remarks), A/CN.9/WG.VI/WP.22/Add.1 (Introduction and key objectives) and A/CN.9/WG.VI/WP.24 and Addenda 1 to 5 (Revised recommendations).

7. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legislative guide on secured transactions.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

8. The Working Group considered recommendations in chapters V (Effectiveness against third parties), VI (Priority) and X (Acquisition financing). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the recommendations in those chapters to reflect the deliberations and decisions of the Working Group.

IV. Preparation of a legislative guide on secured transactions

Chapter V. Effectiveness of the security right against third parties (A/CN.9/WG.VI/WP.24/Add.3, recs. 35-57 ter)

Purpose

9. The Working Group approved the substance of the purpose section unchanged.

Recommendation 35 (general methods for achieving third-party effectiveness of security rights)

10. It was agreed that the words “or to be created” that appeared within square brackets in the chapeau of recommendation 35 should be deleted, since a security right that was not effective even as between the parties to the security agreement could not be effective against third parties (whether the first-registered right would have priority as of the time of registration even if it had not been created at that time was said to be a priority issue to be discussed later).

11. It was also agreed that paragraph (b) should be recast so as to focus on dispossession of the grantor rather than on delivery of possession of the assets by the grantor to the secured creditor. It was observed that, to avoid the appearance of unencumbered title on the part of the grantor, the important element was dispossession of the grantor. It was also stated that the delivery of possession could be not only by the grantor but also by another person, such as the manufacturer of goods. Furthermore, it was pointed out that delivery of possession was sufficient, if it was made not only to the secured creditor, but also to its agents or employees, or to persons like an independent warehouseman that acknowledged that they would hold possession for the benefit of the secured creditor.

12. Moreover, it was agreed that the words “is effective only if” should be substituted for the words “becomes effective if” in order to avoid an implication that a security right might be effective as against all parties even before it was created. It was also agreed that the word “or” should be inserted after paragraph (a), indicating that paragraph (b) introduced alternative methods of achieving third-party effectiveness.

13. In the discussion, the suggestion was made that a security right, about which a notice was registered in the general security rights registry before it was created (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 54), should be effective against third parties, only if it was created within a certain time period after registration. While some support was expressed for that suggestion, it was objected to on the ground that, if a security right was not created, the grantor could obtain a discharge of a registration, even through a summary proceeding (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 57).

Recommendations 35 bis and 36 (special methods for achieving third-party effectiveness of security rights)

14. The Working Group agreed that recommendation 35 bis should be recast so as to separate special methods that were exclusive methods to achieve third-party effectiveness from special methods that were applicable in addition to registration in the general security rights registry. With respect to paragraph (d), the concern was expressed that the dichotomy between delivery of possession of the negotiable document and of the goods covered by the document might be problematic. The Working Group deferred discussion of that matter until it had the opportunity to consider recommendations 39 and 40 (see paras. 20 and 21 below).

15. Differing views were expressed as to whether a security right other than an acquisition security right in consumer goods should be effective against third parties automatically upon its creation. One view was that such an automatic effect would not be appropriate since the absence of transparency could have a negative impact on the availability and the cost of credit. Another view was that an automatic third-party effectiveness upon creation would be appropriate at least with respect to non-acquisition security rights in consumer goods low-value consumer goods, whose value and importance as a source of credit might not justify registration. After discussion, it was agreed that a recommendation should be included within square brackets for future consideration providing for automatic third-party effectiveness of non-acquisition security rights in low-value consumer goods that were not subject to title registration or title certificate systems.

16. The suggestion was made that recommendation 36 be deleted since it restated the obvious rule that, if different types of asset were covered in the same security agreement, different methods of achieving third-party effectiveness would be applicable. That suggestion was objected to. It was widely felt that recommendation 36 usefully clarified a matter with which many jurisdictions might be unfamiliar.

Recommendations 37 and 37 bis (third-party effectiveness of other rights)

17. While there was agreement as to the substance of recommendation 37, it was agreed that the draft Guide should state at the outset that the recommendations on security rights applied also to outright assignments and that, accordingly, references to the “grantor” also referred to the “assignor”, references to the “secured creditor” also referred to the “assignee” and references to a “security right” also referred to the “right of the assignee”.

18. The Working Group agreed that recommendation 37 bis should be deleted and that the commentary should discuss the possibility of extending the registration system to rights of lessors or consignors, setting forth the economic benefits to be derived from such an approach. It was widely felt that, while the commentary could address the possibility that lease or consignment law might provide that rights of lessors or consignors were subject to registration, a recommendation along the lines of 37 bis might go far beyond the scope of a secured transactions law. It was also observed that that approach was more in line with the nature of recommendation 37 bis, which was formulated as an option for States rather than as a recommendation (as indicated by the use of the verb “may” rather than the verb “should”).

Recommendation 38 (third-party effectiveness of a security right in tangibles by delivery of possession to the secured creditor)

19. In line with its decision with respect to recommendation 35 (b) (see para. 3 above), the Working Group agreed that recommendation 38 should be recast so as to focus on

dispossession of the grantor rather than on delivery of possession by the grantor to the secured creditor. It was also agreed that the bracketed text should be revised to explain that dispossession ought to be actual, which would be the case if the encumbered assets were in the possession of the secured creditor, an agent or employee of the secured creditor, or an independent warehouseman that had acknowledged that it retained possession on behalf of the secured creditor. It was observed that that text could be included in the appropriate place in the recommendations or the definitions, so as to apply throughout the draft Guide.

Recommendations 39 (third-party effectiveness of a security right in a negotiable document) and 40 (third-party effectiveness of a security right in goods covered by a negotiable document of title)

20. The Working Group agreed that recommendations 39 and 40 should be merged as, in practical terms, they addressed the same issue (i.e. the third-party effectiveness of a security right in a negotiable document of title and in the goods covered by the document). It was also agreed that the first sentence of recommendation 39 should be deleted as it repeated the general rule of recommendations 35 (b) and 38 that would be applicable in any case unless otherwise provided.

21. Differing views were expressed as to whether a security right in goods that were covered by a negotiable document of title should be made effective as against third parties during the time the goods were covered by the document through delivery of possession of the document only or also through delivery of possession of the goods. One view was that providing that such a security right might be made effective against third parties through delivery of possession of the goods (rather than the document) during the time the goods were covered by the document might undermine the reliability and negotiability of the document. Another view was that such an approach would appropriately recognize delivery of possession of the goods as a method of achieving third-party effectiveness, which would be useful if there was no delivery of the document or the goods were no longer covered by the document. It was observed that such an approach would not undermine the negotiability of the document, as long as a security right that was made effective against third parties by delivery of possession of the document had priority over a security right that was made effective against third parties through delivery of possession of the goods (as was provided in A/CN.9/WG.VI/WP.24/Add.4, rec. 80). After discussion, it was agreed that the language in recommendation 40, referring to third-party effectiveness achieved during the time the goods were covered by the document through delivery of possession of the goods (rather than the document) should be placed within square brackets for future discussion of the matter by the Working Group.

Recommendation 40 bis (third-party effectiveness of a security right in movables with respect to which there is a specialized title registry or a title certificate system)

22. There was general agreement in the Working Group with the substance of recommendation 40 bis. In response to a question as to whether paragraph (c) was redundant since it repeated the general rule of recommendation 35 (a), it was observed that, in the absence of paragraph (c), it might not be clear that third-party effectiveness could be achieved by registration in the general security rights registry, unless that was made clear in recommendations 35 and 35 bis. In response to another question as to whether the methods provided in recommendation 40 bis were exclusive, it was pointed out that that matter should be left to the special legislation dealing with title registration and title certificates. In the discussion, it was stated that recommendation 40 bis might need to be adjusted to apply to security rights in intellectual property rights. The Working

Group agreed that the Commission would have to decide how to deal with intellectual property rights.

Recommendation 41 (third-party effectiveness of security rights in rights to drawing proceeds from independent undertakings)

23. It was agreed that recommendation 41 (see A/CN.9/WG.VI/WP.24/Add.2, rec. 49) should be discussed together with the other recommendations dealing with security rights in rights to drawing rights from independent undertakings (see A/CN.9/WG.VI/WP.24/Add.2).

Recommendations 42-43 (third-party effectiveness of security rights in bank accounts)

24. It was agreed that paragraph (a) of recommendation 42, referring to registration of a notice in the general security rights registry, repeated the general rule of recommendation 35 (a) and should be deleted.

25. While there was general agreement in the Working Group as to the substance of recommendation 43, it was observed that the identification of the encumbered asset should be reviewed since it was not the bank account itself but rather a claim for the payment of funds in the account. The Working Group agreed that that matter could be considered in the context of the discussion of recommendations dealing with bank accounts (see para. 88 below). The Working Group also agreed that the rights of the depositary bank, addressed in the note after recommendation 43, should also be discussed in that context.

Recommendation 44 (third-party effectiveness of security rights in proceeds)

26. A number of concerns were expressed. One concern was that automatic third-party effectiveness of security rights in proceeds of encumbered assets (i.e. without a description of the proceeds in the notice registered or registration of an additional notice once the proceeds arise) would inadvertently result in third parties not being alerted as to pre-existing security rights in cases where the proceeds were of a kind different from the original encumbered assets (e.g. the encumbered assets were inventory and the proceeds receivables). In order to address that concern, the suggestion was made that paragraph (a) should be deleted so that, under the residual rule in recommendation 44, the secured creditor would have a period within which to take any additional step necessary to make a security right in proceeds effective against third parties. There was both support for and opposition to that suggestion. In support, it was stated that, for the registry to fulfil its role of providing sufficient notice to third parties, the notice should include a reasonable description of proceeds other than money, negotiable instruments, negotiable documents or bank accounts. Otherwise, it was observed, parties would need to search outside the registry to find out possible security rights. It was also stated that automatic third-party effectiveness of security right in proceeds could eliminate competition among lenders, as the lender with a security right in the main assets of a grantor would have a security right in all assets that were proceeds of these main assets, a result that could have a negative impact on the availability and the cost of credit.

27. In opposition to that suggestion, it was observed that third parties would normally expect that assets in which they took a security right might be subject to other security rights as proceeds and would conduct a search ("due diligence") in any case to ensure that the grantor had rights in the encumbered assets. It was also pointed out that requiring an additional step to extend third-party effectiveness to security rights in proceeds would result in the secured creditor having to monitor all acts of the grantor with respect to the

encumbered assets so as to make its security rights in the proceeds effective against third parties. Furthermore, it was pointed out that in cases where, for example, inventory was sold and the proceeds subsequently took the form of receivables, negotiable instruments and funds in a bank account, the normal expectation of market participants would be that the security right in all proceeds would be automatically effective against third parties without any additional step. In that connection, the suggestion was made that receivables should be added to the list of assets in paragraph (b), with respect to which a security right in proceeds was automatically effective against third parties. That suggestion received sufficient support.

28. Another concern was that paragraph (a) was not appropriate in that it treated differently registration in the general security rights registry from registration in specialized title registries, although in both cases third parties were put on notice about the possible existence of security rights. In order to address that concern, it was suggested that paragraph (a) should also include a reference to third-party effectiveness by registration in a specialized title registry. There was sufficient support for that suggestion.

29. Yet another concern was that recommendation 44 did not make it sufficiently clear whether third-party effectiveness could be re-established if the secured creditor, having failed to take the steps necessary to make its right in the original encumbered assets or the first proceeds effective against third parties, later took all the steps necessary to make its right in subsequent proceeds effective against third parties. In order to address that concern, it was suggested that recommendation 44 should be revised to address that matter. While the view was expressed that, if third-party effectiveness had lapsed, it was permanently lost, the prevailing view was that the secured creditor could re-establish third-party effectiveness. It was widely felt that such an approach would be consistent with the rule suggested in the note after recommendation 65 (see A/CN.9/WG.VI/WP.24/Add.4), according to which priority would date back to the time when third-party effectiveness was re-established.

30. In response to a question as to whether a separate step was necessary to make effective against third parties a security right in proceeds where the security right in the original encumbered assets had been made effective against third parties by dispossession of the grantor, it was noted that, under the residual rule in recommendation 44, the secured creditor could make its right in proceeds effective against third parties by taking any steps necessary under recommendations 35 or 35 bis within a certain period of time after the proceeds arose.

31. In the discussion, it was stated that the Working Group should keep in mind the overall objective of the draft Guide to promote the availability of secured credit, in particular in developing countries and countries with economies in transition, rather than include a comparative-law analysis of national systems of developed countries.

32. After discussion, the Working Group requested the Secretariat to revise recommendation 44 presenting alternatives with regard to automatic third-party effectiveness of security rights in proceeds, taking into account the suggestions made and the views expressed.

Recommendations 45 and 46 (third-party effectiveness of security rights in fixtures)

33. A number of suggestions were made. One suggestion was that the first sentence of recommendation 45 should be deleted because it either repeated the general rule or required completion of the third-party effectiveness steps a second time after tangibles had become fixtures. That suggestion did not attract sufficient support. Another suggestion was that, for a security right in a fixture to an immovable to become effective against third

parties, notice ought to be registered in the immovables registry. That suggestion was objected to. It was stated that, while the integrity of immovables registries should be preserved by appropriate priority rules, there was no reason to render a security right, with respect to which a notice had been registered in the general security rights registry, ineffective against third parties. Yet another suggestion was that recommendation 45 should be revised to make it clear that registration in the general security rights registry or, alternatively, in the immovables registry should be sufficient to make a security right effective against third parties. There was sufficient support in the Working Group for that suggestion. As a matter of drafting, it was suggested that the reference to negotiable instruments and negotiable documents should be deleted since these types of asset could not be fixtures (see para. 92 below). After discussion, the Working Group requested the Secretariat to revise recommendation 45 taking into account the views expressed and the suggestions made.

Recommendation 46 (third-party effectiveness of security rights in masses of goods or products)

34. There was general agreement in the Working Group as to the substance of recommendation 46.

Recommendation 47 (third-party effectiveness of security rights in masses of goods or products)

35. Differing views were expressed as to whether a security right in an encumbered asset that was effective against third parties should continue to be effective when the asset became a part of a mass of goods or product. One view was that, as in the case of proceeds (see para. 27 above), no additional step should be required to preserve the effectiveness of the security right in the resulting mass or product, since the commercial expectation would be that the encumbered goods would be converted into the mass or product (e.g. as inventory was expected to be sold and converted into receivables, checks and funds in a bank account, so flour and sugar was expected to be converted into cakes). Another view was that, in the absence of an additional step to render the security interest in the mass or product effective against third parties, third parties might not have a way of knowing whether the original encumbered asset was in fact part of the mass or product. After discussion, the Working Group agreed that the recommendation be recast to reflect both alternatives for discussion at a later stage.

36. It was also agreed that the security right in the original encumbered asset that was effective against third parties did not result in a security right in the entire mass of goods or product but rather to a proportionate part of the mass of goods or product. The Working Group agreed that recommendation 47 refer to the formulation of proportionality already found in recommendation 32 in A/CN.9/WG.VI/WP.21 dealing with the creation of a security right in a mass of goods or product. Drafting suggestions made to this effect were to delete the words after the comma in the third and fourth lines and replace them with either the words “the security right thereby arising in accordance with recommendation 32 remains effective” or “that arises under recommendation 32 is effective against third parties”.

Additional recommendation on third-party effectiveness of security rights in personal or property rights securing or supporting assigned receivables

37. The Working Group agreed that a new recommendation should be added to address the third-party effectiveness of a security right in personal or property rights securing or supporting assigned receivables (see A/CN.9/WG.VI/WP.21, recommendation 16 (a)).

Recommendation 48 (characteristics of a general security rights registry)

38. With respect to paragraph (a), the Working Group agreed that the words “indicating the possibility of the existence of a security right” be added in the first sentence in order to accurately reflect the position that the notice registered did not create the security right but only alerted third parties of the possible existence of a security right particularly in the case of advance registration where a notice could be registered before steps to create a security right had been concluded. It was also agreed that the word “only” in the second sentence be deleted since the information required to be reflected in the notice could change.

39. The Working Group approved paragraphs (b), (c) and (d) unchanged. In respect of paragraph (d)(i), it was agreed that the words “and publishing periodic audited statements of the expenses and revenues of the revenue of registration system” that appeared in square brackets be removed and reflected in the commentary since the level of that detail was inconsistent with the rest of the paragraph.

40. In response to a question on the relationship between paragraph (e)(i) with respect to setting of fees at a cost-recovery level and paragraph (h)(v) recommending possible delegation of the registry function to a private authority, it was agreed that there was no conflict between the two paragraphs, since a State could outsource part of the registry function (e.g. operation and maintenance of computers) to a private authority which could operate the function more effectively and that profit by a private entity did not necessarily have to translate into a cost to users. The intent of the paragraphs, it was felt, was to underscore the principle that the registry should not be operated by the State for profit purposes or as a form of indirect tax to users. It was noted that that had led to inefficiencies and decline in the use of security rights and other registries in many jurisdictions.

41. The Working Group agreed that paragraph (e)(i) be amended to reflect the principles in paragraph 40 above by adding the words “at a level no higher than” between the words “searching” and “at” in the first line. In response to a suggestion that language be added to the paragraph to reflect that fees should be as low as possible so as to reasonably provide for operation of the registry, the Working Group agreed that that matter was sufficiently covered by paragraph (a) of the purpose section of the chapter and by paragraph (e)(i) itself.

42. The Working Group approved the substance of paragraphs (e)(ii), (iii) and (iv) unchanged.

43. While there was broad support for paragraph (f)(i), the Working Group agreed that scrutiny relating to validity, sufficiency and accuracy of the notice was too narrow in scope and that the paragraph should be broadened so that no scrutiny of any kind would be necessary by any person other than the registrant. A suggestion that, in the absence of scrutiny of the notice by a registry staff, the draft Guide should provide penalties for filing false or misleading statements did not receive sufficient support. It was felt that, as a false notice had no legal effect and could be discharged under recommendation 57, the matter of penalties should be left to tort, penal or other law and should not be duplicated in the draft Guide. The Working Group agreed that the commentary reflect that position so as to provide guidance to States concerned by potential fraud and abuse of the registry system. It

was also agreed that the Working Group consider expanding the scope of recommendation 57 or the commentary to address the possibility of a grantor abusing the integrity of the registry process by filing a false release.

44. The Working Group approved the substance of paragraphs (g)(i), (ii) and (iii) unchanged. It was also agreed that the examples in paragraph (g)(iv) be moved to the commentary. In addition, the Working Group approved the substance of paragraphs (h)(i), (ii) and (iii) unchanged.

45. With respect to subparagraphs (h) (ii) and (iii), differing views were expressed. One view was that the identity of registrants should be disclosed and a copy of the registered notice should be sent to the grantor. It was stated that disclosure of the identity of the registrant could usefully limit fraudulent registrations and maintain the integrity of the registry. It was also observed that the identity of the secured creditor would be disclosed anyway in the context of payment of the registration fee on line. Furthermore, it was pointed out that, as the secured creditor could register a notice even on its own, the grantor should be informed in a timely fashion so as to be able to exercise its rights. Another view was that such requirements should be left to States that could decide on the basis of a cost-benefit analysis. It was stated that adding such requirements could inadvertently increase the cost of the system, which would have to be borne ultimately by the grantor. It was also observed that it might not always be possible to verify the identity of a registrant, particularly where independent messengers or intermediaries were used to make the registration. Furthermore, it was stated that if the obligation to send a copy of the notice to the grantor was retained, consideration should be given to specifying the consequences of failure to comply.

46. As to whether the obligation to forward a copy of the registered notice should be on the registry or the secured creditor, differing views were expressed. One view was that, in a system that was intended to limit involvement of registry staff so as to avoid costs and the possibility of errors, the secured creditor should forward the copy of the registered notice to the grantor. In addition, it was observed that, as it was in the interest of the secured creditor to ensure that a registration was made, the burden to forward a copy thereof to the grantor was better placed on the secured creditor. Another other view was that the registered notice should be sent to the grantor by the registry. It was stated that that would be easy, quick and inexpensive in the context of an electronic system. After discussion, the Working Group approved the substance of paragraphs (h) and (i) unchanged, and agreed that the issues raised be reflected in the commentary.

Recommendation 49 (required content of registered notice)

47. With respect to paragraph (a), the concern was expressed that inclusion in the notice of the name and address of the secured creditor could inadvertently provide to competitors of the secured creditor access to confidential business information. It was stated that systematic profiling of secured creditors and business relationships would be possible. In order to address that concern, it was suggested that the name and address of the secured creditor should not be included in the notice to be registered. That suggestion was objected to. It was stated that the registration system could not work if third parties were not able to contact secured creditors so as to find out about the existence and the scope of existing security rights. It was also observed that the confidentiality concerns could be satisfied by inclusion in the notice of the name of a nominee of the secured creditor instead of the name of the secured creditor. In addition, it was stated that the concern expressed related to the ability of third parties to search in the registry using the name of the secured creditor rather than the name of the grantor, a matter that could be addressed in the commentary. In response to the point mentioned above about inclusion in the notice of the name of a

nominee of the secured creditor instead of the name of the secured creditor, it was pointed out that that would not hinder profiling if the nominee was an agent of the secured creditor.

48. The Working Group agreed that where a search yielded an excessive number of potentially positive matches, supplementary identification criteria should be required. It was therefore agreed that the word “permitted” in square brackets be deleted and the word “required” be retained outside square brackets. Subject to that change, the Working Group approved the substance of recommendation 49, retaining paragraph (d) within square brackets for consideration at a later stage.

Recommendation 50 and 50 bis (legal sufficiency of grantor name in a registered notice)

49. The Working Group approved the substance of recommendations 50 and 50 bis unchanged.

Recommendation 50 ter (change in name or other identifier of the grantor)

50. The Working Group approved the substance of recommendation 50 ter unchanged.

Recommendations 51-53 (legal sufficiency of description of assets covered by a registered notice)

51. It was agreed that recommendations 51 to 53 should be revised to make it clear that the main rule was in recommendation 51, while recommendations 52 and 53 dealt with the description of generic categories of assets and after-acquired assets respectively. Subject to that change, the Working Group approved the substance of recommendations 51 to 53.

Recommendations 54 (advance registration) and 55 (one registration for multiple security agreements between the same parties)

52. The Working Group approved the substance of recommendations 54 and 55 unchanged.

Recommendation 56 and 56 bis (duration and renewal of registration)

53. The Working Group approved the substance of recommendations 56 and 56 bis unchanged. It was agreed that a new heading should be inserted for recommendation 56 bis along the following lines: “time of effectiveness of registration”.

Recommendations 57 and 57 bis (discharge of registration)

54. It was agreed that, in order to address revolving credit facilities in which new advances could be made at any time before termination of the facility, termination of all lending commitments should be added to the alternative conditions of the discharge of registration listed in the chapeau of recommendation 57. It was also agreed that, in order to avoid placing on the secured creditor the undue burden of having to constantly monitor payments and discharge registrations, paragraph (a) should be amended to provide that the secured creditor should discharge the registration within a specified time period after the request of the grantor. It was stated that, according to paragraph (b), the grantor could seek a discharge of a registration through a summary proceeding even before expiry of the deadline set out in paragraph (a). However, it was observed, in such a case, the grantor might have to bear any costs involved. It was agreed that the commentary should include a discussion of those issues. Subject to those changes, the Working Group approved the

substance of recommendation 57. The Working Group approved also the substance of recommendation 57 bis unchanged.

Recommendation 57 ter (amendment of registration)

55. It was agreed that the secured creditor could seek an amendment of the registered notice at any time. It was also agreed that recommendation 57 ter should include parallel language to the language of recommendation 57 dealing with the amendment of the registered notice by the grantor (e.g. to include a narrower description of the encumbered assets). Subject to those changes, the Working Group approved the substance of recommendation 57 ter.

Additional recommendation on the registration of assignments of secured obligations

56. The suggestion was made that a new recommendation should be added to deal with the question whether, in the case of an assignment of a secured obligation, which would result in the transfer to the assignee of any rights securing the obligation, the registered notice should be amended to indicate the name of the new secured creditor. As to the contents of that recommendation, differing views were expressed. One view was that, despite the assignment, the debt was still owed and the security right remained effective against third parties without any amendment of the registered notice. Another view was that, without such an amendment, the information on record would be inaccurate, which would undermine the reliability of the registry. In response, it was observed that failure to change the name of the secured creditor should not result in a loss of third-party effectiveness, in particular as third parties would conduct searches in registries using the name of the grantor as a search criterion. After discussion, the Working Group requested the Secretariat to prepare an appropriate recommendation and place it within square brackets for future consideration of the matter by the Working Group.

57. In the discussion, the question was raised whether a recommendation should be prepared to address the question of new registration in the case of an assumption of the obligation by a person other than the grantor. In response, it was noted that as, in such a case, the debtor would change but not the grantor, no amendment of the registered notice would be required.

Chapter VI. Priority of the security right over the rights of competing claimants (A/CN.9/WG.VI/WP.24/Add.4, recs. 58-85)

Purpose

58. The Working Group approved the substance of the purpose section unchanged.

Recommendation 58 (scope of the priority rules)

59. The Working Group approved the substance of recommendation 58 unchanged.

Recommendation 59 (secured obligations affected)

60. The Working Group agreed to delete the text in parenthesis in paragraph (b) of recommendation 59 on the understanding that the commentary would clarify that future advances had the same priority as the first advance. It was also agreed that paragraph (b)

should explicitly refer to future advances or other obligations. Subject to those changes, the Working Group approved the substance of recommendation 59.

Recommendation 60 (subordination agreements)

61. It was observed that recommendation 60 should be revised to permit not only a competing claimant with priority but also a competing claimant with the same priority ranking as the beneficiary of the subordination to subordinate its right to the right of another competing claimant. It was also stated that subordination should extend to an amount up to the secured claim of the beneficiary of the subordination. The Working Group approved the substance of recommendation 60 on the understanding that the commentary would include those clarifications.

Recommendations 61 and 62 (priority of security rights that are not effective against third parties)

62. The Working Group considered the question whether security rights that were not effective against third parties should nevertheless be effective against some parties. It was generally agreed that such security rights should be effective as between the grantor and the secured creditor.

63. Differing views were expressed as to whether such rights should be effective against any third party. One view was that security rights that were not effective against third parties should be effective against the general (unsecured) creditors (see recommendation 61 (c)), as well as against other secured creditors whose security rights were not effective against third parties (see recommendation 61 (b)). It was stated that, outside insolvency proceedings there was no reason not to give effect to a security right as against general creditors (with the exception of judgement creditors). It was also observed that, between two security rights that were not effective against third parties, the one that was created first should prevail.

64. However, the prevailing view was that a security right that was not effective against third parties should have no effects as against general creditors or secured creditors whose security rights were not effective against third parties. It was stated that such an approach would be simple and consistent with the meaning of third party effectiveness adopted in the draft Guide. It was also stated that the practical result of such an approach, namely that no issue of priority would arise as between the rights of secured creditors with security rights that were not effective against third parties and that, therefore, their rights would be equal between them and with the rights of general creditors, would be appropriate and could be discussed in the commentary.

65. After discussion, the Working Group agreed that a security right that was not effective against third parties should nevertheless be effective against the grantor but not against other similar secured creditors or general creditors.

66. With respect to recommendation 62, it was widely felt that it appropriately reflected the principle that judgement creditors should have priority over secured creditors whose security rights were not effective against third parties. As a matter of drafting, it was agreed that recommendation 62 should be recast to state in a positive way that, once enforcement had begun, the secured creditor was barred from making its security right effective against third parties. It was also agreed that recommendation 62 should be coordinated with recommendation 71 which dealt with priority as between a judgement creditor and a secured creditor with a security right that was effective against third parties.

Recommendation 63 (priority of security rights that are effective against third parties)

67. Recalling its decision with respect to recommendation 35 (see para. 10 above) that a security right could not become effective against third parties before it was created (i.e. before it became effective as between the grantor and the secured creditor), the Working Group decided that the text in the note after recommendation 63 should be substituted for the first sentence of recommendation 63. It was noted that that text provided that, in the case of advance registration, priority dated back to the time of mere registration or third-party effectiveness (i.e. registration or possession and creation), whichever occurred first. It was widely felt that such an approach would facilitate and recognize advance registration, which should have a beneficial impact on the availability and the cost of credit. It was also agreed that, for the same reasons, reference should be made to registration in a specialized title registry or notation on a title certificate.

68. The suggestion was made that, if the secured creditor took possession of tangibles in advance of the creation of a security right, priority should date back to the time of delivery of possession. That suggestion was objected to. It was stated that with the exception of securities that were outside the scope of the draft Guide and negotiable instruments and negotiable documents with respect to which third-party effectiveness by possession gave a superior right, it was difficult to envisage delivery of possession of tangibles without (implicit or explicit) creation of a security right. It was also observed that, even if such situations could arise, giving retroactive priority to security rights made effective against third parties by possession, would raise uncertainty as third parties would have to follow the assets to determine whether to lend on the basis of those assets as security. After discussion, it was agreed that the matter could be raised in a note for the Working Group to consider it further to an evaluation of various practices.

Recommendation 64 (priority of a security right registered in a specialised title registry or by notation on a title certificate)

69. The Working Group approved the substance of recommendation 64 unchanged (see para. 76 below).

Recommendation 65 (continuity in priority when third-party effectiveness is achieved by more than one method)

70. The Working Group agreed that recommendation 65 should be amended to give effect to the decisions made by the Working Group with respect to recommendation 63 (see para. 67 above) by adding an appropriate reference to registration. It was also agreed that a new recommendation should be added to state that, if third-party effectiveness lapsed, priority dated as of the time third-party effectiveness was re-established.

Recommendations 66 (priority of security rights in proceeds)

71. The Working Group approved the substance of recommendation 66 unchanged.

Recommendations 67-69 (priority of rights of buyers, lessees and licensees of encumbered assets)

72. Differing views were expressed as to whether the buyer of inventory in the ordinary course of business should take free of security rights of the immediate seller only or also of persons from whom the immediate seller acquired the assets. One view was that the buyer should take free of security rights created by the immediate seller only (i.e. the bracketed

language in recommendation 67 should be retained). It was stated that, if the buyer were to take free of all security rights, a bad-faith grantor could achieve the extinction of the security right by organizing two subsequent sales of the encumbered assets (i.e. from grantor A to B and from B to C, where C would take the assets free of security rights created by A).

73. The prevailing view, however, was that buyers in the ordinary course of business should take free of all security rights (i.e. the bracketed language should be deleted). It was stated that it was important to protect the reliability of ordinary course of business transactions. It was also observed that secured creditors would be protected to the extent that their security rights would extend to the proceeds from the sale of encumbered assets (and to proceeds of proceeds), which, assuming that buyers in the ordinary course of business were in good faith, would represent a reasonable price. In addition, it was pointed out that secured creditors would be protected if the sale of the encumbered assets took place outside the ordinary course of business of the seller.

74. As a matter of drafting, it was suggested that the first sentence of recommendation 67 should be recast to make it clear that it constituted the main rule, while the second sentence of recommendation 67 and recommendations 68 and 69 were exceptions to that rule. That suggestion received sufficient support.

75. After discussion, it was agreed that the bracketed language in recommendation 67 should be deleted and recommendations 67 to 69 should be revised as suggested in paragraphs 72 and 74 above. Subject to those changes, the Working Group approved the substance of recommendations 67 to 69.

Additional recommendations on the priority of rights of buyers, lessees and licensees of encumbered assets

76. It was suggested that not only security rights (see recommendation 64 and para. 69 above) but also rights of buyers, lessees or licensees of encumbered assets, registered in a specialised title registry or by notation on a title certificate should be given priority over security rights that were made effective against third parties by registration in the general security rights registry. That suggestion received sufficient support. The Secretariat was requested to prepare a recommendation.

77. It was also suggested that rights of buyers of consumer goods in good faith should be given priority over security rights in consumer goods of low value, as well as over acquisition security rights in consumer goods. It was stated that such a recommendation was necessary since security rights in consumer goods of low value and acquisition security rights in consumer goods in general were exempted from registration (see para. 15 above and A/CN.9/WG.VI/WP.24/Add.5, recommendation 128), and, as a result buyers of consumer goods, could not find out about the possible existence of any security right. It was also suggested that buyers of encumbered assets should have priority over security rights in any asset of low value. In order to address a concern expressed that such an approach might not be appropriate with respect to commercial goods, it was stated that the recommendation could be limited to consumer goods. Interest was expressed in those suggestions. The Secretariat was requested to reflect them in a note for future consideration by the Working Group.

Recommendation 70 (priority of statutory (preferential) claims)

78. The Working Group approved the substance of recommendation 70 unchanged.

Recommendation 71 (priority of rights of judgement creditors)

79. Recalling its decision with respect to recommendation 62 (see para. 66 above), the Working Group agreed that recommendation 71 should also be recast to state the rule in a positive way and be coordinated with recommendation 62. As a matter of drafting, it was suggested that recommendation 71 should refer to “the extension of credit” in general rather than to “amounts advanced” to cover loans but also open credit facilities and similar lending structures (e.g. letters of credit). In addition, it was agreed that the scope of the recommendation be extended to include a creditor that had obtained a provisional court order.

80. The suggestion was made that recommendation 71 should be revised to give priority to a secured creditor over a judgement creditor even with respect to credit extended after the issuance of a judgement on the basis of earlier-made commitments. It was stated that, in the absence of such a provision, lenders in a number of important long-term credit transactions would be reluctant to commit to extend credit in the future, whether by commitment to advance funds or to issue an independent undertaking, and if they did, they would insist that the funds be withdrawn from the facility by the grantor earlier than needed which would result in additional cost to the grantor. It was also observed that, if the secured creditor were to cease providing credit at the time it received knowledge of the judgement, it would deny the grantor liquidity or further credit at a time it was most needed and could lead to insolvency of the grantor. That suggestion was objected to. It was observed that, after the issuance of a judgement, a lender could not expect to obtain priority over the judgement creditor on the basis of a mere commitment and should not be expected to extend credit. It was also stated that that result was obtained in practice through clauses in the loan documentation giving the lender the right to cease providing credit.

81. In the discussion, the view was expressed that the issue would be more easily resolved if the draft Guide were to provide that the notice needed to include the maximum amount secured (see A/CN.9/WG.VI/WP.24/A dd.3, rec. 49 (d)), since priority of a security right could be limited to that amount, thus freeing other assets of the grantor for the benefit of other creditors, such as judgement creditors.

82. Subject to the changes referred to in paragraph 79 above, the Working Group approved the substance of recommendation 71, on the understanding that the implications discussed above would be reflected in the commentary.

Recommendation 72 (priority of rights in assets for improving and storing the assets)

83. The suggestion was made that the recommendation be deleted or at least the priority given be limited to the value added or preserved, since such a priority rule did not further the purpose of the draft Guide of promoting secured credit. After discussion, the Working Group agreed to clarify that the priority in recommendation 72 was limited to the value added or preserved.

Recommendation 73 (priority of reclamation claims)

84. The Working Group agreed that the reference to “an event specified in the sales contract” should be deleted. It was observed that, in practice, reclamation claims arose out of operation of law upon default or financial insolvency of a buyer. Subject to that change, the Working Group approved the substance of recommendation 73.

Recommendation 74 (priority of security rights in negotiable instruments)

85. The Working Group approved the substance of recommendation 74 unchanged.

Recommendation 75 (priority of security rights in rights to drawing rights from independent undertakings)

86. It was agreed that recommendation 75 (see A/CN.9/WG.VI/WP.24/Add.2, rec. 62) should be discussed together with other recommendations dealing with security rights in rights to drawing rights from independent undertakings (see A/CN.9/WG.VI/WP.24/Add.2).

Recommendation 76 to 78 (priority of security rights in bank accounts)

87. A number of concerns were expressed. One concern was that recommendation 76 did not address priority conflicts between a security right in a bank account made effective against third parties by control and a security right in the same account made effective against third parties by any other method (e.g. in the bank account as proceeds). In order to address that concern, it was suggested that a right made effective against third parties by control should have priority over a right made effective against third parties by any other method. That suggestion attracted sufficient support.

88. Another concern was that the encumbered asset was not the bank account itself but the right to claim the funds in the bank account. In order to address that concern, the suggestion was made that the definition of “bank account” should be revised. Yet another concern was that the term “control” was misleading, since it suggested physical possession. With respect to the definition of “control” (see A/CN.9/WG.VI/WP.24/Add.3, note after recommendation 42), the concern was expressed that many countries would not be able to implement it and the priority rules based on it, for example, because, under banking law, a bank was precluded from accepting instructions with respect to an account from any person other than the holder of the account and a bank account would not be transferred to the secured creditor but the funds in that account would be transferred to an account of the secured creditor. To address those concerns, the suggestion was made that the definitions of “bank account” and “control” should be revised to address the concerns raised. That suggestion received sufficient support.

89. With respect to recommendation 77, it was agreed that reference should be made to the right of set-off not being impaired by a security right and not being available unless created by other law.

90. Subject to the changes mentioned above (see paras. 87-89), the Working Group approved the substance of recommendations 76 to 78.

Recommendations 79 (priority of security rights in money) and 80-81 (priority of security rights in negotiable documents and goods covered by negotiable documents)

91. The Working Group approved the substance of recommendations 79 to 81 unchanged.

Recommendations 82-84 (priority of security rights in fixtures)

92. A number of suggestions were made. One suggestion was that recommendations 82 and 83 should refer to rights of buyers, lessees and other parties with a right in fixtures to immovables. Another suggestion was that the language of recommendations 82 and 83

should be aligned so that both referred to registration in the immovables registry. Yet another suggestion was that recommendation 83 should be retained without square brackets and the words in parenthesis should be deleted (see para. 33 above). Subject to those changes, the Working Group approved the substance of recommendations 82 and 83. As to recommendation 84, it was agreed that it should be deleted as it repeated the general rule.

Recommendation 85 (priority of security rights in masses of goods or products)

93. It was agreed that paragraph (a) should be retained as a separate recommendation dealing with security rights in fixtures to movables with respect to which there was a specialized registration or title certificate system. With respect to paragraph (b), it was agreed that the commentary should set forth examples of priority rules so as to provide guidance to States. It was also agreed that the commentary should discuss issues of characterization, for example, of security rights in rents or crops, which in some jurisdictions were subject to the regime on movables, while in other jurisdictions were subject to the regime on immovables.

**Chapter X. Acquisition financing devices
(A/CN.9/WG.VI/ WP.24/Add.5, recs. 125-135)**

94. Due to the lack of sufficient time, the Working Group decided to consider only recommendations 133 and 134.

Recommendation 133 (priority of acquisition security rights in proceeds of inventory)

95. The Working Group considered the bracketed text in recommendation 133 (unitary and non-unitary approach), according to which the super-priority of an acquisition security right in proceeds would not extend to proceeds in the form of receivables. Differing views were expressed. After discussion, it was agreed that the bracketed text in recommendation 133 should be retained within square brackets.

Recommendation 134 (enforcement)

96. There was support for both the unitary and the non-unitary approach. As to the alternative ways to implement the non-unitary approach, there was both support and criticism of both alternatives. The need to preserve the functional equivalence between the various devices was particularly emphasized. At the same time, there was support for preserving the flexibility of States in implementing the non-unitary approach. The Working Group approved the substance of recommendation 134 (unitary approach) unchanged. As to the alternatives reflected in recommendation 134 (non-unitary approach), the Working Group agreed that they should be retained. It was also agreed that the commentary should be further developed to explain in some detail the ways in which these alternatives could be implemented and their specific implications.

V. Future work

97. In view of the expectation of the Commission to approve in principle the substance of the recommendations of the draft Guide at its thirty-ninth session, which was scheduled to take place in New York from 19 June to 7 July 2006, the Working Group agreed to hold

an extra session, its tenth session, in New York from 1 to 5 May 2006. The Working Group noted that its eleventh session would take place in Vienna from 4 to 8 December 2006, those dates being subject to approval by the Commission at its thirty-ninth session.

E. Note by the Secretariat on security interests: recommendations of the draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its ninth session

(A/CN.9/WG.VI/WP.24 and Add.1-5) [Original: English]

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XI. Conflict of laws *

Purpose

The purpose of conflict-of-laws rules is to determine the law applicable to each of the following issues: the creation of a security right; the pre-default rights and obligations between the secured creditor and the grantor; the effectiveness of a security right against third parties; the priority of a security right over the rights of competing claimants; and the enforcement of a security right.²⁵

These rules are also applicable to: (i) rights that are not “security rights” but which are within the scope of this Guide (see recommendation 3 (f)); and (ii) in States that enact a non-unitary system with respect to acquisition financing devices, the rights of a seller or a financial lessor of goods who retains title to the goods.

Security rights in tangible property

136. The law should provide that, except as otherwise provided in recommendations 140 and 142, the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in tangible property are governed by the law of the State in which the encumbered asset is located. However, with respect to security rights in tangible property of a type ordinarily used in more than one State, the law should provide that such issues are governed by the law of the State in which the grantor is located. [With respect to security rights in the type of tangible property mentioned in the preceding sentence that is subject to a title registration system, the law should provide that such issues are governed by the law of the State under the authority of which the registry is maintained.]

[Note to the Working Group: The commentary will explain that the application of recommendation 136 to negotiable instruments and negotiable documents is subject to the limited exception provided in recommendation 140 that the law of the grantor’s location determines in specified circumstances whether the effectiveness against third parties has been achieved by registration. The commentary will also explain that recommendation 142

* Recommendations prepared in close cooperation with the Hague Conference on Private International Law.

²⁵ The meaning of these terms is elaborated in chapters IV, V, VI, VII and VIII.

provides an additional option for the law governing creation and third-party effectiveness of security rights in goods in transit and export goods.

At the eighth session of the Working Group, it was observed that the rule in the second sentence of recommendation 136 should not apply if the assets were subject to specialized registration systems (see A/CN.9/588, para. 87). Language is included in recommendation 136 within square brackets for the consideration of this matter by the Working Group. The Working Group may wish to focus on the exact description of the types of asset to which this rule should apply (e.g. ships, planes).

In addition, the Working Group may wish to consider whether a rule along the lines of recommendation 140 should apply to security rights in tangible assets covered in recommendation 136. If that approach were to be followed, if the grantor's location provided for third-party effectiveness by registration, the only law applicable to third party-effectiveness of security rights in tangible assets other than by possession would be the law of the grantor's location and not the law of the location of the assets.]

Security rights in intangible property

137. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are governed by the law of the State in which the grantor is located. [However, with respect to security rights in intangible property that is subject to a title registration system, the law should provide that such issues are governed by the law of the State in which [...].]

*[Note to the Working Group: The commentary will explain that recommendation 137, reflecting the principle in articles 22 and 30 of the United Nations Assignment Convention, applies, for example, to receivables. The second sentence within square brackets is intended to draw the attention of the Working Group to the possibility that a different law might apply to other intangible assets that are subject to title registration, such as intellectual property rights (e.g. the *lex loci protectionis* for patents and trademarks and the *lex loci protectionis* or the *lex originis* for copyrights).]*

Security rights in rights to proceeds from a drawing under an independent undertaking

138. [See A/CN.9/WG.VI/WP.24/Add.2.]

Security rights in bank accounts

139. Except as otherwise provided in recommendation 140, the law should provide that the creation, the effectiveness against third parties, the priority over the rights of competing claimants, the rights and duties of the depository bank with respect to the security right and the enforcement of the security right in a bank account are governed by

Alternative A

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. However, the law of the State determined pursuant to the preceding sentence applies only if the depository bank has, at the time of the conclusion of the account agreement, an office in that State which is engaged in the regular activity of maintaining bank accounts. The law should also specify that, if the applicable law is not determined pursuant to the

preceding two sentences, the applicable law is to be determined pursuant to fallback rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

[Note to the Working Group: Alternative A is an abbreviated version of the approach followed in articles 4.1 and 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With An Intermediary (“the Hague Securities Convention”). The commentary will include the detailed fallback rules in article 5 of the Hague Securities Convention with sufficient explanation.]

Alternative B

the law of the State in which the bank that maintains the bank account has its place of business. In the case of more than one place of business, reference should be made to the place where the branch maintaining the account is located.

[Note to the Working Group: The Working Group may wish to consider whether alternative B should address methods for identifying the branch which maintains an account.]

Third-party effectiveness of security rights in specified types of asset by registration

140. If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in any of the following types of encumbered assets, the law of that State determines whether the effectiveness against third parties of a security right in such encumbered assets has been achieved by registration under the laws of that State:

- (a) Negotiable instruments;
- (b) Negotiable documents; and
- (c) Bank accounts.

[Note to the Working Group: The commentary will explain that recommendation 140 provides that the State whose law governs the achievement of third-party effectiveness by registration with respect to security rights in the specified types of assets is the same State whose law governs the achievement of third-party effectiveness with respect to security rights in intangible property. Thus, secured creditors seeking to achieve third-party effectiveness by registration for security rights in the specified types of assets and in intangible property will need to comply with the registration system of only one State. Similarly, third parties seeking to determine whether any secured creditor is claiming a security right in the specified types of assets or in intangible property will need to search in the registration system of only one State. Recommendation 140 applies only to third-party effectiveness achieved by registration (not by control or any other method) and does not determine the law governing priority. Under recommendations 61 to 66 in A/CN.9/WG.VI/ WP.21/Add.1, a security right in the specified types of asset made effective against third parties by registration is subordinate to a security made effective against third parties by control or possession.]

Security rights in proceeds

141. The law should provide that:

(a) The creation of a security right in proceeds is governed by the law [of the State whose law governs] [governing] the creation of the security right in the original encumbered asset from which the proceeds arose; and

(b) The effectiveness against third parties and the priority over the rights of competing claimants of a security right in proceeds are governed by the same law as the law [of the State whose law governs] [governing] the effectiveness against third parties and the priority over the rights of competing claimants of a security right in original encumbered assets of the same kind as the proceeds.

Security rights in goods in transit and export goods

142. The law should provide that a security right in tangible property (other than negotiable instruments or negotiable documents) in transit or to be exported from the State in which it is located at the time of the creation of the security right may also be created and made effective against third parties under the law of the State of the ultimate destination, provided that the property reaches that State within a short time period of [to be specified] days after the time of creation of the security right.

[Note to the Working Group: The commentary will explain that a security right in goods in transit and export goods can be created and made effective against third parties, under recommendation 136, in accordance with the law of the country of their location at the time of creation, or, under recommendation 142, in accordance with the law of the country of their ultimate destination. The commentary will also explain that the law of the State of the ultimate destination that governs creation and third-party effectiveness will apply even in the case of a contest with competing rights that were created and made effective against third parties while the export goods were located in the State of origin. In addition, the commentary will explain that the rule in this recommendation: (i) is applicable to encumbered assets that travel whether or not negotiable documents relating to the goods accompany the goods; (ii) is not applicable to encumbered goods that do not travel, whether or not negotiable documents relating to the goods do travel; and (iii) is not applicable to encumbered negotiable documents whether or not they travel.]

Meaning of “location” of the grantor

143. The law should provide that, for the purposes of the recommendations in this chapter, the grantor is located in the State in which it has its place of business. If the grantor has a place of business in more than one State, the grantor’s place of business is that place where the central administration of the grantor is exercised. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

Relevant time when determining location

144. The law should provide that:

(a) Except as provided in paragraph (b), references to the location of the assets or of the grantor in the recommendations in this chapter refer, for creation issues, to that location at the time of the creation of the security right and, for third-party effectiveness and priority issues, to that location at the time the issue arises;

(b) If all rights of competing claimants in an encumbered asset arose before a change in location of the asset or the grantor, references in the recommendations in this chapter to the location of the asset or of the grantor (as relevant under the recommendations in this chapter) refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

Continued third-party effectiveness upon change of location

145. The law should provide that, if a security right in encumbered assets is effective against third parties under the law of the State in which the encumbered assets or the grantor (as relevant under the recommendations in this chapter) are located and that location changes to this State (i.e. the State that has enacted the law), the security right continues to be effective against third parties under the law of this State for a period of [to be specified] days after the location of the encumbered assets or the grantor (as relevant under the recommendations in this chapter) has changed to this State. If the requirements of the law of this State to make the security right effective against third parties are satisfied prior to the end of that period, the security right continues to be effective against third parties thereafter under the law of this State. For the purposes of any rule of this State in which time of registration or other method of achieving third-party effectiveness is relevant for determining priority, that time is the time at which that event occurred under the law of the State in which the encumbered assets or the grantor were located before their location changed to this State.

[Note to the Working Group: The commentary will explain that the application of the recommended provision is not based on reciprocity; i.e. it operates regardless of whether or not the State of the old location of the encumbered assets or of the grantor has enacted an equivalent provision to cover the converse situation involving the relocation of encumbered assets or a grantor to that State. The commentary will also explain that recommendation 145 will apply: (i) if the asset or the grantor moves from an enacting State or a non-enacting State to an enacting State. Recommendation 145 (or the Guide) will not apply if: (i) the asset or the grantor moves from an enacting State or a non-enacting State to a non-enacting State. Furthermore, the commentary will explain that the effect of the last sentence of this recommendation is that priority in the receiving State “relates back” to the time at which the relevant event for achieving third-party effectiveness occurred in the other State.]

Rights and obligations of the grantor and the secured creditor

146. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Rights and obligations of the account debtor and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the transferee

147. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, a transferred negotiable instrument or a transferred negotiable document:

(a) The relationship between an account debtor and the assignee of the receivable, between an obligor under a negotiable instrument and the transferee of that instrument or between the issuer of a negotiable document and the transferee of that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[Note to the Working Group: The Working Group may wish to note that the draft Guide has both substantive and private international law recommendations with respect to the rights and obligations of a guarantor/issuer or nominated person (recs. 25bis, 25tres in A/CN.9/WG.VI/WP.24/Add.2 and 138), a depositary bank (recs. 26 in A/CN.9/WG.VI/WP.21 and 139), an account debtor in the case of an assignment of receivables (recs. 17-23 in A/CN.9/WG.VI/WP.21 and 147) and an obligor under a negotiable instrument (recs. 24 in A/CN.9/WG.VI/WP.21 and 147). The draft Guide includes also a substantive law recommendation with respect to the rights and obligations of an issuer of a negotiable instrument (rec. 109 in A/CN.9/WG.VI/WP.21/Add.2). The Working Group may wish to extend the scope of recommendation 147 to cover the relationship between the issuer of a negotiable document and a transferee of the document, as the same tri-partite relationship exists in the case of a transfer of a negotiable document and the same conflict-of-laws rule might apply.]

The Working Group may also wish to note that recommendation 3 (f) in A/CN.9/WG.VI/WP.21 provides that absolute (or outright) transfers of receivables are “generally” included. However, the definition of “receivable” in para. 21 (o) of A/CN.9/WG.VI/WP.22/Add.1 excludes rights to payment under a negotiable instrument, the obligation to pay under an independent undertaking and the obligation to pay under a bank account. As a result, absolute transfers of all those types of obligation are excluded from the scope of the draft Guide and are left to other non-secured transactions law. While this result may be appropriate with respect to obligations to pay under independent undertakings and bank accounts, which are subject to special rules and have been excluded also from the scope of the UN Assignment Convention, it may not be appropriate with respect to obligations to pay under negotiable instruments. The Working Group may wish to consider the matter and make a decision as to whether the obligation to pay under a negotiable instrument should be included, taking into account that special recommendations might need to be added in this regard.]

Enforcement of security rights

148. Except as provided in the recommendations on the law applicable to the enforcement of security rights after an insolvency proceeding has been commenced with respect to the assets of the grantor, the law should provide that matters affecting the enforcement of a security right are governed by

Alternative A

the law of the State where enforcement takes place.

Alternative B

the law governing the security agreement. However a secured creditor may take possession of tangible encumbered assets without the consent of the person in

possession of them only in accordance with the law of the State in which those assets are located at the time the secured creditor takes possession of them.

Impact of insolvency on the law applicable

[Note to the Working Group: See recommendation K and note in the recommendations of this Guide on Insolvency, A/CN.9/WG.VI/WP.21/Add.3, which read as follows: “The law should provide that, notwithstanding the commencement of an insolvency proceeding, the creation, effectiveness against third parties, priority and enforcement of a security right are governed by the law that would be applicable in the absence of the insolvency proceeding. This recommendation does not affect the application of any insolvency rules, including any rules relating to avoidance, priority or enforcement of security rights. See also recommendations 30 and 31 of the Insolvency Guide. The commentary will clarify the relation between this recommendation, on the one hand, and recommendations 30 and 31 of the Insolvency Guide on the other hand. The commentary will also explain that this recommendation refers to insolvency rules without regard to whether they are characterized as procedural, substantive, jurisdictional or otherwise.]

Exclusion of renvoi

149. The law should provide that the reference in the recommendations in this chapter to “the law” of another State as the law governing an issue refers to the law in force in that State other than its conflict-of-laws rules.

Public policy and internationally mandatory rules

150. The law should provide that:

(a) The application of the law determined under the recommendations of this chapter may be refused by the forum only if the effects of its application would be manifestly contrary to the public policy of the forum;

(b) A forum may apply those provisions of its own law, which, irrespective of rules of conflict of laws, must be applied even to international situations; and

(c) The rules in paragraphs (a) and (b) do not permit the application of provisions of the law of the forum to third-party effectiveness or priority among competing claimants, unless the law of the forum is the applicable law under the recommendations of this chapter.

[Note to the Working Group: The commentary will explain the meaning of public policy and internationally mandatory rules referred to in recommendation 150. Subparagraphs (a) and (b), which track the language of article 11.1 and 11.2 of the Hague Securities Convention, have been prepared pursuant to a suggestion made at the eighth session of the Working Group (see A/CN.9/588, para. 107). Subparagraph (c), which tracks the language of article 11.3 of the Hague Securities Convention, is also in line with articles 30 to 32 of the United Nations Assignment Convention. It is intended to ensure that the certainty of the law applicable to third-party effectiveness and priority of a security right achieved with the recommendations in this chapter will not be compromised by application of the law of the forum.]

Special rules when the applicable law is the law of a multi-unit State

[Note to the Working Group: The Working Group may wish to note that recommendations 151-154 are intended to provide ex ante certainty as to the application

of the recommendations not only by a multi-unit State but also, most importantly, by a unitary State when the law applicable is the law of a multi-unit State. If the Working Group considers that these recommendations are too detailed for a guide, it may wish to consider whether these matters should be addressed with more general recommendations and appropriate explanations in the commentary.]

151. The law should provide that in applying the recommendations in this chapter to situations in which the State whose law governs an issue is a multi-unit State:

(a) Subject to paragraph (b), references to the law of a multi-unit State are to the law of the relevant territorial unit (as determined on the basis of the location of the grantor or of an encumbered asset or otherwise under the recommendations in this chapter) and, to the extent applicable in that unit, to the law of the multi-unit State itself;

(b) If the law in force in a territorial unit of a multi-unit State designates the law of another territorial unit of that State to govern third-party effectiveness or priority, the law of that other territorial unit governs that issue.

152. The law should provide that if, under the recommendations in this chapter, the applicable law is that of a multi-unit State or one of its territorial units, the internal choice of law rules in force in that multi-unit State shall determine whether the substantive rules of law of that multi-unit State or of a particular territorial unit of that multi-unit State shall apply.

[Note to the Working Group: The Working Group may wish to note that recommendations 151 and 152 track the language of article 12.2 and 12.3 of the Hague Securities Convention respectively. The Working Group may wish to consider a definition of “multi-unit State” along the lines of article 1 (1) (m) of the Hague Securities Convention (“multi-unit State” means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in the recommendations in this Guide).]

153. The law should provide that, if the account holder and the depositary bank have agreed on the law of a specified territorial unit of a multi-unit State:

(a) The references to “State” in the first sentence of recommendation 139 (alternative A) are to that territorial unit;

(b) The references to “that State” in the second sentence of recommendation 139 (alternative A) are to the multi-unit State itself.

154. The law should provide that the law of a territorial unit applies if:

(a) Under recommendation 139 (alternative A) and 153, the designated law is that of a territorial unit of a multi-unit State;

(b) Under the law of that State the law of a territorial unit applies only if the depositary bank has an office within that territorial unit which satisfies the condition specified in the second sentence of recommendation 139 (alternative A); and

(c) The rule described in paragraph (b) was in force at the time the security right in the bank account was created.]

[Note to the Working Group: Recommendations 153 and 154, which track the language of article 12.1 and 12.4 of the Hague Securities Convention respectively, may be necessary if the Working Group decides to retain alternative A in recommendation 139.]

A/CN.9/WG.VI/WP.24/Add.1

Report of the Secretary-General: recommendations of the draft
Legislative Guide on Secured Transactions

ADDENDUM

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VII. Pre-default rights and obligations of the parties**Purpose**

The purpose of the provisions of the law on pre-default rights and obligations of the parties is to:

- (a) Provide rules on additional terms for a security agreement with a view to rendering secured transactions more efficient and predictable;
- (b) Reduce transaction costs by eliminating the need to negotiate and draft terms to be included in the security agreement where the rules provide an acceptable basis for agreement;
- (c) Reduce potential disputes;
- (d) Provide a drafting aid or checklist of issues the parties may wish to address at the time of negotiation and conclusion of the security agreement; and
- (e) Encourage party autonomy.

Party autonomy

86. [The law should provide that, except as otherwise provided in [specify the provisions that may not be derogated from or varied by agreement], the secured creditor and the grantor may derogate from or vary by agreement its provisions relating to their respective rights and obligations. Such an agreement should not affect the rights of any person who is not a party to the agreement.]

[Note to the Working Group: Recommendation 86 will be moved to the general provisions of the draft Guide—see A/CN.9/588, para. 47.]

Suppletive rules

87. The law should include suppletive, non-mandatory rules that would apply in the absence of contrary agreement of the parties. Such rules should, inter alia:

- (a) Provide for the care of the encumbered assets by either the grantor or the secured creditor in possession of the encumbered assets;
- (b) Preserve the security rights in the encumbered assets, including the right to

proceeds or civil fruits derived from the encumbered assets;

(c) Provide for the right of the grantor to continue the operation of its business including the right to use, commingle and dispose of the encumbered assets in the ordinary course of its business; and

(d) Secure the discharge of a security right once the obligation it secures has been paid or otherwise performed.

VIII. Default and enforcement

Purpose

The purpose of the provisions of the law on default and enforcement is to:

(a) Provide clear and simple procedures for the enforcement of security rights after debtor default in a predictable and efficient manner;

(b) Provide procedures that maximize the potential realization value of the encumbered assets for the grantor, the secured creditor and other creditors of the grantor;

(c) Provide for expeditious judicial and, subject to appropriate safeguards, non-judicial methods for the secured creditor to realize the value of the encumbered assets;

(d) Coordinate the secured transactions enforcement regime with other law governing the enforcement of claims in encumbered assets, including insolvency law.

Application of this chapter to absolute transfers of receivables

88. The law should provide that this chapter applies to the enforcement of the rights of a transferee of receivables acquired by means of an absolute transfer only to the extent that, pursuant to the terms of the transfer, there is recourse to the transferor for a payment default of the account debtor.

[Note to the Working Group: The Working Group may wish to note that recommendation 88 is intended to clarify that, although the Guide applies generally to the absolute transfer of receivables, this chapter applies only to absolute transfers of receivables made for security purposes.]

General standard of conduct

89. The law should provide that all parties must enforce their rights and perform their obligations under the recommendations of this chapter in good faith and in a commercially reasonable manner.

Liability for failure to comply with recommendations of this chapter

89 bis. The law should provide that any party that fails to comply with the recommendations of this chapter is liable for any loss caused by that failure.

[Note to the Working Group: The Working Group may wish to consider whether the principles in recommendations 89 and 89 bis should be applied, as appropriate, in the exercise of rights and performance of duties under all chapters of the Guide.]

Party autonomy

90. The law should provide that the general standard of conduct set forth in recommendation 89 cannot be waived unilaterally or varied by agreement at any time.

[91.] Subject to recommendation 90, the law should provide that; (i) the grantor and any other person who owes payment or other performance of the secured obligation may waive unilaterally or vary by agreement any of their rights and remedies under the recommendations of this chapter only after default, and (ii) the secured creditor may waive unilaterally or by agreement any of its rights and remedies under the recommendations of this chapter at any time. A variation by agreement does not affect the rights of any person not a party to the agreement. A person challenging an agreement has the burden of showing that it was made prior to default or is inconsistent with recommendation 90.

Rights and remedies after default

92. As more specifically provided in other recommendations of this chapter, the law should provide that after default the grantor and the secured creditor have the rights and remedies provided in the recommendations of this chapter, in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) and in any other law.

Secured creditor remedies

93. As more specifically provided in other recommendations of this chapter, the law should provide that after default the secured creditor may exercise one or more of the following remedies with respect to an encumbered asset:

- (a) Obtain possession of a tangible encumbered asset;
- (b) Collect on an encumbered asset that is a receivable, negotiable instrument, bank account or right to drawing proceeds from an independent undertaking;
- (c) Enforce rights under a negotiable document;
- (d) Dispose of an encumbered asset;
- (e) Propose to the grantor that the secured creditor accept an encumbered asset in total or partial satisfaction of the secured obligation; and
- (f) Any other remedy provided in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) or any other law.

[Note to the Working Group: The Working Group may wish to note that the rule of interpretation “the use of the singular also includes the plural and vice versa” will be added in the general provisions of the Guide.]

Judicial and extrajudicial enforcement

94. As more specifically provided in other recommendations of this chapter, the law should enable the secured creditor after default to exercise the remedies described in recommendation 93:

- (a) By resorting to a court or other authority; or
- (b) Without resorting to a court or other authority.

Grantor remedies

95. As more specifically provided in other recommendations of this chapter, the law should provide that after default the grantor may exercise one or more of the following remedies:

(a) At any time before the disposition, acceptance or collection of an encumbered asset by the secured creditor, pay in full the secured obligation, including interest and costs of enforcement up to the time of full payment, and obtain a release from the security right of all encumbered assets securing that obligation;

(b) Apply to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the recommendations of this chapter with respect to extrajudicial enforcement;

(c) Reject the proposal of the secured creditor to accept an encumbered asset in total or partial satisfaction of the secured obligation within the time limits prescribed by the recommendations of this chapter; and

(d) Any other remedy provided in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) or any other law.

Cumulative remedies

96. The law should provide that the exercise of a remedy does not prevent the exercise of another remedy.

Other remedies

97. The law should provide that the exercise of remedies with respect to an encumbered asset under this law does not prevent the secured creditor from exercising its remedies with respect to the obligation secured by that encumbered asset. The law should also provide that the exercise of remedies with respect to a secured obligation does not prevent the secured creditor from exercising its remedies with respect to an encumbered asset that secures that obligation.

Release of the encumbered assets after full payment

98. The law should provide that, after default and until a disposition, acceptance or collection of an encumbered asset by the secured creditor, the debtor, the grantor or any other interested party (e.g. a secured creditor whose security right has lower priority than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) is entitled to pay in full the secured obligation, including interest and the costs of enforcement up to the time of full payment. The law should specify that the effect of such payment is to release from the security right, all encumbered assets securing that obligation or, to the extent provided in other law, to subrogate any other interested party that makes the payment to the rights of the secured creditor.

[Notice of intention to pursue extrajudicial enforcement]

99. The law should:

(a) Address whether, when and to whom a secured creditor is required to give notice of its intention to pursue extrajudicial enforcement of a security right following default;

(b) State the manner in which the notice is to be given, its timing, and its

minimum contents, including whether the notice [to the grantor] should contain an accounting of the amount then owed and a description of the steps the debtor or the grantor must take to obtain the release of the encumbered assets from the security right under recommendation 98;

(c) Provide that the notice should be in a language that is reasonably expected to inform its recipients about its contents, such as the language of the security agreement;

(d) Address whether the notice must be registered in the general security rights registry;

(e) Address the legal consequences of failure to comply with the recommendations governing notices with respect to extrajudicial enforcement; and

(f) List circumstances in which the notice need not be given in order to avoid a negative effect on the realization value of the encumbered assets (e.g. perishable tangibles or other assets whose value may decline speedily).]

Objections to extrajudicial enforcement

100. The law should provide that nothing in the law prevents the debtor, the grantor or other interested parties (e.g. a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) from applying to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the recommendations of this chapter. The law should build safeguards into the process to discourage unfounded applications and to prevent any improper interference with or undue delay of the secured creditor's ability to realize on encumbered assets.

[Note to the Working Group: The Working Group may wish to consider whether the principle with respect to the right to apply to court for relief by the debtor, grantor or other interested third parties should generally apply to the exercise of all rights and remedies under the recommendations of this chapter and not only with respect to extrajudicial enforcement.]

Secured creditor's right to take possession of an encumbered asset

101. The law should provide that after default the secured creditor is entitled to take possession of a tangible encumbered asset. The secured creditor may obtain possession of such asset without resorting to a court or other authority, but only if this can be accomplished without the use of force or the threat of force. [The law should provide expedited procedures for situations in which the secured creditor resorts to court or other authority to obtain possession of an encumbered asset.]

[Note to the Working Group: The Working Group may wish to consider whether the principle of summary judicial proceedings should be reformulated as a general principle that would apply to the exercise of all rights and remedies under the recommendations of this chapter. If so, language along the following lines could be considered: "The law should provide for summary judicial proceedings with respect to the exercise of rights and remedies of the secured creditor, the grantor, and any other person who owes performance of the secured obligation or claims to have a right in the encumbered assets". The commentary will explain that any person entitled to seek relief under recommendation 100 may seek such relief for violation of this recommendation. Also, the terminology section of the Guide will include a definition of "possession" that defines the term to mean actual rather than fictive or constructive possession.]

Collection of receivables

102. With respect to a receivable that is an encumbered asset, the law should provide that after default the secured creditor may collect or otherwise enforce the receivable.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the secured creditor may, as an alternative, elect to dispose of a receivable pursuant to recommendations 93 (d) and 110.]

103. The law should provide that the secured creditor's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that supports payment or performance of the receivable (such as a guarantee or security right).

Negotiable instruments

104. The law should provide that after default the secured creditor has the right to enforce a negotiable instrument that is an encumbered asset against a person obligated on that instrument. However, as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments.

[Note to Working Group: The commentary will include the following examples of such persons:

(a) The person obligated on the negotiable instrument may be obligated to pay only a holder or other person entitled to enforce the instrument under the law governing negotiable instruments; and

(b) The right of the person obligated on the instrument to raise defences to that obligation is determined by the law governing negotiable instruments.]

105. The law should provide that the secured creditor's right to collect or enforce a negotiable instrument includes the right to collect or enforce any personal or property right that supports payment or performance of the negotiable instrument (such as a guarantee or security right).

Rights to drawing proceeds from an independent undertaking

106. *[See A/CN.9/WG.WGVI/WP.24/Add.2.]*

Bank accounts

106 bis. The law should provide that after default a secured creditor with a security right in a bank account may exercise any remedy of secured creditors under this chapter. However, the right to collect on a bank account is, as against the depositary bank, subject to recommendation [...].

[Note to the Working Group: The Working Group may wish to note that the recommendation mentioned in recommendation 106 bis, which could be placed in a new section of the Guide dealing with third-party rights and obligations, could read along the following lines: "The law should provide that nothing in this Guide obligates a depositary bank to pay any person other than: (i) a person that is the depositary bank's customer with respect to the bank account, and (ii) a secured creditor who has control of the bank account pursuant to an agreement with the depositary bank."]

107. The law should provide that after default a secured creditor who has control of a bank account is entitled to enforce its security right as a depositary bank if the secured creditor is a depositary bank or, if the depositary bank is not the secured creditor, in accordance with the terms of the agreement with the bank establishing control without having to resort to a court or other authority.

108. The law should provide that a secured creditor that does not have control of a bank account may enforce the security right against the depositary bank only pursuant to a court order, unless the depositary bank agrees otherwise.

[Note to the Working Group: The Working Group may wish to note that the following definition will be added to the terminology section of the Guide: “a secured creditor has “control” with respect to a bank account where: (i) the secured creditor is the depositary bank; (ii) the depositary bank has agreed to follow instructions from the secured creditor with respect to the bank account without further consent of the grantor (the agreement by which the depositary bank has agreed to follow instructions from the secured creditor with respect to the bank account without further consent of the grantor is referred to as a “control agreement”); or (iii) the secured creditor is the bank’s customer as to the bank account”.]

Negotiable documents

109. The law should provide that after default the secured creditor has the right to enforce a negotiable document against the issuer or any other person obligated on the negotiable document. However, as between the secured creditor and the issuer or other person obligated on the negotiable document, the rights and obligations of those persons are determined by the law governing negotiable documents.

[Note to Working Group: The Working Group may wish to note that the commentary will include the example that the issuer may be obligated to deliver the goods only to a holder of the negotiable document with respect to them.]

Disposition of encumbered assets

110. As more specifically provided in other recommendations of this chapter, the law should provide that a secured creditor after default is entitled to sell, lease, license or otherwise dispose of an encumbered asset pursuant to recommendation 93(d).

110 bis. The law should provide that a secured creditor that disposes of encumbered assets without resorting to court or other authority may select the method, manner, time, place, and other aspects of the disposition.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that this recommendation is subject to the standard of good faith and commercial reasonableness set out in recommendation 89. It will also explain that the purpose and effect of this recommendation is to provide a balance between the interests of both the grantor (and its other creditors) and the secured creditor in enabling flexibility in the methods used to dispose of the encumbered assets toward the end of obtaining an economically effective realization, while at the same time protecting the grantor against actions taken by the secured creditor that, in the commercial context, are not reasonable.]

Advance notice with respect to extrajudicial disposition of encumbered assets

111. The law should address whether a secured creditor is required to give notice with respect to extrajudicial disposition of an encumbered asset after default. Where the law requires such notice to be given, the law should:

(a) Specify that the notice should be given to: (i) the grantor, the debtor and any other person who owes payment of the secured obligation, (ii) any person with rights in the encumbered asset who, prior to the sending of the notice by the secured creditor to the grantor, has notified in writing the secured creditor of those rights, and (iii) any other secured creditor who, more than [...] days before the notice is sent to the grantor has registered a notice of a security right in the encumbered asset under the name of the grantor or who was in possession of the encumbered asset at the time it was seized by the secured creditor;

(b) State the manner in which such notice is to be given, its timing, and its minimum contents, including whether the notice [to the grantor] should contain an accounting of the amount then owed and the right of the debtor or the grantor to obtain the release of the encumbered assets from the security right under recommendation 98;

(c) Provide that any such notice should be in a language that is reasonably expected to inform its recipients about its contents (notice to the grantor is sufficient if it is in the language of the security agreement and, if the security right was made effective against third parties by registration, notice to all other persons is sufficient if it is in the language of the registry);

(d) Address the legal consequences of failure to comply with the recommendations governing notices with respect to extrajudicial dispositions; and

(e) List circumstances in which any such notice need not be given either because the time delay associated with requiring advance notice could have a negative effect on the realization value of the encumbered assets (as in the case of perishable tangibles or other assets whose value may decline speedily) or because the encumbered assets are of a sort sold on a recognized market (thereby obviating the need for advance notice).

112. The law should provide rules ensuring that the notice can be given in an efficient, timely and reliable way so as to protect the grantor or other interested parties, while, at the same time, avoiding having a negative effect on the secured creditor's remedies and the potential realization value of the encumbered assets.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that these rules should balance the interest of the secured creditor in having the flexibility to dispose of the encumbered asset promptly in order to take advantage of favourable market conditions (an interest that also benefits the grantor and other interested parties) with the interest of the grantor and those other parties in obtaining notice of the disposition sufficiently before the disposition in order to take actions that might further protect their interests (such as locating potential buyers for the encumbered asset or attending a public disposition of the encumbered asset to verify the secured creditor's compliance with its obligations under this chapter.)]

Acceptance of encumbered assets in satisfaction of the secured obligation

113. The law should provide that after default a secured creditor may propose to accept, without resorting to a court or other authority, one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

114. The law should provide that a secured creditor who proposes to accept an encumbered asset in total or partial satisfaction of the secured obligation must send the proposal, specifying the amount owed as of the date the proposal is sent and the amount of the obligation that is proposed to be satisfied by accepting the encumbered asset to:

(a) The grantor, the debtor and any other person who owes payment of the secured obligation (e.g. a guarantor);

(b) Any person with rights in the encumbered asset who, more than [...] days prior to the sending of the proposal by the secured creditor to the grantor, has notified in writing the secured creditor of those rights; and

(c) Any other secured creditor who has registered a notice of a security right in the encumbered asset in the name of the grantor [more than [...] days before the proposal is sent to the grantor] or who was in possession of the encumbered asset at the time it was seized by the secured creditor.

115. The law should provide that, if a person to whom a proposal to accept an encumbered asset in total or partial satisfaction of the secured obligation must be sent under recommendation 114 objects in writing to such a proposal within [a short time, such as 20 days] after the proposal is sent, the secured creditor may not proceed with the proposal.

Surplus and shortfall

116. The law should provide that the enforcing secured creditor must apply the net proceeds of its enforcement (after deducting costs of enforcement) to the secured obligations. Except as provided in recommendation 117, the enforcing secured creditor must pay any surplus remaining after such application to subordinate competing claimants, who, prior to any distribution of the surplus, gave written notice of their claims to any surplus to the enforcing secured creditor. Any balance remaining must be remitted to the grantor.

117. The law should also provide that whether or not there is any dispute as to the entitlement of any competing claimant or as to the priority of payment, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution. In the case of such payment, the surplus should be applied in accordance with the priority rules of this law.

118. The law should provide that distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made in accordance with general rules of the State governing execution proceedings, but subject to the priority rules of this law.

119. The law should provide that the debtor and any other person who owes payment of the secured obligation are liable for any shortfall still owing after application of the net proceeds of enforcement to the secured obligation.

Right of prior-ranking secured creditor to take over enforcement

120. The law should provide that, at any time before final disposition, acceptance or collection of an encumbered asset, a secured creditor whose security right has priority over that of an enforcing [secured creditor] [competing claimant] is entitled to take control of the enforcement process initiated by that [secured creditor] [competing claimant]. The right to take control includes the right to continue enforcement initiated by the [secured

creditor] [competing claimant], enforce by a different method provided in the recommendations of this chapter, and choose whether or not any remedy under the recommendations of this chapter will be administered by a court or other authority.

Title or other right acquired through non-judicial disposition

121. The law should provide that, if a secured creditor elects to dispose of an encumbered asset without resorting to a court or other authority, the person that acquires title or other right in the asset in good faith pursuant to the disposition acquires its right in the asset subject to rights that had priority over the security right of an enforcing [secured creditor] [competing claimant] but takes free of the rights of the grantor, the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor. The same rule applies to the title or other right acquired by a secured creditor who has accepted an encumbered asset in total or partial satisfaction of the secured obligation.

Title or other right acquired through judicial disposition

122. The law should provide that, if a secured creditor disposes of an encumbered asset through a judicial or other officially administered process, the title or other right acquired by the transferee is determined by the general rules of the State governing execution proceedings (for the distribution of the proceeds realized by the disposition, see recommendation 118).

Intersection of movable and immovable secured transactions law

123. The law should provide that:

(a) A security right in fixtures in immovables may be enforced in accordance with either the secured transactions law or the law governing enforcement of encumbrances on immovable property; and

(b) If an obligation to a secured creditor is secured by both a security right in an encumbered asset of the grantor and by an encumbrance on an immovable property of the grantor, the secured creditor may enforce both the security right and the encumbrance under the law governing enforcement of encumbrances on immovables or may enforce the security right under the secured transactions law and the encumbrance under the law governing enforcement of encumbrances on immovable property.

Coordination with other law

124. The law should be coordinated with general civil procedure law to provide a right for secured creditors to intervene in court proceedings initiated by other creditors of the grantor so as to protect security rights and to ensure the same priority status of security rights as under the law.

A/CN.9/WG.VI/WP.24/Add.2

Security rights in rights to drawing proceeds from an independent undertaking: definitions and recommendations

ADDENDUM

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Security rights in rights to drawing proceeds from an independent undertaking

I. Definitions (A/CN.9/WG.VI/WP.22/Add.1, paragraph 21, (y), (z), (aa) and (bb))

(y) “Independent undertaking” means a letter of credit (commercial or standby), a letter of credit confirmation, an independent guarantee (demand, first demand, bank guarantee or counter-guarantee) or any other undertaking recognized as independent by law or practice rules, such as the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits, the International Standby Practices and the Uniform Rules for Demand Guarantees.

(z) “Right to drawing proceeds from an independent undertaking” means the right to receive a payment due, a draft accepted or deferred payment or another item of value, in each case to be delivered by the guarantor/issuer honouring or by a nominated person giving value for, a draw under an independent undertaking. The term does not include[:]
(i) the right to draw (i.e. to request payment) under an independent undertaking, or (ii) what is received upon honour of a drawing from the guarantor/issuer or nominated person or upon disposition of a right to drawing proceeds from an independent undertaking (i.e. the proceeds themselves).

[Note to the Working Group: The commentary will explain that the definition covers only the “right to receive” whatever value is paid or provided upon honour of a drawing and not the right to draw, i.e. to request payment under an independent undertaking. It will also explain that the right to receive the proceeds does not include the proceeds themselves, i.e. what is actually received upon honour of a drawing from the guarantor/issuer or nominated person (a beneficiary’s receipt of value from a negotiating bank should not be characterised as honour or disposition) or upon disposition of a right to drawing proceeds from an independent undertaking. The commentary will also highlight the distinction between the right to drawing proceeds from an independent undertaking (as an original encumbered asset) and the “proceeds” (a key concept of this Guide) of that right. The Working Group will note that the reference to the “beneficiary-

grantor” has been deleted as unnecessary. This is in line with the Guide’s treatment of the term “receivable”(the Guide does not define “receivable” in terms of the grantor). Moreover, at the time of the grant, the grantor may not yet be a beneficiary, indeed, the independent undertaking may not even exist at that time. Who is entitled to receive payment is a matter of other law (in the context of receivables, for example, the Guide does not specify who is entitled to receive payment of the receivable).]

(aa) “Guarantor/Issuer” means a bank or other person that issues an independent undertaking. The term includes a bank or other person that issues a letter of credit confirmation (“confirmer”) or counter-guarantee.

(bb) “Nominated person” means a bank or other person that is identified in an independent undertaking by name or type (e.g. “any bank in country X”) as being nominated to give value, i.e. to purchase or pay upon presentation of documents, and that acts pursuant to that nomination. The term includes a confirmer that is nominated to confirm and that confirms pursuant to the nomination.

(hh) “Control” with respect to a right to drawing proceeds from an independent undertaking means that the guarantor/issuer or nominated person that will pay or give value upon a draw under an independent undertaking: (i) is itself the secured creditor, or (ii) has made an acknowledgment in favour of the secured creditor. “Acknowledgment” with respect to a right to drawing proceeds from an independent undertaking means that the guarantor/issuer or the nominated person that will pay or otherwise give value upon a draw under an independent undertaking has, unilaterally or by agreement: (i) acknowledged or consented to (however evidenced) the creation of a security right (whether denominated as an assignment or otherwise) in favour of the secured creditor in the right to drawing proceeds from an independent undertaking, or (ii) has obligated itself to pay or give value to the secured creditor upon a draw under an independent undertaking.

[Note to the Working Group: This new definition was prepared pursuant to the request of the Working Group (see A/CN.9/588, para. 81). The commentary will include language that the definitions must be read together with all recommendations relating to independent undertakings (3 (d), 16, 25, 25 bis, 25 ter, 25 quater, 49, 62, 106, 138 and 138 bis.).]

II. Recommendations

Parties, secured obligations and assets covered (see A/CN.9/WG.VI/WP.21, recommendations 3 (d), 16 and 25)

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments (such as cheques, bills of exchange and promissory notes), negotiable documents (such as bills of lading), bank accounts, rights to drawing proceeds from an independent undertaking and intellectual property rights;

Security rights in a right that secures or supports an assigned receivable, a negotiable instrument, or another obligation

16. The law should provide that upon creation of a security right in a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this Guide, a security right is automatically created, without further action by either the grantor

or the secured creditor, in any personal or property right that secures or supports payment or performance of that receivable, negotiable instrument, or other obligation. However, if, under the law governing a right that secures or supports payment of a receivable, negotiable instrument or other obligation covered as an encumbered asset by this Guide, a security right in that securing or supporting right may be created only after a separate act of creation, the grantor is obligated to take such action. When an independent undertaking supports payment or performance of a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this Guide, the right to drawing proceeds from the independent undertaking is a supporting obligation under this recommendation and the security right in it is created without a separate act of creation by the grantor.

[Note to the Working Group: Recommendation 16 introduces the concept of supporting rights (which might usefully be presented as a defined term, if the Working Group so decides) and provides for automatic creation of a security right in a personal or property right that supports a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this Guide, immediately upon the creation of a security right in the supported encumbered asset. The substantive effect is to do away with the necessity for a separate act of creation with respect to the supporting obligation. While this concept does nothing that the parties cannot do expressly, it nevertheless serves a very valuable function in practice. A great many routine secured transactions involve supporting obligations and provision for this arrangement serves greatly to enhance the probability of achieving the goal of the secured transactions law to maximize credit at lower cost. In the exceptional case (if that might exist) where the parties would not wish to create a security right in a supporting obligation, that can be done by negating language in the security agreement. The Working Group has already adopted the technique of automatic creation of a security right in proceeds, without the need for express use of special wording.]

The Working Group may find it useful to consider some examples of situations involving supporting rights. An example of a supporting personal right would be a fourth-party guaranty that supports payment of a receivable that is the encumbered asset provided by a grantor (A, grantor, grants to B, secured creditor, a security right in a receivable owed to A by C, account debtor or third-party debtor; the receivable, the supported encumbered asset, is guaranteed by D; D's guaranty is the supporting personal right). An example of a supporting property right would be a security right in a piece of equipment that secures payment of a negotiable instrument that is the encumbered asset provided by a grantor (A, grantor, grants to B, secured creditor, a security interest in a negotiable instrument issued by X in favour of A; the obligation of X evidenced by the instrument, the supported encumbered asset, is secured by a security right, the supporting property right, in a piece of equipment granted to A by the owner of the equipment (who might be X or Y)).

The second sentence of recommendation 16 is intended to ensure that, if the supporting right is transferable, under the law governing it, only by way of a separate act of transfer, a separate act is required for the creation of a security right in that supporting right. This approach is consistent with the relevant law and practice, as well as with article 10 (1) of the UN Assignment Convention.

The purpose of the third sentence is to make clear that the fact that an independent undertaking is a supporting right does not mean that for the creation of a security right in a right to drawing proceeds from that independent undertaking a separate act of creation is required. In other words, the general rule of the first sentence (and not of the second sentence) is applicable.

Thus, for example, a standard commercial letter of credit typically supports a buyer's obligation to pay a commercial invoice and a standby letter of credit or demand guarantee typically supports some other payment or performance obligation of the person who procures the standby letter of credit or demand guarantee for the benefit of the beneficiary. Recognition of the supporting function served by a right to drawing proceeds from an independent undertaking (which by definition does not include the right to request payment, or the proceeds themselves) in no way diminishes the independence of the undertaking itself and in no way adversely affects the guarantor/issuer (who is fully protected under the rules set forth in other recommendations (e.g. 25 bis, 25 ter and 25 quater).]

Creation of a security right in a right to drawing proceeds from an independent undertaking

25. The law should provide that a beneficiary may grant a security right in a right to drawing proceeds from an independent undertaking, [even if the right to draw under the independent undertaking is not itself transferable under the law that governs the independent undertaking]. The grant of a security right in a right to drawing proceeds from an independent undertaking is not a transfer of the right to draw under an independent undertaking.

[Note to the Working Group: The Working Group may wish to note that the bracketed language makes clear the important point that transferability of the undertaking itself (i.e. the right to draw) is irrelevant to the right to create a security right in the right to drawing proceeds from an independent undertaking. The second sentence distinguishes the transfer of the right to request payment under an independent undertaking from the transfer of a right to receive the proceeds from payment under an independent undertaking.]

25 bis. The law should provide that:

(a) A secured creditor's rights in a right to drawing proceeds from an independent undertaking are subject to the rights, under the law and practice that govern independent undertakings, of the guarantor/issuer or nominated person and of any other beneficiary named in the undertaking or to whom a transfer of drawing rights has been effected;

(b) The rights of a transferee- [or co-] beneficiary of an independent undertaking are superior to a security right in a right to drawing proceeds of the independent undertaking acquired from the transferor or any prior transferor; and

(c) The independent rights of a guarantor/issuer, nominated person or transferee-beneficiary [or co-beneficiary] under an independent undertaking [supersede] [are not impaired by reason of] [are distinct from] any security rights it may have in rights to drawing proceeds, including any right to drawing proceeds that may be included in a transfer of drawing rights to a transferee-beneficiary [or co-beneficiary].

[Note to the Working Group: The Working Group may wish to note that the commentary will make clear that this recommendation is intended to ensure that the rights of holders of independent rights to payment, notably nominated persons that have given value and transferee-beneficiaries to whom a transfer has been effected, are superior to mere assignees of rights to drawing proceeds from a drawing by the original beneficiary. The commentary will also explain that their independent rights are distinct and are not impaired because of their rights as secured creditors of the original beneficiary (in other terms, their status as protected holders of independent rights should not be confused with their incidental status as secured creditors). When a nominated person gives value and

obtains reimbursement from the issuer, it does so on the basis of its independent reimbursement rights and not as an acquirer of the rights of the beneficiary.]

25 ter. Neither a guarantor/issuer nor a nominated person is obligated to pay any person other than a named beneficiary, an acknowledged transferee-beneficiary [or co-beneficiary], a nominated person or an acknowledged assignee of the right to drawing proceeds from an independent undertaking.

25 quater. The law should provide that, if a secured creditor has obtained control over a right to drawing proceeds from an independent undertaking by becoming an acknowledged assignee of the right, the secured creditor has the right to enforce the acknowledgement against the guarantor/issuer or nominated person that made the acknowledgement

[Note to Working Group: The Working Group may wish to note that recommendations 25 bis, 25 ter and 25 quater, which have been prepared pursuant to the request of the Working Group (see A/CN.9/588, paras. 82 and 83) and track the language of recommendation 106 (see A/CN.9/WG.VI/WP.21/Add.2), are not really about creation of security rights (or about third-party effectiveness, priority over competing claims or enforcement). However, they are included here as the recommendations on the rights and obligations of the account debtor follow the recommendations dealing with the assignment of receivables. The Working Group may wish to include these three provisions (and other similar sections dealing with the rights and obligations of account debtors, depositary banks, obligors on negotiable instruments and issuers of negotiable documents) in a separate part that addresses rights and obligations of third parties that are obligated with respect to an encumbered asset.]

Third party effectiveness of a security right in a right to drawing proceeds from an independent undertaking (see A/CN.9/WG.VI/WP.21/Add.1, recommendations 49 and 62)

49. The law should provide that a security right in a right to drawing proceeds from an independent undertaking is made effective against third parties :

(a) If the secured creditor has control of the right to drawing proceeds from an independent undertaking; or

(b) Automatically, without further action by either the grantor or the secured creditor, if a security right in the receivable, negotiable instrument or other obligation supported by the independent undertaking is effective against third parties.

[Note to the Working Group: The Working Group may wish to note that recommendation 49 has been revised on the basis of the assumption that neither possession of the independent undertaking nor registration should be a method of achieving third-party effectiveness of a security right in a right to drawing proceeds from an independent undertaking. Possession of an independent undertaking (even when it is in tangible form) plays only a limited role in the modern use of independent undertakings. In addition, if possession were included in this Guide as a method of achieving effectiveness against third parties, there would be a need for complex rules dealing with priority and conflict of laws. It should be noted, however, that, although possession does not constitute a method of achieving effectiveness against third parties, as a practical matter, possession would give protection to a secured creditor when the terms of the independent undertaking require the physical presentation of the independent undertaking to make a draw under the independent undertaking. In such a circumstance, the beneficiary could not make an effective draw without the secured creditor's cooperation, so the secured creditor could take steps to assure itself of payment (e.g. the secured creditor could require the

beneficiary to obtain an acknowledgement that would achieve control for the secured creditor before surrendering the independent undertaking and allowing it to be presented to the guarantor/issuer or nominated person that gave the acknowledgement).]

Priority of a security right in a right to drawing proceeds from an independent undertaking

62. The law should provide that a security right in a right to drawing proceeds from an independent undertaking, which has been made effective against third parties by control has, with respect to a particular guarantor/issuer or a nominated person agreeing to give value under an independent undertaking, priority over the rights of all other secured creditors who have not, with respect to that person, made their security right effective against third parties by control. If control has been achieved by acknowledgement and inconsistent acknowledgements have been given to more than one secured creditor by a person, among those secured creditors, the secured creditor who was identified in the first acknowledgement given by that person has priority.

[Note to the Working Group: The Working Group may wish to note that, as the typical method of achieving control is by obtaining an acknowledgment, in the case of several potential payors (e.g. the issuer and several nominated persons), control is achieved only vis-à-vis the particular guarantor/issuer(s) or nominated person(s) who gave the acknowledgment(s). Thus, the priority rule must focus on the particular person who is the payor. The priority rules relating to possession and registration contained in the previous draft of this recommendation (see A/CN.9/WG.VI/WP.21/Add.1, recommendation 49 (b) and (c)) were deleted since, under revised recommendation 49, possession of the independent undertaking and registration are not recognized as methods of achieving third-party effectiveness of a security right in a right to drawing proceeds from an independent undertaking. The priority rule relating to inconsistent acknowledgements (see A/CN.9/WG.VI/WP.21/Add.1, recommendation 49 (a)) has been included in the second sentence of revised recommendation 62. The basic priority rule makes clear that a secured creditor that has control of the right to drawing proceeds from an independent undertaking has priority over a secured creditor whose security right became effective against third parties automatically.]

Enforcement of a security right in a right to drawing proceeds from an independent undertaking (see A/CN.9/WG.VI/ WP.21/Add.2, recommendation 106)

106. The law should provide that after default the secured creditor with a security right in a right to drawing proceeds from an independent undertaking may exercise any remedy provided for secured creditors in this chapter. Effectiveness against third parties of a security right in a right to drawing proceeds from an independent undertaking (whether achieved by control or automatically) is not a prerequisite to enforcing the right. However, the power to enforce is, as against the guarantor/issuer, nominated person or beneficiary other than the grantor, subject to recommendations 25 bis, 25 ter and 25 quater.

[Note to Working Group: The commentary will make clear that no separate act of transfer by the grantor is necessary for the secured creditor to enforce a security right in a right to drawing proceeds from an independent undertaking when the security right is created automatically under recommendation 16. The commentary will also explain that any obligations of the guarantor/issuer or nominated person to the secured creditor are governed by recommendations 25 bis, 25 ter and 25 quater. Furthermore, the commentary will explain that recommendation 106 is not intended to disturb any pre-default arrangements agreed between the grantor and the secured creditor by which, prior to the

grantor's default, the secured creditor receives the proceeds realized from collection on the right to drawing proceeds from an independent undertaking.]

Law applicable to security rights in a right to drawing proceeds from an independent undertaking (see A/CN.9/WG.VI/WP. 21/Add.5, recommendation 138)

138. The law should provide that: (i) the rights and duties of a guarantor/issuer or a nominated person that has received a request for an acknowledgement or that has or may pay or otherwise give value under an independent undertaking, (ii) the right to enforce a security right in a right to drawing proceeds from an independent undertaking against a guarantor/issuer or nominated person, and (iii) [except to the extent otherwise provided in recommendation 138 bis,] the effectiveness against third parties and the priority over the rights of competing claimants of a security right in a right to the drawing proceeds from the independent undertaking are governed, separately with respect to a particular guarantor/issuer or nominated person, by the law of the State determined as follows:

(a) If the guarantor-issuer has issued an independent undertaking or the nominated person has issued an acknowledgement that specifies that it is governed by the law of a State, the applicable law is the law of the specified State;

(b) If the applicable law is not determined under the preceding paragraph, the applicable law is the law of the State in which is located the branch or office of the guarantor/issuer or nominated person indicated in the independent undertaking of the guarantor/issuer or nominated person. However, in the case of a nominated person that has not issued an independent undertaking, the applicable law is the law of the State in which is located the nominated person's branch or office that has or may pay or otherwise give value under the independent undertaking.

[138 bis. The law should provide that[, to the extent that a security right in a right to drawing proceeds from an independent undertaking is created and is made effective against third parties automatically under recommendations 16 and 49,] the creation and the effectiveness against third parties of that security right is governed by the law of the State whose law governs the creation and the effectiveness against third parties of the security right in the supported receivable, negotiable instrument, or other obligation covered as an encumbered asset by this Guide.]

[Note to the Working Group: The commentary will explain that recommendation 138 follows the conflict-of-laws rules applicable with respect to the rights and obligations of guarantor/issuers and nominated persons. The only exception to the principle embodied in recommendation 138 is recommendation 138 bis, which appears within square brackets, for the limited issues of creation and third-party effectiveness in the cases where a security right arises or is made effective against third parties automatically. Each bank (or sometimes non-bank) filling one of these roles acts pursuant to the law where it is located, meaning where its relevant branch or office is located (or the law it chooses, which is typically where its relevant branch or office is located). Accordingly, different laws govern the different banks involved, and a choice of law in an independent undertaking governs only the particular issuer's obligations (see URDG article 27, UCC 5-116(b), and UN Assignment Convention article 22). The commentary will also explain that what recommendation 138 strives to do is be clear that a request for acknowledgement or for payment (without prior acknowledgement) made by a claimed secured creditor (or the beneficiary on its behalf) is to be handled by the affected bank branch under its local law. Under recommendation 138, all priority conflicts are subject to the law chosen by a guarantor/issuer or nominated person or, in the absence of a choice of law, to the law of the relevant branch or office. The Working Group may wish to consider the question

whether: (i) if that bank branch pays (or gives value to) that secured creditor, then that same law should apply to that secured creditor's dispute with third parties; and (ii), if the payment is to the beneficiary and the competition is among third parties, recommendation 138 should be inapplicable and residual conflict-of-laws rules apply (i.e. recommendation 137).

The commentary will further explain that: (i) creation of the security right is governed by the general conflict-of-laws rule in recommendation 137 for security rights in intangibles (except as provided in recommendation 138 bis for automatic creation); and (ii) enforcement of the security right is governed by the general conflict-of-laws rule in recommendation 148, except to the extent otherwise provided in recommendation 138.

The Working Group may wish to consider whether recommendation 138 bis is necessary, i.e. whether the creation and the third-party effectiveness of a security right in a right to drawing proceeds from an independent undertaking should be referred to the law governing the obligation supported by the independent undertaking (i.e. the law of the grantor's location under recommendation 137 with the exception of situations covered in the second sentence of recommendations 137 and 140). In the absence of recommendation 138 bis, recommendation 137 would apply to the creation (including automatic creation) of such a security right, while recommendation 138 (i.e. the law specified in the independent undertaking or acknowledgement or, in the absence of such specification, the law of the branch of the payor) would apply to the third-party effectiveness of that right. If the Working Group decides that recommendation 138 bis is necessary, it may wish to consider whether the reference to automatic creation under recommendations 16 and 49, which appears within separate square brackets, should be retained. Retention of that reference might complicate the application of recommendation 138 bis where the State whose law is applicable under this recommendations has not adopted the substantive law recommendations of the Guide.]

A/CN.9/WG.VI/WP.24/Add.3

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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V. Effectiveness of the security right against third parties

Purpose

The purpose of the provisions of the law on the effectiveness of a security right against third parties is to establish a foundation for the predictable, fair and efficient ordering of priorities by:

- (a) Relying on a simple, cost-efficient and effective public registry system for the registration of notices of non-possessory security rights;
- (b) Requiring registration or delivery of possession as a pre-condition to the effectiveness of a security right against third parties;
- (c) Identifying appropriate exceptions and alternatives to registration or delivery of possession in the light of countervailing practical considerations.

General methods for achieving third-party effectiveness of security rights

35. The law should provide that, except as otherwise provided in the recommendations of this chapter and the chapter on acquisition financing devices, a security right, created [or to be created] in accordance with the recommendations in the chapter on creation, becomes effective against third parties:

- (a) If a notice with respect to the security right is registered in a general security rights registry, as provided in recommendations 48 to 57 ter;
- (b) If possession of tangibles is delivered by the grantor to the secured creditor, as provided in recommendations 38 to 40.

[Note to the Working Group: The Working Group may wish to note that, under recommendation 54, a notice with respect to a security right may be registered before the conclusion of a security agreement or before the relevant assets are acquired by the grantor or are produced. In such a case, the question arises as to whether third-party effectiveness should be achieved as of the time of registration or actual creation. If the Working Group considers that creation should be one of the requirements for achieving third-party effectiveness (i.e. if the bracketed language is deleted), the question arises as a question of priority between a security right that was registered before one or more of the requirements for its creation were satisfied and a security right that was created and made effective against third parties subsequently. If the legislator wishes to encourage early registration (making the registry more reliable), priority should be given to the first-registered security right even if one or more of the requirements for its creation had

not been satisfied at the time of registration (see recommendation 63 in A/CN.9/WG.VI/WP.24/Add.4). Such an approach does not create a disadvantage for secured creditors that obtain a security right and make it effective against third parties subsequently, since they can always protect their interests by searching the registry and discovering registered notices of security rights.]

Special methods for achieving third-party effectiveness of security rights

35 bis. The law should provide that a security right in the following types of asset becomes effective against third parties as follows:

- (a) In movable property, with respect to which title or a security right is established or evidenced by registration of a notice in the specialized title registry or by a notation in a title certificate, by registration or notation, as provided in recommendation 40 bis;
- (b) In a right to drawing proceeds from an independent undertaking by control, as provided in recommendation 41;
- (c) In a bank account, by control or registration, as provided in recommendations 42 and 43;
- (d) In a negotiable document of title, by delivery of possession of the document to the secured creditor, as provided in recommendation 39, and in goods covered by a document through delivery of the goods under recommendation 35 or delivery of the document under recommendation 40;
- (e) In proceeds, by achieving third-party effectiveness with respect to the original encumbered assets, as provided in recommendation 44;
- (f) In fixtures, by registration, as provided in recommendation 45;
- (g) In masses of goods or products, as provided in recommendation 47; and
- (h) In consumer goods, upon creation of an [acquisition] security right in consumer goods as provided in recommendation [128 (see A/CN.9/WG.VI/WP.24/Add.5)].

[Note to the Working Group: The Working Group may wish to consider whether the exemption for registration agreed upon with respect to acquisition security rights in consumer goods should be extended to non-acquisition security rights in consumer assets (tangibles and intangibles).]

36. The law should confirm that different methods for achieving third-party effectiveness may be used for different items or kinds of encumbered assets, whether or not they are encumbered by the same security agreement or by separate security agreements.

Third-party effectiveness of other rights

37. The law should provide that the right of an assignee under an outright assignment of receivables becomes effective against third parties by registration of a notice of the right in the general security rights registry.

[37 bis. The law may also require registration of a notice in respect of the following rights for them to become effective against third parties:

(a) The title of a lessor under a lease that is not a financing lease but which extends for a term of more than one year;

(b) The title of a consignor under a commercial consignment in which the goods are consigned to a consignee as agent for sale other than an auctioneer or a consignee who does not act as a consignee in the ordinary course of business; and

(c) The title of a buyer under a sale of goods outside the ordinary course of the seller's business where the seller remains in possession of the goods for more than [thirty] [sixty] [ninety] days.]

[Note to the Working Group: The Working Group may wish to note that long-term leases and the other devices mentioned in recommendation 37 bis, which appears within square brackets, are not within the scope of the draft Guide. They are made subject to registration in the general security rights registry as they may compete with a security right. If the Working Group approves their inclusion in this chapter, the scope of the draft Guide may need to be adjusted. The Working Group may also wish to note that, with respect to third-party effectiveness of acquisition financing devices, recommendation 127 (unitary or non-unitary approach) will apply.]

Third-party effectiveness of a security right in tangibles by delivery of possession to the secured creditor

38. The law should provide that a security right in tangibles becomes effective against third parties through delivery of possession of the tangibles by the grantor to the secured creditor. [Delivery of possession should be actual and not constructive, fictive or symbolic, and it is sufficient only if an objective third-party can conclude that the tangibles are not in the actual possession of the grantor. Possession by a third-party constitutes sufficient delivery of possession only if the third person is not an agent or employee of the grantor and holds possession for or on behalf of the secured creditor.]

[Note to the Working Group: The Working Group may wish to consider whether the bracketed language would be necessary if the terminology section clarifies that possession or delivery of possession has to be actual and the commentary deals with possession by an agent or employee of the grantor. In addition, the Working Group may wish to note that, as the term "tangibles" covers negotiable instruments and negotiable documents (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (i)), recommendation 38 applies to third-party effectiveness of security rights in negotiable instruments and negotiable documents. As a result, a security right in a negotiable instrument or in a negotiable document is made effective against third parties by delivery of the instrument or the document to the secured creditor. Recommendations 39 and 40 add special rules with respect to third-party effectiveness of security rights in negotiable documents of title and goods covered by negotiable documents of title.]

Third-party effectiveness of a security right in a negotiable document

39. [The law should provide that a security right in a negotiable document becomes effective against third parties by delivery of possession of the document to the secured creditor.] If a security right in a negotiable document is effective against third parties, the corresponding security right in the goods covered by the document is also effective against third parties.

[Note to the Working Group: The first sentence of recommendation 39 is intended to reiterate a rule already expressed in recommendation 38 (for the sake of avoiding any doubt and completeness of recommendation 39). It appears within square brackets as it may not be necessary.]

Third-party effectiveness of a security right in goods covered by a negotiable document of title

40. The law should provide that a security right in goods, covered by a negotiable document, may be made effective against third parties either through delivery of possession of the goods under recommendation 38 or through delivery of possession of the document, as long as the document covers the goods.

Third-party effectiveness of a security right in movables with respect to which there is a specialized title registry or a title certificate system

40 bis. The law should provide that a security right in movable property, with respect to which title or a security right is established or evidenced by registration in a specialized title registry or in a title certificate system, becomes effective against third parties:

- (a) If it is registered in the title registry;
- (b) A notation of it is made on the title certificate; or
- (c) A notice with respect to that right is registered in the general security rights registry.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that registration, as provided in recommendation 40 bis, is the exclusive method for achieving third-party effectiveness (i.e. third-party effectiveness may not be achieved by possession), if so provided in the relevant special legislation. The Working Group may also wish to note that recommendation 40 bis is supplemented by recommendation 64 in A/CN.9/WG.VI/WP.24/Add.4, under which a security right registered in the specialized title registry or with respect to which a notation was made in a title certificate has priority over a security right registered in the general security rights registry.]

Third-party effectiveness of security rights in rights to drawing proceeds from independent undertakings

41. *[See A/CN.9/WG.VI/WP.24/Add.2, recommendation 49.]*

Third-party effectiveness of security rights in bank accounts

42. The law should provide that a security right in a bank account becomes effective against third parties:

- (a) If a notice with respect to that right is registered in the general security rights registry; or
- (b) If the secured creditor has control of the bank account.

43. If the secured creditor and the depositary institution are the same person, the law should provide that the secured creditor automatically has control upon the creation of the security right.

[Note to the Working Group: The Working Group may wish to note that the following definition will be added to the terminology: “a secured creditor has “control” with respect to a bank account where: (i) automatically upon the creation of a security right where the depositary bank is the secured creditor; (ii) the depositary bank has concluded a control agreement with the secured creditor, according to which the bank has agreed to follow instructions from the secured creditor with respect to the bank account without further consent of the grantor; or (iii) the bank account is transferred to secured creditor so that the secured creditor becomes the bank’s customer with respect to the bank account”.

The Working Group may also wish to note that, according to recommendation 26 (see A/CN.9/WG.VI/WP.21), no obligations are imposed on the depositary bank without its consent. The Working Group may wish to add, in the creation chapter or in a separate chapter on the rights of third-party debtors, recommendations along the following lines:

“X. The law should provide that:

(a) A secured creditor’s rights in a bank account are subject to the rights, under the law and practice that govern bank accounts, of the depositary bank;

(b) The rights of a transferee of a bank account are superior to a security right in a bank account acquired from the transferor or any prior transferor; and

(c) The rights of set-off of the depositary bank [supersede] [are not impaired by reason of] [are distinct from] any security rights it may have in a bank account.

“Y. The depositary bank is not obligated to:

(a) Pay any person other than a person that has control of the bank account;

(b) Respond to requests for information about whether a control agreement or a security right in its own favour exists and whether the grantor retained the right to deal with the account.

“Z. The law should provide that, if a secured creditor has control over a bank account, the secured creditor has the right to enforce the security right against the depositary bank.”

The commentary will explain that these exceptions are designed to complement recommendations 76 and 77 (see A/CN.9/WG.VI/WP.24/Add.4), under which: (i) a secured creditor who has control of a bank account has priority over one who has merely registered a notice of its right in the general security rights registry, and (ii) the depositary bank has priority over other secured creditors except a secured creditor holding the account in its own name. These priority recommendations mean that third parties are taken to know that they cannot rely on a bank account as a primary source of security for extensions of credit or can do so only by obtaining a subordination agreement from the depositary bank or having the account entered in their own name. Consequently, the absence of publicity of the security right is not seen as problematic.]

Third-party effectiveness of security rights in proceeds

44. The law should provide that, if a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset becomes effective against third parties as soon as the proceeds arise, provided that:

(a) The security right in the encumbered asset became effective against third parties by registration of a notice in the general security rights registry and remains effective; or

[Note to the Working Group: Paragraph (a) would not apply, for example, to a security right which was made effective against third parties by possession or by registration in a specialized title registry or by a notation on a title certificate.]

(b) The proceeds take the form of money, negotiable instruments, negotiable documents of title or bank accounts.

If neither (a) nor (b) applies, the security right in the proceeds is effective against third parties for [...] days after the proceeds arise and continuously thereafter, if it becomes effective against third parties by one of the methods referred to in recommendations 35 or 35 bis before the expiry of that time period.

Third-party effectiveness of security rights in fixtures

45. The law should provide that a security right in tangibles (other than negotiable instruments and negotiable documents) that are or to become fixtures to immovables or to movables becomes effective against third parties, if a notice with respect to that right is registered in the general security rights registry. A security right in fixtures in immovables may also become effective against third parties, if a notice of the security right is registered in the immovables registry.

[Note to the Working Group: The commentary will explain that the provision for registration in the immovables registry in order for a security right to take effect against third-party buyers or secured creditors dealing with the related immovable is designed to protect the integrity and reliability of the immovables registry system. This recommendation is supplemented by recommendation 83 in A/CN.9/WG.VI/WP.24/Add.4, under which a security right in tangibles (other than negotiable instruments and negotiable documents) that are or are to become fixtures in immovables that became effective against third parties by registration of a notice in the immovables registry under recommendation 45 has priority over a security right in the related immovable that became registered subsequently.]

46. The law should also provide that, if a security right in an encumbered asset is effective against third parties at the time when the encumbered asset becomes a fixture, the security right remains effective against third parties thereafter.

Third-party effectiveness of security rights in masses of goods or products

47. The law should provide that, if a security right in an encumbered asset is effective against third parties at the time when the asset becomes part of a mass of goods or products, the security right in the mass or product remains effective against third parties thereafter.

[Note to the Working Group: The Working Group may wish to note that the issue of creation of a security right in a mass of goods or products is dealt with in recommendation 32 (see A/CN.9/WG.VI/WP.21).]

Characteristics of a general security rights registry

48. The law should provide for a general security rights registry that has the following characteristics:

- (a) Registration is effected by registering a notice of the security right, containing only the information specified in recommendation 49, as opposed to a copy of the underlying security documentation;
- (b) The record of the registry is centralized (i.e., it contains all notices of security rights registered under this law);
- (c) The registration system is set up to permit the indexing and retrieval of notices according to the name of the grantor or according to some other reliable identifier of the grantor (e.g. identification or commercial registration number);
- (d) The registry is open to the public;
- (e) Reasonable public access to the registry is assured through such measures as:
 - (i) Setting fees for registration and searching at a cost-recovery level, [and publishing periodic audited statements of the expenses and revenues of the registration system];
 - (ii) Making modes and points of access to the registry widely available;
 - (iii) Preparing and disseminating guides to registration and searching procedures and generally educating the public about the existence and role of the registry; and
 - (iv) Establishing reliable and consistent service hours compatible with the needs of potential registry users;
- (f) The registration system is administered and operated to facilitate speedy, cost-effective and effective registration and searching. In particular:
 - (i) A notice may be registered without verification or scrutiny by anybody other than the registrant of the validity, sufficiency and accuracy of its content;
 - (ii) A search may be made without the need for the searcher to justify the reasons for the search;
- (g) To the extent the financial and infrastructural capacity of the State permits, the registration system is computer-based. In particular,
 - (i) Notices registered are stored in electronic form in a computer database;
 - (ii) Registrants and searchers have immediate access to the registry record by electronic or similar means, including Internet and electronic data interchange;
 - (iii) The system is programmed to minimize the risk of entry of incomplete or irrelevant information (e.g. by requiring essential data fields to be completed);
 - (iv) The system is programmed to facilitate speedy and complete retrieval of information and to minimize the practical consequences of human error (for example, search algorithms are designed to display similar grantor names and to disregard generic terms for denoting the status of legal entities, e.g. “Inc.”, “Co.”, “LLP”, “Plc”);
- (h) Legal rules and operating procedures are designed to ensure the security and integrity of the registry record. In particular:

- (i) A registrant can obtain a copy of the registration as soon as the registration information is entered so as to verify that the entry is accurate and complete;
- (ii) The identity of registrants is verified in advance and evidence of identity is preserved;
- (iii) [The registry] [The secured creditor] is obligated to forward a copy of a registration to the grantor named in the registration;
- (iv) The registry is obligated to send a copy of any changes to a registration to the secured creditor named in the financing statement;
- (v) Although the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to ensure that it is operated in accordance with the governing legal framework.
- (vi) A back-up copy of the registry record is maintained so as to ensure that it can be reconstructed.

(i) Provision is made for the allocation of liability for loss or damage caused by an error in the administration or operation of the registration and searching system. If the system is designed to permit direct registration and searching by registry users without the intervention of registry personnel, the responsibility of the registry with respect to an inaccurate or incomplete printed registration or search result is limited to a system malfunction.

Required content of registered notice

49. The law should require the registered notice to contain only:

- (a) The names (or other reliable identifiers) of the grantor and the secured creditor, and their addresses; where the name and address of the grantor is likely to yield an excessive number of potentially positive matches on a search, supplementary identification criteria may be [required] [permitted], for example, date of birth for individuals or company registration number for legal entities;
- (b) A description of the movable property covered by the notice in accordance with recommendations 51 to 53;
- (c) The duration of the registration in accordance with recommendation 56; and
- [(d) A statement of the maximum monetary amount for which the security right may be enforced [if the State determines that such information is helpful to facilitate subordinate lending.]]

Legal sufficiency of grantor name in a registered notice

50. The law should provide that the name or other identifier of the grantor entered on a registered notice is legally sufficient if the notice can be retrieved by searching the registry record according to the correct legal name or other identifier of the grantor. For this purpose, the law should specify rules for determining the correct legal name or other identifier of individuals and entities.

50 bis. Where the grantor is a legal entity, the law should provide that its legal name is the name that appears in the documents constituting the entity. Where the name of the grantor is listed in separate record maintained by the State, for example, a commercial or company register, the State may wish to set up links between the two registers to facilitate accurate data entry. Where the grantor is an individual, the State should provide detailed

guidance on the authoritative source of the grantor's legal name (e.g. name appearing in birth certificate or passport or certificate of citizenship or residence issued by country of habitual residence, or, in the absence of the former, name appearing in at least two government issued documents, such as. driver's licence or social or medical insurance card).

Change in name or other identifier of the grantor

50 ter. The law should provide that, if the name of the grantor changes so that the notice is no longer sufficient as provided in recommendations 53 and 54:

(a) A security right in an encumbered asset, in which the grantor has rights on the date of the name change remains effective against third parties;

(b) A security right in an asset acquired by the grantor or created within [...] days after the date of the name change, is effective against third parties; and

(c) A security right in an asset acquired by the grantor or created more than [...] days after the date of the name change, is not effective against third parties unless the notice is amended to provide the new name of the grantor.

[Note to the Working Group: The Working Group may wish to note that recommendation 50 ter provides a short period within which third-party effectiveness is preserved with respect to assets acquired by the grantor or created . It is assumed that reasonable secured creditors should be able to discover the name change within that period. Alternatively, the Working Group may wish to consider that security rights in such after-acquired or after-created assets are not effective after the name change or after the secured creditor acquires or ought to acquire knowledge of the name change.]

Legal sufficiency of description of assets covered by a registered notice

51. The law should provide that a description of the assets covered by a registered notice is legally sufficient if it enables a third person to identify the assets covered by the notice separate from other assets of the grantor.

52. If the assets covered by the notice consist of a generic category or categories of movable property, the law should provide that a generic description is legally sufficient.

53. If the assets covered by the notice are all the present and after-acquired movable property of the grantor, the law should provide that it is legally sufficient to describe the charged assets as "all movable property" or by using equivalent language.

Advance registration

54. The law should confirm that a registration may be made before or after the creation of the security right to which it relates.

One registration for multiple security agreements between the same parties

55. The law should confirm that a single registration is sufficient for security rights created by all security agreements entered into between the same parties to the extent they cover items or kinds of movable property that fall within the description contained in the registered notice.

Duration and renewal of registration

56. The law should specify the duration of registration or permit the duration to be selected by the registrant at the time of registration. The law should provide for the right of the registrant to renew the term of a registration before its expiry.

56 bis. [The law should provide that a registration takes effect when the information is entered into the registry record so as to be disclosed on a search of the registry record.]

[Note to the Working Group: The Working Group may wish to note that, if the registration system permits the submission of paper notices to the registry (as opposed to direct data entry by registrants), there will be some delay between receipt of the notice by the registrar and the time the information on the notice is entered into the record by registry staff so as to become available to searchers. In such circumstances, the question arises as to the time when the registration should be effective, the time of receipt of the notice at the registry or the time the notice is entered into the record and becomes available to searchers. If the registration is effective when received by the registrar, a search will not disclose all legally effective registrations. To protect the information needs of third parties, recommendation 56 bis, therefore, makes the time of registration concomitant with searchability. Although this puts the risk associated with any delay on the secured creditor, the secured creditor is in a better position to take steps to protect itself than third parties. Moreover, the recommendations earlier outlined on the design and operation of the registry should ensure speedy and efficient registration procedures. In a fully electronic system that requires no intervention by registry staff entry of the notice and its availability to searchers is virtually simultaneous and this problem is significantly reduced.]

Discharge of registration

57. The law should provide that, if no security agreement has been completed between the parties or if the security right has been terminated by full payment or performance of all of the secured obligations:

- (a) The secured creditor must discharge the registration within [...] days;
- (b) The grantor is entitled to compel discharge of a registration through a summary procedure;
- (c) The grantor and the secured creditor may agree to discharge the registration.

57 bis. The law should provide that the registrar should remove a registration from the searchable records of the registry within a short period of time after a discharge is registered, but the information should be archived so as to be capable of retrieval if necessary.

Amendment of registration

57 ter. The law should provide that a registration may be amended at any time. An amendment takes effect only from the time when the information is entered into the registry record so as to be disclosed on a search of the registry record.

[Note to the Working Group: The Working Group may wish to note, in line with recommendation 56 bis which provides that a registration becomes effective when the information entered into the record can be disclosed on a search, recommendation 57 ter provides that an amendment takes effect when it can be disclosed on a search. The Working Group may also wish to note that the commentary will explain that amendment

may involve various changes, such as: (i) adding or deleting items or kinds of encumbered assets; (ii) adding or deleting the name of a grantor; (iii) recording a change in the name of a grantor or secured creditor; (iv) disclosing an assignment of the security right by the secured creditor named in the original registration to a new secured creditor; or (v) disclosing a subordination agreement or undertaking that affects a registered security right.]

A/CN.9/WG.VI/WP.24/Add.4

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VI. Priority of the security right over the rights of competing claimants

Purpose

The purpose of the provisions of the law on priority is to establish clear and precise rules for ranking security rights in encumbered assets relative to the rights of competing claimants and to encourage the extension of secured credit by:

(a) Enabling a potential secured creditor to determine, in an efficient manner and with a high degree of certainty prior to extending credit, the priority that its security right would have over the rights of competing claimants; and

(b) Facilitating transactions by which a grantor may create more than one security right in the same asset and thereby use the full value of its assets to obtain credit.

Scope of priority rules

58. The law should have a complete set of priority rules covering priority conflicts with every possible competing claimant.

Secured obligations affected

59. The law should provide that the priority accorded to a security right:

(a) Extends to all monetary and non-monetary obligations owed to the secured creditor [up to a maximum monetary amount set forth in the registered notice], including principal, costs, interest and fees, to the extent secured by the security right; and

(b) Is unaffected by the date on which an advance is made or other obligation secured by the security right is incurred (so that a security right may secure future advances or other future obligations with the same priority as advances made or other obligations incurred at the time or before the security right is made effective against third parties).

Subordination agreements

60. The law should provide that a competing claimant entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant.

[Note to the Working Group: As to subordination agreements in the case of the grantor's insolvency, see recommendation J in the recommendations of this Guide on Insolvency (A/CN.9/WG.VI/WP.21/Add.3): "The insolvency law should provide that if a holder of a security right in an asset of the insolvency estate has subordinated its priority unilaterally or by agreement in favour of any existing or future competing claimant, such subordination is binding in insolvency proceedings with respect to the grantor."]

Priority of security rights that are not effective against third parties

61. The law should provide that:

(a) A security right in an encumbered asset that is not effective against third parties is subordinate to a security right in the same asset that is effective against third parties, without regard to the order in which the security rights were created;

(b) Priority among security rights that are not effective against third parties is determined by the order in which they were created[; and

(c) A security right that is not effective against third parties has, [relative to the right of an unsecured claimant, the same priority status as that right] [subject to insolvency law, priority over that right]].

[Note to the Working Group: The Working Group may wish to note that: (i) recommendation 61 (a) deals with a contest of priority between a security right that is not effective against third parties and a security right that is effective against third parties, (ii) recommendation 61 (b) deals with a priority contest between two security rights that are not effective against third parties, and (iii) recommendation 61 (c), which appears within square brackets for the consideration of the Working Group, deals with a priority contest between a security right that is not effective against third parties and an unsecured claim. Recommendation 62 deals with a priority contest between a security right that is not effective against third parties and the right of a judgement creditor in the encumbered asset. Recommendation 71 deals with a priority contest between a security right that is effective against third parties and the right of a judgement creditor in the encumbered asset.]

62. The law should provide that[, except as provided in recommendation 130 bis,] a security right that is not effective against third parties is subordinate to the right of an unsecured creditor that has, under law other than this law, obtained a judgement against a grantor and has taken the steps necessary to acquire rights in encumbered assets of the grantor by reason of the judgement, and remains subordinate to the right of such unsecured creditor even if the security right is later made effective against third parties.

[Note to the Working Group: The Working Group may wish to consider whether an exception to this recommendation should be introduced for acquisition security rights that are made effective against third parties within the relevant grace period (see recommendation 130 bis in A/CN.9/WG.VI/WP.24/Add.5). Acquisition security rights that are made effective against third parties during the relevant grace period should not lose to a judgement creditor described in this recommendation whose interest in the encumbered asset arose after the creation of the security right but before it was made effective against third parties. If this were not the case, utilizing the grace period would be too risky for acquisition financiers.]

Priority of security rights that are effective against third parties

63. The law should provide that, except as provided in other recommendations in this chapter and in the chapter on acquisition financing devices, as between two security rights in the same encumbered asset that are effective against third parties, the security right that was first made effective against third parties has priority[, even if one or more of the requirements for the creation of a security right was not satisfied at that time]. A security right in assets that the grantor acquired or that were created after the time a security right became effective against third parties has the same priority as the security right in assets that the grantor owned or that existed at the time the security right was made effective against third parties.

[Note to the Working Group: The Working Group may wish to note that the current formulation of the first sentence of recommendation 64 is based on the assumption that the words within square brackets in recommendation 35 (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 35 and Note to the Working Group) will be retained and thus a security right may be made effective against third parties even before one or more of the requirements for its creation have been satisfied at that time. If the bracketed language in recommendation 35 is deleted and thus a security right cannot be made effective against third parties before it is actually created, the first sentence of recommendation 64 will need to be reformulated along the following lines:

“The law should provide that, except as provided in other recommendations in this chapter and in the chapter on acquisition financing devices, as between two security rights in the same encumbered asset that are effective against third parties, the security right with respect to which a notice has been registered in the general security rights registry or which was first made effective against third parties, whichever occurs first, has priority.”

The commentary will provide examples as to the operation of recommendations 35 and 63, including the following:

(a) Secured creditor A (SC-A) and secured creditor B (SC-B) both register notices covering the same encumbered asset. First to register has priority, regardless of the sequence of creation of the respective security rights and regardless of whether the asset belonged to the grantor or existed at the time of creation of the first security right to be created; and

(b) SC-A registers before its security right is created, subsequently SC-B's security right is created and SC-B takes possession, subsequently SC-A's security right is created. SC-A has priority, whether or not grantor owned asset or asset existed at the time of SC-A's registering, regardless of the sequence of creation of the respective security rights and regardless of whether the asset belonged to the grantor or existed at the time of creation of the first security right to be created. In both of these cases (including all variant assumptions about times of creation and times grantor acquired asset or asset was produced), SP-A wins even though at time SP-A registered the notice its security right was not yet created.

This rule serves to encourage early registration (making the registry more reliable) and because in no case did SP-B, regardless of the fact pattern, achieve its effectiveness against third parties before SP-A registered, so SP-B could always have protected itself by searching and discovering SP-A's notice.]

Priority of a security right registered in a specialised title registry or by notation on a title certificate

64. The law should provide that a security right in movable property that was made effective under recommendation 40 bis (a) and (b) [see A/CN.9/WG.VI/WP.24/Add.3] by registration of a notice with respect to the right in a specialized title registry or by notation of the security right in a title certificate has priority over a right in the same property that was made effective against third parties by registration in the general security rights registry.

Continuity in priority when third-party effectiveness is achieved by more than one method

65. The law should provide that, if a security right is made effective against third parties by more than one method, priority dates as of the time third-party effectiveness was first achieved, provided that there was no time at which the security right was not effective against third parties.

[Note to the Working Group: The Working Group may wish to consider whether recommendation 65 should state expressly a rule that it seems to imply, namely that if there is a lapse in third-party effectiveness (such as where the registration lapses or it is made after the relevant grace period, or where possession of an encumbered asset is delivered to the secured creditor and subsequently obtained by the grantor), priority dates as of the time third-party effectiveness is re-established. Alternatively, the matter may be clarified in the commentary.]

Priority of security rights in proceeds

66. Except as provided in the recommendations of this chapter, the law should provide that a security right in the proceeds of an encumbered asset that is effective against third parties has the same priority as the security right in the encumbered asset.

Priority of rights of buyers, lessees and licensees of encumbered assets

67. The law should provide that the right of a buyer of goods is subject to a security right in the goods that has become effective against third parties before the sale, unless the secured creditor authorized the sale. However, a buyer of inventory, who buys encumbered inventory in the ordinary course of business of the seller (and any person whose rights to the inventory derive from the buyer), takes free of the security right [created by the seller], even if the buyer has knowledge of the existence of the security right.

68. The law should provide that a lessee of goods in the ordinary course of business of the lessor takes its rights under the lease free of a security right [created by the lessor] in the goods that is effective against third parties, even if the lessee has knowledge of the existence of the security right.

69. The law should provide that a licensee in the ordinary course of business of the licensor under a non-exclusive license takes its rights under such license free of a security right [created by the licensor] in the licensed property that is effective against third parties, even if the licensee has knowledge of the existence of the security right.

[Note to the Working Group: The Working Group may wish to note that recommendations 68, 69 and 70 are designed to protect buyers, lessees and licensees of goods against secured creditors with security rights in the goods sold, leased or licensed. If the bracketed language in these recommendations is retained, protection would be limited only against secured creditors who acquired their rights from the immediate sellers, lessors or licensors and would not apply to secured creditors who acquired their rights from other persons. A possible undesirable side effect of such an approach is that, by entrusting the encumbered assets to a seller, lessor or licensor for the purpose of procuring a sale, lease or licence of the assets free of the security right, a grantor could extinguish a security right.]

Priority of statutory (preferential) claims

70. The law should limit, both in number and amount, preferential claims that have priority over security rights that are effective against third parties, and to the extent preferential claims exist, they should be described in the law in a clear and specific way.

Priority of rights of judgement creditors

71. The law should provide that a security right that is effective against third parties has priority over the rights of an unsecured creditor, even if, at or after the time when the security right has become effective against third parties, the unsecured creditor has, under law other than this law, obtained a judgement against a grantor and taken the steps necessary to acquire rights in assets of the grantor by reason of the judgement. The priority of the security right extends to amounts advanced by the secured creditor subsequent to a specified period of days after the secured creditor acquired knowledge of the existence of the unsecured creditor's rights but does not extend to amounts advanced after the expiry of that period.

[Note to the Working Group: The Working Group may wish to consider expanding recommendations 62 and 71 to cover a creditor who obtains a right as provided in recommendations 62 and 71 by way of a provisional court order.]

Priority of rights in assets for improving and storing the assets

72. If law other than this law gives rights equivalent to security rights to a creditor that has added value to goods (e.g. by repairing them) or preserved the value of goods (e.g. by storing them), such rights should be limited to the goods whose value has been improved or preserved that are in the possession of that creditor, and should have priority over pre-existing security rights in the goods that are effective against third parties.

Priority of reclamation claims

73. If law other than this law provides that suppliers of goods have the right to reclaim the goods within a specified time after occurrence of an event specified in the sales contract, the law should provide that the right to reclaim the goods is subordinate to security rights in such goods.

[Note to the Working Group: The Working Group may wish to note that recommendation 73 creates a commercial law rule designed to accord priority to secured creditors over reclamation claims. Reclamation claims may arise in the case of the insolvency of the buyer. If an insolvency proceeding has commenced, applicable insolvency law will determine the extent to which the secured creditors and the

reclamation claimants would be stayed or their rights would otherwise be affected (see recommendations 39-51 of the UNCITRAL Insolvency Guide). However, the priority rule established by this recommendation would be unaffected by the insolvency proceeding (see A/CN.9/WG.VI/WP.21/Add.3, draft additional recommendation I).]

Priority of rights of creditors in insolvency proceedings

[Note to the Working Group: See recommendation I in the recommendations of this Guide on Insolvency (A/CN.9/WG.VI/WP.21/Add.3): “The insolvency law should specify that, if a security right is entitled to priority under law other than the insolvency law, that priority continues unimpaired in insolvency proceedings except if, pursuant to the insolvency law, another claim is given priority. Such exceptions should be minimal and clearly set forth in the insolvency law. This recommendation is subject to Recommendation 88 of the Insolvency Guide.”]

Asset-specific priority recommendations

Priority of security rights in negotiable instruments

74. The law should provide that a security right in a negotiable instrument that has been made effective against third parties by a method other than possession of the instrument by the secured creditor is subordinate to the rights of a buyer, another secured creditor or other transferee in a consensual transaction that either:

(a) Qualifies as a protected holder under the law governing negotiable instruments; or

(b) Takes possession of the negotiable instrument and gives value in good faith and without knowledge that the transfer was in violation of the rights of the holder of the security right.]

Priority of security rights in rights to drawing proceeds from independent undertakings

75. [See A/CN.9/WG.VI/WP.24/Add.2, recommendation 62.]

Priority of security rights in bank accounts

76. The law should provide that a security right in a bank account, which has been made effective against third parties by control, has priority over a security right in the bank account, which has been made effective against third parties by registration of a notice in the general security rights registry. If the secured creditor is the depositary bank, the depositary bank's security right has priority over any other security right (including a security right made effective against third parties by a control agreement with the depositary bank even if the depositary bank's security right is later in time).

77. The law should provide that any right of the depositary bank to recoup from or set-off against the bank account obligations owed to the depositary bank by the grantor has priority over the security right of any secured creditor other than a secured creditor who has acquired control of the bank account by becoming the customer of the depositary bank with respect to the bank account.

78. In the case of a transfer of funds from a bank account initiated by the grantor, the law should provide that the transferee of funds takes free of a security right in the bank account, unless the transferee acts in collusion with the grantor to deprive the secured

creditor of its security right in the funds. This recommendation does not lessen the rights of holders of funds in bank accounts under law other than this law.

Priority of security rights in money

79. The law should provide that a person that obtains possession of money that is subject to a security right holds the money free of the security right, whether the money constitutes an original encumbered asset or proceeds, unless that person acts in collusion with the transferor to deprive the secured creditor of its security right in the money. This recommendation does not lessen the rights of holders of money under law other than this law.

[Note to the Working Group: The Working Group may wish to note that recommendation 79 is designed to promote the important policy of maximizing the negotiability of money, limiting negotiability only to the extent necessary to protect the holder of a security right in the money against collusion by a transferee of money and its transferor. It is intended that this recommendation be aligned with recommendation 78 dealing with security rights in funds transferred from a bank account.]

Priority of security rights in negotiable documents and goods covered by negotiable documents

80. The law should provide that, while goods are in the possession of a person that has issued a negotiable document with respect to them, a security right in those goods that became effective against third parties as a result of the security right in the negotiable document becoming effective against third parties has priority over another security right in the goods that was made effective against third parties by a different method while the goods were covered by the document of title.

81. The law should provide that a security right in a negotiable document and the goods covered thereby is subject to the rights under the law governing negotiable documents of a person to whom the negotiable document has been duly negotiated.

Priority of security rights in fixtures

82. The law should provide that a secured creditor with a security right in fixtures in immovables that has been made effective against third parties under real property law has priority over a secured creditor with a security right in those fixtures that has been made effective against third parties by one of the methods referred to in recommendation 35.

83. [A security right in tangibles (other than negotiable instruments and negotiable documents) that are or are to become fixtures in immovables that became effective against third parties by registration of a notice in the immovables registry under recommendation 45 has priority over a security right in the related immovable that was registered subsequently.]

[Note to the Working Group: The Working Group may wish to consider recommendation 83 with the relevant recommendation in the Chapter on acquisition financing devices (see A/CN.9/WG.VI/WP.24/Add.5, recommendation 130 ter.)]

84. The law should provide that the priority of security rights in fixtures in movables is governed by the general rules applicable to movable property.

Priority of security rights in masses of goods or products

85. The law should set forth rules that are consistent with the priority recommendations in this chapter and respect the priority of security rights in:

- (a) Fixtures in movables over rights of competing claimants in the asset to which the fixture is attached; and
- (b) A product or mass of goods over the rights of competing claimants in the assets from which the product or the mass results.

A/CN.9/WG.VI/WP.24/Add.5

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X. Acquisition financing devices

Definitions (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (b))

(a) “Security right” means a consensual property right in movable property and fixtures that secures payment or other performance of one or more obligations. [Security rights include acquisition security rights and non-acquisition security rights.]

(b) “Acquisition security right” [in the context of a unitary approach] means a security right in an asset that secures the obligation to pay any unpaid portion of the purchase price of the asset or other obligation incurred to enable the grantor to acquire the asset. Acquisition security rights include those that are denominated as security rights, as well as those that are denominated as retention-of-title sales, hire-and-purchase transactions, financial leases and purchase-money lending transactions). “Grantor” of an acquisition security right includes a buyer, financial lessee or grantor in a purchase-money lending transaction. “Acquisition financier” includes a retention-of-title seller, financial lessor or purchase-money lender.

[Note to the Working Group: The Working Group may wish to define acquisition financing devices along the following lines: “Acquisition financing devices [in the context of a unitary approach] are arrangements which, whether denominated as security devices or not, enable a person to acquire possession or use of assets subject to an obligation to pay their price to a person who retains a security right in them until the price is paid.” This definition could be placed right before the definition of “acquisition security right”.]

The Working Group may also wish to consider that additional definitions are necessary for the non-unitary approach along the following lines: (i) “Retention-of-title devices [in the context of a non-unitary approach] are arrangements, which enable a person to acquire possession or use of assets subject to an obligation to pay their price to a person who retains title in them until the price is paid. Retention-of-title devices [in the context of a non-unitary approach] include retention-of-title sales, hire-and-purchase agreements, financial leases and purchase-money lending transactions. and (ii) “Ownership right under a retention-of-title device is ownership in an asset that secures the obligation to pay any unpaid portion of the purchase price of the asset or other obligation incurred to enable the buyer, financial lessee or grantor to acquire the asset.

The Working Group may wish to note that, in the context of a non-unitary approach, in which retention-of-title sellers and financial lessors are treated as owners, purchase-money lenders also need to be treated equally as owners (for this equal-treatment principle, see A/CN.9/574, para. 35.)

Purpose (unitary approach)

The purpose of the provisions of the law on acquisition financing devices is to:

- (a) Recognize the importance and facilitate the use of acquisition financing as a source of affordable credit, in particular for small- and medium-size businesses; and
- (b) Provide for equal treatment of all providers of acquisition financing, by applying to them the general regime governing security rights;
- (c) Facilitate secured transactions in general by creating transparency with respect to acquisition financing devices.

[Note to the Working Group: The Working Group may wish to note that subparagraph (c) has been added in the purpose section of this Chapter since the lack of transparency with respect to acquisition financing in those jurisdictions where acquisition financing devices are not subject to a registration requirement is often a serious impediment to non-acquisition inventory and equipment financing (as well as receivables financing in jurisdictions that recognize extended retention-of-title arrangements). Creating transparency would significantly encourage these types of financing.]

Purpose (non-unitary approach)

The purpose of the provisions of the law on retention-of-title devices is to:

- (a) Recognize the importance and facilitate the use of retention-of-title devices as a source of affordable credit, in particular for small- and medium-size businesses; and
- (b) Provide for equal treatment of all retention-of-title sellers, financial lessors and purchase-money lenders and apply to retention-of-title devices particular rules so as to produce outcomes that are functionally equivalent to the outcomes produced by a security rights regime [to the extent compatible with the relevant ownership regime];
- (c) Facilitate the use of security rights by creating transparency with respect to retention-of-title devices.

[Note to the Working Group: The Working Group may wish to note that a separate set of recommendations has been prepared for States that may wish to adopt a non-unitary approach with respect to retention-of-title devices. In order to use the relevant terminology and to reflect a slight difference in the issue, where necessary, separate titles have been added to the recommendations of the non-unitary approach. In addition, separate (but the same) numbers have been included to the recommendations of the non-unitary approach not only to facilitate their reading but also their possible later reproduction as a separate, consolidated set of recommendations at the end of the recommendations of the unitary approach.]

The Working Group may wish to note that the words “to the extent compatible with the relevant ownership regime” have been added to align the purpose section with one of the alternatives on the enforcement of acquisition security rights in the case of insolvency, which is the treatment of acquisition financiers as owners (see recommendation 135 (non-unitary approach)). The equivalent of this recommendation has been added also with respect to enforcement of an acquisition security right outside an insolvency proceeding (see recommendation 134 (non-unitary approach)). Under this alternative of the non unitary approach, the treatment of the enforcement of acquisition security rights in and outside insolvency proceedings would not be equivalent to the treatment of security rights but would rather conform to the treatment of enforcement of ownership rights (for a

discussion of the differences, see A/CN.9/WG.VI/WP.17, paras. 39-42; see also Note under recommendation 134 below). The commentary will discuss the consequences of such an approach (e.g. lack of uniformity, potential impact on the availability of credit) to assist States in making a choice.]

Equivalence of acquisition security rights to security rights (unitary approach)

125. The law should treat all acquisition security rights as security rights (see definition of “security right” and “acquisition security right”) and, thus, the recommendations in this Guide governing security rights generally, as supplemented by the specific recommendations in this Chapter, should apply equally to acquisition security rights (“unitary approach”).

[Note to the Working Group: The Working Group may wish to have additional text as follows: “In this case, the characterization of an acquisition security right as a security right, with the result that the acquisition secured creditor is the secured creditor and the grantor is the owner of the encumbered assets, applies only to the secured financing aspect of the transaction. While the acquisition security right secures the grantor’s obligation to pay the balance of the purchase price, the underlying transaction is still a sale or a financial lease. Therefore, the law of sales or leases continues to apply to other aspects of the transaction (such as warranties of title and quality, right to re-sell or sub-lease, taxation, insurance and accounting).” The commentary will explain that, if, for example, a secured creditor under an acquisition financing device sold equipment to a buyer which was defective, the buyer would be able to rely on the terms of the contract including other relevant law to pursue such remedies as may be available to a buyer by that other law, such as rejection of the goods and repudiation of the contract by the buyer.]

Equivalence of ownership rights under retention-of-title devices to security rights (non-unitary approach)

125. If the law excludes ownership rights under retention of title devices from the definition of “security rights”, the law should provide that purchase-money lenders have the same status that is inherent in a retention-of-title transaction by a transfer of ownership either from the seller or from the buyer. The law should also provide that the recommendations applicable to security rights, as supplemented by the specific recommendations applicable to ownership rights under retention-of-title devices in this chapter, apply to all retention-of-title devices in a manner that preserves the functional equivalence of rights under retention-of-title devices to security rights [to the extent compatible with the relevant ownership regime].

[Note to the Working Group: The Working Group may wish to note that, in order to implement the Working Group’s decision to treat all providers of acquisition financing equally (see A/CN.9/574, para. 35), under the non-unitary approach, language has been added to recommendation 125 (non-unitary approach) to ensure that purchase-money lenders are treated as owners. The commentary will explain the words “to the extent compatible with the relevant ownership regime” and their consequences with respect to the enforcement of an ownership right under a retention-of-title device in and outside insolvency (see recommendations 134 and 135 (non-unitary approach below).]

Creation of acquisition security rights (unitary approach)

126. The law should provide that an acquisition security right is created [in the same way as a security right under recommendations 8 to 12] [by agreement between the grantor and the secured creditor which need not be concluded in or evidenced by writing and is not

subject to any other requirement as to form. It may be proved by any means, including witnesses].

[Note to the Working Group: The Working Group may wish to note that recommendation 126 (unitary approach) includes the same alternatives as recommendation 126 (non-unitary approach), so as to implement the equivalence principle. However, if the Working Group decides to retain the creation requirements applicable under recommendations 8 to 12, recommendation 126 may not be necessary.]

Creation of ownership rights under retention-of-title devices (non-unitary approach)

126. The law should provide that an ownership right under a retention-of-title device is created [in the same way as a security right under recommendations 8 to 12] [by an agreement between the buyer, financial lessee or grantor and the seller, financial lessor or purchase-money lender which need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses].

[Note to the Working Group: The Working Group may wish to note that, in order to ensure that all issues addressed by recommendations 8 to 12 are covered, recommendation 126 (non-unitary approach) refers to creation, although no new ownership right is created by a retention-of-title device. The Working Group may wish to consider alternative wording or an explanation for the commentary.]

As requested by the Working Group, recommendation 126 (non-unitary approach) provides for two alternatives, one based on article 11 of the United Nations Sales Convention ("CISG") and another based on the form requirements foreseen in recommendations 8 to 12 of the draft Guide.

With regard to recommendation 126 (non-unitary approach), the Working Group may wish to consider additional wording along the following lines: "The law should also provide that a buyer, financial lessee or grantor under a retention-of-title device has the power to grant security rights in the goods sold or leased notwithstanding the seller's, lessor's or purchase-money lender's ownership rights."

Effectiveness of acquisition financing rights against third parties (unitary approach)

127. Except as otherwise provided in recommendation 128, the law should provide that a non-possessory acquisition security right becomes effective against third parties by registration of a notice of the right in the general security rights registry in the same manner as provided in the recommendations in chapter V with respect to security rights in the same kind of encumbered assets. If the notice is registered not later than [specify a short time period, such as 20 or 30 days] from the time of delivery of the goods to the grantor, the right is effective against third parties whose rights arose between the time the acquisition security right was created and its registration, as well as against third parties whose rights were registered subsequently. If the notice is registered after the expiration of that period, the acquisition security right is effective against third parties from the time the notice is registered.

[Note to the Working Group: The Working Group may wish to note that the references to "actual" possession and "actual" delivery in recommendations 127, 129 and 130 have been deleted on the assumption that "possession" and "delivery" will be

explained in the terminology section as referring to “actual” possession and “actual” delivery.]

Effectiveness of ownership rights under retention-of-title devices against third parties (non-unitary approach)

127. Except as otherwise provided in recommendation 128, the law should provide that an ownership right under a retention-of-title device becomes effective against third parties by registration of a notice of the right in the general security rights registry in the same manner as provided in the recommendations in chapter V with respect to security rights in the same kind of encumbered assets. If the notice is registered not later than [specify a short time period, such as 20 or 30 days] from the time of delivery of the goods to the buyer, financial lessee or grantor, the right is effective against third parties whose rights arose between the time the retention-of-title device was concluded and its registration, as well as against third parties whose rights were registered subsequently. If the notice is registered after the expiration of that period, the ownership right under the retention-of-title device is effective against third parties from the time the notice is registered.

[Note to the Working Group: The Working Group may wish to consider adding to recommendation 127 (non-unitary approach) language along the following lines: “In the case of a retention-of-title device, effectiveness against third parties and priority over competing claimants means that the ownership right of the retention-of-title seller, financial lessor or purchase-money lender to the goods may be asserted against third parties, including competing claimants, claiming through the buyer, lessee or grantor.”]

Exceptions to the requirement of registration (unitary approach)

128. The law should provide that an acquisition security right in consumer goods becomes effective against third parties upon its creation. This recommendation does not affect rights made effective against third parties by delivery of possession of the encumbered assets to the secured creditor under recommendations 38 to 40 or by registration in a specialised title registry or notation on a title certificate under recommendation 40 bis.

Exceptions to the requirement of registration (non-unitary approach)

128. The law should provide that an ownership right under a retention-of-title device relating to consumer goods becomes effective against third parties upon its creation. This recommendation does not affect rights made effective against third parties by delivery of possession of the encumbered assets to the secured creditor under recommendations 38 to 40 or by registration in a specialised title registry or notation on a title certificate under recommendation 40 bis.

[Note to the Working Group: The Working Group may wish to consider whether all security rights in consumer goods (perhaps, with the exception of security rights in consumer goods that are to become fixtures in immovables) should be exempted from the requirement of registration (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 35 bis (h)).]

Priority of acquisition security rights in goods other than inventory or consumer goods over earlier registered non-acquisition security rights in the same goods (unitary approach)

129. In the case of goods other than inventory or consumer goods, the law should provide that an acquisition security right has priority over a non-acquisition security right in the

same goods (even if a notice of that security right was registered in the general security rights registry before registration of a notice of the acquisition security right), if: (i) the acquisition financier retains possession of the goods; or (ii) notice of the acquisition security right was registered within a period of [the same number of days specified in recommendation 127] from the delivery of the goods to the grantor.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that a common situation in which this priority conflict arises is where a pre-existing secured creditor has a security right in all of the grantor's existing and future-acquired goods.]

Priority of ownership rights under retention-of-title devices in goods other than inventory or consumer goods over earlier registered security rights in the same goods (non-unitary approach)

129. In the case of goods other than inventory or consumer goods, the law should provide that an ownership right under a retention-of-title device has priority over a security right in the same goods (even if a notice of that security right was registered in the general security rights registry before registration of a notice of the ownership right under the retention-of-title device), if: (i) the seller, financial lessor or purchase-money lender retains possession of the goods; *[Note to the Working Group: The Working Group may wish to consider whether (i) could apply to a retention-of-title device in view of the fact that normally possession of the goods is delivered to the buyer, financial lessee or grantor.]* (ii) notice of the ownership right under the retention-of-title device was registered within a period of [the same number of days specified in recommendation 127] from the delivery of the goods to the buyer, financial lessee or grantor.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain the impact of recommendations 129 and 130 in non-unitary systems along the lines described in A/CN.9/588, para. 60.]

Priority of acquisition security rights in inventory over earlier registered non-acquisition security rights in inventory of the same kind (unitary approach)

130. The law should provide that an acquisition security right in inventory of the grantor has priority over a non-acquisition security right in the grantor's inventory of the same kind (even if that security right became effective against third parties before the acquisition security right became effective against third parties), if: (i) the acquisition financier retains possession of the goods; or (ii) before delivery of the inventory to the grantor: (a) a notice of the acquisition security right is registered in the general security rights registry; and (b) the holder of the earlier-registered security right is notified in writing that the acquisition financier intends to enter into one or more transactions pursuant to which that person will have an acquisition security right with respect to the additional inventory of the grantor described in the notification sufficiently to inform the holder of an earlier-registered security right of the kind of the inventory being financed.

Priority of ownership rights under retention-of-title devices in inventory over earlier registered security rights in inventory of the same kind (non-unitary approach)

130. The law should provide that an ownership right under a retention-of-title device in inventory has priority over a security right in inventory of the same kind (even if that right became effective against third parties before the ownership right under the retention-of-title device became effective against third parties), if: (i) the seller, the financial lessor or

the purchase-money lender retains possession of the goods; [*Note to the Working Group: The Working Group may wish to consider whether (i) would apply to a retention-of-title transaction or financial lease in view of the fact that normally possession of the goods is delivered to the buyer, financial lessee or grantor.*] or (ii) before delivery of the inventory to the buyer, financial lessee or grantor: (a) a notice of the ownership right under the retention-of-title device is registered in the general security rights registry; and (b) the holder of an earlier registered security right is notified in writing that the seller, financial lessor or purchase-money lender intends to enter into one or more transactions pursuant to which that person will retain title in the inventory with respect to the additional inventory described in the notification sufficiently to inform the holder of an earlier-registered security right of the kind of the inventory being financed.

[Priority of acquisition security rights over the rights of unsecured creditors in encumbered assets (unitary approach)]

130 bis. The law should provide that, notwithstanding recommendation 62, an acquisition security right that is made effective against third parties within the grace period provided in recommendation 127 has priority over the rights of an unsecured creditor that has, under law other than this law, obtained a judgement against a grantor after the creation of the acquisition security right and taken the steps necessary to acquire rights in encumbered assets of the grantor by reason of the judgement.

Priority of ownership rights under retention-of-title devices rights over the rights of unsecured creditors in the relevant assets (non-unitary approach)

130 bis. The law should provide that, notwithstanding recommendation 62, an ownership right under a retention-of-title device that is made effective against third parties within the grace period provided in recommendation 127 has priority over the rights of an unsecured creditor that has, under law other than this law, obtained a judgement against a buyer, financial lessee or grantor after the creation of the ownership rights under the retention-of-title device and taken the steps necessary to acquire rights in the relevant assets of the buyer, financial lessee or grantor by reason of the judgement.

[Note to the Working Group: The Working Group may wish to consider that an acquisition security right that became effective against third parties during the relevant grace period should not lose to the rights of a judgement creditor described in this recommendation, whose interest in the encumbered asset arose after the creation of the acquisition security right but before it became effective against third parties. If this were not the case, utilizing the grace period would be too risky for acquisition financiers. The Working Group may wish to consider this recommendation together with recommendation 62 (see A/CN.9/WG.VI/WP.24/Add.4).]

Priority of acquisition security rights in fixtures in immovables over earlier registered security rights in the immovables (unitary approach)

130 ter. The law should provide that an acquisition security right in goods that are to become fixtures in immovables, with respect to which a notice has been registered in the immovables registry within [...] days after the goods become fixtures, has priority over an existing mortgage in the related immovables (other than a mortgage securing loans financing the construction of an immovable).

Priority of ownership rights under retention-of-title devices with respect to fixtures in immovables over earlier registered security rights in the immovables (non-unitary approach)

130 ter. The law should provide that an ownership right under a retention-of-title device in goods that are to become fixtures in immovables, with respect to which a notice has been registered in the immovables registry within [...] days after the goods become fixtures, has priority over an existing mortgage in the related immovables (other than a mortgage securing loans financing the construction of an immovable).]

[Note to the Working Group: The Working Group may wish to note that the super-priority introduced by this recommendation would probably not prejudice the rights of holder of an existing mortgage on the related immovables because presumably the mortgagee under such a mortgage did not, at the time the mortgage was created, rely upon the subsequently acquired goods becoming fixtures. The super-priority created by this rule should not operate to grant priority over construction lenders, who are presumed to rely upon all goods that become fixtures in immovables during the course of construction.]

One or more acquisition financing transactions (unitary approach)

131. The law should provide that a single notification to holders of earlier-registered non-acquisition security rights may cover encumbered assets acquired through one or more acquisition financing transactions between the same parties (without those transactions having to be identified in the notification). However, the notification should be effective only for acquisition security rights in encumbered assets delivered within a period of [specify time, such as five years] after the notification is given.

One or more retention-of-title devices (non-unitary approach)

131. The law should provide that a single notification to holders of earlier-registered security rights may cover assets acquired through one or more retention-of-title devices between the same parties (without those devices having to be identified in the notification). However, the notification should be effective only for ownership rights in assets delivered within a period of [specify time, such as five years] after the notification is given.

Priority of acquisition security rights in proceeds of goods other than inventory or consumer goods (unitary approach)

132. The law should provide that the priority, provided under recommendation 129 (unitary approach), for an acquisition security right in goods other than inventory or consumer goods over an earlier registered non-acquisition security right in the same goods extends to the proceeds of such goods.

Priority of ownership rights under retention-of-title devices in proceeds of goods other than inventory or consumer goods (non-unitary approach)

132. The law should provide that the priority, provided under recommendation 129 (non-unitary approach), for an ownership right under a retention-of-title device in goods other than inventory extends to the proceeds of such goods.

Priority of acquisition security rights in proceeds of inventory (unitary approach)

133. The law should provide that the priority, provided under recommendation 130 (unitary approach), for an acquisition security right in inventory over an earlier-registered

non-acquisition security right inventory of the same kind extends to the proceeds of such inventory [other than receivables], provided that the acquisition financier notified earlier registered financiers with a security right in inventory of the same kind as the proceeds before delivery of the inventory to the grantor or, at the latest, at the time the proceeds arose.

[Note to the Working Group: The Working Group may wish to note that, although it approved the extension of the super-priority of recommendation 130 to all proceeds, it may wish to give further consideration to whether the super-priority should be extended to proceeds consisting of receivables. The extension of the super-priority to receivables would significantly discourage receivables financing. In most instances, there may be no practical way for a receivables financier to determine which of the grantor's receivables would be subject to the acquisition financier's paramount security right. Also, in situations where a single receivable covers both goods subject to an acquisition financing device and goods that are not subject to an acquisition financing device, there may be no practical way for the receivables financier to allocate proceeds of the receivable to the acquisition financier. The result might be that the receivables financier may simply stop financing when it receives the notice contemplated by this recommendation. That possibility will either discourage receivables financing or, if the receivable financier agrees to continue financing only if there are no inventory acquisition financing devices, it will discourage acquisition financing. Neither possibility is consistent with the objectives of the Guide. A better solution would be for the priority of the inventory financier not to extend to proceeds consisting of receivables so that the receivables financier is encouraged to provide credit against the receivables and the proceeds of that credit may be used by the grantor to pay the inventory financier. The Working Group may wish to note that, in most jurisdictions that recognize retention-of-title arrangements, the property right of the retention-of-title seller in the inventory sold does not extend to receivables arising from the sale of that inventory.]

Priority of ownership rights under retention-of-title devices in proceeds of inventory (non-unitary approach)

133. The law should provide that the priority, provided under recommendation 130 (non-unitary approach), for an ownership right under a retention-of-title device in inventory over an earlier-registered security right in inventory of the same kind extends to the proceeds of such inventory [other than receivables], provided that the retention-of-title seller, financial lessor or purchase-money lender notified earlier-registered financiers with a security right in inventory of the same kind as the proceeds before actual delivery of the inventory to the buyer, financial lessee or grantor, or, at the latest, at the time the proceeds arose.

Enforcement (unitary approach)

134. The law should provide that the recommendations in chapter VIII apply to the enforcement of acquisition security rights.

Enforcement (non-unitary approach)

134. [The law should provide that, in the case of default, a retention-of-title device should be enforced in such a manner that: (i) the same principles and objectives as those governing enforcement of security rights generally are complied with; and (ii) the same results are obtained.]

[Note to the Working Group: The Working Group at its eighth session recommended formulation of the non-unitary approach along the lines set out above.]

[The law should provide that the recommendations in chapter VIII apply to the enforcement of ownership rights under retention-of-title devices to the extent compatible with the regime applicable to the enforcement of ownership rights.]

[Note to the Working Group: The Working Group may wish to note that the last words of the second alternative under a non-unitary would conform the non-unitary approach to the existing law in each State on the enforcement of ownership rights rather than to the enforcement recommendations of the Guide. For example, in some jurisdictions this would mean that, upon default, a seller that retained title and obtained possession of the assets would be permitted to retain, rather than dispose of, the assets and would not have to account to the buyer for any surplus of the value of those assets over the unpaid portion of the purchase price and would not have a claim against the buyer with respect to the unpaid portion of the purchase price (for a discussion of the differences, see A/CN.9/WG.VI/WP.17, paras. 39-42; see also the second alternative of the non-unitary approach recommendation on the enforcement of ownership rights under retention-of-title devices in insolvency proceedings below).

In an effort to achieve the appropriate balance between certainty and uniformity on the one hand, and flexibility on the other hand, the Working Group may wish to consider including in recommendation 134 (non-unitary approach) two alternatives, along the lines of the alternatives in recommendation 135 (non-unitary approach). One alternative could be formulated along the lines of recommendation 134 (unitary approach) and the other alternative could be formulated along the lines of the second alternative of recommendation 134 (non-unitary approach). As a result, in the context of a non-unitary approach, States could choose between a recommendation that would conform the non-unitary approach to the enforcement recommendations of the Guide and a recommendation that would conform the non-unitary approach to the existing law in the enacting State on the enforcement of ownership rights. The commentary could discuss these alternatives to assist States in making a decision.

The Working Group may also wish to consider additional text along the following lines: "In the case of an ownership right under a retention-of-title device, if notice of the right was required to be registered in the security rights registry, but was not registered, or was registered only after the expiration of the time specified in recommendation 127, the retention-of-title seller, financial lessor or purchase-money lender is entitled to repossess the goods only if they are still in the possession of the buyer, financial lessee or grantor and takes the goods back subject to any security rights granted by the buyer, financial lessee or grantor. However, in the case of a late registration, if the notice was registered before the sale of the goods by the original buyer, financial lessee or grantor, the seller, financial lessor or purchase-money lender may repossess the goods in the possession of the subsequent buyer, other than [a buyer of inventory in the ordinary course of business of the seller, and any other person whose rights to the inventory derive from that buyer (even if such buyer or other person has knowledge of the existence of the security right)] [a good faith buyer]".]

Insolvency

[Note to the Working Group: See recommendations A and B in the recommendations of this Guide on Insolvency:]

Unitary approach

A. The insolvency law should provide that, in the case of the insolvency proceedings of the grantor, the acquisition financier has the rights and duties of a holder of a security right.

Non-unitary approach

B. *[The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer, financial lessee or grantor under a retention-of-title device, the seller, financial lessor or purchase-money lender has the rights and duties of a holder of a security right.] [The insolvency law should provide that, in the case of insolvency proceedings with respect to a buyer, financial lessee or grantor under a retention-of-title device, the seller, financial lessor or purchase-money lender has the rights and duties of a third-party owner of the asset under the UNCITRAL Legislative Guide on Insolvency Law.]*

Conflict of laws (unitary approach)

135. The law should provide that the conflict-of-laws recommendations in chapter XI apply to acquisition security rights.

Conflict of laws (non-unitary approach)

135. The law should provide that the conflict-of-laws recommendations in chapter XI apply to retention-of-title devices.

[Note to the Working Group: The Working Group may wish to refer in this recommendation to the definition of grantor for retention of title devices included in this chapter, i.e. "Grantor" in the context of an acquisition financing device includes a buyer, financial lessee or grantor in a purchase-money lending transaction. "Acquisition financier" includes a retention-of-title seller, financial lessor or purchase-money lender.]

F. Report of the Working Group on Security Interests on the work of its tenth session (New York, 1-5 May 2006)

(A/CN.9/603) [Original: English]

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I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.²⁶ The Commission's decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime

²⁶ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paragraph 358. For a history of the project, see A/CN.9/WG.VI/WP.22. The reports of the first to the seventh sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543 and A/CN.9/549, A/CN.9/570 and A/CN.9/574. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222), A/59/17 (paras. 75-78) and A/60/17 (paras. 185-187).

that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.²⁷

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its tenth session in New York from 1 to 5 May 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belgium, Benin, Brazil, Canada, China, Colombia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Madagascar, Mexico, Poland, Republic of Korea, Russian Federation, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Uganda, United States of America and Uruguay.

3. The session was attended by observers from the following States: Dominican Republic, Guinea, Hungary, Ireland, Maldives, the Philippines and Zambia.

4. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Monetary Fund, World Bank and World Intellectual Property Organization;

(b) International non-governmental organizations invited by the Commission: American Bar Association, Center for International Legal Studies, Commercial Finance Association, Forum for International Commercial Arbitration, International Chamber of Commerce, International Federation of Insolvency Practitioners, International Insolvency Institute, International Swaps & Derivatives Association, International Trademark Association, Max-Planck Institute for Foreign and Private International Law, National Law Center for Inter-American Free Trade, New York City Bar Association and European Law Students' Association.

5. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Margaret Kaggwa KASULE (Uganda)

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.24 and Addenda 1, 2 and 5 (Recommendations) and A/CN.9/WG.VI/WP.26 and Addenda 1 to 4 (Recommendations).

7. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legislative guide on secured transactions.
5. Other business.

²⁷ Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paragraph 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paragraph 347.

6. Adoption of the report.

III. Deliberations and decisions

8. The Working Group considered recommendations on security rights in receivables, negotiable instruments, negotiable documents, rights to payment of funds credited to bank accounts, rights to drawing proceeds from independent undertakings, as well as recommendations on pre-default rights and obligations of the parties, and recommendations 88 to 111 on default and enforcement. The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise those recommendations to reflect the deliberations and decisions of the Working Group.

IV. Preparation of a legislative guide on secured transactions

A. Security rights in receivables (A/CN.9/WG.VI/WP.26)

1. Definitions

9. Subject to substituting the word “attachments” for the word “fixtures” in definition (a) (“security right”), the Working Group approved the substance of definitions (a), (d) (“secured creditor”) and (f) (“grantor”) unchanged, and decided to delete definition (n) (“claim”) (see para. 35). The Working Group also approved the substance of definitions (o) (“receivable”), (p) (“assignment”), (q) (“assignor”), (r) (“assignee”) and (s) (“subsequent assignment”) unchanged.

10. With regard to definition (t) (“account debtor”), it was agreed that the word “account” should be deleted as it was not universally understood and was inconsistent with the terminology used in the United Nations Convention on the Assignment of Receivables in International Trade (“the United Nations Assignment Convention”). As to the distinction between the debtor of the secured obligation and the debtor of the receivable, several suggestions were made, including that the terms “borrower” or “obligor” should be used for the debtor of the secured obligation. Subject to that change, the Working Group approved the substance of the definition (t).

11. With regard to definition (u) (“notification of the assignment”), it was agreed that the commentary should explain that the act of communication was also included (not just the document) and all communications were covered irrespective of whether they took place in the context of judicial or other official service of documents, or not.

12. With respect to definition (v) (“original contract”), the Working Group agreed that the definition might need to be revised to reflect the sources of non-contractual obligations (see para. 36).

13. It was also agreed that the term “writing” should be expanded to include electronic communication as stated in recommendation 11 (see A/CN.9/WG.VI/WP.21) but the issue raised regarding signature should be deferred until the substance of recommendation 12 was agreed upon by the Working Group.

2. Recommendations

Recommendations 3 (d) and (f) (parties, security rights, secured obligations and assets covered)

14. Subject to substituting the word “attachments” for the word “fixtures”, the Working Group approved the substance of recommendation 3 (d). The Working Group approved the substance of recommendation 3 (f) unchanged.

Recommendation 13 (assets and obligations subject to a security right)

15. The Working Group approved the substance of recommendation 13 unchanged.

Recommendation 14 (effectiveness of a bulk assignment and an assignment of future, parts of and undivided interests in receivables)

16. Subject to deleting the word “account” from the references to “the debtor”, the Working Group approved the substance of recommendation 14 unchanged.

Recommendation 15 (effectiveness of an assignment made despite an anti-assignment clause)

17. The Working Group agreed that recommendation 15 (c), limiting the scope of application of recommendation 15 to certain types of receivables, should be retained outside square brackets for the sake of consistency with the United Nations Assignment Convention. Subject to deleting the word “account” from the references to debtor, the Working Group approved the substance of recommendation 15.

Recommendation 16 (creation of a security right in a right that secures an assigned receivable, a negotiable instrument or other obligation)

18. The Working Group considered a proposal to adjust recommendation 16, dealing with the automatic creation (i.e. without a separate act of creation) of a security right in a personal or property right that secured payment of a receivable, negotiable instrument or other obligation when the obligation was an encumbered asset within the scope of the draft Guide, and to add two new recommendations. The first recommendation would deal with the automatic third-party effectiveness of the automatically created right. The second new recommendation would extend the scope of the draft Guide to include a personal or property right otherwise outside of the scope of the Guide to the limited extent that a security right in the personal or property right would be automatically created and would be automatically effective against third parties.

19. Language along the following lines was proposed for recommendation 16:

“The law should provide that upon creation of a security right in a receivable, a negotiable instrument, or any other obligation covered as an encumbered asset by this Guide, a security right is automatically created, without further action by either the grantor or the secured creditor, in any personal or property right that secures payment or performance of that receivable, negotiable instrument, or other obligation. If the personal or property right is an independent undertaking, the law should not provide that a security right in the right to draw under the independent undertaking is automatically created but should provide that a security right in the right to drawing proceeds from the independent undertaking is automatically created. This recommendation does not apply to a right in an immovable that under applicable law

is transferable separately from a receivable, negotiable instrument or other obligation that it may secure.”

20. In addition, language along the following lines was proposed for a new recommendation on third-party effectiveness:

“The law should provide that upon a security right in a receivable, a negotiable instrument, or any other obligation covered as an encumbered asset by this Guide becoming effective against third parties, a security right is automatically effective against third parties, without further action by either the grantor or the secured creditor, in any personal or property right that secures payment or performance of that receivable, negotiable instrument, or other obligation. If the personal or property right is an independent undertaking, the law should not provide that a security right in the right to draw under the independent undertaking is automatically effective against third parties but should provide that a security right in the right to drawing proceeds from the independent undertaking is automatically effective against third parties. This recommendation does not apply to a right in an immovable that under applicable law is transferable separately from a receivable, negotiable instrument or other obligation that it may secure.”

21. Furthermore, to align the first two recommendations with recommendation 4 in A/CN.9/WG.VI/WP.21 addressing the scope of the Guide, language along the following lines was proposed for inclusion in recommendation 4:

“Except to the limited extent provided in recommendations 16 and [...] relating to a personal or property right that secures a receivable, negotiable instrument or other obligation that is within the scope of the Guide, the law should not apply to”

22. It was agreed that automatic creation and automatic third-party effectiveness of a security right securing a receivable, negotiable instrument or other obligation would dispense with unnecessary formalities and facilitate the enhancement of the value of a receivable, negotiable instrument or other obligation as an asset on the basis of which credit might be raised and thus have a beneficial effect on the availability and the cost of credit. It was also agreed that that result should not be achieved at the expense of third-party rights, priority or enforcement.

23. However, while there was agreement as to the economic result to be achieved, diverging views were expressed as to how that result might be achieved. One view was that the secured creditor acquired a security right in the security right in a receivable, negotiable instrument. Another view was that the secured creditor would be substituted in the rights of the grantor of the security right in the receivable, negotiable instrument or other obligation. After discussion, it was agreed that the conceptual analysis or method by which the above-mentioned practical result (automatic creation and automatic third-party effectiveness) would be achieved was not so important as long as that result was achieved and, therefore, neutral terminology should be used that would be suitable for the various legal systems.

24. With respect to independent undertakings in particular, it was agreed that the automatic creation and third-party effectiveness of a security right in a right to drawing proceeds from an independent undertaking should not affect the right to draw under the independent undertaking or the rights and obligations of the guarantor/issuer. With respect to mortgages, it was agreed that the automatic creation and third-party effectiveness of a security right in a mortgage (or the transfer of mortgage rights) should not affect third-party rights, priority or enforcement. The example was given of the securitization of receivables secured by mortgages, in which, under the proposed recommendations, the

secured creditor or transferee would register in the immovable property registry only if there was default on a receivable and wanted to enforce the mortgage that secured payment of the receivable. In that connection, a note of caution was struck to the effect that the commentary should explain that implementation of those recommendations might differ from country to country depending on the general legislation, for example, on securitization of receivables secured by mortgages.

25. After discussion, the Working Group requested the Secretariat to revise recommendation 16 as proposed and to add the two new recommendations proposed. It was also agreed that recommendation 16 should also cover outright assignments of receivables and should include language along the lines of article 10 (2) to (6) of the United Nations Assignment Convention. With respect to the provision that would deal with form requirements, it was agreed that if the security right related to assets within the scope of the draft Guide, reference should be made to the form requirements of the draft Guide, while, if the relevant assets were not covered in the draft Guide, form requirements would be subject to the law governing rights in such assets to the extent that the law did not impair automatic creation and third-party effectiveness.

Recommendations 16 bis to quinquies (pre-default rights and obligations of the assignor and assignee)

26. Subject to the deletion of recommendation 16 bis (c), dealing with international usages that were implicitly made applicable between the parties, which was not thought to be suitable for a domestic regime, the Working Group approved the substance of recommendations 16 bis to quinquies.

Recommendations 17 to 23 (rights and obligations of the account debtor and the assignee)

27. Subject to deleting the word “account” from the references to “the debtor”, the Working Group approved the substance of recommendations 17 to 23. The Working Group also agreed that in recommendation 17 (b)(ii) the reference to “State” should be retained (rather than “place”) of payment in order to provide flexibility with regard to a change in the place of payment within a jurisdiction as a result of an assignment.

Recommendation 37 (third-party effectiveness of a security right in receivables)

28. The Working Group agreed to delete recommendation 37 as its substance was already covered by the general rules of the draft Guide on third-party effectiveness (for the addition of another recommendation, see para. 21).

Recommendation 88 (application of this chapter to outright transfers of receivables)

29. It was agreed that recommendation 88 should be revised to clarify that, with the exception of certain rights, obligations and remedies (e.g. the obligation of the secured creditor to account to the assignor for a surplus or the liability for a deficiency), the rights, obligations and remedies provided for in the chapter on enforcement should be available to an assignee in an outright assignment.

30. In the discussion, the suggestion was made that the qualifications included in recommendation 88 (A/CN.9/WG.VI/WP.26) with respect to outright transfers of receivables without recourse to the transferor might need to be included in the insolvency chapter. While interest was expressed in that suggestion, it was agreed that a decision

would require a careful consideration of the recommendations in the insolvency chapter. After discussion, the Working Group requested the Secretariat to study the matter and prepare a note for consideration by the Working Group at a future session.

Recommendations 102 and 103 (collection of receivables)

31. The Working Group approved the substance of recommendations 102 and 103 unchanged.

Recommendations 137 and 137 bis (law applicable to security rights in intangible property)

32. There was general support for the rule reflected in the first sentence of recommendation 137. As to the second sentence, it was suggested that it be deleted since: (i) the first sentence was sufficient to indicate the general rule, (ii) the commentary could explain that there were exceptions to the general rule (such as, for example, with regard to intellectual property rights as to which the principle of territoriality was applicable) and (iii) in any case, it would be inconsistent with the approach taken in the draft Guide, which did not include special rules for security rights in intellectual property rights, to establish such rules in the context of the chapter on conflict of laws. That suggestion was objected to. It was stated that the fact that the draft Guide did not include special substantive-law rules with regard to security rights in intellectual property rights did not mean that it should not include any conflict-of-laws rules in that regard. After discussion, the Working Group approved the substance of the first sentence of recommendation 137 and agreed to retain the second sentence within square brackets for consideration of the law applicable to security rights in intellectual property rights at a later stage.

33. After discussion, the Working Group approved the substance of recommendation 137 bis unchanged.

Recommendations 146 (law applicable to the obligations of the grantor and the secured creditor) and 147 (law applicable to the rights and obligations of the account debtor, etc.)

34. Subject to deleting the word “account” from the references to “the debtor” in recommendation 147, the Working Group approved the substance of recommendations 146 and 147.

Rights to performance of non-monetary obligations (“claims”)

35. The Working Group considered the question whether the recommendations on receivables should apply to rights to performance of non-monetary obligations. It was generally agreed that the recommendations on receivables could apply to contractual rights to non-monetary performance but not to all rights to performance. It was thus agreed that definition (n) (“claim”) was overly broad and should be deleted. It was also agreed that some special rules might be required to preserve the rights of obligors of intangibles, such as contractual non-monetary obligations.

Non-contractual receivables

36. It was agreed that the recommendations on receivables should apply to contractual and non-contractual receivables. It was also agreed that statutory limitations on the assignability of non-contractual receivables should not be interfered with and that certain recommendations should be adjusted to apply to non-contractual receivables (e.g.

references to “the original contract” might need to be deleted or substituted with more general language to cover the sources of both contractual and non-contractual receivables, and representations of the assignor were not relevant in the context of non-contractual receivables).

Outright transfers of negotiable instruments

37. In the context of its discussion of recommendation 3 (f), which dealt with outright transfers of receivables (see para. 14), the Working Group considered whether outright transfers of negotiable instruments should also be covered in the draft Guide. Differing views were expressed. One view was that they should not be covered as they did not constitute secured transactions and there was no need to subject them to registration and to the same priority rules as those applicable to security transfers, since secured creditors could be protected by taking possession of the instrument.

38. Another view was that outright transfers of negotiable instruments should be covered since they formed part of important financing transactions (e.g. securitization and forfeiting), and, in practice, it was not always easy to distinguish an outright transfer from a security transfer and a receivable from a negotiable instrument. It was pointed out, however, that there was no practice involving the outright transfer of cheques or bills of exchange. In that connection, to distinguish a promissory note from those other instruments, reference was made to promises to pay as opposed to orders to pay. However, the use of that terminology was objected to as it was not universally understood. In addition, the exclusion of outright transfers of bills of exchange was objected to on the ground that such transfers were part of important financing transactions.

39. After discussion, it was provisionally agreed that outright transfers of negotiable instruments (with the exception of cheques) should be covered. At the same time, it was agreed that the issue should be revisited after the Working Group had completed its consideration of the recommendations on negotiable instruments and other relevant recommendations, and determined whether any special rules were necessary (see para. 50).

B. Security rights in negotiable instruments (A/CN.9/WG.VI/WP.26/Add.2)

1. Definitions

40. Subject to the substitution of the word “attachments” for the word “fixtures” in recommendation (i) (“tangibles”), the Working Group approved the substance of definitions (i) and (w) (“negotiable instrument”), noting that it had already approved definition (o) (“receivable”) (see para. 9).

2. Recommendations

Recommendation 3 (d) (parties, security rights, secured obligations and assets covered)

41. The Working Group noted that it had already approved the substance of recommendation 3 (d) (see para. 14).

Creation of a security right in a negotiable instrument

42. The Working Group noted that the general recommendations were sufficient to address the creation of a security right in a negotiable instrument and that the commentary

should explain that creation of a security right would not affect the rights obtained by the transfer of a negotiable instrument by endorsement under negotiable instrument law.

Recommendation 24 (creation of a security right in a right that secures a negotiable instrument)

43. In view of the fact that the revised recommendation 16 would cover security rights in rights that secured negotiable instruments, the Working Group decided that recommendation 24 should be deleted.

Rights and obligations of the obligor under a negotiable instrument

44. The Working Group approved the substance of a new recommendation that read as follows: “The law should provide that as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments.” It was agreed that that recommendation should be placed in a new chapter dealing with the rights and obligations of third-party obligors.

Third-party effectiveness of a security right in a negotiable instrument

45. The Working Group approved the substance of a new recommendation that read as follows: “The law should provide that, where a security right in a negotiable instrument is effective against third parties, the security right continues to be effective against third parties for a short period of [to be specified] days after the negotiable instrument has been relinquished to the grantor for the purpose of presentation, collection, enforcement, renewal”. It was understood that by returning the encumbered negotiable instrument to the grantor the secured creditor would be exposed, for good reasons, to the risk of losing its security only for a short period of time and only if it had not registered a notice about its security right in the general security rights registry.

46. Accordingly, the Working Group approved the substance of that recommendation but agreed that the recommendation should be limited to situations in which security rights were made effective against third parties “by a method other than registration” or “by dispossession”.

Recommendation 74 (priority of a security right in a negotiable instrument)

47. Subject to clarification that paragraphs (a) and (b) referred to the secured creditor, or the buyer or other transferee, the Working Group approved the substance of recommendation 74.

Recommendations 104 and 105 (enforcement of a security right in a negotiable instrument)

48. It was agreed that the secured creditor should have a right to enforce its security right in the negotiable instrument before default only with the consent of the grantor. It was stated that that rule should apply only if parties had not addressed the matter in the security agreement. It was also observed that a different approach would upset legitimate expectations of third-party creditors of the grantor. However, at the same time, it was agreed that, recommendation 104 should not affect any right the secured creditor might have under negotiable instrument law to collect the instrument upon maturity before default even without the consent of the grantor. It was also agreed that recommendation

104 should make it clear that the enforcement rights of the secured creditor were subject to the rights of obligors of negotiable instruments under law governing negotiable instruments. Subject to those changes, the Working Group approved the substance of recommendations 104 and 105.

Recommendations 136, 140, 146 and 147 (applicable law issues)

49. The Working Group approved the substance of recommendations 136, 140, 146 and 147 unchanged.

Outright transfers of negotiable instruments

50. Recalling its earlier discussion (see paras. 37-39), the Working Group agreed that outright transfers of negotiable instruments should not be addressed in the recommendations. It was stated that such transfers were involved in specialized markets. It was also stated that there were no financial practices that involved, for example, outright transfers of cheques. However, it was also agreed that the commentary should discuss the relevant issues for the benefit of States that might wish to address outright transfers of negotiable instruments in their secured transactions laws. It was stated that the general recommendations on the creation, third-party effectiveness and priority of a security right in a negotiable instrument, as supplemented by the relevant asset-specific recommendations, should equally apply to outright transfers of negotiable instruments. In that connection, it was pointed out that a possible alternative third-party effectiveness rule might provide that an outright transfer could be made effective against third parties automatically upon creation. As a result, it was said, a security right that was created first would have priority over a subsequently registered right (but not over a security right that became effective against third parties by dispossession of the grantor). As to enforcement, it was observed, a different recommendation might be required to provide that the transferee of the negotiable instrument could enforce it freely without first having obtained the consent of the transferor.

C. Security rights in negotiable documents (A/CN.9/WG.VI/WP.26/Add.3)

1. Definitions

51. With respect to the definition (pp) (“possession”), it was stated that reference to the requirement for actual possession might need to be deleted, as possession of goods by the issuer of the negotiable document covering those goods might be constructive (i.e. the issuer might hold possession through another person). In response, it was noted that possession should be defined by reference to actual possession for the purposes of the draft Guide, while the nature of possession of goods by the issuer required for the issuance of a negotiable document should be left to the law governing negotiable documents.

52. Subject to the substitution of the word “attachments” for the word “fixtures” in definition (i) (“tangibles”) and the deletion of references to the secured creditor in definition (pp) (“possession”), the Working Group approved the substance of definitions (i), (x) (“negotiable document”) and (pp).

2. Recommendations

Recommendation 3 (d) (parties, security rights, secured obligations and assets covered)

53. The Working Group noted that it had already approved the substance of recommendation 3 (d) (see para. 14).

Recommendation 28 (creation of a security right in a negotiable document)

54. The Working Group agreed that the general rules relating to creation of a security right applied to negotiable documents as well. With respect to recommendation 28, the concern was expressed that, by requiring that the goods be in the possession of the issuer at the time the security right in the goods was created, recommendation 28 might exclude multi-modal transport documents in which the goods would be in the possession of the issuer at some point of time but would have been shipped at the time the issuer created a security right in the goods. After discussion, the Working Group approved the substance of recommendation 28 unchanged. It was agreed that, as the definition of “negotiable document” referred to the law governing negotiable documents, the issue of negotiability of multi-modal transport documents was appropriately left to that law. It was also agreed that the commentary could explain that a State might wish to address multi-modal transport documents. In addition, it was agreed that the term “issuer” could be defined in a way that would make the definition work whether a multi-modal transport document was negotiable or not.

Rights and obligations of the issuer of a negotiable document

55. The Working Group approved the substance of a new recommendation that read as follows: “The law should provide that as between the secured creditor and the issuer or other person obligated on the negotiable document, the rights and obligations of those persons are determined by the law governing negotiable documents.”

Recommendation 44 (third-party effectiveness of a security right in a negotiable document)

56. The Working Group agreed that the word “only” be deleted as possession was not the only method by which a security right in a negotiable document could be made effective against third parties. It was also agreed that the words “or with respect to the goods” be deleted since, as long as the negotiable document covered the goods they would be in the possession of the issuer and thus logically could not at the same time be in the possession of the grantor. In addition, it was agreed that the commentary should discuss the notion of possession in the context of electronic negotiable documents. Subject to those changes, the Working Group approved the substance of recommendation 44.

Recommendation 44 bis (third-party effectiveness of a security right in a negotiable document)

57. The Working Group agreed recommendation 44 bis should be limited to situations in which a security right was made effective against third parties “by a method other than registration” or “by dispossession”. Subject to those changes, the Working Group approved the substance of recommendation 44 bis.

Recommendations 80 and 81 (priority of security rights in negotiable documents)

58. The Working Group approved the substance of recommendations 80 and 81 unchanged.

Recommendation 109 (enforcement of a security right in a negotiable document)

59. Subject to providing that enforcement could take place before default with the consent of the grantor (rather than the issuer), the Working Group approved the substance of recommendation 109.

Recommendation 136 (law applicable to security rights in tangibles)

60. It was agreed that the creation, third-party effectiveness and priority of a security right in a negotiable document should be subject to the law of the place where the document was held. It was also agreed, however, that application of that rule might create problems where the goods were in another State. The Working Group considered a suggestion that application of the law of the ultimate destination of the goods (see A/CN.9/WG.VI/WP.24, rec. 142) might provide a sufficient solution to that problem but was not able to reach agreement. After discussion, the Working Group requested the Secretariat to prepare a note and possibly alternative recommendations to address that problem.

Recommendation 140 (law applicable to third-party effectiveness of security rights in specified types of asset by registration)

61. It was noted that recommendation 140 referred to the law of the grantor's location only when third-party effectiveness was achieved by registration.

Recommendations 146 (law applicable to the obligations of the grantor and the secured creditor) and 147 (law applicable to the rights and obligations of the account debtor, etc.)

62. The Working Group approved the substance of recommendations 146 and 147 unchanged.

D. Security rights in rights to payment of funds credited to bank accounts (A/CN.9/WG.VI/WP.26/Add.1)**1. Definitions**

63. The Working Group noted that it had already approved the substance of definition (o) ("receivable") (see para. 9). With regard to definition (cc) ("bank account"), the Working Group agreed that it should be revised to refer to the encumbered asset, namely the right to payment of funds credited to a bank account. It was also agreed that the commentary should explain that funds not credited at the time of the creation of a security right (for example interest or commissions) should also be covered. As to the meaning of the term "bank", it was agreed that it should be explained in the commentary by reference to the maintenance of accounts without going into regulatory law issues (e.g. banking licence). It was also agreed that the commentary should explain that accounts maintained by central banks or payment, clearing and settlement systems should not be covered. With respect to the definition of "control", it was agreed that control should refer to the right to payment of funds credited to a bank account (rather than to the funds) and that the third

way of achieving control should be revised to focus on the secured creditor becoming the customer of the bank (i.e. the account holder). Subject to the changes mentioned above, the Working Group approved the substance of definitions (cc) and (hh).

2. Recommendations

Recommendation 3 (d) (parties, security rights, secured obligations and assets covered)

64. The Working Group noted that it had already approved the substance of recommendation 3 (d) (see para. 14).

Recommendation 26 (creation of a security right in a right to payment of funds credited to a bank account)

65. Subject to the deletion of the words “as between the secured creditor and the grantor”, the Working Group approved the substance of recommendation 26.

Recommendations X and Y (rights and obligations of the depositary bank)

66. Subject to the retention of the first set of bracketed language outside square brackets and the deletion of the second set of bracketed language in recommendation X (b), the Working Group approved the substance of recommendations X and Y.

Recommendation 43 (third-party effectiveness of a security right in a right to payment of funds credited to a bank account)

67. Subject to referring to control with respect to the right to payment of funds credited to a bank account and to dealing with the issue of tracing proceeds deposited in a bank account in the context of its discussion on proceeds at a later stage, the Working Group approved the substance of recommendation 43.

Recommendations 76-78 (priority of a security right in a right to payment of funds credited to a bank account)

68. Differing views were expressed as to whether a depositary bank’s security right should have priority even over a security right made effective against third parties by a prior control agreement with the depositary bank, as provided in the second sentence of recommendation 76. One view was that a depositary bank should not have priority over a secured creditor with whom it had concluded a control agreement. It was stated that the control agreement should be respected. In addition, it was observed that, if the bank wanted to have priority, it would provide so in the control agreement. Moreover, it was said that that way would be simpler and more transparent than expecting the secured creditor to later seek to obtain a subordination agreement with the bank. It was also stated that the bank’s rights of set-off would not necessarily justify the super-priority of the bank because whether the bank had set-off rights would be subject to other law.

69. However, the prevailing view was that the bank should have priority even over a creditor with whom it had entered into a control agreement. It was stated that otherwise the bank would not enter into control agreements at all, which would limit the amount of credit available from creditors other than the bank (or would increase its cost), or would enter into control agreements but would limit the amount of credit it would make available to its customers (or would increase its cost). In addition, it was observed that the fact that a secured creditor with control would not have priority over the rights of the depositary bank

did not render the control agreement useless, since it could still protect the secured creditor as against other competing claimants (e.g. the administrator in the insolvency of the grantor). Moreover, it was pointed out that such an approach would be consistent with the rule providing that the bank's rights of set-off would have priority. Furthermore, it was said that the secured creditor with control could always seek to obtain a subordination agreement with the depositary bank.

70. In the discussion, it was noted that, according to recommendation 77, the bank's rights of set-off would have priority over the right of any secured creditor except a secured creditor who acquired control by becoming the bank's customer. After discussion, it was agreed that, for the sake of consistency, that exception should be included in recommendation 76 as well.

71. Subject to that change, the Working Group approved the substance of recommendation 76, on the understanding that the commentary would develop the other option and discuss its implications along the lines mentioned above (for another change to recommendation 76, see para. 86). In addition, subject to referring to a secured creditor acquiring control with respect to the right to payment of funds credited to a bank account by becoming the customer of the bank, the Working Group approved the substance of recommendation 77. Moreover, subject to referring to transfer of funds rather than of the right to payment of the funds and to changing collusion to knowledge that the transfer of funds violated the terms of the security agreement, the Working Group approved the substance of recommendation 78 which was intended to protect the free flow of funds in commerce.

Recommendations 106 bis, 107 and 108 (enforcement of a security right in a right to payment of funds credited to a bank account)

72. Subject to the clarification that the secured creditor would be enforcing the grantor's right to payment of the funds credited to a bank account (except where the secured creditor would acquire control by becoming the bank's customer), the Working Group approved the substance of recommendation 106 bis. Subject to clarifying that control referred to the right to payment of funds rather than to the funds themselves, the Working Group approved the substance of recommendations 107 and 108.

Recommendation 139 (law applicable to a security right in a right to payment of funds credited to a bank account)

73. Differing views were expressed with regard to the alternatives presented in recommendation 139. One view was that the law of the State, in which the branch of the bank that maintained the account was located, should apply (alternative B). It was stated that that rule in alternative B reflected the universally-recognized, dominant and characteristic link between the funds deposited into a bank account and the depositary bank maintaining that account, conformed to the expectations of all parties purporting to assert a security right in a right to payment of funds credited to a bank account, respected the need for transparency and predictability in secured transactions and, as such, furthered the objectives of the draft Guide. In addition, it was observed that the bank account involved a bilateral relationship between the customer and the bank, and raised no problem of localization of the funds credited to a bank account because of the international harmonization of the norms governing the localization and the identification of bank accounts. Moreover, it was said that the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary ("the Hague Convention") was not designed to apply to bank accounts or even to directly-held

securities. Thus, the law applicable to security rights in bank accounts should be different from the law applicable to such rights in securities accounts.

74. In addition, with respect to alternative A, it was stated that it was inconsistent with established banking practice, countered transparency and predictability by creating a trap to unwary creditors, ignored the rules set by banking regulators to control banking activities and, as such, could trigger strong opposition among banks and their national regulators. In addition, it was observed that it would be very difficult for third parties to ascertain the choice of law in an account agreement because the relevant documents were usually confidential. It was further observed that application of the law of the account agreement could have serious adverse effects on banking practice, since the rights and duties of the bank or enforcement would be made subject to a law other than that of the bank's location. It was also said that party autonomy was not appropriate in the case of proprietary law issues.

75. Another view was that the rule applicable to securities under the Hague Convention (i.e. the law governing the account, subject to the depositary bank having an office in the State whose law governed the account agreement) was preferable, since bank accounts and securities accounts were very similar in many respects and their differences did not justify subjecting them to a different law. In addition, it was observed that such an approach would provide certainty and predictability, as lenders would expect to receive a copy of the account agreement (or even obtain a control agreement) before extending credit on the basis of a bank account. Moreover, it was said that alternative B would cause uncertainty, as there was no universally acceptable system to locate bank accounts. It was also mentioned that application of the law governing the bank account would not cause any changes in practice since banks already applied that rule with respect to securities accounts.

76. It was also stated that, whatever the law applicable to bank accounts might be, it would not affect the law applicable to regulatory, tax, accounting or criminal law issues, which would remain subject to the law of the bank's relevant location. It was also said that bank secrecy was not an issue since borrowers were prepared to give lenders copies of the bank account agreements so as to obtain credit on the basis of those agreements, and often lenders would obtain a control agreement with the consent of the depositary bank. In addition, it was observed that analysis based on the principle of party autonomy was not very helpful, since alternative A referred to objective connecting factors and alternative B eventually involved some degree of choice by the parties as to the location of an account.

77. Yet another view was that neither alternative A nor alternative B was satisfactory to the extent that they would result in a transfer of and a security right in a bank account being subjected to different laws. Yet another view was that reference could be made either in alternative A or in alternative B to the law governing the control agreement between the grantor, the secured creditor and the depositary bank. After discussion, the Working Group decided to retain both alternatives.

Recommendation 140 (third-party effectiveness of security rights in specified types of asset by registration)

78. Recalling its earlier discussion of recommendation 140 (see para. 61), the Working Group decided that the reference to negotiable documents should be deleted as the law of the grantor's location did not apply to security rights in negotiable documents.

E. Security rights in rights to drawing proceeds from independent undertakings (A/CN.9/WG.VI/WP.24/Add.2)

1. Definitions

79. Subject to aligning definition (y) (“independent undertaking”) with article 6 (e) of the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit with respect to the confirmation of a letter of credit and definition (z) (“independent undertaking”) with independent undertaking practice, while avoiding terms that might cause confusion, the Working Group approved the substance of definitions (y) and (z). As to definitions, (aa) (“guarantor/issuer”) and (bb) (“nominated person”), subject to reviewing the appropriateness of referring in both to a confirmer, the Working Group approved their substance. With respect to definition (z), it was agreed that the asset subject to these recommendations was the right to proceeds and not the proceeds themselves that would take the form of money, funds in bank accounts and the like and would thus be subject to other recommendations of the draft Guide. It was also agreed that the word “drawing” should be deleted from the term “right to drawing proceeds from an independent undertaking”.

80. As to definition (hh), it was agreed that it should be aligned with the definition of “control” with respect to a right to payment of funds credited to a bank account (A/CN.9/WG.VI/WP.26/Add.1, definition (hh)). Subject to that change, the Working Group approved the substance of definition (hh). While it was suggested that some discussion should be included in the commentary of the general part of the draft Guide to issues of agency, a note of caution was struck that the draft Guide should not go into other areas of law in which there were many divergences among the various legal systems.

Recommendation 3 (d) (parties, security rights, secured obligations and assets covered)

81. The Working Group noted that it had already approved the substance of recommendation 3 (d) (see para. 14).

Recommendation 16 (creation of a security right in a right that secures an assigned receivable, a negotiable instrument or other obligation)

82. The Working Group noted that it had already approved the substance of recommendation 16 (see para. 25).

Recommendation 25 (creation of a security right in a right to drawing proceeds from an independent undertaking)

83. Subject to the retention of the bracketed language outside square brackets, the Working Group approved the substance of recommendation 25.

Recommendations 25 bis, ter and quater (rights and obligations of a guarantor/issuer or nominated person)

84. With respect to recommendation 25 bis, the Working Group agreed that the reference to “the co-beneficiary” should be deleted as it was covered by the reference to “the beneficiary” and that the reference to “prior transferor” should be placed within square brackets as it was not clear whether it was necessary. Subject to those changes, the Working Group approved the substance of recommendations 25 bis, ter and quater.

Recommendation 49 (third-party effectiveness of a security right in a right to drawing proceeds from an independent undertaking)

85. Subject to the changes agreed upon in the context of the discussion of recommendation 16 (see paras. 18-25), the Working Group approved the substance of recommendation 49.

Recommendation 62 (priority of a security right in a right to drawing proceeds from an independent undertaking)

86. It was agreed that the commentary should explain that, depending on the terms of the acknowledgment, the guarantor/issuer might be liable to an acknowledged secured creditor that would lose in a priority contest with the first acknowledged secured creditor. It was also agreed that a similar rule should be inserted in recommendation 76 (see paras. 68-71) to the effect that, among creditors that had obtained a control agreement with respect to the same bank account, priority would be determined on the basis of the time of conclusion of the control agreement, while, depending on the terms of the control agreement, the depositary bank might be liable to the secured creditor that lost the priority contest. Subject to those changes, the Working Group approved the substance of recommendations 62 and 76.

Recommendation 106 (enforcement of a security right in a right to drawing proceeds from an independent undertaking)

87. It was agreed that a security right in a right to drawing proceeds from an independent undertaking should be enforceable even before default if so agreed between the secured creditor and the grantor. Subject to that change, the Working Group approved the substance of recommendation 106.

Recommendations 138 and 138 bis (law applicable to a security right in a right to drawing proceeds from an independent undertaking)

88. Support was expressed for recommendations 138 and 138 bis. At the same time, it was widely felt that they should be explained in the commentary, possibly with the use of examples. The concern was also expressed that application of recommendation 138 bis, which would apply in more cases than recommendation 138 as independent undertakings were typically used to enhance the value of a receivable or other obligation, might be problematic to the extent that a State might not have enacted recommendations 16 and 49 providing for automatic creation and third-party effectiveness. Subject to revising recommendation 138 bis to address that concern, the Working Group approved the substance of recommendations 138 and 138 bis.

**F. Chapter VII. Pre-default rights and obligations of the parties
(A/CN.9/WG.VI/WP.24/Add.1)****Purpose**

89. The Working Group approved the purpose section unchanged.

Recommendation 86 (party autonomy)

90. It was agreed that recommendation 86 reflected a general principle and should be moved to the general provisions of the draft Guide.

Recommendation 87 (suppletive rules)

91. It was agreed that the words “preserve and protect” should be substituted for the word “care” in paragraph (a). With respect to paragraph (d), the Working Group agreed that the discharge of the security right and the return of the encumbered asset (in the case of a possessory security right), required full payment of the secured obligation, as well as termination of all lending commitments. It was also agreed that the structure of the recommendation should be aligned with the structure of the relevant commentary (A/CN.9/WG.VI/WP.9/Add.4). After discussion, the Working Group approved the substance of recommendation 87.

G. Chapter VIII. Default and enforcement (A/CN.9/WG.VI/WP.24/Add.1)**Purpose**

92. The Working Group approved the purpose section unchanged.

Recommendation 88 (application of this chapter to outright transfers of receivables)

93. The Working Group noted that it had already approved the substance of recommendation 88 (see para. 29).

Recommendations 89 (general standard of conduct) and 89 bis (liability for failure to comply with recommendations of this chapter)

94. While the view was expressed that recommendations 89 and 89 bis reflected general principles and should be placed in the general part of the draft Guide, it was agreed that they should be retained in the enforcement chapter until the Working Group had an opportunity to consider the impact of their application to other chapters of the draft Guide. With respect to the term “good faith”, it was suggested that it implied a subjective test of knowledge and should be supplemented by an objective test of “fair dealing”. That suggestion was objected to. It was stated that that matter was within the realm of the law of obligations rather than property law and the reference to “commercial reasonableness” was in that connection more appropriate. After discussion, the Working Group approved the substance of recommendations 89 and 89 bis unchanged.

Recommendations 90 and 91 (party autonomy)

95. The Working Group considered whether recommendation 90 should be moved to the general part of the draft Guide and agreed that the decision be deferred until all the recommendations had been carefully examined. After discussion, the Working Group approved the substance of recommendations 90 and 91 unchanged.

Recommendation 92 (rights and remedies after default)

96. The Working Group approved the substance of recommendation 92 unchanged.

Recommendations 93 (secured creditor remedies) and 94 (judicial and extrajudicial enforcement)

97. The Working Group approved the substance of recommendations 93 and 94 unchanged.

Recommendation 95 (grantor remedies)

98. The suggestion was made that the title of recommendation 95 should be revised to refer to “grantor rights”. It was also suggested that the word “may” in the chapeau of recommendation 95 be replaced by stronger language along the lines “was entitled to”. Subject to those changes, the Working Group approved the substance of recommendation 95.

Recommendations 96 (cumulative remedies) and 97 (other remedies)

99. The Working Group approved the substance of recommendations 96 and 97 unchanged and noted that recommendation 96, read together with recommendations 95 and 97, provided the secured creditor and the grantor with various options in the exercise of their rights and remedies. These included the right of the secured creditor to choose the asset or assets against which enforcement was sought, the right to start exercising one remedy and then change to another and the right to enforce the secured obligation or the security right or both up to full payment of the secured obligation.

Recommendation 98 (release of encumbered assets after full payment)

100. Subject to the inclusion of a reference to termination of any lending commitments, the Working Group approved the substance of recommendation 98.

Recommendation 99 (notice of intention to pursue extrajudicial enforcement)

101. After discussion, the Working Group decided to delete recommendation 99 on the understanding that a reference to a notice of intention to pursue extrajudicial enforcement would be introduced, as an alternative, to recommendation 101.

Recommendation 100 (objections to extrajudicial enforcement)

102. The Working Group approved the substance of recommendation 100 and agreed that the second sentence, in particular, should be clearly explained in the commentary.

Recommendation 101 (secured creditor’s right to take possession of an encumbered asset)

103. The Working Group requested the Secretariat to prepare two alternatives, one along the lines of the first two sentences of recommendation 101 and another providing for a notice of intention to pursue extrajudicial enforcement. In addition, it was agreed that the principle of summary proceedings should be reflected in a recommendation that would apply to all the rights and remedies provided in the chapter on enforcement. Moreover, it was agreed that the commentary should discuss the notice of default, which was typically dealt with in the law of obligations. It was also suggested that the reference to use or threat of force might be expanded to cover illegal or abusive conduct in general.

Recommendations 102-109 (enforcement of security rights in receivables, negotiable instruments, proceeds of independent undertakings, funds credited to bank accounts and negotiable documents)

104. The Working Group noted that it had already approved the substance of recommendations 102 to 109 (see paras. 31, 48, 59, 72 and 87).

Recommendations 110 and 110 bis (disposition of encumbered assets)

105. After discussion, the Working Group approved the substance of recommendations 110 and 110 bis unchanged.

Recommendation 111 (advance notice with respect to extrajudicial disposition of encumbered assets)

106. Subject to positively requiring a notice of extrajudicial disposition, the Working Group approved the substance of recommendation 111.

V. Future work

107. It was widely felt that intellectual property rights (e.g. copyrights, patents or trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In that connection, it was stated that financing transactions with respect to equipment or inventory often included security rights in intellectual property rights as an essential and valuable component. It was also observed that significant financing transactions involving security rights in all the assets of a business grantor would typically include intellectual property rights.

108. The Working Group recalled that the recommendations of the draft Guide generally applied to security rights in intellectual property rights to the extent they were not inconsistent with intellectual property law (see A/CN.9/WG.VI/WP.26/Add.7, rec. 3 (h)). The Working Group also recalled that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft Guide recommended that enacting States might wish to make any necessary adjustments to the recommendations to address those issues.

109. The Working Group noted that the Commission was expected to approve in principle the substance (i.e. the policy, not the formulation) of the recommendations of the draft Guide at its upcoming thirty-ninth session (New York, 19 June to 7 July 2006). It was noted that the Commission would discuss the recommendations of the draft Guide from 19 to 23 June 2006, with the adoption of the report of that part of the Commission's session scheduled to take place on Monday, 26 June 2006 (see A/CN.9/587, para. 53).

110. The Working Group also noted that its eleventh and twelfth sessions were scheduled to take place in Vienna from 4 to 8 December 2006 and in New York from 12 to 16 February 2007 respectively, those dates being subject to approval by the Commission at its upcoming thirty-ninth session.

**G. Note by the Secretariat on security interests: draft Legislative Guide
on Secured Transactions, submitted to the Working Group
on Security Interests at its tenth session**

(A/CN.9/WG.VI/WP.26 and Add.1-8) [Original: English]

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Security rights in receivables

I. Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (n)-(v))

(a) “Security right” means a consensual property right in movable property and fixtures that secures payment or other performance of one or more obligations. References to a “security right” in this Guide also refer to the “right of an assignee of receivables”.

(d) “Secured creditor” means a creditor that has a security right. References to the “secured creditor” in this Guide also refer to the “assignee”.

(f) “Grantor” means a person that creates a security right in one or more of its assets in favour of a secured creditor to secure either its own obligation or that of another person (see debtor). References to the “grantor” in this Guide also refer to the “assignor”.

[Note to the Working Group: The Working Group may wish to note that the second sentence in the definitions of “security right”, “secured creditor” and “grantor” is intended to ensure that the general recommendations apply to security rights in receivables and to outright transfers of receivables, unless otherwise provided.]

(n) “Claim” means a right to the performance of a non-monetary obligation other than a right in tangibles under a negotiable document.

[Note to the Working Group: The Working Group may wish to consider whether limited special rules are required for transactions in which a “claim” is an encumbered asset.]

As defined in the terminology chapter (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (n)), “claim” means “a right to the performance of a non-monetary obligation other than a right in tangibles under a negotiable document.” For example, if a grantor has entered into a contract with another party pursuant to which the other party (the “obligor”) has agreed to transfer goods to the grantor or perform services for the grantor, the grantor’s right to the other party’s performance is a “claim.” This definition does not include rights granted by a government or a private party that owes no performance obligation with respect to those rights, such as may be the case with a State-granted licence to sell alcoholic beverages. It is not clear, though, whether this definition covers other rights, such as the right of a franchisee under a franchise agreement in which the

franchisor owes no positive performance of an obligation to the franchisee (but has agreed not to sue the franchisee for using the franchisor's name) or the right of a licensee under an intellectual property licence in which the licensor owes no positive performance of an obligation to the licensee. The Working Group may wish to consider whether, in light of the discussion below concerning issues about security rights in "claims" that might require special rules, the definition of "claim" should include rights as to which the only performance obligation is to refrain from taking an action (as in the case of a franchise or license) or as to which there is no performance obligation owed to the grantor at all (as in the case of a State-granted licence to sell alcoholic beverages).

In determining whether any special rules are required for security rights in claims, several issues must be considered: (i) the rules governing creation of a security right in the claim, (ii) the rules governing the steps required for a security right in the claim to be effective against third parties, (iii) the rules governing priority of a security right in the claim over the rights of competing claimants, (iv) the rules governing enforcement of a security right in the claim as against the grantor and other parties that may have an interest in the claim deriving from the grantor, and (v) the rules governing the right of the secured creditor, or a party to which the claim has been transferred in a disposition under the enforcement procedures, to enforce the claim against the obligor. With respect to issue (v), consideration must also be given to the source of substantive law governing the rights and duties of the obligor on the claim with respect to the enforcing secured creditor or other party. With respect to all of the issues, conflict-of-laws rules that determine the State whose law is applicable must also be considered.

It would appear that the existing recommendations in the draft Guide that address security rights in other intangible movable property are sufficient to govern the first four issues with respect to security rights in claims.

Resolution of the fifth issue: the right of the secured creditor to enforce the claim against the obligor likely depends, in part, on whether, under other law, the claim is assignable (or may be enforced by an assignee). Limitations on assignment of a claim (or on the enforceability of a claim by an assignee) may result from limitations on assignment in a contract between the obligor on the claim and the obligee/grantor that is enforceable under applicable law or may arise directly by rule of law that limits assignment of certain claims even in the absence of a contractual prohibition. It should be noted in this regard that in some cases such rules of law exist for the protection of the obligor while in other cases such rules of law exist for the protection of the obligee. While the draft Guide recommends limits on the effectiveness of certain contractual anti-assignment provisions with respect to receivables, the Working Group may conclude that the economic justifications for limiting the effectiveness of those anti-assignment provisions in the case of receivables are not present when the obligation of the obligor is not monetary. Accordingly, the Working Group may conclude that the ability of the secured creditor to enforce a claim directly against the obligor may be limited by contract.

With respect to the source of substantive law governing the fifth issue, the Working Group may wish to conclude that, as in the case of security rights in other types of movable property consisting of a claim against a third party (such as receivables and negotiable instruments), the body of law that governs the claim determines the nature of the obligations of the obligor (and the extent to which contractual anti-assignment provisions or other legal anti-assignment rules are applicable).

With respect to conflict-of-laws rules, the recommendations in the conflict-of-laws chapter seem well suited to address the first four issues listed above. With respect to the

fifth issue, the Working Group may wish to conclude that the State whose law governs the claim should govern.]

- (o) “Receivable” means a right to the payment of a monetary obligation, excluding, however, rights to payment evidenced by a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account.

[Note to the Working Group: The Working Group may wish to note that the definition of “receivable” in the draft Guide is broader than the definition of “receivable” in article 2 (a) of the Convention in that it covers even non-contractual receivables, such as receivables arising by operation of law (e.g. tort receivables, receivables arising in the context of unjust enrichment or tax receivables), or receivables confirmed in court judgements or arbitral awards (unless incorporated in a settlement agreement). The Working Group may wish to limit the definition of “receivable” in the draft Guide to contractual receivables or consider whether the recommendations in this document should apply, with any necessary modifications, to non-contractual receivables as well.]

- (p) “Assignment” means the creation of a security right in a receivable or the outright transfer of a receivable.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the creation of a security right in a receivable includes an outright transfer of receivables by way of security, which is treated in the draft Guide as a security right.]

- (q) “Assignor” means the person that makes an assignment of a receivable.

[Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

- (r) “Assignee” means the person to which an assignment of a receivable is made.

[Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention.]

- (s) “Subsequent assignment” means an assignment by the initial or any other assignee. In the case of a subsequent assignment, the person that makes that assignment is the assignor and the person to which that assignment is made is the assignee.

[Note to the Working Group: Article 2 (b) of the United Nations Assignment Convention.]

- (t) “Account debtor” means a person liable for payment of a receivable.

[Note to the Working Group: Article 2 (a) of the United Nations Assignment Convention. “Account debtor” includes a “guarantor”, as an accessory guarantee is a receivable.]

- (u) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivables and the assignee.

[Note to the Working Group: Article 5 (d) of the United Nations Assignment Convention. According to recommendations 11 and 12 (see A/CN.9/WG.VI/WP.21), “writing” includes electronic communications and “signature” includes electronic signature. The Working Group may wish to consider including recommendations 11 and 12 in the definitions.]

(v) “Original contract” in the context of an assignment means the contract between the assignor and the account debtor from which the assigned receivable arises.

[Note to the Working Group: Article 5 (a) of the United Nations Assignment Convention.]

II. Recommendations

Parties, security rights, secured obligations and assets covered (A/CN.9/WG.VI/WP.21, recs. 3 (d) and (f))

3.. In particular, the law should provide that it applies to:

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments, negotiable documents, rights to payment of funds credited to bank accounts, rights to drawing proceeds from independent undertakings, and intellectual property rights;

...

(f) Generally, outright transfers of receivables;

[Note to the Working Group: The Working Group may wish to note that, as the definition of “receivable” in para. 21 (o) of A/CN.9/WG.VI/WP.22/Add.1 excludes rights to payment under a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account, recommendation 3 (f) does not apply to an outright transfer of a negotiable instrument, an independent undertaking or a right to payment of funds credited to a bank account (however, the recommendations apply to transfers of such assets for security purposes, as they are treated as secured transactions; for example, the transfer for security purposes of a right to payment of funds in a bank account is covered as a method of achieving control; see definition of “control” in A/CN.9/WG.VI/WP.26/Add.1). The Working Group may wish to consider whether the outright transfer of a negotiable instrument should be included within the scope of the draft Guide.]

There are several reasons to include such transfers. Providing clear rules for the creation, effectiveness against third parties and priority of an outright transfer of a negotiable instrument might assist financing transactions, securitizations and sales of loan participations that involve the outright transfer of negotiable instruments. Inclusion also recognizes that, since the draft Guide already includes the outright transfer of receivables within its scope, it would be a logical extension to include in the scope rights to payment that would have been receivables had they not been evidenced by negotiable instruments.

However, there are also reasons not to include outright transfers of negotiable instruments within the scope of the draft Guide. The main reason is that the benefits of inclusion may be outweighed by the burdens of adding to the draft Guide rules dealing with outright transfers of negotiable instruments. The benefits of inclusion may not be significant in those States in which the law relating to the outright transfer of negotiable instruments is already clear. The greater the number of States that are satisfied with their current law on this subject, the less the benefits that would be provided by inclusion in the draft Guide. Moreover, the volume of financing transactions actually involving the outright transfer of negotiable instruments and the need to give the transferee sufficient

protective rights in law other than the negotiable instrument law may differ from country to country.

The burdens of inclusion would be several. The Working Group would need to examine the entire draft Guide in order to determine what special rules will need to be added on such issues as creation, effectiveness against third parties and priority. In addressing effectiveness against third parties, the Working Group would need to consider whether, for the outright transfer of a negotiable instrument to be effective against third parties, the buyer must take possession of the negotiable instrument or register in the general security rights registry a notice of the outright transfer, or whether effectiveness against third parties is achieved automatically upon creation. Parties that extend credit secured by security rights in negotiable instruments may favour a possession/registration third-party effectiveness rule, while parties that buy negotiable instruments in bulk and customary buyers and sellers of loans and loan participations, may prefer an automatic third-party effectiveness rule.

A final reason to exclude outright transfers of negotiable instruments is that, as a technical matter, outright transfers of negotiable instruments concern the law of sale more than the law of secured transactions. Although the draft Guide does include outright transfers of receivables within its scope, it does so largely to protect reliance upon the registration system, which would be of little utility in establishing priority for the financing of receivables if outright transfers of receivables were excluded from the registration requirement. Similar concerns may not apply to an outright transfer of a negotiable instrument since the lender or buyer would usually have the option to obtain priority under recommendation 74 (b) (see A/CN.9/WG.VI/WP.24/Add.4) by taking possession of the negotiable instrument.

Even if the Working Group does decide that transfers of negotiable instruments should be included within the scope of the draft Guide as a general matter, the Working Group may nevertheless wish to consider whether certain exclusions are appropriate. For example, it may make sense to exclude transfers of cheques from the scope of the draft Guide even if transfers of other negotiable instruments are included. Financing transactions that involve transfers of cheques may be far less common and may be expected to remain far less common than financing transactions involving transfers of other negotiable instruments.]

Creation of a security right in receivables (see A/CN.9/WG.VI/WP.21, recs. 13, 14 and 15)

Assets and obligations subject to a security agreement

13. The law should specify that a security right may secure all types of obligation, including future, conditional and fluctuating obligations. It should also specify that a security right may be given in all types of asset, including parts of assets and undivided interests in assets and assets which, at the time of the security agreement, the grantor may not yet own or have the power to dispose of, or which may not yet exist, as well as in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

Effectiveness of a bulk assignment and an assignment of future, parts of and undivided interests in receivables

14. The law should provide that:

(a) The assignment of receivables that are not specifically identified, future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee and as against the account debtor, as long as, at the time of the assignment or, in the case of future receivables, at the time they arise, they can be identified to the assignment to which they relate; and

(b) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

[Note to the Working Group: Article 8 of the United Nations Assignment Convention. The Working Group may wish to note that the commentary will explain that the general recommendations apply unless modified by asset-specific recommendations.]

Effectiveness of an assignment made despite an anti-assignment clause

15. The law should provide that:

(a) An assignment is effective as between the assignor and the assignee and as against the account debtor notwithstanding an agreement between the initial or any subsequent assignor and the account debtor or subsequent assignee limiting in any way the assignor's right to assign its receivables;

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation 15 (a) makes ineffective only an agreement between an obligor and an obligee that limits the obligee's right to assign a receivable owed by the obligor to the obligee. If such a receivable is assigned, the obligor is the "account debtor" and the obligee is the "assignor".

For example, if an agreement for the lease of goods limits the lessor's right to assign the rents due to it under the lease, recommendation 15 (a) makes the limitation on assignment ineffective, because the agreement is between the obligor (the lessee) and the obligee (the lessor) of the receivable (the rent arising from the lease agreement). By way of contrast, if the lease agreement between the lessor and the lessee limits the lessee's right to assign a receivable consisting of the lessee's claim to rents due to the lessee from the sublessee under a sublease, recommendation 15 (a) has no application, and nothing in this Guide makes the limitation ineffective. That is because the agreement limiting the right of the lessee to assign its claim for rents due to it from the sublessee under the sublease is not an agreement between the lessee (sublessor and obligee in a sublease) and the sublessee (obligor in the sublease). Whether the limitation in the lease is enforceable against the lessee would be determined by the law other than the law recommended in this Guide.

The same analysis would apply if the restriction on transfer was contained in a licence of intellectual property. Recommendation 15 (a) would render ineffective a term in the licence agreement that restricted the licensor from assigning fees due from the licensee. However, it would not render ineffective a term in the licence agreement restricting the licensee from assigning sublicense fees. Whether the latter term would be effective would be determined by law other than that recommended in the draft Guide.]

(b) If other law creates any obligation or liability of the assignor for breach of such an agreement, the other party to such an agreement may not avoid the contract from which the assigned receivables arise or the assignment contract on the sole ground of that breach.

A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement;

[(c) This recommendation applies only to assignments of receivables:

- (i) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;
- (ii) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
- (iii) Representing the payment obligation for a credit card transaction;
- (iv) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.]

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that contract avoidance referred to in paragraph (b) means contract termination in general.]

Creation of a security right in a right that secures an assigned receivable, a negotiable instrument or any other obligation (see A/CN.9/WG.VI/WP.24/Add.2)

16. The law should provide that upon creation of a security right in a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this Guide, a security right is automatically created, without further action by either the grantor or the secured creditor, in any personal or property right that secures payment or performance of that receivable, negotiable instrument, or other obligation. If, under the law governing a right that secures payment of a receivable, negotiable instrument or other obligation covered as an encumbered asset by this Guide, a security right in that securing right may be created only after a separate act of creation, the grantor is obligated to take such action. When an independent undertaking secures payment or performance of a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this Guide, a security right in a right to drawing proceeds from the independent undertaking is created without a separate act of creation by the grantor.

[Note to the Working Group: The Working Group may wish to note that the second sentence of recommendation 16 refers to “law governing a right”. The law recommended in the draft Guide may be this domestic law. The Working Group may also wish to note that the second sentence of recommendation 16, which is based on the second sentence of article 10 (1) of the United Nations Assignment Convention, was intended to refer to independent rights so as to safeguard the interests of the obligor of an independent right, such as an independent undertaking (see Analytical commentary on the draft Convention, A/CN.9/489, para. 105). This result may be better achieved in a domestic law, such as the law recommended in the draft Guide, by language along the following lines: “This recommendation does not create a security right in an independent right, such as an independent undertaking, and does not affect the rights and obligations of an obligor of an independent right, such as a guarantor/issuer of or nominated person in an independent undertaking.” If the Working Group adopts this wording, the second sentence of recommendation 16 could be deleted. As the third sentence of recommendation 16 is intended to carve out of the second sentence rights to receive payment under an independent undertaking, the third sentence could also be deleted.]

Financing transactions that fall under the first sentence of recommendation 16 would thus be facilitated. Such transactions include securitizations of pools of loans

secured by security rights in movables and immovables. In these cases the buyer of the loans will want to be able to look to the security rights securing the loans but would not want to incur, at the outset of the purchase, the additional expense of a separate act of transfer (if required under law other than the law recommended in the draft Guide) for each loan in the pool of loans, that could number in the hundreds or thousands. Separate acts of transfer, if any, would be necessary (if required under other law) to enforce only those loans that are later in default, typically a small proportion of the loans in the pool actually purchased. The buyer could decide whether to accept the expense of separate acts of transfer at the time of enforcement, whether voluntarily from the seller or with the assistance of a court. But, in deciding whether to purchase the loans and at what price, the buyer would take into account the expense of separate acts of transfer only for the small portion of the loans expected to be in default, not for the entire pool of loans. As a result of the expense savings, the seller should be able to obtain a higher purchase price, thereby making more funds available to the seller.

The Working Group may wish to consider whether: (i) recommendation 16 apply to outright transfers of receivables (but not of negotiable instruments or other obligations as the draft Guide generally applies only to outright transfers of receivables), since, even in the case of an outright transfer of a receivable, rights securing payment of the receivable should follow); and (ii) recommendation 16 should be supplemented by recommendations along the lines of paras. (2) to (6) of article 10 of the Convention (for para. (2) to (4) see rec. 15 above; for paras. (5) and (6), see below).

“The creation of a security right in [or the outright transfer of] a possessory property right under paragraph 1 of this recommendation does not affect any obligations of the assignor to the account debtor or the person granting the property right with respect to the relevant property existing under the law governing that property right.”

According to this wording, if the security right in or the transfer of a security right involves the delivery of possession of an asset and such delivery causes loss or prejudice to the account debtor or the person granting the right, any liability that may exist under law applicable outside the law recommended in the draft Guide is not affected. This may arise, for example, in the case of a delivery of possession of an item of valuable tangible property if the secured creditor or transferee damages or loses the property.

“This recommendation does not affect any requirement under law other than this law relating to the form or registration of the creation of security rights in [or the outright transfer of] any rights securing payment of the assigned receivable, negotiable instrument or other obligation.”

This wording makes it clear that, the form of transfer of a security right in an asset outside the scope of this law (e.g. an immovable) is left to law other than this law. Accordingly, a notarized document and registration may be necessary for the transferee of a mortgage to obtain various rights under immovables law, such the right to enforce the mortgage.]

Pre-default rights and obligations of the assignor and the assignee

[Note to the Working Group: The Working Group may wish to include recommendations dealing with the rights and obligations of the assignor and the assignee in the chapter on the pre-default rights and obligations of the parties. These recommendations could be based on articles 11 to 14 of the United Nations Assignment Convention.]

Rights and obligations of the assignor and the assignee

16 bis The law should provide that:

(a) The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein;

(b) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves[;

(c) In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, implicitly to have made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or to the assignment of the particular category of receivables].

[Note to the Working Group: The Working Group may wish to consider whether paragraph (c) would fit in a domestic law. If paragraph (c) were to be included, “international assignment” might need to be defined.]

Representations of the assignor

16 ter The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:

(i) The assignor has the right to assign the receivable;

(ii) The assignor has not previously assigned the receivable to another assignee; and

(iii) The account debtor does not and will not have any defences or rights of set off;

(b) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the account debtor has, or will have, the ability to pay.

Right to notify the account debtor

16 quater The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the account debtor notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction; and

(b) Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph (a) of this recommendation is not ineffective for the purposes of recommendation 19 by reason of such breach. However, nothing in this recommendation affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Right to payment

16 quinquies The law should provide that:

(a) As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(i) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(ii) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(iii) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable;

(b) The assignee may not retain more than the value of its right in the receivable.

Rights and obligations of the account debtor and the assignee (see A/CN.9/WG.VI/WP.21, recs. 17-23)

Principle of account debtor protection

[Note to the Working Group: Recommendations 17 to 23 are based on articles 15-21 of the United Nations Assignment Convention.]

17. The law should provide that:

(a) Except as otherwise provided in this law, an assignment does not, without the consent of the account debtor, affect the rights and obligations of the account debtor, including the payment terms contained in the original contract;

(b) A payment instruction may change the person, address or account to which the account debtor is required to make payment, but may not change:

(i) The currency of payment specified in the original contract; or

(ii) The State specified in the original contract in which payment is to be made to a State other than that in which the account debtor is located.

[Note to the Working Group: The Working Group may wish to consider whether subparagraph (b)(ii) should refer to "place" rather than "State", so as to preclude a change in the place of payment even in a single State. The Working Group may also wish to note that references to "the original contract" would need to be adjusted if the Working Group decides that these recommendations should apply even to non-contractual receivables (see Note after the definition of "receivable" above).]

Notification of the account debtor

18. The law should provide that:

(a) Notification of the assignment or a payment instruction is effective when received by the account debtor if it is in a language that is reasonably expected to inform the account debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract; and

(b) Notification of the assignment or a payment instruction may relate to receivables arising after notification and that notification of a subsequent assignment constitutes notification of all prior assignments.

Discharge of the account debtor by payment

19. The law should provide that:

(a) Until the account debtor receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract;

(b) After the account debtor receives notification of the assignment, subject to paragraphs (c) to (h) of this recommendation, it is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the account debtor, in accordance with such payment instruction;

(c) If the account debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment;

(d) If the account debtor receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received;

(e) If the account debtor receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments;

(f) If the account debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this recommendation as if the account debtor had not received the notification. If the account debtor pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

(g) If the account debtor receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the account debtor is discharged by paying in accordance with this recommendation as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

(h) This recommendation does not affect any other ground on which payment by the account debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the account debtor.

Defences and rights of set-off of the account debtor

20. The law should provide that:

(a) In a claim by the assignee against the account debtor for payment of the assigned receivable, the account debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the

same transaction, of which the account debtor could avail itself as if the assignment had not been made and such claim were made by the assignor;

(b) The account debtor may raise against the assignee any other right of set-off, provided that it was available to the account debtor at the time notification of the assignment was received by the account debtor;

(c) Notwithstanding paragraphs (a) and (b) of this recommendation, defences and rights of set-off that the account debtor may raise pursuant to recommendations 15 and 16 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the account debtor against the assignee.

[Note to the Working Group: The Working Group may wish to note that, under recommendation 3 (a) (see A/CN.9/WG.VI/WP.21), the draft Guide applies to consumers but does affect the rights of consumers under consumer-protection law.]

Agreement not to raise defences or rights of set-off

21. The law should provide that:

(a) The account debtor may agree with the assignor in a writing signed by the account debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to recommendation 20. Such an agreement precludes the account debtor from raising against the assignee those defences and rights of set-off;

(b) The account debtor may not waive defences:

- (i) Arising from fraudulent acts on the part of the assignee; or
- (ii) Based on the account debtor's incapacity;

(c) Such an agreement may be modified only by an agreement in a writing signed by the account debtor. The effect of such a modification as against the assignee is determined by recommendation 22, paragraph (b).

[Note to the Working Group: Recommendation 21 is based on article 19 of the United Nations Assignment Convention, which refers to a signed writing only for a waiver of defences or its modification. If the Working Group decides not to refer to signature in recommendation 8 (see A/CN.9/WG.VI/WP.21) but rather to evidence that the grantor intended to grant a security right, it may wish to reconsider the reference to signature in recommendation 21. If reference to signature is retained in recommendation 8, an electronic signature should be sufficient (see note after definition (u).]

Modification of the original contract

22. The law should provide that:

(a) An agreement concluded before notification of the assignment between the assignor and the account debtor that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights;

(b) An agreement concluded after notification of the assignment between the assignor and the account debtor that affects the assignee's rights is ineffective as against the assignee unless:

- (i) The assignee consents to it; or

(ii) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(c) Paragraphs (a) and (b) of this recommendation do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Recovery of payments

23. The law should provide that failure of the assignor to perform the original contract does not entitle the account debtor to recover from the assignee a sum paid by the account debtor to the assignor or the assignee.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation 23 does not affect any liability of the assignor towards the account debtor for breach of contract.]

Third-party effectiveness of a security right in receivables (see A/CN.9/WG.VI/WP.24/Add.3, rec. 37)

37. The law should provide that the right of an assignee under an outright assignment of receivables becomes effective against third parties by registration of a notice of the right in the general security rights registry.

[Note to the Working Group: The Working Group will recall that at its ninth session it decided that text of recommendation 37 should be placed in the commentary as it repeats the general third-party effectiveness rule (see A/CN.9/593, para. 18).]

Priority of security rights in receivables (A/CN.9/WG.VI/WP.24/Add.4, recs. 80 and 81)

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the general priority recommendations apply to security rights in receivables, as well as to outright transfers of receivables.]

Enforcement of a security right in receivables (A/CN.9/WG.VI/WP.24/Add.1, recs. 88, 102 and 103)

Application of this chapter to outright transfers of receivables

88. The law should provide that this chapter applies to the enforcement of the rights of a transferee of receivables acquired by means of an outright transfer only to the extent that, pursuant to the terms of the transfer, there is recourse to the transferor for a payment default of the account debtor.

[Note to the Working Group: The Working Group may wish to note that recommendation 88 is intended to clarify that, although the Guide applies generally to outright transfers of receivables, this chapter applies to transfers of receivables only if there is recourse to the transferor.]

Collection of receivables

102. With respect to a receivable that is an encumbered asset, the law should provide that after default or before default with the agreement of the assignor the secured creditor may collect or otherwise enforce the receivable.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the secured creditor may, as an alternative, elect to dispose of or retain a receivable pursuant to recommendations 93 (d), (e), 110 and 113 (see A/CN.9/WG.VI/WP.24/Add.1). The commentary will also explain that the assignee may send a notification and a payment instruction even in breach of an agreement with the assignor (see rec. 16 quater bis above).]

103. The law should provide that the secured creditor's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable (such as a guarantee or security right).

[Note to the Working Group: The Working Group may wish to note that the commentary will discuss how other recommendations of the chapter on enforcement may apply to the enforcement of a right securing payment of an assigned receivable.]

Law applicable to security rights in intangible property (A/CN.9/WG.VI/WP.24)

137. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are governed by the law of the State in which the grantor is located. [However, with respect to security rights in intangible property that is subject to a title registration system, the law should provide that such issues are governed by the law of the State in which [...].]

[137 bis The law should provide that the law of the State in which the assignor is located governs the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale or lease of, or a security agreement relating to, an immovable over the rights of competing claimants. However, a priority conflict involving the rights of a competing third party registered in the immovables registry of the State in which the immovable is located is governed by the law of that State.]

[Note to the Working Group: The Working Group may wish to consider adding a new recommendation along the lines of recommendation 137 bis, which is designed to address the law applicable to assignments of receivables owing to the grantor under an agreement for the sale or lease of an immovable or under a security agreement over an immovable. In a number of States, it is not possible to create rights in such receivables independently of the related immovable with the result that the effectiveness as between the parties, the third-party effectiveness and the priority of a security right in the receivables is governed by the law (and, in particular, the registry regime) that applies to the related immovable. In other States, it is possible to grant a security right in such receivables independently of the related immovable but the secured creditor is subordinated to third-party rights that are registered against the related immovable in the immovables registry. The second sentence of recommendation 137 bis is designed to preserve the application of the law of the State where the related immovable is located in order to protect third parties who rely on the registration in the immovables registry of that State. Reference is made to rights of a competing third party as the term "competing claimant" is defined by reference to security rights in movables. Reference is also made to "rights" of such parties, since rights of third parties could include not just competing mortgagees but also assignees or buyers of the immovable or the related intangible and indeed any class of third party right for which the immovables regime makes provision for registration. In addition, reference is made to a right "registered in the immovables registry" rather than "that became effective against third parties by registration", since: (i) some immovables registries do not distinguish between inter-parties and third party effectiveness, and (ii) immovables registries do not necessarily require registration for general third-party effectiveness but

only for effectiveness against third parties whose rights are also registrable in the immovables registry (e.g. registration may not be needed for effectiveness against an insolvency administrator or a judgment creditor.)

Law applicable to the rights and obligations of the grantor and the secured creditor

146. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Law applicable to the rights and obligations of the account debtor and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor

147. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, or a negotiable instrument or a negotiable document in which a security right has been created:

(a) The relationship between an account debtor and an assignee of the receivable, between an obligor under a negotiable instrument and a creditor with a security right in that instrument or between an issuer of a negotiable document and a creditor with a security right in that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a receivable (A/CN.9/WG.VI/WP.24); and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in receivables.]

A/CN.9/WG.VI/WP.26/Add.1

Security rights in rights to payment of funds credited to bank accounts: definitions and recommendations

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Security rights in rights to payment of funds credited to bank accounts

I. Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (o), (cc) and (hh))

(o) “Receivable” means a right to the payment of a monetary obligation, excluding, however, rights to payment evidenced by a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited in a bank account.

[Note to the Working Group: The Working Group may wish to note that the encumbered asset is described as “the right to payment of funds credited to a bank account” rather than the bank account itself. Therefore, the definition of “bank account” could be placed in the commentary. The commentary will also include a description of institutions covered under the term “bank”. In this connection, the Working Group may wish to consider whether the term “bank” should cover all institutions that have a banking licence under the law of the enacting State, which may include payment institutions, payment, clearing and settlement systems operating cash accounts and central banks. The Working Group may wish to note that the commentary to a previous version of the recommendations on bank accounts is in document A/CN.9/WG.VI/WP.18 and Add.1.]

[(cc) “Bank account” means an account maintained by a bank into which funds may be deposited. The term includes checking, saving and time-deposit accounts.]

Definition of “control” (see A/CN.9/WG.VI/WP.24/Add.3, Note to the Working Group after rec. 43)

(hh) A secured creditor has “control” with respect to funds credited to a bank account: (i) automatically upon the creation of a security right where the depositary bank is the secured creditor; (ii) where the depositary bank has concluded a control agreement with the grantor and the secured creditor, according to which the depositary bank has agreed to follow instructions from the secured creditor with respect to the right to payment of funds credited

to the bank account without further consent of the grantor; or (iii) the right to payment of funds credited to a bank account is transferred to secured creditor.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (i) there is no obligation on a depositary bank to enter into a control agreement; (ii) that a secured creditor's rights will be subject to the rights and obligations of the depositary bank under law and practice governing bank accounts; (iii) a control agreement requires the consent of the grantor (as well as of the depositary bank) and the grantor retains the right to deal with the funds in the bank account until the secured creditor instructs the depositary bank otherwise (although in some control agreements, the funds would be blocked from the time of the conclusion of the control agreement).]

II. Recommendations

Scope

Parties, security rights, secured obligations and assets covered (A/CN.9/WG.VI/WP.21, rec. 3 (d))

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments (such as cheques, bills of exchange and promissory notes), negotiable documents (such as bills of lading), rights to payment of funds credited to bank accounts, rights to drawing proceeds from independent undertakings, and intellectual property rights;

Creation of a security right in a right to payment of funds credited to a bank account (see A/CN.9/WG.VI/WP.21, rec. 26)

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, pursuant to recommendation 8 (see A/CN.9/WG.VI/WP.21), a security right in a right to payment of funds credited to a bank account may be created by agreement between the grantor and the secured creditor.]

26. The law should provide that a security right in a right to payment of funds credited to a bank account is effective as between the secured creditor and the grantor notwithstanding an agreement between the grantor and the depositary bank limiting in any way the grantor's right to create a security right in its right to payment of funds credited to the bank account. However, the depositary bank has no duty to recognize the secured creditor and no obligation is otherwise imposed on the depositary bank with respect to the security right, without the depositary bank's consent.

[Note to the Working Group: The Working Group may wish to note that the commentary to recommendation 3 (a) (see A/CN.9/WG.VI/WP.21) will clarify that enacting States may wish to take into account any impact that the recommendations in this Guide might have on consumer protection law.]

Rights and obligations of the depositary bank (see A/CN.9/WG.VI/WP.24/ Add.3, Note to the Working Group after rec. 43)

X. The law should provide that:

(a) The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the depositary bank without its consent; and

(b) The rights of set-off of the depositary bank [are not impaired by reason of] [are distinct from] any security rights that the depositary bank may have in a right to payment of funds credited to a bank account.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendations X and Y are supplemented by recommendations 76, 77 (to the extent that there is a priority conflict between a security right or right of set-off of the depositary bank and a security right of another person) and 106 bis, 107 and 108 (enforcement against the depositary bank).]

The commentary will also explain that recommendation X (b) does not deal with a priority conflict but with the situation where the depositary bank itself has both a right of set-off against and a security right in a right to payment of funds credited to a bank account. In this situation, according to recommendation X (b), the bank's rights of set-off are not impaired or subsumed (i.e. they remain distinct from) the bank's security right.]

Y. The law should provide that nothing in these recommendations obligates a depositary bank to:

(a) Pay any person other than a person that has control with respect to funds credited to a bank account; or

(b) Respond to requests for information about whether a control agreement or a security right in its own favour exists and whether the grantor retained the right to dispose of the funds credited in the account.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation Y does not affect the bank-customer relationship and the rights and obligations arising from other law governing bank accounts (e.g. money-laundering, bank secrecy).]

Third-party effectiveness of a security right in a right to payment of funds credited to a bank account (see A/CN.9/WG.VI/WP.24/Add.3, recs. 42 and 43)

43. The law should provide that a security right in a right to payment of funds credited to a bank account is effective against third parties also if the secured creditor obtains control with respect to the funds credited to the bank account.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, pursuant to recommendation 35 (see A/CN.9/WG.VI/WP.24/Add.3), a security right in a right to payment of funds credited to a bank account may also become effective against third parties by registration of a notice in the general security rights registry.]

Priority of a security right in a right to payment of funds credited to a bank account (see A/CN.9/WG.VI/WP.24/Add.4, recs. 76-78)

76. The law should provide that a security right in a right to payment of funds credited to a bank account, which has been made effective against third parties by control, has priority over a security right in a right to payment of the funds, which has been made effective against third parties by any other method. If the secured creditor is the depositary bank, the depositary bank's security right has priority over any other security right (including a security right made effective against third parties by a control agreement with the depositary bank even if the depositary bank's security right is later in time).

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that a security right of the depositary bank has always priority even over a security right with respect to which the bank has earlier entered into a control agreement because: (i) a security right of the depositary bank should have the same priority as its set-off right, which has always priority; (ii) if the depositary bank's security right had no priority, the bank would not enter into any control agreement; (iii) a secured creditor could always seek to obtain a subordination agreement from the depositary bank.]

77. The law should provide that any right of the depositary bank to set-off against the right to payment of funds credited to a bank account obligations owed to the depositary bank by the grantor has priority over the security right of any secured creditor other than a secured creditor who has acquired control with respect to the funds credited to the bank account by becoming a transferee of the right to payment of the funds.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that these priority recommendations mean that third parties are taken to know that they cannot rely on a right to payment of funds credited to a bank account as a primary source of security for extensions of credit and can do so only by obtaining a subordination agreement from the depositary bank or having the account entered in their own name. Consequently, the absence of publicity of the security right is not seen as problematic.]

The commentary will also explain that, unlike recommendation X(b), recommendation 77 deals with priority conflicts between rights of set-off of the depositary bank and security rights of other persons. Moreover, the commentary will explain that recommendation 77 does not create any rights of set-off, a matter which remains subject to other law.]

78. In the case of a transfer of the right to payment of funds from a bank account initiated by the grantor, the law should provide that the transferee of the right to payment of the funds takes free of a security right in the right to payment of funds credited to the bank account, unless the transferee acts in collusion with the grantor to deprive the secured creditor of its security right in the right to payment of the funds. This recommendation does not lessen the rights of transferees of rights to payment of funds from bank accounts under law other than this law.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the general priority recommendations apply to security rights in rights to payment of funds credited to a bank accounts subject to recommendations 76 to 78.]

Enforcement of a security right in a right to payment of funds credited to a bank account (see A/CN.9/WG.VI/WP.24/Add.1, recs. 106 bis, 107 and 108)

106 bis. The law should provide that after default or before default with the consent of the grantor a secured creditor with a security right in a right to payment of funds credited to a bank account may, subject to recommendations X and Y, collect or otherwise enforce its right to payment of the funds.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the reference to recommendations X and Y is designed to complement recommendations 76 and 77.]

107. The law should provide that after default or before default with the consent of the grantor, a secured creditor that has control with respect to funds credited to a bank account is entitled to enforce its security right without having to resort to a court or other authority.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, unlike a secured creditor that has to collect the funds to apply them to the secured obligation according to recommendation 116 (see A/CN.9/WG.VI/WP.24/Add.1), a depositary bank as a secured creditor may apply the funds to the secured obligation directly. The commentary will also explain that enforcement of the bank's rights of set-off remains subject to other law.]

108. The law should provide that a secured creditor that does not have control with respect to funds credited to a bank account may collect or otherwise enforce the security right against the depositary bank only pursuant to a court order, unless the depositary bank agrees otherwise.

Law applicable to a security right in a right to payment of funds credited to a bank account (A/CN.9/WG.VI/WP.24, rec. 139)

139. Except as otherwise provided in recommendation 140, the law should provide that the creation, the effectiveness against third parties, the priority over the rights of competing claimants, the rights and duties of the depositary bank with respect to the security right and the enforcement of the security right in a right to payment of funds credited to a bank account are governed by

Alternative A

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. However, the law of the State determined pursuant to the preceding sentence applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State which is engaged in the regular activity of maintaining bank accounts. The law should also specify that, if the applicable law is not determined pursuant to the preceding two sentences, the applicable law is to be determined pursuant to fallback rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

[Note to the Working Group: Alternative A is an abbreviated version of the approach followed in articles 4.1 and 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With An Intermediary ("the Hague Securities Convention"). The commentary will include the detailed fallback rules in article 5 of the Hague Securities Convention with sufficient explanation.]

Alternative B

the law of the State in which the bank that maintains the bank account has its place of business. In the case of more than one place of business, reference should be made to the place where the branch maintaining the account is located.

[Note to the Working Group: The Working Group may wish to consider whether alternative B should address methods for identifying the branch which maintains an account.]

The Working Group may also wish to note that the commentary will explain that the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in rights to payment of funds credited to bank accounts.]

A/CN.9/WG.VI/WP.26/Add.2

Security rights in negotiable instruments: definitions and recommendations

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Security rights in negotiable instruments

I. Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (i), (o) and (w))

(i) “Tangibles” means all forms of corporeal movable property. Among the categories of tangibles are inventory, equipment, fixtures, negotiable instruments and negotiable documents.

(o) “Receivable” means a right to the payment of a monetary obligation, excluding, however, rights to payment evidenced by a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to payment of funds credited to a bank account.

(w) “Negotiable instrument” means an instrument that embodies a right to payment, such as a cheque, bill of exchange or promissory note, which satisfies the requirements for negotiability under the law governing negotiable instruments.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the phrase “law governing negotiable instruments”, or law governing negotiable documents” or similar expression are intended to encompass all law that applies to negotiable instruments or negotiable documents, including not only negotiable instrument or negotiable document law as such but also bailment law, contract law and other law that might be applicable. Other applicable law might include in particular specialized laws that relate to obligors or negotiable instruments or to issuers of negotiable documents or to particular types of goods that might be covered by a negotiable document. Throughout the draft Guide, the term “law” is intended to include both statutory and non-statutory law.]

II. Recommendations

Parties, security rights, secured obligations and assets covered (see A/CN.9/WG.VI/WP.21, recs. 3 (d) and 16)

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments (such as cheques, bills of exchange and promissory notes), negotiable documents (such as bills of lading),] rights to payment of funds credited to bank accounts, rights to drawing proceeds from an independent undertakings, and intellectual property rights;

[See A/CN.9/WG.VI/WP.26, rec. 16 and Note to the Working Group.]

Creation of a security right in a negotiable instrument

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, pursuant to recommendation 8 (see A/CN.9/WG.VI/WP.21), a security right in a negotiable instrument may be created by a written and possibly signed agreement between the grantor and the secured creditor or by even an oral agreement and delivery of possession of the instrument to the secured creditor. The commentary will also explain that creation of a security right or transfer of a negotiable instrument by endorsement under negotiable instrument law would not be affected by this recommendation.]

Creation of a security right in a right that secures a negotiable instrument (see A/CN.9/WG.VI/WP.21, rec. 24)

24. The law should provide that, if a security right has been effectively created in a negotiable instrument, the secured creditor also has a security right in accessory rights with respect to the negotiable instrument without a new act of transfer. Such accessory rights may include:

- (a) Rights against guarantors with respect to the negotiable instrument; and
- (b) Security rights securing the obligation of the obligor on the negotiable instrument.]

[Note to the Working Group: The Working Group may wish to note that, under recommendation 24, if A gets a note from B guaranteed by C and then grants a security right in the note to D, D gets a security right in the guarantee as well. As the matter is addressed in recommendation 16, the Working Group may wish to consider deleting recommendation 24 and placing the examples in the commentary.]

Rights and obligations of the obligor under a negotiable instrument

[Note to the Working Group: The Working Group may wish to consider whether language along the following lines should be included here to address the rights and obligations of the obligor under a negotiable instrument:

“The law should provide that as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the

law governing negotiable instruments.” This text is drawn from recommendation 104 (see rec. 104 below.)

**Third-party effectiveness of a security right in a negotiable instrument
(see A/CN.9/WG.VI/WP.24/Add.3)**

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, according to the general third-party effectiveness recommendation 35, a security right in a negotiable instrument may be made effective against third parties by registration of a notice in the general security rights registry or by dispossession of the grantor.

The Working Group may also wish to include an additional recommendation along the following lines:

“The law should provide that where a security right in a negotiable instrument is effective against third parties, the security right continues to be effective against third parties for a short period of [to be specified] days after the negotiable instrument has been relinquished to the grantor for the purpose of presentation, collection, enforcement, renewal.”]

**Priority of a security right in a negotiable instrument
(see A/CN.9/WG.VI/WP.24/Add.4, rec. 74)**

74. The law should provide that a security right in a negotiable instrument that has been made effective against third parties by dispossession of the grantor with respect to the instrument has priority over a security right in a negotiable instrument that was made effective against third parties by any other method. The law should also provide that a security right in a negotiable instrument that has been made effective against third parties by a method other than by dispossession of the grantor with respect to the instrument is subordinate to the rights of a buyer, another secured creditor or other transferee in a consensual transaction that either:

(a) Qualifies as a protected holder under the law governing negotiable instruments; or

(b) Takes possession of the negotiable instrument and gives value in good faith and without knowledge that the transfer was in violation of the rights of the holder of the security right.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the general priority recommendations apply to priority with respect to security rights in negotiable instruments, while recommendation 74 deals with additional priority conflicts.]

**Enforcement of a security right in a negotiable instrument
(A/CN.9/WG.VI/WP.24/Add.1, recs. 104 and 105)**

104. The law should provide that after default or before default with the agreement of the obligor of the negotiable instrument the secured creditor has the right to collect or otherwise enforce a negotiable instrument that is an encumbered asset against a person obligated on that instrument.

[Note to the Working Group: The commentary will explain that as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other

persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments. The commentary will also include the following examples of such persons:

(a) The person obligated on the negotiable instrument may be obligated to pay only a holder or other person entitled to enforce the instrument under the law governing negotiable instruments; and

(b) The right of the person obligated on the instrument to raise defences to that obligation is determined by the law governing negotiable instruments.]

105. The law should provide that the secured creditor's right to collect or otherwise enforce a negotiable instrument includes the right to collect or otherwise enforce any personal or property right that secures payment of the negotiable instrument (such as a guarantee or security right).

Law applicable to security rights in tangibles (A/CN.9/WG.VI/WP.24, rec. 136)

159. The law should provide that, except as otherwise provided in recommendations 140 and 142, the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in tangible property are governed by the law of the State in which the encumbered asset is located. However, with respect to security rights in tangible property of a type ordinarily used in more than one State, the law should provide that such issues are governed by the law of the State in which the grantor is located. [With respect to security rights in the type of tangible property mentioned in the preceding sentence that is subject to a title registration system, the law should provide that such issues are governed by the law of the State under the authority of which the registry is maintained.]

[Note to the Working Group: The commentary will explain that "tangible property of a type ordinarily used in more than one State" refers to mobile goods, such as motor vehicles.]

Law applicable to third-party effectiveness of security rights in specified types of asset by registration (A/CN.9/WG.VI/WP.24, rec. 140)

140. If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in negotiable instruments, negotiable documents and rights to payment of funds credited to bank accounts, the law of that State determines whether the effectiveness against third parties of a security right in such encumbered assets has been achieved by registration under the laws of that State.

Law applicable to rights and obligations of the grantor and the secured creditor (A/CN.9/WG.VI/WP.24, rec. 146)

148. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Law applicable to the rights and obligations of the account debtor and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor (A/CN.9/WG.VI/WP.24, rec. 147)

149. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, or a negotiable instrument or a negotiable document in which a security right has been created:

(a) The relationship between an account debtor and an assignee of the receivable, between an obligor under a negotiable instrument and a creditor with a security right in that instrument or between an issuer of a negotiable document and a creditor with a security right in that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[Note to the Working Group: The Working Group may wish to note that the extension of the scope of the Guide to outright transfers of negotiable instruments is addressed in the Note to the Working Group after recommendation 3(f) in A/CN.9/WG.VI/WP.26). The Working Group may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a negotiable instrument (A/CN.9/WG.VI/WP.24); and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in negotiable instruments.]

A/CN.9/WG.VI/WP.26/Add.3

Security rights in negotiable documents: definitions and recommendations

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Security rights in negotiable documents

I. Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (i) and (x))

(i) “Tangibles” means all forms of corporeal movable property. Among the categories of tangibles are inventory, equipment, fixtures, negotiable instruments and negotiable documents.

(x) “Negotiable document” means a document that embodies a right for delivery of tangibles, such as a warehouse receipt or a bill of lading, which satisfies the requirements for negotiability under the law governing negotiable documents.

(pp) “Possession” means the actual possession of tangibles by the secured creditor, or an agent, employee or other person holding on behalf of the secured creditor, or an independent person who acknowledges that it holds for the secured creditor. It does not include constructive, fictive or symbolic possession.

II. Recommendations

Parties, security rights, secured obligations and assets covered (A/CN.9/WG.VI/WP.21, rec. 3 (d))

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and fixtures, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments (such as cheques, bills of exchange and promissory notes), negotiable documents (such as bills of lading),] rights to payment of funds credited to bank accounts, rights to drawing proceeds from an independent undertakings, and intellectual property rights;

Creation of a security right in a negotiable document (see A/CN.9/WG.VI/WP.21, rec. 28)

[Note to the Working Group: The Working Group may wish to note that, pursuant to

recommendation 8 (see A/CN.9/WG.VI/WP.21), a security right in a negotiable document may be created by a written and possibly signed agreement between the grantor and the secured creditor or even by an oral agreement and delivery of possession of the document to the secured creditor. The Working Group may wish to consider whether this rule should be stated explicitly in a recommendation.]

28. The law should provide that the creation of a security right in a negotiable document also gives rise to a security right in the goods represented by the document, provided that the issuer is in possession of the goods at the time the security right in the document is created.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that recommendation 28 is intended to negate that a separate security right needs to be created in the goods.]

Rights and obligations of the issuer of a negotiable document

[Note to the Working Group: The Working Group may wish to consider whether language along the following lines should be included here to address the rights and obligations of the issuer of a negotiable document:

“The law should provide that as between the secured creditor and the issuer or other person obligated on the negotiable document, the rights and obligations of those persons are determined by the law governing negotiable documents.” This text is drawn from recommendation 109 (see rec. 109 below).]

Third-party effectiveness of a security right in a negotiable document (see A/CN.9/WG.VI/WP.24/Add.3, rec. 39)

44. The law should provide that, if a security right in a negotiable document is effective against third parties, the corresponding security right in the goods covered by the document is also effective against third parties. The law should also provide that, as long as a negotiable document covers goods, a security right in the goods may be made effective against third parties [only] by dispossession of the grantor with respect to the document [or with respect to the goods].

[Note to the Working Group: The Working Group may wish to recall that the language in square brackets indicates a difference of opinion in the Working Group as to whether allowing alternative methods of achieving third-party effectiveness of a security right in goods covered by a negotiable document undermines the negotiability of the document or the matter can be addressed by giving priority to a right in goods made effective against third parties by dispossession of the grantor with respect to the document (see A/CN.9/593, para. 21); see also A/CN.9/WG.VI/WP.26/Add.3, rec. 80.]

[44 bis. The law should provide that a security right in a negotiable document that is effective against third parties remains effective against third parties for a short period of [to be specified] days after the negotiable document has been relinquished to the grantor for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the goods covered by the negotiable document.]

Priority of security rights in negotiable documents (A/CN.9/WG.VI/WP.24/Add.4, recs. 80 and 81)

80. The law should provide that, while goods are in the possession of the issuer of a negotiable document with respect to them, a security right in those goods that became

effective against third parties as a result of the security right in the negotiable document becoming effective against third parties has priority over another security right in the goods that was made effective against third parties by a different method while the goods were covered by the document.

81. The law should provide that a security right in a negotiable document and the goods covered thereby is subject to the rights under the law governing negotiable documents of a person to whom the negotiable document has been duly negotiated.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the general priority recommendations apply to security rights in negotiable documents, while recommendations 80 and 81 deal with additional priority conflicts.]

**Enforcement of a security right in a negotiable document
(A/CN.9/WG.VI/WP.24/Add.1, rec. 109)**

109. The law should provide that after default or before default with the agreement of the issuer of the negotiable document the secured creditor has the right to enforce a negotiable document against the issuer or any other person obligated on the negotiable document. However, as between the secured creditor and the issuer or other person obligated on the negotiable document, the rights and obligations of those persons are determined by the law governing negotiable documents.

[Note to the Working Group: The Working Group may wish to note that the commentary will include the example that the issuer may be obligated to deliver the goods only to a holder of the negotiable document with respect to them. The commentary will also explain that the general recommendations on enforcement of security rights apply here as well, while recommendation 109 deals with a special issue.]

Law applicable to security rights in tangibles (A/CN.9/WG.VI/WP.24, rec. 136)

160. The law should provide that, except as otherwise provided in recommendations 140 and 142, the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in tangible property are governed by the law of the State in which the encumbered asset is located. However, with respect to security rights in tangible property of a type ordinarily used in more than one State, the law should provide that such issues are governed by the law of the State in which the grantor is located. [With respect to security rights in the type of tangible property mentioned in the preceding sentence that is subject to a title registration system, the law should provide that such issues are governed by the law of the State under the authority of which the registry is maintained.]

[Note to the Working Group: The commentary will explain that “tangible property of a type ordinarily used in more than one State” refers to mobile goods, such as motor vehicles.]

Law applicable to third-party effectiveness of security rights in specified types of asset by registration (A/CN.9/WG.VI/WP.24, rec. 140)

140. If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in negotiable instruments, negotiable documents and rights to payment of funds credited to bank accounts, the law of that State determines whether the effectiveness against third parties of a security right in

such encumbered assets has been achieved by registration under the laws of that State.

Law applicable to rights and obligations of the grantor and the secured creditor (A/CN.9/WG.VI/WP.24, rec. 146)

146. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Law applicable to the rights and obligations of the account debtor and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor (A/CN.9/WG.VI/WP.24, rec. 147)

147. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, or a negotiable instrument or a negotiable document in which a security right has been created:

(a) The relationship between an account debtor and an assignee of the receivable, between an obligor under a negotiable instrument and a creditor with a security right in that instrument or between an issuer of a negotiable document and a creditor with a security right in that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the account debtor, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a negotiable document (A/CN.9/WG.VI/WP.24); and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in negotiable documents.]

A/CN.9/WG.VI/WP.26/Add.4

Security rights in proceeds, attachments and masses or products: definitions and recommendations

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I. Security rights in proceeds

A. Definitions (A/CN.9/WG.VI/WP.22/Add.1, paragraph 21 (ee))

(ee) “Proceeds” means whatever is received in respect of encumbered assets. [For example, proceeds include what is received as a result of sale, or other disposition or collection, lease, licence, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects, damage or loss.]

[Note to the Working Group: The Working Group may wish to note that assets that are excluded from the scope of the draft Guide as original encumbered assets may be affected by the draft Guide if they are identifiable proceeds of assets that are within the scope of the draft Guide (e.g. securities that are proceeds of bank accounts or proceeds of independent undertakings). However, rights of parties under other law applicable to assets outside the scope of the draft Guide as original encumbered assets are not to be affected (see Note after recommendation 3 (d) in A/CN.9/WG.VI/WP.26/Add.7). The Working Group may wish to note that the definition of proceeds or recommendation 29 may need to be adjusted if recommendation 30 is retained.]

B. Recommendations

Creation of a security right in proceeds (see A/CN.9/WG.VI/WP.21, recommendations 29 and 30)

29. The law should provide that, unless otherwise agreed by the parties to the security agreement, the security right in the encumbered assets extends to the proceeds to the extent that the proceeds are identifiable in accordance with recommendations 29 bis.

29 bis. The law should provide that, when the proceeds are money, receivables or rights to payment of funds credited to a bank account that have been commingled with other property so that the proceeds are not identifiable, the [amount] [value] of proceeds immediately before they were commingled with the other property is to be treated as identifiable proceeds, provided that, at any time after the proceeds were commingled with the other property, the total [amount] [value] of the commingled property was more than the [amount] [value] of the proceeds. If, at any time after the proceeds were commingled with the other property, the total [amount] [value] of the commingled property was less than the [amount] [value] of the proceeds, the total [amount] [value] of the commingled property at the time that the [amount] [value] of the commingled property was lowest, plus the [amount] [value] of any proceeds later commingled with the commingled property, is to be treated as identifiable proceeds.]

[Note to the Working Group: The Working Group may wish to consider whether a recommendation should be prepared for identifying proceeds ("tracing") other than money and the like. The Working Group may also wish to note that the commentary will explain how proceeds that are money, receivables or rights to payment of funds credited to a bank account may be commingled with other property so that the proceeds cannot be separately identified.]

30. [The law should provide that, notwithstanding recommendation 29, the security right extends to civil and natural fruits of encumbered assets, such as [...], only if the parties so provide in the security agreement.]

[Note to the Working Group: The Working Group may wish to note that recommendation 30 introduces a different approach as to civil and natural fruits of encumbered assets from the approach taken in recommendation 29 with respect to other types of proceeds. However, the notion of "proceeds", as defined in the terminology section, includes civil and natural fruits, and the natural expectation may be that the security right will extend automatically to civil and natural fruits. Thus, the Working Group may wish to consider deleting recommendation 30.]

Third party effectiveness of a security right in proceeds (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 44)

41.

Alternative A

The law should provide that, if a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset is effective against third parties when the proceeds arise, provided that: (a) The security right in the encumbered asset was made effective against third parties by registration of a notice in the general security rights registry, registration in a specialized registry or notation on a title certificate and remains effective at that time; or

[Note to the Working Group: The Working Group may wish to note that paragraph (a) would not apply, for example, to a security right which was made effective against third parties by possession. The residual rule in recommendation 41 bis would apply to such a right.]

(b) The proceeds take the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

41 bis. If recommendation 41 does not apply, the security right in the proceeds is effective against third parties for [...] days after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in recommendations 35 or 36 before the expiry of that time period.

Alternative B

The law should provide that, if a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset is effective against third parties when the proceeds arise, provided that the proceeds take the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

41 bis. If recommendation 41 does not apply, the security right in the proceeds is effective against third parties for [...] days after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in recommendations 35 or 36 before the expiry of that time period.

[Note to the Working Group: The Working Group may wish to note that, in view of the difference of opinion in the Working Group as to whether the right in proceeds should be automatically effective or whether a separate act of third-party effectiveness should take place when the proceeds arose (see A/CN.9/593, paras. 26-32), recommendation 41 includes two alternatives.

Under alternative A, a security right in proceeds is automatically effective against third parties, if the security right in the originally encumbered assets was made effective against third parties by registration or if the security right was in money and the like. If the security right was made effective against third parties by possession, according to recommendation 41 bis, the security right in the proceeds would be effective for a short period of time and thereafter only subject to a separate act of third-party effectiveness.

Under alternative B, automatic third-party effectiveness would be limited to proceeds in the form of money and the like, while recommendation 41 bis would apply to all other cases. As a result of this approach, a security right in proceeds would remain effective against third parties for a few days after the proceeds arose and thereafter only if a notice was registered with respect to the security right in the proceeds or by dispossession of the grantor. The commentary will clarify that civil fruits are covered by receivables, while natural fruits are automatically covered as they are defined as proceeds.

The Working Group may also wish to consider that, to balance the needs to protect a secured creditor and third parties, the time period referred to in recommendation 41 bis should be as short as the grace period in the third-party effectiveness recommendation applicable to acquisition security rights (i.e. 20-30 days, see A/CN.9/WG.VI/WP.24/Add.5, rec. 127).]

Priority of a security right in proceeds (see A/CN.9/WG.VI/WP.24/Add.4, recommendation 66)

67. Except as provided in the recommendations of this chapter [and the chapter on acquisition financing devices], the law should provide that a security right in the proceeds of an encumbered asset that is effective against third parties has the same priority as the security right in the encumbered asset.

[Note to the Working Group: The Working Group may wish to note that the text in square brackets may be necessary if the Working Group decides that the super-priority of an acquisition security right should not extend to proceeds in the form of receivables (see A/CN.9/WG.VI/WP.24/Add.5, rec. 133, text in square brackets).]

Enforcement of a security right in proceeds (see A/CN.9/WG.VI/ WP.21/Add.2, recommendation 106)

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the general enforcement recommendations apply to proceeds.]

Law applicable to security rights in proceeds (see A/CN.9/WG.VI/WP. 21/Add.5, recommendation 136)

161. The law should provide that:

(a) The creation of a security right in proceeds is governed by the law [of the State whose law governs] [governing] the creation of the security right in the original encumbered asset from which the proceeds arose; and

(b) The effectiveness against third parties and the priority over the rights of competing claimants of a security right in proceeds are governed by the same law as the law [of the State whose law governs] [governing] the effectiveness against third parties and the priority over the rights of competing claimants of a security right in original encumbered assets of the same kind as the proceeds.

II. Security rights in attachments

A. Definitions (A/CN.9/WG.VI/WP.22/Add.1, paragraph 21 (l))

(l) “Attachments to immovable property” means tangibles that are so physically attached to immovable property as to be treated as immovable property without however losing their separate identity as movables under the law of the State where the immovable property is located.

[Note to the Working Group: The Working Group may wish to note that the commentary will set forth examples of attachments to immovable (e.g. air conditioner or furnace but not bricks or cement).]

“Attachments to movable property” means tangibles that are so physically attached to other movable property [as to be treated as part of that movable property], without however losing their separate identity under law other than this law.

[Note to the Working Group: The Working Group may wish to note that the commentary will set forth examples of attachments to movable property (e.g. tires, aircraft engines).]

B. Recommendations

Creation of a security right in attachments (see A/CN.9/WG.VI/WP.21, recommendation 31)

31. The law should provide that a security right may be created in tangibles that are attachments at the time of creation of the security right or continue in tangibles that become attachments subsequently. Security rights in attachments to immovable property may be created under this law or law on immovable property.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, if the security right in attachments to immovable property is created under the law of immovable property, the security right may be at the same time effective against third parties. The commentary will also explain that, if such a security right is created under the secured transactions law, rights of persons that have rights under immovable property law may not be affected. For example, a security right created under secured transactions law may be enforced only if there are no competing rights created under immovable property law or the former security right has priority over competing rights acquired under immovable property law (see recommendation 83).]

Third party effectiveness of a security right in attachments (see A/CN.9/WG.VI/WP.24/Add.3, recommendations 45 and 46)

45. The law should provide that a security right in a tangible that is an attachment at the time it is made effective against third parties or becomes an attachment only subsequently may be made effective against third parties by registration of a notice in the general security rights registry. The law should also provide that, if a security right in a tangible is effective against third parties at the time when the tangible becomes an attachment, the security right remains effective against third parties thereafter.

46. A security right in an attachment to immovable property may also be made effective against third parties by registration in the immovable property registry.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation 46 is designed to protect the integrity and reliability of the immovable property registry. This recommendation is supplemented by recommendation 83 in A/CN.9/WG.VI/WP.24/Add.4, under which a security right in tangibles that are or are to become attachments to immovable property, which became effective against third parties by registration of a notice in the immovable property registry under recommendation 45 has priority over a security right in the related immovable that was registered subsequently.

The commentary will also explain that, if a security right in an attachment to immovable property is made effective against third parties under this recommendation, what is registered is, in principle, a matter of immovable property law. However, the attention of the legislator may have to be drawn to the need to amend immovable property law so as to permit registration of a notice about a security right rather than only notarial documents. One difficulty in third parties finding that notice is that registration in the immovable property registry is made against the asset and not the grantor.

The commentary will further explain that the security right will be in the immovable property as a whole but the notice should describe the attachment and priority should be limited to the value of the attachment, if it were detached. The question whether the attachment could be detached and how the secured creditor would be paid would also need to be addressed as a matter of enforcement (see recommendation in enforcement

below). The Working Group may wish to consider whether a creditor with a right acquired under immovable property law should have a right to pay off the debt owed to the secured creditor with a security right acquired under movable property law. This matter may be left to inter-creditor agreements.]

Third-party effectiveness of a security or other right in attachments to movables subject to a specialized registration system or title certificate system

46 bis. A security right or any other right (such as the right of a buyer or lessor) in an attachment to movable property that is subject to registration in a specialized registry or a title notation system may also be made effective against third parties by such registration or notation.

Priority of a security or other right in attachments to immovable (see A/CN.9/WG.VI/WP.24/Add.4, recommendations 82 and 83)

82. The law should provide that a security right or any other right (such as the right of a buyer or lessor) in attachments to immovable property that has been created and made effective against third parties under immovable property law has priority over a secured creditor with a security right in those attachments that has been made effective against third parties by one of the methods referred to in recommendations 35 or 36.

83. A security right in tangibles that are attachments to immovable property at the time the security right is made effective against third parties or that become attachments to immovable property subsequently, which was made effective against third parties by registration in the immovable property registry under recommendation 46 has priority over a security right or any other right (such as the right of a buyer or lessor) in the related immovable that was registered subsequently.

[Note to the Working Group: The Working Group may wish to consider recommendation 83 together with the relevant recommendation in the chapter on acquisition financing devices (see A/CN.9/WG.VI/WP.24/Add.5, recommendation 130 ter. The commentary will explain that the words “any other right” refers to any right registrable in the immovable property law.]

Priority of a security or other right in attachments to movable property subject to a specialized registration system or title certificate system (see A/CN.9/WG.VI/WP.24/Add.4, recommendations 84 and 85(a))

84. The law should provide that a security right or any other right (such as the right of a buyer or lessor) in attachments to movable property that has been created and made effective against third parties under other law by registration in a specialized registry or by notation on a title certificate has priority over a security right or any other right in those attachments that has been made effective against third parties by one of the methods referred to in recommendations 35 or 36.

84 bis. A security right or any other right in tangibles that are attachments to movable property at the time the security right is made effective against third parties or that are to become attachments to movable property subsequently, which was made effective against third parties by registration in a specialized registry or by notation on a title certificate under recommendation 46 bis has priority over a security right or any other right in the related movable property that was registered subsequently.

[Note to the Working Group: The Working Group may wish to note that recommendations 84 and 84 bis track the language of recommendations 82 and 83. The only difference is that recommendations 84 and 84 bis deal with assets that are within the scope of the draft Guide (e.g. automobile engines).]

Enforcement of a security right in attachments (see A/CN.9/WG.VI/WP.24/Add.1)

[Note to the Working Group: The Working Group may wish to consider that the general recommendations apply to the enforcement of a security right in attachments to movable property. As to the enforcement of security rights in attachments to immovable property, the Working Group may wish to consider an additional recommendation along the following lines:

“The law should provide that the secured creditor with a right in an attachment to immovable property (e.g. an elevator) that has priority can enforce its right in the attachment (not in the immovable property). A creditor with a security right in the immovable is entitled to pay off the debt of the creditor with a security right in the attachment (as a general rule, junior creditors should have this right). The creditor with a security right in the attachment has to pay damages for any damage caused by the act of removal of the attachment from the immovable (not the diminution value). If the creditor with a security right in the attachment does not have priority, it cannot enforce-detach (although this may be an issue of valuation that arises generally in the case of enforcement by the junior creditor with a right in part of an asset). If the creditor with a security right in the attachment has an acquisition security right, it has the super-priority provided under recommendation 130, except as against a construction lender who is financing all construction (this rule is part of construction law, see A/CN.9/WG.VI/WP.24/Add.5, rec. 130 ter).”]

Law applicable to security rights in attachments (see A/CN.9/WG.VI/WP.21/Add.5)

[Note to the Working Group: The Working Group may wish to consider that recommendation 136 is sufficient with respect to the law applicable to the creation, third-party effectiveness and priority of a security right in an attachment to movable property, while recommendation 148 is sufficient for the enforcement of a security right in an attachment to movable property. As to the law applicable to the enforcement of a security right in an attachment to immovable property, the Working Group may wish to include an additional recommendation along the following lines: “The enforcement of a security right in an attachment to immovable property is governed by the law of the State where the immovable property is located.”]

III. Security rights in masses or products

A. Definitions (A/CN.9/WG.VI/WP.22/Add.1, paragraph 21 (l))

(l) “Mass or product” means tangibles other than money that are so physically associated or united with each other that they lose their separate identity under law other than this law.

[Note to the Working Group: The Working Group may wish to note that the commentary will give examples of masses or products (e.g. product: cake produced from sugar, eggs, flower and water. Mass: grain in a silo or oil in a tank).]

B. Recommendations

Creation of a security right in a mass or product (see A/CN.9/WG.VI/WP.21, recommendation 32)

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that a security right may not be created in tangibles that are part of a mass or product as, at the time of creation of the security right, they do not exist as separate tangibles.]

32. The law should also provide that a security right in tangibles that become part of a mass or product after the creation of a security right, continues in the mass or product. [The security right is limited to the value of the tangibles immediately before they became part of the mass or product.]

[Note to the Working Group: The Working Group may wish to note that the second sentence is within square brackets as the valuation issue may be an issue of priority rather than creation. Under this approach, if the value of the flour is 5 and the value of the sugar is 5, while the value of the cake is 20 and there are two secured creditors, each secured creditor will get 5, while the remaining value of 10 will be preserved for the grantor and its unsecured creditors. If the value of the cake is lower than the value of the ingredients, the secured creditors will share the loss proportionately (e.g. if the value of the cake is 8, each secured creditor will get 4). This means that: (i) the security right is still a security right in the separate tangible and the secured creditor cannot get more than owed, (ii) if the value of the mass or product is less, the secured creditor will suffer a proportionate diminution (this is a priority issue), and (iii) the dates of creation do not affect priority.]

Third party effectiveness of a security right in a mass or product (see A/CN.9/WG.VI/WP.24/Add.3, recommendation 47)

47. The law should provide that, if a security right in a tangible is effective against third parties at the time when it becomes part of a mass or product, the security right in the mass or product created as provided in recommendation 32 is effective against third parties thereafter [without the need for any further act] [for [...] days after the mass or product is created, and continuously thereafter if it was made effective against third parties by one of the methods referred to in recommendations 35 or 36 before the expiry of that time period.]

Priority of a security right in a mass or product (see A/CN.9/WG.VI/WP.24/Add.4, recommendation 85)

[Note to the Working Group: The Working Group may wish to note that priority contests between creditors with security rights in property that becomes part of a mass or product and unsecured creditors require no special treatment since the regular priority rules apply once it is determined that the security right continues into the mass or product. There are, however, three types of potential priority contests between creditors each of whom has a security right with respect to the resulting mass or product: (i) contests between security rights taken in the same tangibles that ultimately become part of a mass or product (e.g. sugar and sugar), (ii) contests involving security rights in different tangibles that ultimately become part of a mass or product (e.g. sugar and flower) and (iii) contests involving a security right originally taken in the separate tangibles and a security right in the mass or product (e.g. sugar and cake). In order to deal with all these situations recommendation 85 has been reformulated in three parts. It should be noted

that, as a general matter, priority contests arise only when there is not enough value to satisfy all claims.]

85. The law should provide that a security right in the same separate tangibles that continues in a mass or product as provided in recommendation 32 and that is effective against third parties as provided in recommendation 47 has the same priority in relation to other security rights granted in the separate tangibles immediately before the tangibles became part of the product or mass. A secured creditor may not receive an amount greater than the obligation secured by its security right.

[Note to the Working Group: The Working Group may wish to note that the effect of the first sentence of this recommendation is to treat all security rights in tangibles that becomes commingled as having the same priority vis-à-vis each other as they had in the separate property. The rationale for this suggested rule is that the incorporation of goods into a mass or product should have no bearing on the respective rights of creditors with competing security rights in the separate goods. The Working Group may wish to note that the rule is framed to respect both the general priority rules and to cover the super-priority afforded to creditors who may claim “acquisition security rights”. The second sentence essentially repeats the rule stated (in somehow different formulation) in the second sentence of recommendation 32. The Working Group may wish to consider which formulation is preferable and whether the rule should be stated in both the creation and the priority recommendations.]

85 bis. The law should provide that, if (i) more than one security right in separate tangibles continues in the same mass or product as provided in recommendation 32 and each security right is effective against third parties as provided in recommendation 47, and (ii) the obligations secured by such security rights cannot all be satisfied from those security rights, the secured creditors are entitled to share in the value of their security rights in the mass or product according to the ratio of the value of the separate tangibles immediately before they became part of the mass or product. A secured creditor may not receive an amount greater than the obligation secured by its security right. If there is only one other security right, the secured creditor with respect to that other security right is entitled to the remainder of the value of its security right in the mass or product. If there is more than one other security right, the secured creditors with respect to those other security rights are entitled to share in the remainder of the value of their security rights in the mass or product in the ratio described above.

[Note to the Working Group: The Working Group may wish to note that, according to recommendation 85 bis, if the value of the sugar is 2 and the flower 5, while the value of the cake is 6 and the amount of the secured obligation 7, the creditors will receive 2/7 and 5/7 of 6. In any case, if the value of the mass or product is less than the amount of the secured obligations, there will be no value left for unsecured creditors.]

85 ter. The law should provide that a security right in separate tangibles that continues in a mass or product as provided in recommendation 32 and that is effective against third parties as provided in recommendation 47 has priority over a security right granted by the same debtor in the mass or product, if it is an acquisition security right. A secured creditor may not receive an amount greater than the obligation secured by its security right.

[Note to the Working Group: The Working Group may wish to note that the effect of the first sentence of this recommendation is to apply the general priority rules. Security rights in initial property have priority over all security rights in the mass or product that have been taken so as to cover future property, only if the former are acquisition security rights.]

Enforcement of a security right in a mass or product

[Note by the Working Group: The Working Group may wish to consider that the general enforcement rules should apply to the enforcement of a security right in assets that become part of a mass or product. For example, if the encumbered assets are oil of value 5 in a tank with oil worth 100, the secured creditor should be able to enforce its right only in oil of value 5. If the encumbered asset can be separated the secured creditor should be able to dispose of that part only in a commercially reasonable manner. If the encumbered asset cannot be easily separated, the whole mass or product may have to be sold.]

Law applicable to a security rights in a mass or product

[Note to the Working Group: The Working Group may wish to consider whether the law governing security rights in tangibles that become part of a mass or product should be the general rule applicable with respect to security rights in tangibles (i.e. rec. 136) or the rule applicable to security rights in proceeds (i.e. rec. 141). If rec. 136 applied and the sugar component was in country X, while the cake was in country Y, the law applicable would be the law of country Y (subject to the exceptions for mobile goods and export goods). If rec. 141 applied, the law of country Y would govern creation of the security right, while the law of country X would govern third-party effectiveness and priority. The difference between these two approaches is only about the law governing creation (i.e., law of country X or Y).]

Movables by anticipation and crops

[Note to the Working Group: The draft Guide provides that it is possible to take a security right in attachments either under the draft Guide or under applicable law governing security in immovable property. Similar issues arise in respect of (i) crops, whether renewable (e.g. as apples), annual (e.g. grain crops) or harvested (e.g. timber), (ii) products extracted from the ground (e.g. minerals, hydrocarbons, water, sand, gravel, sod), and (iii) materials that were returned to the status of movables as a result of their removal from a building being demolished or otherwise.

It is always possible to take a security right in each of these assets as future property, with creation of the security right occurring only once the property becomes movable. In such cases, there can never be a priority contest between a security right in the immovable created under other law and a security right in the movable created under the draft Guide, since the security right in the immovable will terminate as soon as the asset becomes mobilized.

Nonetheless it is possible to imagine a regime, like that applicable to attachments, that permits the creation of a security right in movables, which is immediately effective, even while the property remains an immovable. Such a regime would have the advantage of permitting, for example, separate crop financing or financing of extractive industries separate from the financing of the farm or the mining operation.

If the Working Group decides that the draft Guide should include such a regime, additional recommendations should be prepared to address: (i) priority contests between security rights taken in immovable property acquired under other law and security rights in movable property acquired under the draft Guide, (ii) the conditions under which creditors with security rights under the draft Guide may enforce them and the enforcement rights they may exercise, and (iii) the steps that must be taken by the creditor of a security right under the draft Guide in order to make the security right effective as against a creditor with a security right in the immovable property.]

A/CN.9/WG.VI/WP.26/Add.5

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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V. Effectiveness of the security right against third parties and registration

Part I. Effectiveness of the security right against third parties

Purpose

The purpose of the provisions of the law on the effectiveness of a security right against third parties is to create a foundation for the predictable, fair and efficient ordering of priorities by:

(a) Requiring registration as a pre-condition to the effectiveness of a security right against third parties, except where exceptions and alternatives to registration are appropriate in the light of countervailing commercial policy considerations; and

(b) Establishing the legal framework to support a simple, cost-efficient and effective public registry system for the registration of notices with respect to security rights.

[Meaning of third-party effectiveness]

34 bis. The law should provide that a security right is effective against third parties if it has been effectively created as provided in recommendation 7 and made effective against third parties as provided in recommendation 35 or 36.]

[Note to the Working Group: The Working Group may wish to note that the meaning of third-party effectiveness is addressed in recommendation 35 (see text in square brackets). However, because of its importance for both the third-party effectiveness and the priority chapter and the fact that these notions will be new to many legal systems, the Working Group may wish to address this matter in a separate recommendation at the beginning of this chapter. If the Working Group decides to retain recommendation 34 bis, which appears within square brackets, the bracketed text in recommendation 35 may be deleted. Recommendation 34 bis is supplemented by recommendations 34 ter to 34 quinquies, which further clarify the meaning of third-party effectiveness.]

Effectiveness of a security right that is not effective against third parties

34 ter. The law should provide that a security right that has been created under recommendation 7 is effective against the grantor even if it is not effective against third parties.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that a security right that is not effective against third parties has no effects as against general creditors or secured creditors whose security rights are not effective against third parties. This approach is consistent with the meaning of third-party effectiveness adopted in the draft Guide. The practical result of this approach is that no issue of priority arises in the case of security rights that are not effective against third parties and, therefore, such rights would be equal between them and with the rights of general creditors (unless they become judgement creditors, see A/CN.9/WG.VI/WP.26/Add.6, rec. 71).]

Effectiveness of a security right that is effective against third parties after a transfer of the encumbered asset

34 quater. The law should provide that, except as provided in recommendations 68 bis, 69 and 69 bis [see A/CN.9/WG.VI/WP.26/Add.6], a security right in an asset continues after transfer of the asset. If the security right was made effective against third parties before the transfer, it does not cease to be effective against third parties solely as a result of the transfer.

[Note to the Working Group: The Working Group may wish to note that the rule stated in rec. 34 quater (droit de suite) is re-stated somewhat differently in rec. 68 (see A/CN.9/WG.VI/WP.26/Add.6). The Working Group may wish to consider whether this rule should be stated in this chapter or in the chapter on priority. The Working Group may also wish to note that the commentary will explain that the second sentence is intended to ensure that the mere transfer does not make a security right ineffective against third parties, unless, for example, the transfer results in a change of location of the asset and the loss of third-party effectiveness due to the application of another law (although, under recommendation 145, third-party effectiveness is preserved for a certain period of time after the change of location) or the secured creditor does not amend its notice to reflect the name of the transferee as a new debtor.]

General method for achieving third-party effectiveness of security rights

35. The law should provide that, except as otherwise provided in the recommendations of this chapter and the chapter on acquisition financing devices, a security right [, created in accordance with the recommendations in the chapter on creation,] is effective against third parties only if a notice with respect to the security right is registered in a general security rights registry, as provided in recommendations 47 ter to 60. Registration of such a notice does not create a security right.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that registration of a notice of a security right is a pre-condition for it to become effective against third parties but does not create the security right. Creation requires an off-registry agreement between the parties as provided in the recommendations of the chapter on creation.]

Alternatives to registration

36. As an alternative to registration, the law should provide that a security right in the following types of asset may be made effective against third parties as follows:

(a) In tangibles, by dispossessing the grantor of the encumbered asset, as provided in recommendations 39 and 44;

(b) [In consumer goods of a value less than [specify value] at the time of creation of the security right, automatically upon creation of a non-acquisition security right (for acquisition security rights in consumer goods, see A/CN.9/WG.VI/WP.24/Add.5, rec. 128) that is not subject to a specialized registration or to a title certificate system, as provided in recommendation 39 bis];

(c) In movable property with respect to which a security right may, by other law, be made effective against third parties by registration in a specialized registry or by notation on a title certificate, by such registration or notation, as provided in recommendation 40;

(d) In proceeds, (i) automatically when the proceeds arise by achieving third-party effectiveness with respect to the original encumbered assets by registration before the proceeds arise[, but only if the proceeds are money, receivables negotiable instruments or rights to the payment of funds credited to a bank account], or (ii) by achieving third-party effectiveness with respect to the proceeds within a specified period after the proceeds arise, as provided in recommendations 41 and 41 bis;

(e) In a personal or property right securing payment or other performance of a receivable, negotiable instrument or other obligation, by achieving third-party effectiveness with respect to the receivable, negotiable instrument or other obligation, as provided in recommendation 41 ter;

(f) In a right to payment of funds credited to a bank account, by control, as provided in recommendation 43;

(g) In tangibles that are attachments at the time third-party effectiveness is achieved or that become attachments only subsequently, by registration with respect to the tangible as provided in recommendations 45, 46 and 46 bis; and

(h) In a mass or product by achieving third-party effectiveness [in a tangible before it becomes part of a mass or product] [in the mass or product within a certain time period after the asset becomes part of the mass or product], as provided in recommendation 47.

Concurrent methods

37. The law should confirm that different methods for achieving third-party effectiveness may be used for different items or kinds of encumbered assets, whether they are encumbered by the same security agreement or not.

Exclusive method

38. The law should provide that, except as provided in recommendation 36 (e), a security right in a right to drawing proceeds from an independent undertaking is made effective against third parties only by control, as provided in recommendation 42.

Continuity in third-party effectiveness

38 bis The law should provide that third-party effectiveness of a security right is continuous notwithstanding a change in the method by which it is made effective against third parties, provided that there is no time when the security right is not effective against third parties.

[Note to the Working Group: The Working Group may wish to note that recommendation 38 bis makes no separate reference to registration (i.e. advance registration before creation), as, if there is a change in the method of third-party effectiveness before registration lapses, the security will have been created and thus made effective against third parties.]

Lapse in registration or third-party effectiveness

38 ter. The law should provide that, if a security right has been registered as provided in recommendations 35 and 54 or made effective against third parties as provided in recommendations 35 and 36 and subsequently there is a period at which the security right is neither registered nor effective against third parties, registration or third-party effectiveness may be re-established. In such a case, registration or third-party effectiveness dates from the earliest time thereafter at which the security right is either registered or made effective against third parties.

[Note to the Working Group: The Working Group may wish to note that recommendations 38 bis and 38 ter track the language of recommendations 66 and 66 bis (see A/CN.9/WG.VI/WP.26/Add.6), under which priority dates from the time when third-party effectiveness is re-established or a notice with respect to the security right is registered. The Working Group may wish to consider whether the first sentence of recommendation 38 ter should be retained in this chapter as it deals with the lapse of registration or third-party effectiveness and the second sentence should be reflected only in the chapter on priority as it essentially deals with priority.]

The Working Group may also wish to note that the commentary will explain that third-party effectiveness may lapse where, for example, the secured creditor does not renew its registration before expiry of its initial term or where third-party effectiveness was obtained by delivery of possession of the encumbered assets to the secured creditor but the secured creditor later returns possession to the grantor. The commentary will also explain that third-party effectiveness does not lapse in such cases if the security right is registered or made effective against third parties before the lapse of the particular method of third-party effectiveness.

The commentary will include the following examples of situations where continuity in third-party effectiveness is preserved notwithstanding lapse in a particular method of third-party effectiveness.

On day 1, the grantor creates a security right in favour of the secured creditor who on the same day takes possession of the encumbered assets. On day 2, the secured creditor registers a notice about its security right and then relinquishes possession. Third-party effectiveness is continuous from day 1.

On day 1, the grantor creates a security right in favour of the secured creditor on day 1 who, on the same day, registers a notice of its security right. On day 2, the secured creditor, takes possession of the encumbered assets while registration lapses on day 3. Third-party effectiveness is continuous from day 1. The result is the same if the secured

creditor registers again on day 4 and surrenders possession of the encumbered assets to the grantor on day 5.]

Third-party effectiveness of a security right in tangibles

39. The law should provide that a security right in tangibles may also be made effective against third parties through dispossession of the grantor.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, as the term “tangibles” covers negotiable instruments and negotiable documents (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (i)), recommendation 39 applies to third-party effectiveness of security rights in negotiable instruments and negotiable documents. As a result, a security right in a negotiable instrument or in a negotiable document is made effective against third parties by registration or dispossession of the grantor. Recommendation 44 adds special rules with respect to third-party effectiveness of security rights in negotiable documents and goods covered by negotiable documents. The Working Group may also wish to note that “dispossession” will be defined to mean real objective dispossession.]

[Third-party effectiveness of a non-acquisition security right in low-value consumer goods]

39 bis. A non-acquisition security right in consumer goods of a value less than [specify value] at the time of creation of the security right [for acquisition security rights in consumer goods, see A/CN.9/WG.VI/WP.24/Add.5, rec. 128] that is not subject to a specialized registration or title certificate system is effective against third parties automatically upon creation of the security right.]

[Note to the Working Group: The Working Group may wish to note that there is no significant financing that involves non-acquisition security rights in consumer goods. Accordingly, the Working Group may wish to delete recommendation 39 bis (and recommendation 36 (b)). If this recommendation is retained, the Working Group may wish to consider that, as low value in one country may be high value in another country, the determination of low value should be based on a cost-benefit analysis that compares the potential realization value of an asset to the cost of registration. For the same reasons, the Working Group may also wish to exclude non-acquisition security rights in assets necessary for the livelihood, basic subsistence or health of an individual or a member of his or her household from the security rights covered in the Guide. The commentary could explain that, as a result, the same exceptions that apply typically to execution by judgement creditors would apply to secured creditors. Alternatively, the Working Group could include security rights in such assets in the scope of the Guide but apply to enforcement by secured creditors the same exemptions that apply to enforcement by judgements creditors.]

Third-party effectiveness of a security right in movables with respect to which there is a specialized registration or a title certificate system

40. The law should provide that a security right in movable property with respect to which a security right, by other law, may be made effective against third parties by registration in a specialized registry or by notation on a title certificate is effective against third parties:

- (a) If it is registered in the specialized registry; or

- (b) A notation of it is made on the title certificate.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that registration in the general security rights registry as provided in recommendation 35 or registration in the specialized registry or notation on a title certificate as provided in recommendation 40 are the only available methods for achieving third-party effectiveness (i.e. third-party effectiveness may not be achieved by possession), if so provided in the relevant special legislation. The Working Group may also wish to note that recommendation 40 is supplemented by recommendation 65 in A/CN.9/WG.VI/WP.26/Add.6, under which a security right registered in the specialized registry or with respect to which a notation was made in a title certificate has priority over a security right registered in the general security rights registry. Consequently, to ensure maximum priority over all classes of competing creditors, the security right should be made effective by registration in accordance to recommendation 40 rather than recommendation 35. This approach is justified by the need to preserve the reliability of the specialized registry or title certificate system for buyer of encumbered assets or other secured creditors who rely on these systems to ensure protection of their own rights.]

Third-party effectiveness of security rights in proceeds

41. *[See A/CN.9/WG.VI/WP.26/Add.4, rec. 41.]*

41 bis *[See A/CN.9/WG.VI/WP.26/Add.4, rec. 41 bis.]*

Third-party effectiveness of rights securing a receivable, negotiable instrument or any other obligation

41 ter. A personal or property right securing payment or other performance of a receivable, negotiable instrument or other obligation, is effective against third parties if the security right in the receivable, negotiable instrument or other obligation is effective against third parties.

[Note to the Working Group: The Working Group may wish to consider this recommendation together with recommendation 37 dealing with third-party effectiveness of a security right in a receivable (see A/CN.9/WG.VI/WP.26).]

Third-party effectiveness of security rights in rights to drawing proceeds from independent undertakings

42. *[See A/CN.9/WG.VI/WP.24/Add.2, rec. 49.]*

Third-party effectiveness of security rights in rights to payment of funds credited to bank accounts

43. *[See A/CN.9/WG.VI/WP.26/Add.1, rec. 43.]*

Third-party effectiveness of security rights in negotiable documents

44. *[See A/CN.9/WG.VI/WP.26/Add.3, rec. 40.]*

Third-party effectiveness of security rights in attachments

45. *[See A/CN.9/WG.VI/WP.26/Add.4, rec. 45.]*

46. *[See A/CN.9/WG.VI/WP.26/Add.4, rec. 46.]*

Third-party effectiveness of security rights in masses or products

47. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 47.]

Part II. The registry system**Purpose**

The purpose of the provisions of the law on the registry system is to clarify the functions, requirements and consequences of registration in the general security rights registry.

Functions of registration in the general security rights registry

47 bis. The law should provide that the functions of registration in the general security rights registry are to provide:

- (a) A method by which a security right may be made effective against third parties whether the security exists at that time or is created in the future;
- (b) A basis for applying priority rules based on the time at which a security right was made effective against third parties; and
- (c) An additional source for third parties, such as prospective secured creditors, judgement creditors, the grantor's insolvency representative and buyers of encumbered assets, to obtain information as to whether assets of the grantor may be encumbered then or subsequently by a competing a security right.

47 ter. The law should provide that a notice may be registered in the general security rights registry and may perform the functions mentioned in recommendation 47 bis whether the security right exists at the time of registration or is created subsequently and whether the grantor has a right in the assets covered in the notice at the time of registration or obtains a right in them subsequently.

[Note to the Working Group: The Working Group may wish to note that the commentary will relate recommendations 47 bis and 47 ter to the relevant recommendation on creation, recommendation 34 bis (distinguishing creation from third-party effectiveness), recommendation 35 (making the point that registration does not create a security right), recommendation 54 (pre-registration) and recommendation 40 (registration in a specialized registry).]

The commentary will also explain that that registry systems that require document filing (rather than notice filing as provided in rec. 48 (a) and 49, without any scrutiny or verification by anybody other than the registrant as provided in rec. 48 (b)), have constitutive effects (rather than the effects described in recommendation 47 bis) and require high (e.g. ad valorem) registration fees (rather than nominal fees based on cost recovery as provided in rec. 48 (g)) are not suitable for a speedy, efficient, inexpensive and user-friendly registry (see recs. 47 quater and 48 below), which is crucial for a secured transactions law in movable property that promotes increased access to lower-cost credit.]

Design principles

47 quater. The law should provide that the registry is designed to accomplish the functions set out in recommendation 47 ter, but only in a manner that ensures that registration and

searching are speedy, efficient, inexpensive, user-friendly and publicly accessible. In particular, requirements as to content (specified items of information, not original documents) of the information submitted ("notice") and the method of submission should be no more burdensome than is necessary to ensure that the registry system functions in the manner indicated in this chapter and produce the least possible risk of invalidation of the registration.

Speedy, cost-efficient and effective registration and searching

48. In order to ensure speedy, flexible, cost-efficient and effective registration and searching, the operational and legal framework of the registry should reflect the following characteristics:

(a) Registration is effected by registering a notice, containing the information specified in recommendation 49, as opposed to a copy of the underlying security documentation;

(b) A notice may be registered without verification or scrutiny by anybody other than the registrant;

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that false or misleading notices could be discharged under recommendation 57, while the question whether any penalties for knowingly registering a false or misleading notice should be imposed is left to tort, penal or other law. The commentary will also provide guidance as to the type of possible penalties.]

(c) A search may be made without the need for the searcher to justify the reasons for the search;

(d) The record of the registry is centralized and contains all notices of security rights registered under this law;

(e) Notices are indexed and can be retrieved by searchers according to the name of the grantor or according to some other reliable identifier of the grantor, such as State-issued identification or commercial registration number;

(f) The registry is open to the public;

(g) Fees for registration and searching are set at a level no higher than necessary to permit cost-recovery;

(h) Registrants may choose among multiple modes and points of access to the registry;

(i) Clear and concise guides to registration and searching procedures and are widely available and information about the existence and role of the registry is widely disseminated; and

(j) The registry operates reliable and consistent service hours compatible with the needs of potential registry users;

(k) To the extent the infrastructural capacity of the State permits, the registration system is computer-based. In particular,

(i) Notices are stored in electronic form in a computer database;

(ii) Registrants and searchers have immediate access to the registry record by electronic or similar means, including internet and electronic data interchange;

- (iii) The system is programmed to minimize the risk of entry of incomplete or irrelevant information (e.g. by requiring essential data fields to be completed);
- (iv) The system is programmed to facilitate speedy and complete retrieval of information and to minimize the practical consequences of human error.

Security and integrity of the registry

48 bis. In order to ensure the security and integrity of the registry record, the operational and legal framework of the registry should reflect the following characteristics:

- (a) A registrant can obtain a record of the registration as soon as the registration information is entered so as to verify that the entry is accurate and complete;
- (b) The identity of registrants is verified in advance and evidence of identity is preserved;
- (c) [The registry] [The secured creditor] is obligated to forward a copy of a notice to the grantor named in the notice;
- (d) The registry is obligated to send a copy of any changes to a notice to the secured creditor named in the notice;
- (e) Although the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to ensure that it is operated in accordance with the governing legal framework.
- (f) A back-up copy of the registry record is maintained so as to ensure that it can be reconstructed.

Liability for loss or damage

48 ter. The law should provide for the allocation of liability for loss or damage caused by an error in the administration or operation of the registration and searching system. If the system is designed to permit direct registration and searching by registry users without the intervention of registry personnel, the responsibility of the registry with respect to an inaccurate or incomplete printed registration or search result is limited to a system malfunction.

Required content of notice

49. The law should require the notice to contain only:

- (a) The names or other reliable identifiers of the grantor and the secured creditor, or its representative, as provided in recommendations 50 and 51, and an address for each one of them;
- (b) A description of the asset covered by the notice as provided in recommendation 53;
- (c) The duration of the registration as provided in recommendation 56; and
- [(d) A statement of the maximum monetary amount for which the security right may be enforced [if the State determines that such information is helpful to facilitate subordinate lending.]]

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, while the meaning of the term representative may be subject

to other law, it included agent, trustee, or other person acting on behalf or in favour of the secured creditor.]

Sufficiency of grantor name in a notice

50. The law should provide that the name or other identifier of the grantor entered on a registered notice is sufficient only if the notice can be retrieved by searching the registry record according to the correct name or other identifier of the grantor.

51. Where the grantor is an individual, the law should provide that the grantor's name for the purposes of effective registration of a notice is the name that appears in specified official documents, such as a birth certificate, identity card, driver's licence or passport. Where the grantor is a legal entity, the law should provide that the grantor's name for the purposes of effective registration is the name that appears in the documents constituting the entity.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that where the name of the grantor is listed in separate record maintained by the State, for example, a commercial or company register, the State may wish to set up links between the two registers to facilitate accurate data entry.]

Change in name or other identifier of the grantor

52. The law should provide that if the name of the grantor changes after a notice with respect to a security right is registered:

(a) A security right in an encumbered asset, in which the grantor had rights at the time of the name change remains effective against third parties;

(b) A security right in an asset acquired by the grantor or created within [...] days after the time of the name change, is effective against third parties; and

(c) A security right in an asset acquired by the grantor or created more than [...] days after the time of the name change, is not effective against third parties unless the notice is amended to provide the new name of the grantor.

[Note to the Working Group: The Working Group may wish to note that the commentary will provide guidance as to the length of the time period referred to in recommendation 52 (e.g. 60, 90 or 120 days). The commentary will also discuss various circumstances in which an entity may change its name (e.g. merger or acquisition).]

Sufficiency of description of assets covered by a notice

53. The law should provide that a description of the assets covered by a notice is sufficient if it enables a third person to identify the assets covered by the notice separate from other assets of the grantor. If the assets covered by the notice consist of a generic category or categories of movable property or of all present and after-acquired movable property, a generic description is sufficient.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that descriptions, such as "all inventory" or "all present and future assets", would be sufficient.]

Advance registration

54. The law should provide that a notice with respect to a security right may be registered before or after creation of the security right.

[Note to the Working Group: The Working Group may wish to note that the purpose of this recommendation is to confirm that registration may take place before creation of the security right. The commentary will explain that the purpose of allowing advance registration is to enable secured creditors to ensure their priority position by registering – especially as against potential competing secured creditors – at the earliest time possible in order to facilitate the extension of credit upon conclusion of the formal security agreement (see also A/CN.9/WG.VI/WP.26/Add.6, rec. 66, according to which priority dates back from the time of registration (i.e. before creation of a security right, assuming that a security right comes into existence subsequently) or at the time of third-party effectiveness (i.e. creation plus registration or possession).]

One notice for multiple security agreements between the same parties

55. The law should provide that registration of a single notice is sufficient to ensure the third-party effectiveness of security rights created or to be created by all security agreements entered into between the same parties to the extent they cover items or kinds of movable property that fall within the description contained in the notice.

Duration and extension of notice

56. The law should specify the duration of a notice or permit the registrant to select the duration of a notice at the time of registration and extend it at any time before its expiry.

Time of effectiveness of notice or amendment

56 bis. The law should provide that a notice or its amendment takes effect when the information contained in the notice or its amendment is entered into the registry record so as to be disclosed on a search of the registry record.

[Note to the Working Group: The Working Group may wish to note that, if the registration system permits the submission of paper notices to the registry (as opposed to direct data entry by registrants), there will be some delay between receipt of the notice by the registrar and the time the information on the notice is entered into the record by registry staff so as to become available to searchers. In such circumstances, the question arises as to the time when the registration should be effective, the time of receipt of the notice at the registry or the time the notice is entered into the record and becomes available to searchers. If the registration is effective when received by the registrar, a search will not disclose all legally effective registrations. To protect the information needs of third parties, recommendation 56 bis, therefore, makes the time of registration concomitant with searchability. Although this puts the risk associated with any delay on the secured creditor, the secured creditor is in a better position to take steps to protect itself than third parties. Moreover, the recommendations earlier outlined on the design and operation of the registry should ensure speedy and efficient registration procedures. In a fully electronic system that requires no intervention by registry staff entry of the notice and its availability to searchers is virtually simultaneous and this problem is significantly reduced.

The Working Group may also wish to note that the commentary will explain that an amendment may involve various changes, such as: (i) adding or deleting items or kinds of encumbered assets; (ii) adding or deleting the name of a grantor; (iii) recording a change

in the name of a grantor or secured creditor; (iv) disclosing an assignment of the security right by the secured creditor named in the original registration to a new secured creditor; or (v) disclosing a subordination agreement or undertaking that affects a registered security right.]

Cancellation or amendment of notice

57. The law should provide that, if no security agreement has been completed between the parties or if the security right has been terminated by full payment or performance of all of the secured obligations and termination of any commitment to extend credit or if any information contained in the notice is not authorized by the grantor:

(a) The secured creditor must cancel or amend the notice within [...] days after the request of the grantor;

(b) The grantor is entitled to compel cancellation or amendment of a notice through a summary procedure;

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the grantor may seek to cancel the notice under paragraph (b) even before expiry of the period under paragraph (a). In such a case, however, the grantor may have to bear any costs involved (see A/CN.9/593, para. 54). The Working Group may also wish to note that the commentary will provide guidance to States as to the length of the time period referred to in recommendation 58 (e.g. 20-30 days).]

(c) The grantor and the secured creditor may agree to cancel or amend the notice.

58. The law should provide that the secured creditor is entitled to cancel or amend a notice at any time.

59. The law should provide that the registrar should remove a notice from the searchable records of the registry within a short period of time after its cancellation, but the information in the cancelled notice and the fact of the cancellation should be archived so as to be capable of retrieval if necessary.

60. [The law should provide that, in the case of an assignment of the secured obligation, [the notice may be amended to indicate the name of the new secured creditor but the unamended notice remains effective] [to remain effective, the notice must be amended to indicate the name of the new secured creditor].]

[Note to the Working Group: The Working Group may wish to consider which of the alternatives reflected in recommendation 60 within square brackets is preferable (see A/CN.9/593, para. 56).]

A/CN.9/WG.VI/WP.26/Add.6

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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VI. Priority of the security right over the rights of competing claimants

Purpose

Consistent with the purpose of the Guide to encourage the extension of secured credit, the purpose of the provisions of the law on priority is to:

(a) Enable a potential secured creditor to determine, in an efficient manner and with a high degree of certainty prior to extending credit, the priority that its security right would have over the rights of competing claimants; and

(b) Facilitate transactions by which a grantor may create more than one security right in the same asset and thereby use the full value of its assets to obtain credit.

Scope of priority rules

61. The law should have a complete set of priority rules covering priority conflicts with every possible competing claimant.

Scope of priority

62. The law should provide that the priority accorded to a security right extends to all monetary and non-monetary obligations owed to the secured creditor [up to a maximum monetary amount set forth in the notice], including principal, costs, interest and fees, to the extent secured by the security right.

Priority of security rights securing future obligations

62 bis. [Subject to recommendation 71,] the priority of a security right does not depend on the date when the secured obligation was incurred.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that if a security right securing a credit facility is made effective against third parties on day 1 and credit is extended on day 2 and then on day 3 and 4, priority dates back from the time the security right was made effective against third parties (i.e. day 1). The commentary will also explain that an exception to this rule is stated in rec. 71, which provides that, if the secured obligation was incurred after a judgement creditor acquires rights in the encumbered asset, the security right is subordinate to the

rights of the judgement creditor. The Working Group may wish to consider whether further exceptions should be introduced (e.g. the super-priority of an acquisition security right should be limited to secured obligations incurred up to the time of the acquisition of the relevant assets by the transferee).]

Priority of security rights in future assets

62 ter. A security right in assets that the grantor acquired or that were created after the time a security right in them became effective against third parties [by registration] has the same priority as the security right in assets in which the grantor had rights at the time the security right was made effective against third parties.

[Note to the Working Group: The Working Group may wish to consider whether the priority in future assets should be the same as the priority in present assets only if a security right was made effective against third parties by registration. Such an approach could be justified, since only in the case of registration would third parties have notice of the possible existence of a security right.]

Subordination agreements

63. The law should provide that a competing claimant entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant.

[Note to the Working Group: The Working Group may wish to note that the commentary will make clear that, under recommendation 63, a subordination agreement would be possible not only between competing claimants with a different priority ranking but also between competing claimants with the same priority ranking (see A/CN.9/593, para. 61). The Working Group may also wish to note that subordination agreements in the case of the grantor's insolvency are addressed in recommendation J in the recommendations of this Guide on Insolvency (A/CN.9/WG.VI/WP.21/Add.3): "The insolvency law should provide that if a holder of a security right in an asset of the insolvency estate has subordinated its priority unilaterally or by agreement in favour of any existing or future competing claimant, such subordination is binding in insolvency proceedings with respect to the grantor."]

Priority between security rights in the same encumbered assets

64. The law should provide that, except as provided in other recommendations in this chapter and in the chapter on acquisition financing devices, a security right in movable property registered as provided in recommendation 40 or 54 [see A/CN.9/WG.VI/WP.26/Add.5] or made effective against third parties as provided in recommendation 35 or 36 [see A/CN.9/WG.VI/WP.26/Add.5], whichever occurs first, has priority over a security right in the same property which was subsequently registered, as provided in recommendation 40 or 54, or made effective against third parties, as provided in recommendation 35 or 36.

[Note to the Working Group: The Working Group may wish to note that the commentary will make clear that issues of priority arise where there are competing rights in the same assets, the debtor defaults on the secured obligation and the value of the encumbered assets is not sufficient to satisfy all secured obligations. The commentary will also make clear that:

(a) As between two security rights registered in the general security rights registry, the first registered wins;

(b) As between two security rights registered in a specialized registry or noted on a title certificate, the first registered wins (the same rule is restated within square brackets in recommendation 65);

(c) As between a security right registered in the general security rights registry and a security right registered in a specialized registry or noted on a title certificate, the latter wins (as a result of rec. 65); and

(d) As between a security right registered (in advance of creation) in the general security rights registry or in a specialized registry or noted on a title certificate and a security right (created and) made effective against third parties, the first registered or made effective against third parties wins.

In addition, the Working Group may wish to note that the commentary will also clarify that, if a security right is not effective against third parties, no issue of priority arises and, therefore, such security rights have the same ranking. The commentary will also explain that recommendation 64 applies to a conflict between two security rights in the same encumbered assets (as to whether it should apply to conflicts with a buyers and judgement creditor, see note after rec. 68 bis).

Moreover, the Working Group may wish to note that the commentary will also explain that the reasons why a security right registered in advance of its creation is given priority as of the time of registration are to encourage advance registration (which provides notice to third parties) and to provide certainty to secured creditors by enabling them to determine the priority of their security rights before they extend credit. This reason does not apply to advance possession. Furthermore, such a rule would not be necessary with respect to negotiable instruments and negotiable documents, since possession of them gives a superior right than is afforded by registration (see A/CN.9/WG.VI/WP.26/Add.2, rec. 74, and A/CN.9/WG.VI/WP.26/Add.3, recs. 80 and 81). As to other tangibles, the assumption is that advance possession is not practiced (delivery of possession will always be based on an agreement about the security right). Accordingly, no general rule along the lines of recommendation 64 is introduced with respect to advance possession. The Working Group may wish to consider whether there are substantial financing practices in which the secured creditor may take possession of the encumbered assets in advance of such agreement and, if so, whether the secured creditor that took advance possession should have priority as of that time (see A/CN.9/593, para. 68).]

Priority of security or other rights registered in a specialized registry or noted on a title certificate

65. The law should provide that a security right in movable property that was made effective against third parties as provided in recommendation 40 [see A/CN.9/WG.VI/WP.26/Add.5] has priority over [(i)] a security right in the same property with respect to which a notice was registered in the general security rights registry or which was made effective against third parties by any other method regardless of the

order[, (ii) a security that was subsequently registered in the specialized registry or noted on a title certificate].

[Note to the Working Group: The Working Group may wish to note that recommendation 65 does not apply to the priority of security rights in attachments. Recommendations 82 and 83 apply to attachments to immovable property, recommendation 84 applies to attachments to movables subject to a specialized registration system and recommendation 84 bis applies to attachments to movables.]

Continuity in priority

66. The law should provide that the priority of a security right is continuous notwithstanding a change in the method by which it is made effective against third parties, provided that there is no time when the security right is not effective against third parties.

66 bis. The law should provide that, if a security right has been registered as provided in recommendations 35 and 54 or made effective against third parties as provided in recommendations 35 or 36 and subsequently there is a period at which the security right is neither registered nor effective against third parties, the priority of that security right dates from the earliest time thereafter at which the security right is either registered or made effective against third parties.

[Note to the Working Group: The Working Group may wish to note that, under recommendations 38 bis and ter (see A/CN.9/WG.VI/WP.26/Add.5), third-party effectiveness is continuous, if it lapses, it dates back from the time it was re-established (see also examples set forth in the note to rec. 38 ter).]

Priority of security rights in proceeds

67. *[See A/CN.9/WG.VI/WP.26/Add.4, rec. 67.]*

Rights of buyers, lessees and licensees of encumbered assets

68. The law should provide that, once a security right is made effective against third parties, the security right continues in the encumbered assets in the hands of a third party except as otherwise specifically provided in recommendations 68 bis, 69 and 69 bis.

[Note to the Working Group: The Working Group may wish to note that recommendation 68 is designed to state the rule that the secured creditor may follow the asset in the hands of a transferee (droit de suite, a rule stated somewhat differently in rec. 34 quater) (see A/CN.9/WG.VI/WP.26/Add.5).]

68 bis. The law should provide that a security right that was made effective against third parties before a sale, lease, licence or other disposition of the encumbered assets does not continue in the assets if the grantor transfers, leases or licences the assets free of the security right with the authority of the secured creditor.

[Note to the Working Group: The Working Group may wish to note that, under recommendation 64, registration of a notice before the creation of a security right gives priority over another security right that was (created and) made effective against third parties later. The Working Group may wish to consider whether this recommendation should apply to priority conflicts between a secured creditor and a buyer, lessees or licensee of encumbered assets acquiring a right in the assets after registration of a notice but before actual creation of a security right in them. It may be considered that the buyer, lessee or licensee should take free of the security right in these circumstances on the basis that by the time the security right is created, the encumbered assets are no longer owned

by the seller or are subject to the possession or use rights of the lessee or licensee. The disadvantage of such an approach would be that the secured creditor would then be able to rely on its act of advance registration to preserve priority only as against other secured creditors. As against intervening transferees, the secured creditor would have to undertake further inquiries before being able to safely advance credit once the security right comes into existence.

A similar issue arises when a judgement creditor acquires rights in the encumbered assets after advance notice of a security right is registered but before the security right is actually created. The considerations are somewhat different in this case since a secured creditor is not subordinated to the rights of the judgement creditor, under the recommendations in this chapter, until it acquires actual knowledge of the judgement creditor's rights and is then subordinated for advances made after receiving knowledge. Consequently, if the security right has not yet been created when the judgement creditor advises the secured creditor of its intervening rights, the secured creditor can protect itself either by requiring the grantor to discharge the judgement or by reducing the credit the secured creditor plans to extend. A similar rule could be adopted for intervening buyers. Under this approach, a buyer, licensee, or lessor of assets would take free of a prior-registered security right that has not yet come into existence provided the secured creditor had knowledge of the sale, lease or licence. Buyers, lessees, and licensees could then protect themselves by giving notice of their transaction rather than having to secure a positive waiver of priority from the secured creditor. The secured creditor would likewise be protected because it would have actual knowledge of the intervening transaction before entering into the security agreement.

The Working Group may also wish to note that application of the rule in recommendation 68 bis requires a comparison of the date at which a security right was made effective against third parties with the date of the sale, lease or license of the encumbered asset. While the date at which the security right was made effective against third parties will usually be obvious (inasmuch as the registry's records will reveal when a notice was filed), it may not be clear when a sale has taken place. For example, a contract to sell goods that are encumbered assets may be entered into between the grantor/seller and the buyer on date 1, they may have been shipped to the buyer on date 2 (either because the contract provided for shipment on that date or otherwise), the goods may have been received by the buyer on date 3, and the buyer may have paid for them on date 4; under applicable law, the sale by the grantor/seller to the buyer may have occurred on any of those dates or on still another date. Application of the rule in recommendation 68 requires knowing which of those dates is the date on which the sale took place because the date that the security right was made effective against third parties might precede some but not all of those dates. The Working Group may thus wish to consider whether recommendation 68 bis (or the commentary accompanying it) should provide additional guidance as to when a sale should be considered to have taken place for purposes of determining the status of the buyer's rights to the goods as against the secured creditor. The commentary will also make clear that, if the grantor of an asset sells it with a retention of title (ROT), the buyer takes free of the ROT when it pays the price. Before that, the ROT seller has the rights of an owner (or secured creditor, depending on whether a unitary or a non-unitary approach is followed (see A/CN.9/WG.VI/WP.24/Add.5).]

69. The law should also provide that:

(a) A buyer of inventory, who buys encumbered inventory in the ordinary course of business of the seller, takes the inventory free of the security right, even if the buyer has knowledge of the existence of the security right;

(b) A lessee of movable property in the ordinary course of business of the lessor takes its rights under the lease free of a security right in that property, even if the lessee has knowledge of the existence of the security right; and

(c) A licensee in the ordinary course of business of the licensor under a non-exclusive license takes its rights under such license free of a security right in the licensed property that is effective against third parties, even if the licensee has knowledge of the existence of the security right.

[Note to the Working Group: The Working Group may wish to also recommend that buyers of consumer goods [of low value] that have no knowledge of a security right in the goods should take free of a security right in the goods. In that connection, the Working Group may wish to take into account that such buyer would have no way of finding out about the existence of a security right in the goods as, under recommendations 36 (b) (see A/CN.9/WG.VI/WP.26/Add.5) and 128 (see A/CN.9/WG.VI/WP.24/Add.5) non-acquisition security rights in low-value consumer goods and acquisition security rights in consumer goods are exempted from registration (see A/CN.9/593, para. 77).]

69 bis. The law should provide that where a person acquires a right in encumbered assets free of a security right, any person who subsequently acquires a right in those assets from that person also takes free of the security right.

Priority of preferential claims

70. The law should limit, both in number and amount, preferential claims arising by operation of law that have priority over security rights, and to the extent preferential claims exist, they should be described in the law in a clear and specific way.

[Note to the Working Group: The Working Group may wish to consider whether buyers, lessees and licensees should take free of any preferential claims. As this question does not involve a priority conflict with a security right, it may be addressed in the commentary.]

Priority of rights of judgement creditors

71. The law should provide that[, except as provided in recommendation 130 bis,] a security right has priority over the rights of an enforcing unsecured creditor, provided that it was made effective against third parties before the enforcing unsecured creditor[, under law other than this law,] obtained a judgement or provisional court order against the grantor and taken the steps necessary to acquire rights in assets of the grantor by reason of the judgement or provisional court order. The priority of the security right extends to credit extended by the secured creditor within a specified period of days after the secured creditor acquired knowledge of the existence of the enforcing unsecured creditor's rights in the assets but does not extend to credit extended after the expiry of that period.

[Note to the Working Group: The Working Group may wish to consider: (i) whether it is possible for a security right in a particular asset to become effective against third parties at the same time that an unsecured creditor acquires, by reason of judgement or provisional court order, a right in that asset and (ii) if so, which of those rights has priority over the other.]

The problem is most important in the case of a security right in future assets of a grantor. The Working Group may wish to consider the following example. A secured creditor takes a security right in all present and future assets of the grantor and advances credit to the grantor. The secured creditor registers a notice that covers present and future

assets. Subsequently, under law other than the secured transactions law, an unsecured creditor of the grantor obtains a judgement or provisional court order entitling the unsecured creditor to a right in the grantor's present and future assets. Still later, the grantor buys and receives delivery of new assets. At that moment, the grantor acquires rights in those assets and the security right in those assets is created and, because of the earlier registration of the notice, the security right is immediately effective against third parties. At the same time, the unsecured creditor obtains a right in those goods because of the previously granted judgement or provisional court order providing for such a right. The current draft of recommendation 71 provides that the unsecured creditor's right has priority over the security right of the secured creditor.

The Working Group may wish to consider whether in such cases the secured creditor should have priority rather than the unsecured creditor. This result would seem to further the goals of the Guide in creating greater certainty for the secured creditor with a view to making more credit available at lower cost. The result could be easily accomplished, without extensive redrafting, by adding in the first sentence of recommendation 71 the words "at the same time as or" immediately prior to the words "before the enforcing unsecured creditor".

The Working Group may also wish to consider whether an exception to this recommendation should be introduced for acquisition security rights that are made effective against third parties within the relevant grace period (see recommendation 130 bis in A/CN.9/WG.VI/WP.24/Add.5). Acquisition security rights that are made effective against third parties during the relevant grace period should not lose to a judgement creditor described in this recommendation whose right in the encumbered asset arose after the creation of the security right but before it was made effective against third parties. If this were not the case, utilizing the grace period would be too risky for acquisition financiers.

In addition, the Working Group may wish to note that the commentary will explain that the priority under recommendation 71 does not extend to credit committed but not extended before the judgement creditor took the necessary steps to acquire rights in the encumbered assets. This approach is based on the assumption that the judgement will be an event of default under the credit facility enabling the secured creditor to cease extending any credit.

The commentary will also explain the implications of this recommendations for certain practices in which the credit facility does not provide for an event of default, such as a commitment consisting of an independent undertaking where the issuer may not revoke the independent undertaking if it does not permit revocation as a result of a judgement against assets securing the grantor's obligation to reimburse the issuer for a payment under the independent undertaking.

Furthermore, the commentary will explain that, if the priority were to be limited to an amount mentioned in the notice registered, the issue might be resolved since the remaining assets of the secured creditor would be available for the payment of claims of unsecured creditors (see A/CN.9/593, para. 80-82). The commentary will also give guidance as to the length of the time period referred to in this recommendation.]

Priority of rights in assets for improving, storing or transporting the assets

72. If law other than this law gives rights equivalent to security rights to a creditor that has added value to goods (e.g. by repairing them) or preserved the value of goods (e.g. by storing or transporting them), such rights are limited to the goods, whose value has been

improved or preserved and which are in the possession of that creditor, up to the value so added or preserved, and have priority over pre-existing security rights in the goods.

[Note to the Working Group: The Working Group may wish to note that limiting the priority given to storage and repair claims over security rights by reference to the extent to which they add to or preserve the value of the encumbered assets may give rise to a difficult and costly evidentiary burden for repairers, storers or transporters. The Working Group may wish to consider referring instead to the value (or the reasonable value) of the repair, transport or storage services rendered in respect of the encumbered assets. Alternatively, reference could be made to the reasonable expenses of the repairer, storer or transporter. These formulations would still ensure that the priority of the repairer, storer or transporter is limited to services rendered with respect to the encumbered assets while avoiding difficult questions of proof as to the relative value of the encumbered assets before and after the services are rendered.]

Priority of reclamation claims

73. If law other than this law provides that suppliers of goods have the right to reclaim the goods, the law should provide that the right to reclaim the goods is subordinate to security rights in such goods.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation 73 creates a commercial law rule designed to accord priority to secured creditors over reclamation claims. Reclamation claims may arise by operation of law upon default or financial insolvency of the grantor. If an insolvency proceeding has commenced, applicable insolvency law will determine the extent to which the secured creditors and the reclamation claimants would be stayed or their rights would otherwise be affected (see recommendations 39-51 of the UNCITRAL Insolvency Guide). However, the priority rule established by this recommendation would be unaffected by the insolvency proceeding (see A/CN.9/WG.VI/WP.21/Add.3, draft additional recommendation I). The commentary will also explain, for the benefit of States that do adopt a non-unitary approach, that the reclamation claim does not include retention of title.]

Priority of rights of creditors in insolvency proceedings

[Note to the Working Group: See recommendation I in the recommendations of this Guide on Insolvency (A/CN.9/WG.VI/WP.21/Add.3): "The insolvency law should specify that, if a security right is entitled to priority under law other than the insolvency law, that priority continues unimpaired in insolvency proceedings except if, pursuant to the insolvency law, another claim is given priority. Such exceptions should be minimal and clearly set forth in the insolvency law. This recommendation is subject to Recommendation 88 of the Insolvency Guide."]

Priority of security rights in negotiable instruments

74. *[See A/CN.9/WG.VI/WP.26/Add.2, rec. 74.]*

Priority of security rights in rights to drawing proceeds from independent undertakings

75. *[See A/CN.9/WG.VI/WP.24/Add.2, recommendation 62.]*

Priority of security rights in bank accounts

76. [See A/CN.9/WG.VI/WP.26/Add.1, rec. 76.]

77. [See A/CN.9/WG.VI/WP.26/Add.1, rec. 77.]

78. [See A/CN.9/WG.VI/WP.26/Add.1, rec. 78.]

Priority of security rights in money

79. The law should provide that a person that obtains possession of money that is subject to a security right takes the money free of the security right, whether the money constitutes an original encumbered asset or proceeds, unless that person acts in collusion with the transferor to deprive the secured creditor of its security right in the money. This recommendation does not lessen the rights of holders of money under law other than this law.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that recommendation 79 is designed to promote the important policy of maximizing the negotiability of money, limiting negotiability only to the extent necessary to protect the holder of a security right in the money against collusion by a transferee of money and its transferor. It is intended that this recommendation be aligned with recommendation 78 dealing with security rights in funds transferred from a bank account.]

The Working Group may also wish to note that the commentary will clarify that the term “money” in the Guide is intended to refer to, and only to, legal tender, i.e. the currency currently in use as a medium of exchange authorized by a government. Other forms of property are casually spoken of as money, but they are not money for purposes of the Guide. For example, if one deposits currency into one’s bank account, reference is often made to money in the bank (or cash in the bank), but the depositor’s asset is no longer money, it is instead, under the Guide, “funds credited to a bank account”. and the claim of the depositor against the bank is referred to in the Guide as the “right to payment of funds credited to a bank account”. Similarly, the deposit of a check would result in the depositor’s asset no longer being a negotiable instrument, but instead would be funds credited to a bank account. In addition, money held by a coin dealer as part of a collection is not “money” under the Guide.

The Guide addresses security rights in money both as original encumbered assets and as proceeds of another form of encumbered asset. An example of the latter case would be the receipt, by a seller that has granted a security right in its receivables, of payment of its outstanding invoices in currency (not by check or electronic funds transfer). Under the Guide, the money in the seller’s hands would be the proceeds of the seller’s receivable and the secured creditor would have a security right in the money as proceeds. Similarly, if a person that has granted a security right in an item of equipment sells it to a person who pays for it in cash, the money in the seller’s hands constitutes proceeds of the equipment and is subject to the security right.

Like money, funds credited to a bank account may be the subject of security rights either as original encumbered assets or as proceeds. If the currency and the checks were subject to a security right in favour of the depositor’s creditor, the funds credited to the bank account would in both cases be the proceeds of the pre-existing encumbered asset (the money or the negotiable instrument). If the credit to the depositor’s bank account results from an electronic funds transfer from a third party in payment of a receivable

owed by the transmitter to the depositor, the funds credited to the bank account would be the proceeds of the pre-existing encumbered asset (the receivable).

Each provision of the Guide, e.g. rules for creation, effectiveness against third parties, priority, etc., applies to all encumbered assets—except to the extent a special rule is provided for a particular type of asset. Thus, it is always necessary to ascertain whether a special rule exists with respect to money or the right to payment of funds credited to a bank account.

An important example of a special rule is that which governs the rights of a transferee of (i) money that, in the hands of transferor, was subject to a security right, and (ii) funds that were transferred from a bank account in which those funds, while owned by the transferor and credited to that bank account, were subject to a security right. Because of the need to preserve the negotiability of money and funds transferred from bank accounts, special rules are provided in the Guide to protect transferees of such assets.

With respect to money and funds credited to a bank account, it is important to focus on whether the issue under consideration concerns (i) those two assets as property of the grantor or (ii) the rights of third-party transferees from the grantor of money or of funds transferred from the grantor's bank account. The preceding paragraph, which deals with the rule that governs the rights of transferees (the second category), illustrates this distinction. It is separate from the rule (the first category) that governs a priority contest between a security right in money or in funds credited to a bank account vis-à-vis a competing claimant when the grantor still owns (i.e., has not transferred) the encumbered asset.]

Priority of security rights in negotiable documents

80. [See A/CN.9/WG.VI/WP.26/Add.3, rec. 80.]

81. [See A/CN.9/WG.VI/WP.26/Add.3, rec. 81.]

Priority of security rights in attachments to immovable property

82. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 82.]

83. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 83.]

Priority of security rights in attachments to movable property subject to a specialized registration or title certificate system

84. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 84.]

84 bis. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 84 bis.]

Priority of security rights in masses of goods or products

85. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 85.]

85 bis. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 85 bis.]

85 ter. [See A/CN.9/WG.VI/WP.26/Add.4, rec. 85 ter.]

A/CN.9/WG.VI/WP.26/Add.7

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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Recommendations of the draft Legislative Guide on Secured Transactions

I. Key objectives

Purpose

The purpose of the recommendations on key objectives is to provide a broad policy framework for the establishment and development of an effective and efficient secured transactions law. These recommendations could be included in a preamble of the secured transactions law as a guide to the underlying legislative policies to be taken into account in the interpretation of the law (hereinafter referred to as “the law”).

Key objectives

1. The following key objectives should be considered:
 - (a) Promote secured credit;
 - (b) Allow utilization of the full value inherent in assets to support credit in a broad array of credit transactions;
 - (c) Enable parties to obtain security rights in a simple and efficient manner;
 - (d) Recognize party autonomy;
 - (e) Provide for equal treatment of diverse sources of credit;
 - (f) Validate non-possessory security rights;
 - (g) Encourage responsible behaviour on the part of all parties by enhancing predictability and transparency;
 - (h) Establish clear and predictable priority rules;
 - (i) Facilitate enforcement of creditor’s rights in a predictable and efficient manner;

- (j) Balance the interests of affected persons; and
- (k) Harmonize secured transactions laws, including conflict-of-laws rules.

II. Scope of application

Purpose

The purpose of the scope provisions of the law is to specify the parties, the security rights, the secured obligations and the assets to which the law applies.

Parties, security rights, secured obligations and assets covered

2. The law should apply to all parties and types of security rights, secured obligations and encumbered assets. Any exceptions should be limited and clearly stated in the law.
3. In particular, the law should provide that it applies to:

(a) Legal and natural persons, including consumers, without, however, affecting their rights under consumer-protection legislation;

(b) Property rights created contractually to secure all types of obligations, including future obligations, fluctuating obligations and obligations described in a generic way;

(c) Possessory and non-possessory security rights in movable property and attachments securing payment or other performance of one or more obligations, present or future, determined or determinable;

(d) All types of movable property and attachments, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, receivables, negotiable instruments, negotiable documents, funds credited to bank accounts, rights to drawing proceeds from an independent undertaking and intellectual property rights;

[Note to the Working Group: The Working Group may wish to consider the terms “independent-undertaking-proceeds-rights” and “bank-account-rights” instead of the terms used presently throughout the draft Guide. The term “independent-undertaking-proceeds-rights” reflects that the encumbered asset is not the right to demand payment under an independent undertaking or the proceeds themselves, and is shorter than the term currently used. Similarly, the term “bank-account-rights” reflects that the encumbered asset is not the bank-customer relationship.]

(e) Security rights acquired by way of transfer of title and all other types of rights securing the payment or other performance of one or more obligations, irrespective of the form of the relevant transaction and whether ownership of the encumbered assets is held by the secured creditor or the grantor, including the various forms of retention of title, financial leases and hire-purchase agreements;

- (f) Generally, outright transfers of receivables;

[Note to the Working Group: The Working Group may wish to note that the definition of “receivable” in para. 21 (o) of A/CN.9/WG.VI/JP.22/Add.1 excludes rights to payment under a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account. As a result, recommendation 3 (f) does not apply to an outright transfer of a negotiable

instrument, an independent undertaking or a right to payment of funds credited to a bank account. However, the recommendations apply to transfers of such assets for security purposes, as they are treated as secured transactions. For example, the transfer for security purposes of a right to payment of funds in a bank account is covered as a method of achieving control (see definition of “control” in A/CN.9/WG.VI/WP.26/Add.1). As to the question whether outright transfers of negotiable instruments should be included within the scope of the draft Guide, see note after rec. 3 (f) in document A/CN.9/WG.VI/WP.26.]

(g) [Types of asset that are subject to a special registration or title certificate system as well as other methods of third-party effectiveness subject to special laws (such as a book entry or a control agreement), including securities, immovable property,] aircraft, ships and attachments thereto to the extent that the recommendations of this law are not inconsistent with existing special laws or international obligations of the State relating to these types of asset. Where a direct inconsistency exists, the State’s secured transactions law should expressly confirm that the other law and international obligations govern those assets to the extent of that inconsistency;

[Note to the Working Group: The Working Group may wish to note that securities and immovable property are excluded from the scope of the draft Guide as original encumbered assets (see rec. 4 (a) and (b) below). However, they may be affected by the recommendations of the draft Guide in two instances.

First, if a security right in securities or a mortgage secures a receivable, negotiable instrument or other obligation and the receivable is assigned, the security right in the securities or the mortgage follows. This rule does not affect any third-party rights, priority or enforcement requirements existing under securities or immovable property law (see rec. 16 in A/CN.9/WG.VI/WP.26, rec. 16). For example, a security right in intermediated securities that was made effective against third parties by a book entry or a control under securities law will have priority. This is the result under art. 5 (3) and 10 (1) of the draft UNIDROIT Convention on Substantive Rules regarding Intermediated Securities (see Study LXXVIII-Doc. 42, March 2006).

In addition, securities and immovable property may be affected by the recommendations of the draft Guide if they constitute proceeds of an asset covered in the draft Guide (e.g. inventory or funds in a bank account). The security right in the original encumbered assets continues in the proceeds (see A/CN.9/WG.VI/WP.26/Add.4, recs. 29 and 30). Whether a separate act is necessary for the security right in the proceeds to be effective against third parties is still an open issue (see A/CN.9/WG.VI/WP.26/Add.4, recs. 41 and 41 bis). However, if the proceeds are a kind of asset that is not covered by the recommendations in the draft Guide, a separate act may be necessary under other law irrespective of the outcome of the debate with respect to recs. 41 and 41 bis.

In order to better reflect the fact that securities and immovable property may be affected by the Guide, the Working Group may wish to consider whether a qualified exclusion along the lines of the text in square brackets in recommendation 3 (g) would be more appropriate than an outright exclusion along the lines of recommendation 4 (a) and (b).

If the Working Group were to adopt this approach, recommendation 40 might need to be expanded to preserve other methods of third-party effectiveness beyond registration in a specialized registry or notation on a title certificate (e.g. a book entry or a control agreement) and a new recommendation along the lines of recommendations 83 and 85 may need to be added to preserve the priority of rights made effective against third parties through one of these special methods.

Such an approach would be consistent with the approach followed in the draft Guide with respect to attachments to immovable property or movable property subject to a specialized registration or title certificate system (see A/CN.9/WG.VI/WP.26/Add.4, recs. 46, 46 bis, 82, 83, 84 and 84 bis), according to which, a security right in attachments to immovable property is subordinate to a security right in the relevant immovable property or in the relevant movable property subject to a specialized registration or title certificate system, unless it is registered first in the immovable registry or in the specialized registry or is noted on the relevant title certificate respectively.

In addition, this approach would be consistent with the draft UNIDROIT Convention. Article 10 (1) of this draft Convention provides that a security right in securities (as original encumbered assets or as proceeds) that was made effective against third parties under the draft Convention has priority over a security right that was made effective against third parties under law outside the draft Convention (e.g. a law based on the recommendations of the draft Guide). The rationale underlying this approach is that the book-entry- or control-related system established by the draft Convention could not be relied upon if a security right in intermediated securities created and perfected under other law had priority over a Convention security right.

Moreover, this approach would avoid excluding from the scope of the draft Guide directly-held securities to the extent they are not subject to any special legislation (even the UNIDROIT draft Convention does not apply to directly-held securities). Thus, no gap would be left with respect to, for example, security rights in shares of a subsidiary all held by the parent company, since such security rights are involved in many commercial loan transactions.

On another matter, the draft Guide deals with security rights in rights to drawing proceeds under an independent undertaking but not with security rights in independent undertakings. The Working Group may wish to consider whether this fact should be explicitly stated in the recommendations. This could be done by way of a qualified exclusion in recommendation 3 (g) along the lines “and independent undertakings to the extent that the recommendations in this law are not inconsistent with special law and practice”. In any case, the commentary should explain that, if an asset otherwise outside the scope of the recommendations of the draft Guide becomes subject to these recommendations because it constitutes proceeds of an asset within the scope of the draft Guide or secures payment or other performance of a receivable, negotiable instrument or other obligation within the scope of the draft Guide, the creation, third-party effectiveness and conflict-of-laws relating to these issues are governed by the recommendations of the draft Guide, while third-party rights, priority, enforcement and conflict-of-laws relating to those issues remain subject to law outside the draft Guide.

If the Working Group decides to retain the outright exclusions of security rights in securities (or indirectly-held securities) and immovable property, and to add to the list in rec. 4 independent undertakings, instead of the qualified exclusions suggested above, it may wish to consider including the text suggested in the last sentence of the preceding paragraph in a recommendation.]

(h) Intellectual property rights to the extent that the recommendations of this law are not inconsistent with existing laws or international obligations of the State relating to these assets. A State enacting secured transactions legislation in accordance with this Guide should consider whether it might be appropriate to adjust certain of the recommendations as they apply to security rights in intellectual property. In this regard, a State should examine its existing intellectual property laws and the State's obligations under intellectual property treaties, conventions and other international agreements and, in

the event that the recommendations of the Guide are directly inconsistent with any such existing laws or obligations, the State's secured transactions law should expressly confirm that those existing intellectual property laws and obligations govern such issues to the extent of the inconsistency. In considering whether any adjustments of the recommendations as they apply to security rights in intellectual property are appropriate, a State should analyse each circumstance on an issue-by-issue basis and should have proper regard both to establishing an efficient secured transactions regime and to ensuring the protection and exercise of intellectual property rights in accordance with international conventions and national laws.

4. [Except to the limited extent provided in recommendations 16 and 37 relating to a personal or property right that secures a receivable, negotiable instrument or other obligation that is within the scope of the Guide,] the law should not apply to security rights in:

- (a) Securities;
- (b) Immovable property, with the exception of attachments to immovable property;
- (c) Wages;
- (d) [Assets necessary for the livelihood, basic subsistence or health of an individual or a member of his or her household].

[Note to the Working Group: With regard to the outright exclusion in recommendation 4 (d), the Working Group may also wish consider, instead of the outright exclusion, a qualified exclusion from the recommendations of the chapter on enforcement. Under such an approach, the enforcement of security rights in such assets should be subject to the same exemptions applying under general procedural law to the enforcement of rights of judgement creditors to such assets (see note after recommendation 3 (g) above and 39 bis in A/CN.9/WG.VI/WP.26/Add.5). Whether the Working Group decides in favour of a qualified or outright exclusion of securities and immovable property, the language in square brackets (see A/CN.9/603, para. 21) may be retained in recommendation 4 and perhaps added in recommendation 3 (g) as well.]

III. Basic approaches to security

Purpose

The purpose of the recommendations on basic approaches to security is to ensure that the law covers in a comprehensive and consistent manner all forms of transactions that function as security.

Comprehensive approach

5. The law should include a comprehensive and consistent set of provisions on security rights in tangibles and intangibles.

Functional approach

6. The law should treat all devices that perform security functions as secured transactions, including the transfer of title to tangibles or the outright assignment of receivables for security purposes, retention of title sales, financial leases and hire-purchase agreements, except to the extent otherwise contemplated in recommendation 125 [see A/CN.9/WG.VI/WP.24/Add.5].

IV. Creation of the security right (effectiveness as between the parties)**Purpose**

The purpose of the provisions of the law dealing with creation is to specify the way in which a security right in movable property is created (i.e. becomes effective as between the parties).

Creation of a security right by agreement

7. The law should specify that a security right is created by agreement between the grantor and the secured creditor, which is in writing [signed by the grantor in accordance with recommendation 10] [that evidences the intent of the grantor to grant a security right] or is accompanied by dispossession of the grantor pursuant to the agreement.

Minimum contents of the security agreement

8. The law should provide that the security agreement must, at a minimum, identify the secured creditor and the grantor, and reasonably describe the secured obligation and the assets to be encumbered. A generic description of the secured obligation and the encumbered assets is sufficient.

Form

9. The law should specify that a writing requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce).

10. [The law should also specify that, unless the law provides otherwise, where the law requires a signature of a person, that requirement is satisfied in relation to an electronic communication if:

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the electronic communication message; and

(b) That method is as reliable as was appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement (see article 7 of the UNCITRAL Model Law on Electronic Commerce).]

Assets and obligations subject to a security agreement

11. The law should specify that a security right may secure all types of obligation, including future, conditional and fluctuating obligations. It should also specify that a

security right may be given in all types of asset, including parts of assets and undivided interests in assets and assets which, at the time of the security agreement, the grantor may not yet own or have the power to dispose of, or which may not yet exist, as well as in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

12. The law should specify that a security right may be granted in all assets of a grantor.

[Note to the Working Group: The Working Group may wish to note that the commentary discusses an approach taken in some legal systems of preserving in the case of insolvency of the grantor of a security right in all its assets (for a discussion of all-asset security, see A/CN.9/WG.VI/WP.11/Add.2, paras. 20-25) a certain percentage of the value of the encumbered assets for unsecured creditors (see A/CN.9/WG.VI/WP.9/Add.6, paras. 33-35). However, for the reasons set forth in the commentary, the draft Guide does not recommend this approach (see A/CN.9/WG.VI/WP.26/Add.6, priority of rights of creditors in insolvency proceedings).]

Creation of a security right in receivables

13. [For the recommendations on receivables, see A/CN.9/WG.VI/WP.26.]

Creation of a security right in a negotiable instrument

24. [For the recommendations on negotiable instruments, see A/CN.9/WG.VI/WP.26/Add.2.]

Creation of a security right in rights to drawing proceeds from independent undertakings

25. [For the recommendations on independent undertakings, see A/CN.9/WG.VI/WP.24.]

Creation of a security right in funds credited to a bank account

26. [For the recommendations on funds credited to bank accounts, see A/CN.9/WG.VI/WP.26/Add.1.]

Creation of a security right in a negotiable document

28. [For the recommendations on negotiable documents, see A/CN.9/WG.VI/WP.26/Add.3.]

Creation of a security right in proceeds

29. [For the recommendations on proceeds, see A/CN.9/WG.VI/WP.26/Add.4.]

Creation of a security right in attachments

31. [For the recommendations on attachments, see A/CN.9/WG.VI/WP.26/Add.4.]

Creation of a security right in masses of goods or products

32. [For the recommendation on masses of goods or products, see A/CN.9/WG.VI/WP.26/Add.4.]

Time of creation

33. The law should provide that, unless the parties otherwise agree, a security right becomes effective as between the parties at the time the security agreement is concluded or at the time the grantor is dispossessed, whichever occurs first.

34. The law should provide that, unless the parties otherwise agree, a security right in future property is created when the grantor acquires rights or the right to transfer rights in such property.

A/CN.9/WG.VI/WP.26/Add.8

Draft Legislative Guide on Secured Transactions

ADDENDUM

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XI. Transition issues**A. General remarks (see A/CN.9/WG.VI/WP.9/Add.8)****1. The need for transition provisions**

1. The rules embodied in new secured transactions legislation will be different from the rules in the law predating the legislation. Those differences will have an obvious impact on secured transactions that take place after the new legislation is enacted. The effect of the new legislation on existing transactions entered into prior to the new legislation must also be considered. In light of the differences between the old and new legal regimes and the continued existence of transactions and security rights created under the old regime, it will be important for the success of the new legislation that it contain fair and efficient rules governing the transition from the old rules to the new rules. A similar need for transition rules is present when, under the conflict-of-laws rules of the old regime, the law of a different State governed the creation, effectiveness against third parties or priority of a security right. Two issues related to the transition from the old regime to the new law must be addressed. First, the new legislation should provide the date as of which it will have legal effect (the “effective date”). Second, the new legislation should also set forth the extent, if any, to which, after the effective date, the new legislation applies to issues relating to transactions or security rights that existed before the effective date.

2. A number of factors require consideration in determining the effective date of the legislation. Prompt realization of the economic advantages of new legislation must be balanced against the need to avoid causing instability in, or disruption of, the markets that will be governed by new legislation and in allowing the market participants adequate time to prepare for conducting transactions under the new legislation, which may be significantly different from the prior law. Accordingly, a State may conclude that the effective date of new legislation should be some period of time after the enactment of the new legislation in order for these markets and their participants to adjust their transactions to the new rules. In determining the effective date, States might consider: the impact of the effective date on credit decisions; maximization of benefits to be derived from the new legislation; the necessary regulatory, institutional, educational and other arrangements or infrastructure improvements to be made by the State; the status of the pre-existing law and other infrastructure; the harmonization of the new secured transaction legislation with other legislation; constitutional limits to the retroactive effect of new legislation; and standard or convenient practice for the entry into force of legislation (e.g. on the first day of a month).

3. As debts that are secured by rights in the grantor's property are often payable over a period of time, it is likely that there will be many rights created before the effective date that will continue to exist on and after the effective date, securing debts that are not yet paid. Therefore, as noted above, another important decision that must be made with respect to any new legislation is the extent, if any, to which the new legislation will govern issues relating to transactions entered into prior to the effective date.

4. One approach would be for the new legislation to apply prospectively only and, therefore, not to govern any transactions entered into prior to the effective date. While there might be some appeal in such a solution, especially with respect to issues that arise between the grantor and the secured creditor, such an approach would create significant problems, especially with respect to priorities. Foremost among those problems would be the necessity of resolving priority disputes between a secured creditor which obtained its security right prior to the effective date and a competing secured creditor which obtained its security right in the same property after the effective date. Because priority is a comparative concept, and the same priority rule must govern the two rights that are being compared, it is not possible for the old rules to govern the priority of the right of the pre-effective date creditor and the new rules to govern the priority of the right of the post-effective date creditor. Of course, determining which priority rule to apply to such priority dispute is not without difficulty. Applying the old rules to such priority disputes would essentially delay the effectiveness of some of the most important aspects of the new legislation, with the result that significant economic benefits of the new legislation could be deferred for a substantial period. On the other hand, applying the new rules to such priority disputes might unfairly prejudice parties which relied on the old law and might also provide an incentive for such parties to object to the new legislation or advocate an unduly delayed effective date.

5. Alternatively, greater certainty and earlier realization of the economic benefits of the new legislation could be promoted by applying the new legislation to all transactions as of the effective date, but with such "transition provisions" as are necessary to assure an effective transition to the new regime without loss of pre-effective date priority status. Such an approach would avoid the problems identified above and would otherwise fairly and efficiently balance the interests of parties that complied with the old law with the interests of parties, which comply with the new law.

2. Issues to be addressed by transition provisions

a. Generally

6. Because many security rights created before the effective date will continue to exist after the effective date and may come into conflict with security rights created after the effective date it is important for the new legislation to provide clear transition provisions to determine the extent to which the rules in the new legislation will apply to those pre-existing rights. These transition provisions should appropriately address both the settled expectations of parties and the need for certainty and predictability in future transactions. The transition provisions must address the extent to which the new rules will apply, after the effective date, as between the parties to a transaction creating a security right before the effective date. They must also address the extent to which the new rules will apply, after the effective date, to resolve priority disputes between holder of a security right and a competing claimant, when either the security right or the right of the competing claimant was created before the effective date.

b. Effectiveness of pre-effective date rights as between the parties

7. When a security right has been created before the effective date of new legislation, two questions arise regarding the effectiveness of that right between the grantor and the creditor. The first is whether a security right that was not effectively created under old law but met all the requirements for creation of a security right under the new law should become effective on the effective date of the new law. The second question is whether a right that was effectively created under the old law but does not fulfil the requirements for creation under the new law should become ineffective on the effective date of the new law. Such an approach would recognize that the new legislation's rules for creation of a security right comprise the State's most current policy choices, taking into account the protections of the transacting parties and that as a general matter the parties themselves would presumably favour effectiveness of a transaction that they entered into. With respect to the first question, consideration should be given to making the right effective as of the effective date of the new law. With respect to the second question, a transition period might be created during which the security right would remain effective between the parties, so that the creditor could take the necessary steps for creation under the new law during the transition period. At the expiration of the transition period, if such steps had not been taken the right would become ineffective under the new law.

c. Effectiveness of pre-effective date rights as against third parties

8. Different issues are raised as to the effectiveness against third parties of a right created before the effective date. As new legislation will embody public policy regarding the proper steps necessary to make a right effective against third parties, it is preferable for the new rules to apply to the greatest extent possible. It may, however, be unreasonable to expect a creditor whose right was effective against third parties under the previous legal regime of the State (or under the law of the State whose law applied to third party effectiveness under the conflict-of-laws rules of the old regime) to comply immediately with any additional requirements of the new law. The expectation would be especially onerous for institutional creditors, which would be required to comply with the additional requirements of the new law simultaneously for large numbers of pre-effective date transactions. A preferable approach would be for a security right that was effective against third parties under the previous legal regime but would not be effective under the new rules to remain effective for a reasonable period of time (as set forth in the new law) so as to give the creditor time to take the necessary steps under the new law. At the expiration of

the transition period, the right would become ineffective against third parties unless it had become effective against third parties under the new law.

9. If the right was not effective against third parties under the previous legal regime, but is nonetheless effective against them under the new rules, the right should be effective against third parties immediately upon the effective date of the new rules. Once again, the presumption is that the parties intended effectiveness as between them, and third parties are protected to the full extent of the new rules.

d. Priority disputes

10. An entirely different set of questions arises in the case of priority disputes because such disputes necessarily involve applying one set of rules to two (or more) different rights created at different times. A legal system cannot simply provide that the priority rule in effect at the time when a right was created governs priority with respect to that right because such a rule would not provide a coherent answer when one of the rights that is being compared was created under the former regime while the other was created under the new regime. Rather, there must be rules that address each of the following situations: (i) where both rights are created after the effective date of the new legislation, (ii) where both rights are created before the effective date, and (iii) where one right is created before the effective date and the other right is created after the effective date.

11. The easiest situation, of course, is a priority dispute between two parties both of whose rights were created after the effective date of the new legislation. In that situation, it is obvious that the priority rules in the new legislation should be applied to resolve that dispute.

12. Conversely, if both of the competing rights were created before the effective date of the new legislation (and, accordingly, the relative priority of the two competing rights in the encumbered assets was established before the effective date of new rules) and, in addition, nothing (other than the effective date having occurred) has happened that would change that relative priority, stability of relationships suggests that the priority established before the effective date should not be changed. If, however, something occurs after the effective date that would have had an effect on priority even under the previous legal regime (such as a security right becoming effective against third parties or ceasing to be effective against third parties), there is less reason to continue to utilize old rules to govern a dispute that has been changed by an action that took place after the effective date. Therefore, there is a much stronger argument for applying the new rules to such a situation.

13. The most difficult transition situation involves a priority dispute between one party whose right was established before the effective date and another party whose right was established after the effective date. In such a case, while it is preferable to have the new rules govern eventually, it is appropriate to provide a transition rule protecting the status of the creditor whose right was acquired under the old regime while that creditor takes whatever steps are necessary to maintain protection under the new regime. If those steps are taken within the requisite time, the new legislation should provide that creditor with priority to the same extent as would have been the case had the new rules been effective at the time of the original transaction and those steps had been taken at that time.

e. Disputes before a court or arbitral tribunal

14. When a dispute is in litigation (or a comparable dispute resolution system, such as arbitration) at the effective date, the rights of the parties have sufficiently crystallized so

that the effectiveness of a new legal regime should not change the outcome of that dispute. Therefore, such a dispute should not be resolved by application of the new legal regime.

B. Recommendations (see A/CN.9/WG.VI/WP.21/Add.5)

Purpose

The purpose of transition provisions of the law is to provide a fair and efficient transition from the regime before the enactment of the law to the regime after the enactment of the law.

Effective date

155. The law should specify a date (or a mechanism by which a date may be specified), subsequent to its enactment, as of which it will enter into force (the “effective date”). In determining the effective date, the State should take into account:

- (a) The impact of the effective date on credit decisions and in particular the maximization of benefits to be derived from the law;
- (b) The necessary regulatory, institutional, educational and other arrangements or infrastructure improvements to be made by the State;
- (c) The status of the pre-existing law and other infrastructure;
- (d) The harmonization of the law with other legislation;
- (e) The content of constitutional rules with respect to pre-effective date transactions;
- (f) Standard or convenient practice for the entry into force of legislation (e.g. on the first day of a month); and
- (g) The need to give affected persons sufficient time to prepare for the law.

Transition period

156. The law should provide a period of time after the effective date (the “transition period”), during which a security right, which was created and made effective against third parties under the previous legal regime, continues to exist and remains effective against third parties and during which the secured creditor may take any necessary steps to ensure that the security right is created and is made effective against third parties under the new law. If those steps are taken during the transition period (or such longer period provided in recommendation 158), the law should provide that the existence and effectiveness against third parties of the security right is continuous.

157. If, under the law of the State (or States) whose law governed creation of a security right and its effectiveness against third parties under the conflict-of-laws rules of the previous legal regime, the security right was created but had not been made effective against third parties, the law should provide that the security right continues to exist during the transition period and if, during the transition period, the secured creditor takes any steps necessary to ensure that the security right is created under the new law, the law should provide that the existence of the security right is continuous.

158. If, under the law of the State (or States) whose law governed creation of a security right and its effectiveness against third parties under the conflict-of-laws rules of the

previous legal regime, the security right was created and had been made effective against third parties by registration of a notice of the security right, the law should provide that the security right remains effective against third parties until the earlier of (i) the date the registration would cease to be effective under the law of that State and (ii) [X] years after the effective date.

Priority

159. Subject to recommendations 160 and 161, the law should provide that priority of a security right as against a competing claimant is governed by the new law.

160. The law should provide that, if both a security right and the right of a competing claimant were created (or, in the case of the right of the competing claimant, otherwise came into existence) before the effective date and, since the effective date the status of neither right has changed, the priority of the security right as against the right of the competing claimant is determined by the law in effect immediately before the effective date in the State whose law governed priority under the conflict-of-laws rules of the prior legal regime. The status of a security right has changed if (i) by application of the rules in recommendations 156–158, it was effective against third parties on the effective date and later ceased to be effective against third parties or (ii) it was not effective against third parties on the effective date and later became effective against third parties.

161. The law should provide that, when a dispute is in litigation (or a comparable dispute resolution system) or the secured creditor has taken steps towards enforcing its rights at the effective date of the law, it does not apply to the rights and obligations of the parties.

162. The law should ensure that the transition should not entail any cost other than the nominal cost of registration.

H. Note by the Secretariat on the draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its tenth session

(A/CN.9/WG.VI/WP.27 and Add.1-2) [Original: English]

Background remarks

1. At its thirty-third session in 2000, the Commission considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.¹

2. At its thirty-fourth session in 2001, the Commission considered a further report by the Secretariat (A/CN.9/496). At that session, the Commission agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.² As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.³

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 351.

³ *Ibid.*, para. 357.

3. After discussion, the Commission decided to entrust a working group with the task of developing “an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral ...”.⁴

Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry and practice, the Commission recommended that a two- to three-day colloquium be held.⁵

4. At its first session (New York, 20-24 May 2002), Working Group VI (Security Interests) had before it a first, preliminary draft legislative guide on secured transactions, prepared by the Secretariat (A/CN.9/WG.VI/WP.2 and Add.1-12), a report on an UNCITRAL-CFA international colloquium, held in Vienna from 20 to 22 March 2002 (A/CN.9/WG.VI/WP.3), and comments by the European Bank for Reconstruction and Development (EBRD) (A/CN.9/WG.VI/WP.4). At that session, the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10), and requested the Secretariat to revise these chapters (A/CN.9/512, para. 12). At the same session, the Working Group considered suggestions for the presentation of modern registration systems in order to provide the Working Group with information necessary to address concerns expressed with respect to registration of security rights in movable property (see A/CN.9/512, para. 65). In addition, the Working Group agreed on the need to ensure, in cooperation with Working Group V (Insolvency Law), that issues relating to the treatment of security rights in insolvency proceedings would be addressed consistently with the conclusions of Working Group V on the intersection of the work of Working Group V and Working Group VI (see A/CN.9/512, para. 88 and A/CN.9/511, paras. 126-127).

5. At its thirty-fifth session in 2002, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission expressed its appreciation to the Working Group for the progress made in its work. It was widely felt that, with that legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations.⁶ In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group. The comments submitted to Working Group VI, in particular by the European Bank on Reconstruction and Development (A/CN.9/WG.VI/WP.4), were mentioned as an indication of that interest.

6. At that session, the feeling was widely shared that the timing of the Commission’s initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission’s own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group V (Insolvency Law) and Working Group VI towards coordinating their work on a subject of common interest such as the treatment of security interests in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance

⁴ Ibid., para. 358.

⁵ Ibid., para. 359.

⁶ Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 202.

for providing States with comprehensive and consistent guidance with respect to the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise the insolvency chapter of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the Secretariat to consider organizing a joint session of the two Working Groups in December 2002.⁷

7. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security interests in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.⁸

8. At its second session (Vienna, 17-20 December 2002), the Working Group considered chapters VI, VII and IX (A/CN.9/WG.VI/WP.2 and Add.6, 7 and 9) of the first preliminary draft guide on secured transactions, prepared by the Secretariat. At that session, the Working Group requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/531, para. 15). In conjunction with that session and in accordance with suggestions made at the first session of the Working Group (see A/CN.9/512, para. 65), an informal presentation of the registration systems of security rights in movable property of New Zealand and Norway was held. Immediately before that session, Working Groups V (Insolvency Law) and VI (Security Interests) held their first joint session (Vienna, 16-17 December 2002), during which the revised version of former chapter X (new chapter IX; A/CN.9/WG.VI/WP.6/Add.5) on insolvency was considered. At that session, the Secretariat was requested to prepare a revised version of that chapter (see A/CN.9/535, para. 8).

9. At its third session (New York, 3-7 March 2003), the Working Group considered chapters VIII, XI and XII of the first preliminary draft guide on secured transactions and chapters II and III of the second version of the draft Guide (A/CN.9/WG.VI/WP.2/Add.8, A/CN.9/WG.VI/WP.2/Add.11, A/CN.9/WG.VI/WP.2/Add.12, A/CN.9/WG.VI/WP.6/Add.2 and A/CN.9/WG.VI/WP.6/Add.3) and requested the Secretariat to prepare revised versions (A/CN.9/532, para. 13). In conjunction with that session, an informal presentation was made of the recently completed secured transactions law in the Slovak Republic, which was supported by the World Bank and by EBRD.

10. At its thirty-sixth session in 2003, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its second and third sessions (A/CN.9/531 and A/CN.9/532), as well as the report of the first joint session of Working Group V and VI (A/CN.9/535). The Commission commended the Working Group for the progress in its work and expressed its appreciation to Working Group V and Working Group VI for the coordination of their work in relation to the treatment of security rights in insolvency proceedings. The Commission also noted with appreciation the presentation of modern registration systems of security rights in movable property and the plan of the Secretariat to prepare a paper addressing technical registration-related issues.⁹

11. In addition, the Commission emphasized the importance of coordination with organizations with interest and expertise in the field of secured transactions law, such as UNIDROIT, the Hague Conference on Private International Law, the World Bank, the

⁷ Ibid., para. 203.

⁸ Ibid., para. 204.

⁹ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 217.

International Monetary Fund, EBRD and the Asian Development Bank. Reference was made to the current work of UNIDROIT on security rights in securities, to the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems to the extent they concerned secured transactions, to the Model Law on Secured Transactions and the Principles of EBRD, to the Asian Development Bank's Guide to Movable Registries and to the Inter-American Model Law on Secured Transactions of 2002 prepared by the Organization of American States. Reference was also made to the need to coordinate with the Hague Conference with respect to the conflict-of-laws chapter of the draft legislative guide on secured transactions, in particular with respect to the law applicable to the enforcement of security rights in the case of insolvency.¹⁰

12. With respect to the scope of work, the Commission noted suggestions that the Working Group should consider covering, in addition to goods (including inventory), trade receivables, letters of credit, deposit accounts and intellectual property rights in view of their economic importance as security for credit. As to the substance of the draft legislative guide, the Commission noted statements that, while the draft guide should discuss various workable approaches, it should also include recommendations and, that if alternative recommendations had to be prepared, their relative merits, in particular for developing countries and for countries with economies in transition, should also be discussed.¹¹

13. After discussion, the Commission confirmed the mandate given to Working Group VI at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory, and its decision at its thirty-fifth session that the mandate should be interpreted widely to ensure an appropriate work product, which should take the form of a legislative guide. The Commission also confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights should be covered in the draft legislative guide.¹²

14. At its fourth session (Vienna, 8-12 September 2003), the Working Group considered chapters I (Introduction), II (Key Objectives), IV (Creation), IX (Insolvency) and paragraphs 1 to 41 of chapter VII (Priority), and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/543, para. 15).

15. At its fifth session (New York, 22-25 March 2004), the Working Group considered the summary and recommendations of chapters V (Publicity), VI (Priority), X (Conflicts of Laws) and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/549, para. 16).

16. At their second joint session (New York, 26 and 29 March 2004), Working Groups V (Insolvency Law) and VI (Security Interests) considered the treatment of security interests in the draft Legislative Guide on Insolvency Law on the basis of document A/CN.9/WG.V/WP.71 (see A/CN.9/550, para. 11).

17. At its thirty-seventh session in 2004, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its fourth and fifth sessions (A/CN.9/543 and A/CN.9/549), as well as the report of the second joint session of Working Groups V and VI (A/CN.9/550). The Commission commended the Working Group for the progress achieved so far and expressed its appreciation to Working Groups V and VI for the progress made during their second joint session, at which they

¹⁰ Ibid., para. 218.

¹¹ Ibid., paras. 220-221.

¹² Ibid., para. 222.

had considered pending issues of common interest.¹³

18. In addition, the Commission noted with appreciation the progress made by the Working Group in the coordination of its work on conflict of laws with the Hague Conference on Private International Law and in particular the plans for a joint meeting of experts. The Commission also commended the efforts to coordinate with the International Institute for the Unification of Private Law (UNIDROIT), which was preparing a text on security interests in securities. The Commission also expressed its appreciation for the coordination with the World Bank, which was preparing principles and guidelines for effective insolvency and creditor rights systems, and in particular for the agreement that the World Bank text would form with the draft legislative guide on secured transactions a single international standard.¹⁴

19. The Commission noted with interest that a preliminary consolidated set of recommendations might be ready by early 2005. The Commission also welcomed the preparation of additional chapters on various types of asset, such as negotiable instruments and documents, bank accounts, letters of credit and intellectual property rights. In that connection, while the importance of those types of asset was generally recognized, it was stated that including them in the draft guide should not be at the expense of slowing down work with respect to the core assets within the scope of the draft guide (i.e. goods, including inventory, and receivables).¹⁵

20. After discussion, the Commission confirmed the mandate given to Working Group VI at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth and thirty-sixth sessions. The Commission also requested the Working Group to expedite its work so as to submit the draft guide to the Commission for final adoption as soon as possible and, hopefully, in 2006.¹⁶

21. At its sixth session (Vienna, 27 September-1 October 2004), the Working Group considered chapters I and II (Introduction and key objectives), III (Basic approaches to security), IV (Creation), V (Effectiveness against third parties), VII (Pre-default rights and obligations), VIII (Default and enforcement), X (Conflict of laws) and XI (Transition) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/570, para. 8). At that session, the Working Group noted with appreciation that the conflicts-of-laws chapter of the Guide was being prepared in close cooperation with the Hague Conference on Private International Law (A/CN.9/570, para. 75).

22. At its seventh session (New York, 24-28 January 2005), the Working Group considered chapters X (Conflict of laws), XII (Acquisition financing devices) and XVI (Security rights in bank accounts) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/574, para. 8).

23. At its thirty-eighth session (2005), the Commission had before it the reports of Working Group VI (Security Interests) on the work of its sixth and seventh sessions (A/CN.9/570 and A/CN.9/574 respectively). The Commission commended the Working Group for the progress achieved thus far, noted with interest the progress made by the Working Group in the coordination of its work with the Hague Conference on Private International Law, the International Institute for the Unification of Private Law

¹³ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 75.

¹⁴ Ibid., para. 76.

¹⁵ Ibid., para. 77.

¹⁶ Ibid., para. 78.

(UNIDROIT), the World Bank and the World Intellectual Property Organization and requested the Working Group to expedite its work so as to submit the draft legislative guide to the Commission, at least for approval in principle, in 2006, and for final adoption in 2007.¹⁷

24. At its eighth session (Vienna, 5-9 September 2005), the Working Group considered recommendations in chapters VII (Pre-default rights and obligations), VIII (Default and enforcement), IX (Insolvency), X (Acquisition financing) and XI (Conflict of laws). It also considered terminology and recommendations related to: (i) negotiable instruments and negotiable documents (definitions (w) and (x), as well as recommendations 3 (d) and 24); (ii) proceeds from a drawing under an independent undertaking (definitions (y), (z), (aa) and (bb), as well as recommendations 25, 49, 62, 106 and 138); and intellectual property rights (definition (dd), and recommendation 3 (h)) (see A/CN.9/588, para. 8).

25. At its ninth session (New York, 30 January-3 February 2006), the Working Group considered recommendations in chapters V (Effectiveness against third parties), VI (Priority) and X (Acquisition financing devices) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/593, para. 8). At that session, in view of the expectation of the Commission to approve in principle the substance of the recommendations of the draft Guide at its thirty-ninth session, which was scheduled to take place in New York from 19 June to 7 July 2006, the Working Group agreed to hold an extra session, its tenth session, in New York from 1 to 5 May 2006 (see A/CN.9/593, para. 97).

¹⁷ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 186 and 187.

A/CN.9/WG.VI/WP.27/Add.1

Draft Legislative Guide on Secured Transactions

ADDENDUM

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I. Introduction

A. Purpose

1. The purpose of this Guide is to assist States in the development of modern secured transactions laws with a view to promoting the availability of low-cost secured credit. The Guide is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to review or modernize them, or to harmonize or coordinate their laws with those of other States.

2. The Guide is based on the premise that sound secured transactions laws can have significant economic benefits for States that adopt them, including attracting credit from domestic and foreign lenders and other credit providers, promoting the development and growth of domestic businesses (particularly small and medium-size enterprises), and generally increasing trade. Such laws also benefit consumers by lowering prices for goods and services and making low-cost consumer credit more readily available. To be effective, such laws must be supported by efficient and effective judicial systems and other enforcement mechanisms. They must also be supported by insolvency laws that respect rights derived from secured transactions laws (see UNCITRAL Legislative Guide on Insolvency Law).

3. The Guide seeks to rise above differences among legal regimes to suggest pragmatic and proven solutions that can be accepted and implemented in States having divergent legal traditions. The focus of the Guide is on developing laws that achieve practical economic benefits for States that adopt them. While it is possible that States will have to incur predictable, yet limited, costs to develop and implement these laws, substantial experience suggests that the resulting short- and long-term benefits to such States should greatly outweigh the costs.

4. All businesses, whether manufacturers, distributors, service providers or retailers, require working capital to operate, to grow and to compete successfully in the marketplace. It is well established, through studies conducted by such organizations as the International Bank for Reconstruction and Development (the World Bank), the International Monetary Fund, the Asian Development Bank and the European Bank for Reconstruction and Development (EBRD), that one of the most effective means of providing working capital to commercial enterprises is through secured credit.

5. The key to the effectiveness of secured credit is that it allows businesses to use the value inherent in their assets as a means of reducing risk for the creditor. Risk is reduced because credit secured by assets gives creditors access to the assets as another source of payment in the event of non-payment of the secured obligation. As the risk of non-payment is reduced, the availability of credit increases and the cost of credit falls.

6. A legal system that supports secured credit transactions is critical to reducing the perceived risks of credit transactions and promoting the availability of secured credit. Secured credit is more readily available to businesses in States that have efficient and effective laws that provide for consistent, predictable outcomes for creditors in the event of non-performance by debtors. On the other hand, in States that do not have efficient and effective laws, where creditors perceive the legal risks associated with credit transactions to be high, the cost of credit increases as creditors require increased compensation to evaluate and assume the increased risk. In some States, the absence of an efficient and effective secured transactions regime, or of an insolvency law regime under which security

rights are recognized, has resulted in the virtual elimination of credit for small and medium-size commercial enterprises, as well as for consumers.

7. By aiding in the cultivation and growth of individual businesses, creating a legal regime that promotes secured credit can have a positive effect upon the general economic prosperity of a State. Thus, States that do not have an efficient and effective secured transactions regime may deny themselves a valuable economic benefit.

8. To best promote the availability of low-cost secured credit, the Guide suggests that secured transactions laws should be structured to enable businesses to utilize the value inherent in their property to the maximum extent possible to obtain credit. In this regard, the Guide adopts two of the most essential concepts of successful secured transactions laws, the concepts of priority and effectiveness against third parties. The concept of priority, which allows for the concurrent existence of security rights having different priority status in the same assets, makes it possible for a business to utilize the value of its assets to the maximum extent possible by obtaining secured credit from more than one creditor using the same assets as security with transparent rules allowing each creditor to know the priority of its security right. The concept of effectiveness against third parties, in the form of a system allowing, *inter alia*, the registration of a notice concerning security rights, is designed to promote legal certainty with regard to the relative priority status of creditors and thus to reduce the risks and costs associated with secured transactions.

B. Scope

9. The Guide deals with consensual security rights. However, it contains references to non-consensual rights, such as those provided by statute or judicial process, when the same property is subject to both consensual and non-consensual security rights and the law must provide for the relative priority of such rights (see A/CN.9/WG.VI/WP.14/Add.1, paras. 56-61 and 82-85). The primary focus of the Guide is on core commercial assets, such as commercial goods (inventory and equipment) and trade receivables. However, the Guide proposes that all types of assets are capable of being the object of a security right, including all present and future assets of a business, and covers all assets, both tangible and intangible, with the exception of assets specifically excluded.

10. Immovable property, securities and wages are types of asset that are subject to an outright exclusion. Immovable property (with the exception of fixtures, which are covered by the Guide and can be subjected to security rights) is excluded as it raises different issues and is subject to a special title registration system indexed by asset and not by grantor. In addition, the Guide does not cover security rights in securities as original encumbered assets because the nature of securities and their importance for the functioning of financial markets raise a broad range of issues that merit special legislative treatment. The substantive law issues relating to security and other rights in securities held with an intermediary are dealt with in a draft Convention being prepared by the International Institute for the Unification of Private Law (Unidroit). The private international law issues with respect to that subject matter are not addressed in this Guide since they are dealt with in the Hague Convention on the Law applicable to Certain Rights in Respect of Securities (The Hague, December 2002). The Guide is structured in such a way that the State enacting legislation based on the regime envisaged in the Guide can, at the same time, implement the texts prepared by Unidroit and the Hague Conference, as well as relevant texts prepared by UNCITRAL, such as the United Nations Convention on the Assignment of Receivables in International Trade (New York, December 2001; herein after referred to

as “the United Nations Assignment Convention”) and the UNCITRAL Legislative Guide on Insolvency Law.

[Note to the Working Group: The Working Group may wish to note that, if it adopts a qualified exclusion of securities and immovable property (see A/CN.9/WG.VI/WP.26/Add.7, note to rec. 3 (g)), para. 10 would need to be revised. Similarly, if rec. 4 (d) is adopted, the commentary should include some explanation. Similar amendments may need to be made depending on the decisions of the Working Group on the issues raised in the notes to rec. 3 (d) and (f).]

11. Security rights in wages are excluded based on the policy of protecting individual and family life. Any additional exclusions based on competing policy objectives should be limited in number and in scope, should be clearly stated in the law and should be adopted only after their potential benefit has been carefully weighed against the social and economic policy underlying the secured transactions law of promoting the availability of low-cost credit.

12. Some assets, such as ships, aircraft [and intellectual property rights] are in whole or in part subject to special laws. Security rights in such assets are not excluded but, in the case of any inconsistency between such a special law and secured transactions law, the special law (e.g. the special registration system) prevails.

13. In particular, the Guide does not address issues specific to security rights in intellectual property rights and it does not make recommendations concerning those issues. However, in developing its secured transactions law, a State should take account of the increasing importance and economic value of intellectual property assets to companies seeking to obtain low-cost secured credit. Subject to the limitations discussed in the following paragraph, the secured transactions law would apply to security interests in intellectual property rights.

14. When adopting a secured transaction regime, a State should take into account the particular characteristics of, and national laws applicable to, intellectual property, as well as the State’s obligations under international intellectual property treaties, conventions and other international agreements. Accordingly, when implementing the recommendations of the Guide, a State should give careful consideration to situations in which the existing legal regime and characteristics of intellectual property are sufficiently unique as to justify the adjustment of those recommendations when the encumbered assets include intellectual property rights. If upon examination there is found to be a direct inconsistency between the State’s intellectual property laws or obligations under intellectual property treaties, conventions and other international agreements, in particular insofar as they establish a rule for the creation, effectiveness against third parties, priority or enforcement of security rights in intellectual property, then the State’s secured transactions law should provide that the intellectual property laws and obligations will govern such issues to the extent of any inconsistency.

15. The Guide stresses the need to enable a grantor to create security rights not only in its existing assets but also in its future assets (i.e. assets acquired or created after the conclusion of the security agreement), without requiring the grantor or secured creditor to execute any additional documents or to take any additional action at the time such assets are acquired or created. This approach is consistent, for example, with the United Nations Assignment Convention, which provides for the creation of security rights in future receivables without requiring any additional steps to be taken. In addition, the Guide recommends recognition of a security right in all existing and future assets of a business grantor through a single security agreement such as already exists in some legal systems as an “enterprise mortgage” or as a combination of fixed and floating charges.

16. The Guide also recommends that a broad range of obligations, monetary and non-monetary, may be secured and that both physical and legal persons may be parties to a secured transaction, including consumers, subject to consumer-protection laws. In addition, the Guide is intended to cover a broad range of transactions that serve security functions, including those related to possessory and non-possessory security rights, as well as transactions not denominated as secured transactions (such as retention of title, transfer of title for security purposes, assignment of receivables for security purposes, financial leases, and sale and leaseback transactions and the like).

17. The legal regime envisaged in the Guide is a purely domestic regime. The recommendations of the Guide are addressed to national legislators considering reform of domestic secured transactions laws. However, because secured transactions often involve parties and assets located in different jurisdictions, the Guide also seeks to address the recognition of security rights and title-based security devices, such as retention of title and financial leases, effectively created in other jurisdictions. This would represent a marked improvement for the holders of those rights over the laws currently in effect in many States, under which such rights often are lost once an encumbered asset is transported across national borders, and would go far toward encouraging creditors to extend credit in cross-border transactions (see A/CN.9/WG.VI/WP.14/Add.4, paras. 21-25).

18. Throughout, the Guide seeks to establish a balance among the interests of debtors, creditors (whether secured, privileged or unsecured), affected third persons, buyers and other transferees, and the State. In so doing, the Guide adopts the premise, supported by substantial empirical evidence, that all creditors will accept such a balanced approach, and will thereby be encouraged to extend credit, as long as the laws (and supporting legal and governmental infrastructure) are effective to enable the creditors to assess their risks with a high level of predictability and with confidence that they will ultimately realize the economic value of the encumbered assets. Essential to this balance is a close coordination between the secured transactions and insolvency law regimes, including provisions pertaining to the treatment of security rights in the event of a reorganization or liquidation of a business. Additionally, certain debtors, such as consumer debtors, require additional protections. Thus, although the regime envisioned by the Guide will apply to many forms of consumer transactions, it is not intended to override consumer-protection laws or to discuss consumer-protection policies, since this matter does not lend itself to unification.

19. In the same spirit, the Guide also addresses concerns that have been expressed with respect to secured credit. One such concern is that providing a creditor with a priority claim to all or substantially all of a person's assets may appear to limit the ability of that person to obtain financing from other sources. Another concern is the potential ability of a secured creditor to exercise influence over a business, to the extent that the creditor may seize, or threaten seizure of, the encumbered assets of that business upon default. Yet another concern is that in some cases secured creditors may take most or all of a person's assets in the case of insolvency and leave little for unsecured creditors, some of whom are not in a position to bargain for a security right in those assets. The Guide discusses these concerns and, in those situations where the concerns appear to have merit, suggests solutions.

20. The Guide builds on the work of UNCITRAL and other organizations. Such work includes: the EBRD Model Law on Secured Transactions, completed in 1994; the EBRD General principles of a modern secured transactions law, completed in 1997; the OHADA Uniform Act Organizing Securities, prepared in 1997; the study on Secured Transactions Law Reform in Asia, prepared by the Asian Development Bank in 2000; the United Nations Assignment Convention, adopted in 2001; the Convention on International Interests in Mobile Equipment, adopted in 2001, and the relevant protocols; the

Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, adopted in 2001; the Organization of American States (OAS) Model Inter-American Law on Secured Transactions, prepared in 2002; the UNCITRAL Legislative Guide on Insolvency Law, completed in 2004; [the UNIDROIT Convention on Substantive Rules regarding Intermediated Securities; and [...]].

C. Terminology

21. This Guide adopts terminology to express the concepts that underlie an effective secured transactions regime. The terms used are not drawn from any particular legal system. Even when a particular term appears to be the same as that found in a particular national law, the meaning given to the term may differ. This approach is taken to provide readers with a common vocabulary and conceptual framework and to encourage harmonization of the law governing security rights. The following paragraphs therefore identify the principal terms used and the core meaning given to them in this Guide. The meaning of those terms is further refined when they are used in subsequent chapters. Those chapters also define and use additional terms (as is the case, for example, with the insolvency and the acquisition finance chapters). “Or” is not intended to be exclusive; use of the singular also includes the plural and vice versa; “include” and “including” are not intended to indicate an exhaustive list; “may” indicates permission and “should” indicates instruction; and “such as” and “for example” are to be interpreted in the same manner as “include” or “including”. [“Creditors” should be interpreted as including both the creditors in the forum State and foreign creditors, unless otherwise specified.] References to “person” should be interpreted as including both natural and legal persons, unless otherwise specified. The term “law” throughout the draft Guide is intended to include both statutory and non-statutory law. The phrase “law governing negotiable instruments” or similar expression encompasses all law that applies to negotiable instruments, including not only negotiable instrument law but also contract and other law that might be applicable.

(a) “Security right” means a consensual property right in movable property and attachments that secure payment or other performance of one or more obligations, regardless of whether the parties have designated it as a security right. With respect to receivables, security right also means an outright transfer of a receivable, as well as a transfer by way of security. It includes acquisition security rights and non-acquisition security rights. [See *A/CN.9/WG.VI/WP.24/Add.5*.] References to a “security right” in this Guide also refer to the “right of an assignee”.

(b) “Acquisition security right” means a security right in an asset that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred to enable the grantor to acquire the asset. Acquisition security rights include those that are denominated as security rights, as well as rights acquired under retention-of-title sales, hire and-purchase transactions, financial leases and purchase-money lending transactions. “Grantor” of an acquisition security right includes a buyer, financial lessee or grantor in a purchase-money lending transaction. “Acquisition financier” means the secured creditor with an acquisition security right and includes a retention-of-title seller, financial lessor or purchase-money lender. [See *A/CN.9/WG.VI/WP.24/Add.5*]

(c) “Secured obligation” means the obligation secured by a security right.

(d) “Secured creditor” means a creditor that has a security right. References to the “secured creditor” in this Guide also refer to the “assignee”. [See *A/CN.9/WG.VI/WP.26*]

(e) “Debtor” means a person that owes performance of the secured obligation [and includes secondary obligors, such as guarantors of a secured obligation]. The debtor may or may not be the person that grants the security right to a secured creditor (see grantor).

(f) “Grantor” means a person that creates a security right in one or more of its assets in favour of a secured creditor to secure either its own obligation or that of another person (see debtor of the receivable). References to the “grantor” in this Guide also refer to the “assignor”.

[Note to the Working Group: The Working Group may wish to note that the second sentence in the definitions of “security right”, “secured creditor” and “grantor” is intended to ensure that the general recommendations apply to security rights in receivables and to outright transfers of receivables, unless otherwise provided.]

(g) “Security agreement” means an agreement between a grantor and a creditor, in whatever form or terminology, that creates a security right.

(h) “Encumbered asset” means property that is subject to a security right. The property may be tangible or intangible. Each of these two general types of property includes various categories, some of which fall within particular defined terms used in the Guide.

(i) “Tangibles” means all forms of corporeal movable property. Among the categories of tangibles are inventory, equipment, attachments, negotiable instruments and negotiable documents.

(j) “Inventory” means a stock of tangibles held for sale or lease in the ordinary course of business and also raw and semi-processed materials (work-in-process).

(k) “Equipment” means tangibles used by a person in the operation of its business.

(l) “Attachments to immovable property” means tangibles that are so physically attached to immovable property as to be treated as immovable property without however losing their identity as movables under the law of the State where the immovable property is located. *[See A/CN.9/WG.VI/WP.26/Add.4]*

(m) “Attachments to movable property” means tangibles that are so physically attached to other movable property [as to be treated as part of that movable property], without however losing their identity under law other than this law. *[See A/CN.9/WG.VI/WP.26/Add.4]*

(n) “Mass or product” means tangibles other than money that are so physically associated or united with each other that they lose their separate identity under law other than this law. *[See A/CN.9/WG.VI/WP.26/Add.4]*

(o) “Intangibles” means all forms of movable property other than tangibles. Among the categories of intangibles are claims and receivables.

(p) “Receivable” means a [contractual] right to the payment of a monetary obligation excluding rights to payment evidenced by a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account.

[Note to the Working Group: The Working Group may wish to recall that, at its tenth session, it decided that non-contractual receivables should be covered (see A/CN.9/603, para. 36). This result may be achieved by limiting the definition of receivables to contractual receivables and clarifying in the commentary that the general recommendations apply to non-contractual receivables. Alternatively, the definition of

“receivable” might be retained as is but the definition of “original contract” might need to be revised to address the sources of non-contractual receivables. In addition, new recommendations might need to be added to ensure that: (i) recommendations 13 and 14 (dealing with statutory limitations on assignability) do not affect statutory limitations to the assignability of non-contractual receivables and (ii) that recommendations 16 bis and ter (dealing with representations of the assignor) do not apply to security rights in non-contractual receivables.]

(q) “Assignment” means the creation of a security right in a receivable, including an outright transfer of a receivable. [See article 2 (a) of the United Nations Assignment Convention.]

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the creation of a security right in a receivable includes an outright transfer of receivables by way of security, which is treated in the draft Guide as a security right.]

(r) “Assignor” means the person that makes an assignment of a receivable. [See article 2 (a) of the United Nations Assignment Convention.]

(s) “Assignee” means the person to which an assignment of a receivable is made. [See article 2 (a) of the United Nations Assignment Convention.]

(t) “Subsequent assignment” means an assignment by the initial or any other assignee. In the case of a subsequent assignment, the person that makes that assignment is the assignor and the person to which that assignment is made is the assignee. [See article 2 (b) of the United Nations Assignment Convention.]

(u) “Debtor of the receivable” means a person liable for payment of a receivable. “Debtor of the receivable” includes a guarantor, as an accessory guarantee is a receivable. [See article 2 (a) of the United Nations Assignment Convention.]

[Note to the Working Group: The Working Group may wish to recall that, at its tenth session, it agreed that the word “account” should be deleted from the references to “the account debtor”. It is suggested that the term “account debtor” should be replaced by the term “debtor of the receivable”. This approach would result in avoiding confusion with the debtor of the secured obligation, as well as a major change to the whole draft Guide that may not be substantively correct (as the word “debtor” should refer to the debtor of the secured obligation). In addition, this approach is not inconsistent with the United Nations Assignment Convention, in which reference was made to “the debtor” rather than to the debtor of the receivable, since, unlike the draft Guide which covers many types of asset, the Convention covers only receivables. If the Working Group approves this change, the references to the “account debtor” throughout the draft Guide will be revised to refer to “the debtor of the receivable”.]

(v) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivable and the assignee. [See article 5 (d) of the United Nations Assignment Convention]. The writing requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce).

[Note to the Working Group: The Working Group may wish to note that the definition of “notification of the assignment” includes the rule contained in recommendation 9 (see A/CN.9/WG.VI/WP.26/Add.7). The Working Group may wish to note that reference to writing is made only in the notification of the assignment and the

notice of a security right, but not in the other notices referred to in the draft Guide (e.g. notice of intention to pursue extrajudicial enforcement).

Depending on whether the reference to signature is retained in recommendation 7 the Working Group may wish to consider whether the rule contained in recommendation 10 (see A/CN.9/WG.VI/WP.26/Add.7) that “signature” includes electronic signature should be reflected in the definitions. The Working Group may wish to note that reference to a “signed writing” is made, apart from recommendation 7, in recommendation 21 dealing with waiver of defences of the debtor of the receivable.]

(w) “Original contract” in the context of an assignment means the contract between the assignor and debtor of the receivable from which the receivable arises. [See article 5 (a) of the United Nations Assignment Convention.]

[Note to the Working Group: The Working Group may wish to note that the recommendations on receivables will make it clear that statutory limitations with respect to non-contractual receivables are not affected and the recommendation on representations of the assignor are not relevant with respect to statutory receivables (see A/CN.9/603, para. 36).]

(x) “Negotiable instrument” means an instrument that embodies a right to payment, such as a cheque, bill of exchange or promissory note which satisfies the requirements for negotiability under the law governing negotiable instruments.

(y) “Negotiable document” means a document that embodies a right for delivery of tangibles, such as a warehouse receipt or a bill of lading, and satisfies the requirements for negotiability under the law governing negotiable documents.

(z) “Independent undertaking” means a letter of credit (commercial or standby), a confirmation of a letter of credit, an independent guarantee (demand, first demand, bank guarantee or counter-guarantee) or any other undertaking recognized as independent by law or practice rules, such as the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits, the International Standby Practices, and the Uniform Rules for Demand Guarantees.

(aa) “Proceeds under an independent undertaking” means the right to receive a payment due, a draft accepted or deferred payment or another item of value, in each case to be delivered by the guarantor/issuer honouring or by a nominated person giving value for, a draw under an independent undertaking. The term does not include[:] (i) the right to draw (i.e. to request payment) under an independent undertaking, or (ii) what is received upon honour of a drawing from the guarantor/issuer or nominated person or upon disposition of a right to drawing proceeds from an independent undertaking (i.e. the proceeds themselves).

[Note to the Working Group: the commentary will explain that the definition refers to “proceeds under an independent undertaking” to be consistent with terminology generally used in independent undertaking law and practice. The term as used in this Guide means the right of the grantor as beneficiary of an independent undertaking to receive whatever payment or other value is given under the independent undertaking contingent upon the beneficiary’s compliance with the terms and conditions of the independent undertaking. The term does not include the proceeds themselves, i.e. what is actually received upon honour of a drawing from the guarantor/issuer, confirmer or nominated person (a beneficiary’s receipt of value from a negotiating bank should not be characterized as honour or disposition) or upon disposition of a right to proceeds under an independent undertaking.]

The term “proceeds under an independent undertaking” refers to a right to receive even though the term “proceeds” as used in independent undertaking law and practice may refer either to the right to receive or to whatever is received under the independent undertaking, and even though the term “proceeds” as used elsewhere in the draft Guide refers to whatever is received. The commentary will highlight the distinction between a security right in proceeds under an independent undertaking (as an original encumbered asset) and the “proceeds” (a key concept of the draft Guide) of assets covered in the draft Guide. The Working Group will note that the reference to the “beneficiary-grantor” has been deleted as unnecessary. This is in line with the Guide’s treatment of the term “receivable” (the draft Guide does not define “receivable” in terms of the grantor). Moreover, at the time of the grant, the grantor may not yet be a beneficiary; indeed, the independent undertaking may not even exist at that time. The question of who is entitled to receive payment is a matter of other law (in the context of receivables, for example, the Guide does not specify who is entitled to receive payment of the receivable).]

(bb) “Guarantor/issuer” means a bank or other person that issues an independent undertaking.

(cc) “Confirmer” means a bank or other person that adds its own independent undertaking to that of the guarantor/issuer.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, in line with article 6 (e) of the United Nations Guarantee and Standby Convention, a confirmation provides the beneficiary with the option of demanding payment from the confirmer in conformity with the terms and conditions of the confirmed independent undertaking instead of from the guarantor/issuer.]

(dd) “Nominated person” means a bank or other person that is identified in an independent undertaking by name or type (e.g. “any bank in country X”) as being nominated to give value, i.e. to purchase or pay upon presentation of documents, and that acts pursuant to that nomination.

(ee) A secured creditor has “control” with respect to proceeds under an independent undertaking: (i) automatically upon the creation of the security right if the guarantor/issuer, confirmer or nominated person is the secured creditor, or (ii) if the guarantor/issuer, confirmer or nominated person has made an acknowledgment in favour of the secured creditor. “Acknowledgment” with respect to proceeds under an independent undertaking means that the guarantor/issuer, confirmer or nominated person that will pay or otherwise give value upon a draw under an independent undertaking has, unilaterally or by agreement: (i) acknowledged or consented to (however evidenced) the creation of a security right (whether denominated as an assignment or otherwise) in favour of the secured creditor in the proceeds from an independent undertaking, or (ii) has obligated itself to pay or give value to the secured creditor upon a draw under an independent undertaking.

[Note to the Working Group: The Working Group may wish to note that the commentary will include language that the definitions must be read together with all recommendations relating to independent undertakings (3 (d), 16, 25, 25 bis, 25 ter, 25 quater, 49, 62, 106, 138 and 138 bis).]

(ff) “Bank account” means an account that is maintained by a bank into which funds may be deposited or credited. The term includes a chequing or other current account, as well as a savings or time-deposit account. The term does not include a claim against the bank arising under law governing negotiable instruments.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the right to payment of funds credited to a bank account covers a right to the payment of funds transferred into an internal account of the bank and not applied to any obligations owing to the bank. The commentary will also explain that funds transferred to the bank by way of anticipated reimbursement of a future payment obligation that the bank has accepted in the ordinary course of its banking business is also covered to the extent that the person that gave the bank instructions has a claim to those funds if the bank does not make the future payment.]

(gg) A secured creditor has “control” with respect to a right to payment of funds credited to a bank account: (i) automatically upon the creation of a security right if the depositary bank is the secured creditor; (ii) if the depositary bank has concluded a control agreement with the grantor and the secured creditor, according to which the depositary bank has agreed to follow instructions from the secured creditor with respect to the right to payment of funds credited to the bank account without further consent of the grantor; or (iii) if the secured creditor is the account holder.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (i) there is no obligation on a depositary bank to enter into a control agreement; (ii) that a secured creditor’s rights will be subject to the rights and obligations of the depositary bank under law and practice governing bank accounts; (iii) a control agreement requires the consent of the grantor (as well as of the depositary bank) and the grantor retains the right to deal with the funds in the bank account until the secured creditor instructs the depositary bank otherwise (although in some control agreements, the funds would be blocked from the time of the conclusion of the control agreement). The commentary will also explain that (iii) covers situations where: (i) an existing account is transferred to the secured creditor, (ii) the secured creditor agrees with the grantor that funds should be deposited to an account to be opened later and (iii) the secured creditor is the only account holder (i.e. not merely a joint account holder).]

(hh) “Intellectual property right” includes, subject to law other than the secured transactions law, patents, trademarks, service marks, trade secrets, copyright and related rights and designs. It also includes rights under licences of such rights.

(ii) “Proceeds” means whatever is received in respect of encumbered assets. For example, proceeds include what is received as a result of sale or other disposition or collection, lease, licence, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects, damage or loss. *[See A/CN.9/WG.VI/WP.26/Add.4, as well as note in A/CN.9/WG.VI/WP.26/Add.7, note to rec. 3 (g).]*

(jj) “Priority” means the right of a person to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant.

(kk) “Competing claimant” means:

- (i) Another secured creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);
- (ii) In the context of the non-unitary system for acquisition security rights, the seller or financial lessor of the same encumbered asset that has retained title to it;
- (iii) Another creditor of the grantor asserting a right in the same encumbered asset (e.g. by operation of law, attachment or seizure or a similar process);
- (iv) The insolvency representative in the insolvency of the grantor; or

(v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset.

(ll) “Possessory security right” means a security right in tangibles that are in the actual possession of the secured creditor or of another person (other than the debtor or other grantor) holding the asset for the secured creditor.

(mm) “Non-possessory security right” means a security right in: (i) tangibles that are not in the actual possession of the secured creditor or another person holding the tangibles for the benefit of the secured creditor, or (ii) intangibles.

[Note to the Working Group: The Working Group may wish to consider whether the (ll) and (mm) are necessary after the decision not to make such a distinction between possessory and non-possessory security rights. The terms are used only in recs. 1 (f) and 3 (c).]

(nn) “Possession”, except as the term is used in recommendations [28 and 80] with respect to the issuer of a negotiable document, means the actual possession of tangibles by a person or an agent or employee of that person, or by another person holding on behalf of that person, or an independent person that acknowledges that it holds for that person. It does not include constructive, fictive or symbolic possession.

(oo) “Issuer” of a negotiable document means the person who is obligated to deliver the tangibles covered by the document under the law governing negotiable documents.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, in the case of a so-called multimodal bill of lading (if it qualifies as a negotiable document under the applicable law), the “issuer” may be a person who subcontracts various portions of the transport of the goods to other persons but still takes responsibility for their transport and for any damage that might occur during carriage.]

(pp) “Dispossession of the grantor” means the actual delivery of possession of the assets to be encumbered to the secured creditor or a third person (other than the grantor or an agent or employee of the grantor) that holds the assets on behalf of the secured creditor or to an independent person who acknowledges that it holds for the secured creditor.

(qq) “Insolvency court” means a judicial or other authority competent to control or supervise an insolvency proceeding.

(rr) “Insolvency estate” means assets and rights of the debtor that are controlled or supervised by the insolvency representative and subject to the insolvency proceedings.

(ss) “Insolvency proceedings” means collective judicial or administrative proceedings for the purposes of either reorganization or liquidation of the debtor’s business conducted according to the insolvency law.

(tt) “Insolvency representative” means a person or body responsible for administering the insolvency estate.

(uu) “Buyer in the ordinary course of business” means a person that buys inventory in the ordinary course from a person in the business of selling tangibles of that kind and without knowledge that the sale violates the security rights or other rights of another person in the tangibles.

D. Examples of financing practices covered in the Guide

22. Set forth below are short examples of the types of secured credit transactions that the Guide is designed to encourage, and to which reference will be made throughout the Guide to illustrate specific points. These examples represent only a few of the numerous forms of secured credit transactions currently in use, and an effective secured transactions regime must be sufficiently flexible to accommodate many existing methods of financing, as well as methods that may evolve in the future.

1. Inventory and equipment acquisition financing

23. Businesses often obtain financing for specific purchases of inventory or equipment. In many cases, the financing is provided by the seller of the tangibles (inventory and equipment) purchased. In other cases, the financing is provided by a lender. Sometimes the lender is an independent third party, but in other cases the lender may be an affiliate of the seller. The seller retains title or the lender is granted a security right in the tangibles purchased to secure the repayment of the credit or loan.

24. Here is an illustration of acquisition financing: ABC Manufacturing Company (ABC), a manufacturer of furniture, wishes to acquire certain inventory and equipment for use in manufacturing operations. ABC desires to purchase paint (constituting raw materials and, therefore, inventory) from Vendor A. ABC also wishes to purchase certain drill presses (constituting equipment) from Vendor B and certain conveyor equipment from Vendor C. Finally, ABC wishes to lease certain computer equipment from Lessor A.

25. Under the purchase agreement with Vendor A, ABC is required to pay the purchase price for the paint within thirty days of Vendor's A invoice to ABC, and ABC grants to Vendor A a security right in the paint to secure the purchase price. Under the purchase agreement with Vendor B, ABC is required to pay the purchase price for the drill presses within ten days after they are delivered to ABC's plant. ABC obtains a loan from Lender A to finance the purchase of the drill presses from Vendor B, secured by a security right in the drill presses. ABC also maintains a bank account with Lender A and has granted Lender A a security right in the bank account as additional security for the repayment of the loan.

26. Under the purchase agreement with Vendor C, ABC is required to pay the purchase price for the conveyor equipment when it is installed in ABC's plant and rendered operational. ABC obtains a loan from Lender B to finance the purchase and installation of the conveyor equipment from Vendor C, secured by a security right in the conveyor equipment.

27. Under the lease agreement with Lessor A, ABC leases the computer equipment from Lessor A for a period of two years. ABC is required to make monthly lease payments during the lease term. ABC has the option (but not the obligation) to purchase the equipment for a nominal purchase price at the end of the lease term. Lessor A retains title to the equipment during the lease term but title will be transferred to ABC at the end of the lease term if ABC exercises the purchase option. This type of lease is often referred to as a "financial lease". Under some forms of financial leases, title to the leased property is transferred to the lessee automatically at the end of the lease term. A financial lease is to be distinguished from what is usually called an "operating lease". Under an operating lease, the leased property is expected to have a remaining useful life at the end of the lease term and the lessee does not have an option to purchase the leased property at the end of the

lease term for a nominal price, nor is title to the leased property transferred to the lessee automatically at the end of the lease term.

28. In each of the above four cases, the acquisitions are made possible by means of acquisition financing provided by another person (seller, lender or financial lessor) who holds rights in the acquired property for the purpose of securing the acquisition financing granted. As the illustrations make clear, acquisition financing can occur with respect to both inventory and equipment.

2. Inventory and receivable revolving loan financing

29. Businesses generally have to expend capital before they are able to generate and collect revenues. For example, before a typical manufacturer can generate receivables and collect payments, the manufacturer must expend capital to purchase raw materials, to convert the raw materials into finished goods and to sell the finished goods. Depending on the type of business, this process may take up to several months. Access to working capital is critical to bridge the period between cash expenditures and revenue collections.

30. One highly effective method of providing such working capital is a revolving loan facility. Under this type of credit facility, loans secured by the borrower's existing and future inventory and receivables are made from time to time at the request of the borrower to fund the borrower's working capital needs (see also A/CN.9/WG.VI/WP.11/Add.2, para. 12). The borrower typically requests loans when it needs to purchase and manufacture inventory, and repays the loans when the inventory is sold and the sales price is collected. Thus, borrowings and repayments are frequent (though not necessarily regular) and the amount of the credit is constantly fluctuating. Because the revolving loan structure matches borrowings to the borrower's cash conversion cycle (that is, acquiring inventory, processing inventory, selling inventory, creating receivables, receiving payment and acquiring more inventory to begin the cycle again), this structure is, from an economic standpoint, highly efficient and beneficial to the borrower, and helps the borrower to avoid borrowing more than it actually needs.

31. Here is an illustration of this type of financing: It typically takes four months for ABC to manufacture, sell and collect the sales price for its products. Lender B agrees to provide a revolving loan facility to ABC to finance this process. Under the loan facility, ABC may obtain loans from time to time in an aggregate amount of up to 50 percent of the value of its inventory that Lender B deems to be acceptable for borrowing (based upon its type and quality of the inventory, as well as other criteria) and of up to 80 percent of the value of its receivables that Lender B deems to be acceptable for borrowing (based upon criteria such as the creditworthiness of the account debtors). ABC is expected to repay these loans from time to time as it receives payments from its customers. The loan facility is secured by all of ABC's existing and future inventory and receivables. In this type of financing, it is also common for the lender to obtain a security right in the bank account into which customer payments (i.e. the proceeds of inventory and receivables) are deposited.

3. Securitization

32. Another highly effective form of financing involving the use of receivables is securitization. Securitization is a sophisticated form of financing under which a business enterprise can obtain less-expensive financing based on the value of its receivables by transferring them to a wholly-owned "special purpose vehicle" ("SPV") that will issue commercial paper or other securities in the capital markets secured by the stream of income generated by such receivables. For example, this technique is commonly used in

situations where a company's receivables consist of credit card receivables, rents or home mortgages, though the securitization of many other types of receivables is possible. Securitization transactions are complex financing transactions that are also dependent upon a jurisdiction's securities laws as well as its secured lending laws.

33. Securitization is intended to lower the cost of financing because the SPV is structured in a way to make the risk of its insolvency "remote" (e.g. theoretically not possible). That significantly reduces one risk that the lender has to take into account when deciding what interest rate to charge for the loan. In addition, as the source of credit is capital markets, greater amounts of credit may be generated and at lower costs than the normal bank loan costs.

34. Here is an illustration of a securitization transaction: An SPV is created by a subsidiary of an automobile manufacturer to purchase automobile leases from automobile dealers throughout a geographically defined market. The automobile leases are purchased from the dealers for a discount from the projected value of the payment streams expected to be generated by such leases. The SPV then issues debt securities, under applicable securities laws, to investors in the capital market secured by such income stream. As payments are made under the leases, the SPV will use such proceeds to make payments on the debt securities.

4. Term-loan financing

35. Businesses often need financing for large, non-ordinary-course expenditures, such as the acquisition of equipment or the acquisition of a business. In these situations, businesses generally seek financing whereby loans are repaid over a fixed period of time (with principal being repaid in monthly, quarterly or other periodic instalments pursuant to an agreed-upon schedule or in a single payment at the end of the loan term).

36. As is the case with many other types of financing, businesses that do not have strong, well-established credit ratings will have difficulty obtaining term loan financing, unless the business is able to grant security rights in its assets to secure the financing. The amount of the financing will be based in part on the creditor's estimate of the net realizable value of the assets to be encumbered. In many States, immovable property is the only type of asset that typically is accepted by lenders to secure term-loan financing and, as a result, in such States term-loan financing is often not available for other important asset types, such as equipment or the enterprise value of an entire business. This is most likely the case in States that do not have a modern secured transactions regime. However, many businesses, particularly newly established businesses, do not own any immovable property and, therefore, may not have access to term-loan financing. In other States, term loans secured by movables, such as equipment and even intellectual property and the enterprise value of the business, are common.

37. Here is an illustration of this type of financing: ABC desires to expand its operations and purchase a business in State Y. ABC obtains a loan (predicated on the value of, and secured by, substantially all of the assets of the business being acquired) from Lender C to finance such acquisition. The loan is repayable in equal monthly instalments over a period of ten years and is secured by existing and future assets of ABC and the entity being acquired.

5. Transfer of title for security purposes

38. In States that honour a form of transfer of ownership even when it does not entail a transfer of possession and is done for financing purposes, a transaction denominated as a

transfer of title by way of security (or sometimes as a “fiduciary” transfer of title) is recognized. These transactions are essentially non-possessory security rights, and they are primarily used in States where the secured transactions law has not yet appropriately recognized non-possessory security rights.

6. Sale and leaseback transactions

39. A “sale and leaseback transaction” provides a method by which a company can obtain credit based upon its existing tangibles (usually equipment) while still retaining possession and the right to use the tangibles in the operation of its business. In a sale and leaseback transaction, the company will sell its assets to another person for a specific sum (which it may then use as working capital, to make capital expenditures or for other purposes). Simultaneously with the sale, the company will lease the equipment back from that other person for a lease term and at a rental rate specified in the lease agreement. Often, the lease is a “financial lease” as opposed to an “operating lease” (see para. 27 for a definition of both terms).

II. Key objectives of an effective and efficient secured transactions regime

40. In the spirit of providing practical, effective solutions, the Guide explores and develops the following key objectives and themes of an effective and efficient secured transactions regime.

A. Promote secured credit

41. The primary overall objective of the Guide is to promote low-cost secured credit for persons in jurisdictions that adopt legislation based on the Guide’s recommendations, thereby enabling such persons and the economy as a whole to obtain the economic benefits that flow from access to such credit (see para. 2).

B. Allow utilization of the full value inherent in assets to support credit in a broad array of credit transactions

42. A key to a successful legal regime governing secured transactions is to enable a broad array of businesses to utilize the full value inherent in their assets to obtain credit in a broad array of credit transactions. In order to achieve this objective, the Guide emphasizes the importance of comprehensiveness, by: (i) permitting a broad range of assets to serve as encumbered assets (including present and future assets); (ii) permitting a broad range of obligations (including future and conditional, monetary and non-monetary, obligations) to be secured by security rights in encumbered assets; and (iii) extending the benefits of the regime to a broad array of debtors, creditors and credit transactions.

C. Enable parties to obtain security rights in a simple and efficient manner

43. The cost of credit will be reduced if security rights can be obtained in an efficient manner. For this reason, the Guide suggests methods for streamlining the procedures for obtaining security rights and otherwise reducing transaction costs. These methods include: eliminating unnecessary formalities; providing for a single method for creating security rights rather than a multiplicity of security devices for different kinds of encumbered assets; and permitting security rights in future assets and for future advances of credit without any additional documentation or actions by the parties.

D. Recognize party autonomy

44. Because an effective secured transactions regime should provide maximum flexibility and durability to encompass a broad array of credit transactions, and also accommodate new and evolving forms of credit transactions, the Guide stresses the need to keep mandatory rules to a minimum so that parties may tailor their credit transactions to their specific needs. At the same time, the Guide takes into account that other legislation may protect the legitimate interests of consumers or other persons and specifies that a secured transactions regime should not override such legislation.

E. Provide for equal treatment of diverse sources of credit

45. Because healthy competition among all potential creditors is an effective way of reducing the cost of credit, the Guide recommends that the secured transactions regime apply equally to various creditors, including banks and other financial institutions, as well as domestic and non-domestic creditors.

F. Validate non-possessory security rights

46. Because the granting of a security right should not make it difficult or impossible for the debtor or other grantor to continue to operate its business, the Guide recommends that the legal regime provide for non-possessory security rights in a broad range of assets coupled with mechanisms for publicizing the existence of such security rights.

G. Encourage responsible behaviour on the part of all parties by enhancing predictability and transparency

47. Because an effective secured transactions regime should also encourage responsible behaviour by all parties to a credit transaction, the Guide seeks to promote predictability and transparency to enable the parties to assess all relevant legal issues and to establish appropriate consequences for non-compliance with applicable rules, while at the same time respecting and addressing confidentiality concerns.

H. Establish clear and predictable priority rules

48. A security right will have little or no value to a creditor unless the creditor is able to ascertain, at the time a transaction takes place, its priority in the property relative to other

creditors (including an insolvency representative). Thus, the Guide proposes the establishment of a system for registering public notices with respect to security rights and, based on that system, clear rules that allow creditors to determine the priority of their security rights at the outset of the transaction in a reliable, timely and cost-efficient manner.

I. Facilitate enforcement of creditor's rights in a predictable and efficient manner

49. A security right will also have little or no value to a creditor unless the creditor is able to enforce the security right in a predictable and efficient manner. Thus, the Guide proposes procedures that allow creditors to so enforce their security rights, subject to judicial or other official control, supervision or review when appropriate. The Guide also recommends that there be a close coordination between a State's secured transactions laws and its insolvency laws with a view to respecting the pre-insolvency effectiveness and priority, as well as the economic value, of a security right subject to the appropriate rules of insolvency law.

J. Balance the interests of the affected persons

50. Because secured transactions affect the interests of various persons, including the debtor, other grantors, competing creditors, such as secured, privileged and unsecured creditors, purchasers and other transferees, and the State, the Guide proposes rules that take into account their legitimate interests and seek to achieve, in a balanced way, all the objectives mentioned above.

K. Harmonize secured transactions laws, including conflict-of-laws rules

51. Adoption of legislation based on the recommendations contained in the Guide will result in harmonization of secured transactions laws (through the adoption of similar substantive laws which will facilitate the cross-border recognition of security rights). This result in itself will promote the financing of international trade and the movement of goods and services across national borders. Furthermore, to the extent complete harmonization of national secured transactions laws might not be achieved, conflict rules would be particularly useful to facilitate cross-border transactions. In any event, conflict-of-laws rules would be useful in order, for example, to help secured creditors determine how to make their security rights effective against third parties.

A/CN.9/WG.VI/WP.27/Add.2

Draft Legislative Guide on Secured Transactions

ADDENDUM

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IX. Default and enforcement

A. General remarks

1. Introduction

1. A secured creditor usually expects a grantor¹ to perform its obligations without the need for the secured creditor to have recourse to the encumbered assets. A grantor will also typically expect to perform its secured obligations to the secured creditor. Both will recognize, however, that there will be times when the grantor will not be able to do so. The failure may result from poor management or business misjudgements, but it may also be for reasons beyond the grantor's control, such as an economic downturn in an industry or more general economic conditions.

2. Secured creditors generally will periodically review their grantors' business activities and the encumbered assets and communicate with those grantors who show signs of having financial difficulties. Grantors generally will cooperate with their secured creditors to work out ways to overcome these financial difficulties. A grantor and its creditors working together may enter into a "composition" or "work out" agreement that extends the time for payment, otherwise modifies the grantor's obligation or adds or reduces encumbered assets that secured the grantor's obligations. Negotiations to reach a composition agreement take place in the shadow of two principal legal factors: the secured creditor's right to enforce its security rights in the encumbered assets if the grantor defaults on its secured obligation and the possibility that insolvency proceedings will be initiated by or against the grantor. Even well short of formal processes, however, the grantor is likely to be well aware that it is not performing its obligations and only rarely, if ever, would it be the case that the grantor learns for the first time that it is in default by means of a notice from the secured creditor.

3. At the heart of a secured transactions regime is the right of the secured creditor to look to the amount that can be realized for the encumbered assets to satisfy the secured obligation if the grantor defaults. The availability of efficient and economical enforcement mechanisms that allow creditors accurately to predict the time and cost involved in the realization on the encumbered assets will have a significant impact on the availability and the cost of credit. A secured transactions regime should, therefore, provide efficient, predictable and economical procedural and substantive rules for the enforcement of a security right after a grantor has defaulted. These rules should be clear, simple and transparent to ensure certainty about the ability quickly to enforce a security right and efficiently at low cost to realize on the encumbered assets. At the same time, the rules should provide reasonable safeguards for the interests of the grantor other persons with an interest in the encumbered assets and the grantor's other creditors.

4. This chapter examines the secured creditor's enforcement of its security right if the grantor fails to perform ("defaults on"; see paras. 8-9) the secured obligation prior to the institution of insolvency proceedings or, with the permission of the appropriate body, during insolvency (insolvency is dealt with in chapter IX).

5. This Guide covers outright transfers of receivables. However, in such an outright transfer, the transferor has generally transferred all of its rights in the receivables. Thus,

¹ These general remarks use the term "grantor" as in the vast majority of cases the grantor is also the debtor. When a specific reference is limited to a third-party grantor that is not the debtor, the term "debtor" is used.

the transferor has no continuing right in the receivables and no interest in the realization (usually collection) of the receivables. Accordingly, this chapter applies to the outright transfer of a receivable only when the transferee has some recourse to the transferor for the non-collection of the receivables. It is only in that circumstance that the transferor has an interest in the method and other aspects of the collection or other disposition of the receivables.

6. Recourse to the grantor for the non-collection of receivables that have been the subject of an outright transfer may arise when the grantor has guaranteed some or all of the payment of the receivables by the account debtors. Recourse may also arise from other functionally equivalent arrangements, such as when (i) the grantor agrees to repurchase from the transferee a receivable sold to the transferee if the account debtor on the receivable fails to pay, or (ii) the grantor merely agrees to pay any deficiency between the purchase price for the bulk sale of receivables and the actual collections on the receivables.

7. Recourse to the grantor for “non-collection” as used here refers to non-collection because of the failure of the account debtor to pay for credit reasons, such as its financial inability to pay. Thus, for example, an account debtor’s failure to pay for goods or services because of poor quality or failure of the grantor to comply with the account debtor’s specifications for the goods or services would not be considered as non-collection as the term is referred to here.

2. Default

8. The parties’ agreement and the general law of obligations will determine whether the grantor is in default and what are the consequences of default (e.g. if and how the grantor may cure the default and whether a notice of default is required).²

9. Generally speaking, the grantor is in default if it fails to perform the secured obligation and, upon the grantor’s default, the secured creditor may enforce its security right against the encumbered assets. Normally, the grantor will seek to challenge before a court the secured creditor’s position that the grantor is in default, or the calculation of the amount owing as a result of the default. To avoid unduly delaying rightful enforcement, the judicial review should be expedited. Safeguards should be built into the process to discourage grantors from making unfounded claims to delay enforcement. However, even if the grantor does not challenge the secured creditor on these issues prior to enforcement against the encumbered assets, the grantor is always able to raise these issues afterwards when the secured creditor seeks to collect any deficiency.

3. Enforcement

(a) General considerations

10. It is important that the system take into account the rights of the grantor, other persons with a right in the encumbered assets and the grantor’s other creditors. Many systems impose, as a general and overriding matter, a requirement that the secured creditor in enforcing its rights must act in good faith and follow commercially reasonable standards. Because of the importance of this obligation, the secured creditor and the grantor may not agree at any time to waive or vary this obligation. A secured creditor that does not comply with its obligations under this chapter should be liable to the persons injured by that failure for any damages caused by the failure. For example, if a secured

² This should be distinguished from a requirement that the secured creditor give notice prior to extra-judicial disposition of the encumbered asset.

creditor does not act in a commercially reasonable manner in disposing of the encumbered assets and that results in the secured creditor realizing a smaller amount for the encumbered assets than it would have realized had it acted in a commercially reasonable manner, the secured creditor should be liable to the person damaged for that differential.

11. Other than the obligation to act in good faith and in a reasonably commercial manner, the grantor and the secured creditor may, after the grantor's default, waive the other obligations described in this chapter. This approach protects the grantor from pressure from the secured creditor to waive or modify the obligation at the time the secured transaction is entered into. At the same time, allowing a waiver after the grantor's default would permit the facilitation of the grantor and the secured creditor "working out" in a non-adversarial way a disposition of the encumbered assets in a manner that maximises the amount that can be realized for the benefit of the secured creditor, the grantor, and the other creditors of the grantor. Moreover, at this stage, the secured creditor has already extended the credit, and it is often the case that the grantor, not the secured creditor, knows more about the encumbered assets and how most effectively to realize on the encumbered assets.

12. The key issue for a secured transactions regime is what modifications, if any, should be made to the normal rules for debt collection to facilitate the enforcement of security rights. Some regimes, for example, provide for expedited court proceedings. Other regimes permit the secured creditor, at least on a preliminary basis but subject to judicial intervention at the behest of the grantor and subject also to the obligations described above of good faith and commercial reasonableness, to determine if a breach has occurred, to take possession of the encumbered assets and to dispose of them with no direct judicial or administrative intervention. Expedited judicial and non-judicial procedures, however, should take into account the right of other persons to be heard in protection of their legitimate claims to the encumbered assets. Moreover, the allocation of resources within the judicial system and allowing private persons to take actions that affect others necessarily raise issues of public interest. When determining the role of the judiciary or other administrative authorities in the enforcement of security rights, it is essential to do so in a clear and straightforward manner.

13. All interested parties (i.e. the secured creditor, the debtor or grantor and other creditors) benefit from maximizing the amount that will be realized by disposing of the encumbered assets after the grantor has defaulted. The secured creditor benefits by the potential reduction of any deficiency the grantor may owe as an unsecured debt after application of the proceeds of the disposition or collection on the encumbered assets. At the same time, the grantor and the grantor's other creditors benefit from a smaller deficiency or a larger surplus. A secured transactions regime that decreases the hurdles and transaction costs of the disposition or collection, while obliging the secured creditor to exercise its remedies in good faith and in a commercially reasonable manner, will increase the amount of the proceeds received on disposition of the encumbered assets.

14. A security right is of particular importance to a secured creditor when the grantor is in financial difficulty. A grantor who is in financial difficulty is more likely to default on its obligations and may end up voluntarily or involuntarily in insolvency proceedings. The effect of insolvency proceedings on the rights of the secured creditor and the secured creditor's valuation of the encumbered assets are discussed in Chapter IX.

(b) Notice of intended extra-judicial disposition

15. Secured transactions laws that provide for non-judicial disposition normally require that notice of the intention to dispose of the encumbered assets be given to persons that

may be affected by the disposition (e.g. the debtor, a third-party grantor and any person with rights in the encumbered assets) and specify the intended time and place of the disposition. The principal benefit of a notice of intended disposition to the debtor or grantor is that it alerts them to the need to protect their interests in the encumbered assets (the debtor will not be unaware of its default but the third-party grantor may be), such as by curing the debtor's default, if otherwise allowed, or by seeking potential buyers for the encumbered assets. Notice to other interested parties allows them to monitor subsequent enforcement by the secured creditor and, if they are secured creditors whose rights have priority (and the grantor is in default towards them as well), to participate in or take control of the enforcement process. The disadvantages of notice include its cost, the opportunity it provides an uncooperative grantor to remove the encumbered assets from the creditor's reach and the possibility that other creditors will race to assert claims against the grantor's business and interfere with the disposition process. Moreover, unless requirements with respect to notices are clear and simple, they generate the risk of "technical" non-compliance that generates litigation and inappropriate loss of rights. Many legal systems that require notice of intended disposition of the encumbered assets do not also require a notice of default (see paras. 8-9) or notice of extra-judicial enforcement.

[Note to the Working Group: The Working Group may wish to note that, depending on whether recommendation 99 in document A/CN.9/WG.VI/WP.24/Add.1 dealing with notice of intention to pursue extrajudicial enforcement is retained or not, the commentary may have to be revised.]

16. As with other situations where notice may be required, in those legal systems where a notice of default is required, secured transactions law normally states the minimum contents of a notice, the manner in which it is to be given and its timing. When doing so, the law might distinguish between notice to the debtor, notice to the grantor when the grantor is not the debtor, notice to other creditors and notice to public authorities or the public in general. It is a matter of a cost-benefit analysis whether the secured creditor should be required to give prior written notice to others beyond the debtor and grantor and other secured creditors known to exist, i.e., other secured creditors who have registered a notice of their interests or who have otherwise notified the secured creditor who proposes to dispose of the encumbered assets. Alternatively, the registrar might be required to give such notice to those who have registered (see article 54 of the Inter-American Model Law). As for the information to be included in the notice to the debtor and grantor, likewise a cost-benefit analysis is required. The law might require the inclusion of the secured creditor's calculation of the amount owed as a consequence of default. It might further require advice to the debtor or grantor regarding what steps to take to pay the secured obligation in full or, if such a right exists, to cure the default. The secured creditor might also be required to indicate, at least provisionally, the steps it intends to take to dispose of the encumbered assets. Notice to other interested parties may not need to be as extensive or specific as that to the debtor and grantor.

(c) The extent of court supervision of enforcement

17. A key issue for a secured transactions regime is the extent to which the secured creditor must resort to the courts or other authorities (e.g. bailiffs, notaries or the police) to enforce its security right rather than to make use of out-of-court procedures. In order to protect the grantor and other parties with rights in the encumbered assets, some legal systems require the secured creditor to resort exclusively to the courts or other governmental authorities to enforce its security right. However, because court proceedings often cannot produce a result in a timely and cost-efficient manner or may well be less likely to produce the maximum possible amount for the encumbered assets, the

requirement of court proceedings will negatively impact on the availability and the cost of credit. The time and cost involved reduce the amount that will be realized for the encumbered assets and will be factored into the cost of the financing transaction.

18. In order to avoid these problems, some legal systems do not require the secured creditor to use the courts or other governmental authorities in the enforcement process. Rather, the courts are at all times available at the behest of any interested person but do not intervene unless requested to do so by an interested person. A properly designed system can provide protection to the grantor and other persons with an interest in maximizing the amount that will be realized for the encumbered assets while at the same time providing an efficient system for realizing on the encumbered assets. In these legal systems the secured creditor is often authorized to enforce its security right without any prior intervention of official State institutions, such as courts, bailiffs or the police. In other legal systems, there is only limited prior intervention of official State institutions in the enforcement process. For example, the secured creditor may apply to a court for an order of repossession, which the court issues without a hearing (although the grantor may initiate an independent proceeding to challenge this order; see article 57 of the Inter-American Model Law). In such a case, once the secured creditor is in possession of the asset, it may sell it directly without court intervention following certain prescribed procedures (see article 59 of the Inter-American Model Law). The justification for such an approach lies in the fact that having the secured creditor or a trusted third party take control and dispose of the assets will often be more flexible, quicker and less costly than a State-controlled process. The availability of judicial intervention at the behest of any party and the legal obligations imposed on conduct often is sufficient to obviate the need to resort to the courts. The knowledge that judicial intervention is readily available is often sufficient to create the incentives to cooperative and reasonable conduct.

19. However, even in these legal systems the courts are available to ensure recognition of legitimate claims and defences of the grantor and other parties with rights in the encumbered assets. In order to inform these parties and give them an opportunity to react, the secured creditor may be required to give them a notice of intended disposition and possibly also a notice of default (see paras. 8-9). In addition, the secured creditor may not enforce its right to take possession of the encumbered assets if such enforcement would result in a disturbance of the public order. Moreover, in disposing of the encumbered assets, the secured creditor must act in a “commercially reasonable” manner (see para. 10). The purpose and effect of this requirement is to provide a balance between the interests of both the grantor (and its other creditors) and the secured creditor in enabling flexibility in the methods used to dispose of the encumbered assets toward the end of obtaining an economically effective realization, while at the same time protecting the grantor against actions taken by the secured creditor that, in the commercial context, are not reasonable.

20. Even if permitted to act without official intervention, a secured creditor is normally also entitled to seek to enforce its security right by judicial action. The secured creditor may choose to bring a judicial action, rather than rely on its own actions, for a number of reasons. For example, the secured creditor may wish to avoid the risk of having its private actions challenged after the fact, or may conclude that it will have to bring a judicial action anyway to recover an anticipated deficiency. A secured creditor’s decision to pursue remedies with or without judicial intervention does not prevent the secured creditor from later pursuing a different remedy.

21. Whether or not they require a secured creditor to resort to the courts, many legal systems modify the normal rules of civil procedure when a secured creditor seeks to enforce security rights. These modifications may limit the time within which the court must act or limit the claims or defences that the parties may raise. If the court concludes

that there has been a default by the grantor, the objective of any decision is to satisfy the creditor's secured claim. The court is typically authorized to order the grantor to pay the obligation, to dispose of the encumbered assets under a court proceeding, or to turn over the assets to the secured creditor or to the court for disposition.

(d) Freedom of parties to agree to the enforcement procedure

22. Another key issue is the extent to which the secured creditor and the grantor may agree to modify the statutory framework for the enforcement of the security right. In some legal systems, the enforcement procedure is part of mandatory law that the parties cannot modify by agreement. In other legal systems, the parties are allowed to modify the statutory framework for enforcement as long as public policy, priority, and third-party rights (in particular in the case of insolvency) are not affected. In yet other legal systems, emphasis is placed on efficient enforcement mechanisms in which judicial enforcement is not the exclusive or the primary procedure. Even if a system has limits on the extent to which the secured creditor and the grantor may agree to modify the statutory framework, permitting the parties to agree freely on the consequences of their exchange after a default encourages an efficient allocation of resources. However, such freedom may be the subject of abuse at the time of conclusion of the security agreement. Thus, the law may recognize only those agreements modifying the statutory framework that are reached after the grantor is in default. In any event, an agreement may not modify or waive the secured creditor's obligation to act in a commercially reasonable manner and in good faith (see para. 10).

(e) Acceptance of the encumbered assets in satisfaction of the secured obligation

23. Following default, the secured creditor may propose to the grantor that the secured creditor accept the encumbered assets in full or partial satisfaction of the secured obligation. Most jurisdictions make unenforceable an agreement entered into prior to default that automatically vests ownership of the encumbered assets in the secured creditor upon default, although some laws make an agreement entered into after default enforceable. The advantage of permitting agreements entered into after default is that, as a result of such an agreement, enforcement costs are minimized and the security right is enforced more quickly. This benefits the grantor as well as the secured creditor, since enforcement costs and risks are avoided by both parties. The disadvantage is that there may be a risk of abuse in the rare cases where both (i) the encumbered assets are more valuable than the secured obligation and (ii) the secured creditor has, even in the post-default situation, unusual power over the grantor and interested third persons.

24. The law may guard against abusive behaviour by the secured creditor in connection with such agreements by requiring the consent not only of the grantor but also notice to and failure to object by third parties with rights in the encumbered assets an absolute veto power held by any of the persons whose consent is required or who may lodge an objection should be quite sufficient as a safeguard against abuse. In addition, consent of a court might be required under certain circumstances, such as where the grantor has paid a substantial portion of the secured obligation. The law might also require an official appraisal of the encumbered assets. Again, a cost-benefit analysis should be made to determine whether to impose judicial involvement on this otherwise private process among consenting parties.

(f) Redemption of the encumbered assets

25. Most laws permit a defaulting grantor to redeem the encumbered assets before their disposition by the secured creditor by paying the outstanding amount of the secured

obligation, including interest and the costs of enforcement incurred up to the time of redemption. Redemption brings the transaction to an end. The hope of redemption may encourage the grantor to search for potential buyers to purchase the encumbered assets and to monitor the secured creditor's acts closely. Redemption of the encumbered assets should be distinguished from reinstatement of the secured obligation. Reinstating the secured obligation (e.g. by paying a missed instalment before disposition), if permitted under the general law of obligations, cures a default and the restored obligation continues to be secured by the encumbered assets. Redemption of the encumbered assets occurs only when the secured obligation is discharged in full.

26. The grantor usually retains its right of redemption until (i) disposition of, or the completion of collection by the secured creditor on, the encumbered asset, (ii) the secured creditor entering into a commitment to dispose of the encumbered asset, or (iii) acceptance by the secured creditor of the encumbered asset in total or partial satisfaction of the secured obligation, whichever occurs first.

(g) Authorized disposition by the grantor

27. Following default, the secured creditor will be concerned about obtaining to the extent feasible the highest price possible for the encumbered assets. Frequently, the grantor will be more knowledgeable about the market for the assets than the secured creditor. For this reason, the grantor might be given a very limited period of time following default during which it is entitled to dispose of the encumbered assets. This might best be accomplished by the grantor's bringing the potential buyer to the attention of the secured creditor, rather than establishing a delay period in which the secured creditor cannot proceed with arrangements for the disposition of the encumbered assets. In any event, the regime should be structured so as to give the grantor the incentive to cooperate with the secured creditor.

(h) Removing the encumbered assets from the grantor's control

28. Upon the grantor's default, the secured creditor who is not already in possession of the encumbered assets will be concerned about potential dissipation or misuse of the assets. This may be alleviated by placing the assets in the hands of a court, a State official, a trusted third party or the secured creditor itself. Permitting the secured creditor to take possession without any or only limited recourse to a court or other authority reduces the costs of enforcement (see paras. 17-18). However, even those laws that permit such repossession by the secured creditor recognize the potential for abuse, especially the possibility of public disorder or intimidation. Most of these laws, therefore, condition repossession on avoiding a disturbance of the public order ("breach of the peace"). Some laws require prior notice of default as a precondition to taking possession. Other laws do not do so on the ground that a desperate grantor in default may then seek to hide or transfer the encumbered asset before the secured creditor may take possession of it.

29. In the special case where the encumbered assets threaten to decline rapidly in value, most laws provide for expedited, preliminary relief ordered by a court or other relevant authority to preserve the value of the assets.

(i) Sale or other disposition of the encumbered assets

30. A security right entitles the secured creditor to have the encumbered assets sold or otherwise disposed of. Law should provide additional general procedures for the disposition of the encumbered assets, which may provide for the secured creditor or a judicial authority to control the disposition. These should include the method of

advertising a proposed disposition, whether to have a public auction and permission to sell, lease, license or collect upon the encumbered assets. The objective of the disposition should be to maximize the amount realized for the encumbered assets, while not jeopardizing the legitimate claims and defences of the grantor and other persons.

31. Requirements in existing legal systems range from the less to the more formal. Some legal systems require disposition subject to the same public procedures used to enforce court judgements. Other legal systems permit the secured creditor to control the disposition but prescribe uniform procedures for the disposition by public auction of encumbered assets, with rules on such matters as timing, publicity and minimum price. Yet other legal systems permit the secured creditor to make the disposition (including private disposition) of the encumbered assets—always subject to independent standards, i.e. good faith and commercial reasonableness. The grant of flexibility provides benefits to the grantor, the secured creditor, others with an interest in the encumbered assets, and other creditors of the grantor because a formal public auction will not always be the best way to maximize the net recovery from the encumbered assets. These systems may condition the right of the creditor on the consent of the grantor, whether in the security agreement or after default. A general standard is usually prescribed which the secured creditor must observe (e.g. “commercially reasonable” or “with the care of a prudent business person”). There may also be special rules dealing with the manner by which the proceeds of a disposition are to be held pending distribution.

32. Most secured transactions laws share the requirements that notice must be given to certain parties with respect to a proposed disposition and the sale must be advertised or offers sought from appropriate parties. Due to the finality of any disposition, detailed rules are necessary to alert interested parties to protect their interest. Special procedures may be prescribed for the sale of a business as a going concern.

33. The collection of receivables and negotiable instruments may not fit easily into the procedures for disposition of the encumbered assets. Thus many systems have special rules for this type of encumbered asset, including giving the secured creditor the right to collect directly from the person obligated on the receivable or negotiable document and requiring that person to make any payments owed directly to the secured creditor (see para. 37).

(j) Allocation of proceeds of disposition

34. Secured transactions laws set out rules on the distribution of the proceeds of the disposition. The most common allocation is to pay reasonable enforcement costs first and then the secured obligation. Laws typically include rules prescribing if and when a secured creditor is responsible for distributing proceeds to some or all other secured creditors (such as secured creditors with junior security rights in the encumbered assets) with security rights in the same encumbered assets. These rules often require that notice of these other interests be given to the secured creditor and that any surplus proceeds are to be returned to the grantor.

35. The proceeds distributed to the secured creditor are applied towards the costs of the distribution and the satisfaction of the secured obligation. If there is a deficiency after the distribution, the obligation is discharged only to the extent of the proceeds received. The secured creditor is normally entitled to recover the amount of the deficiency from the grantor. Unless the grantor has created a security right in other assets for the benefit of the creditor, the creditor’s claim for the deficiency is unsecured vis-à-vis the grantor (although the secured creditor may have received security rights from a third party).

(k) Finality

36. Secured transactions laws normally provide finality following disposition of the encumbered assets in favour of the person acquiring the encumbered asset through the disposition by the secured creditor. The secured creditor's security right in the encumbered assets terminates, as does the grantor's rights, and the rights of any junior secured creditor or other person with a lower ranking right in the encumbered assets. The law normally provides that the rights of other persons in the encumbered assets (including other secured creditors) continue notwithstanding disposition of the assets in the enforcement procedure.

(l) Variations on general framework

37. Secured transactions law that includes within its scope many different types of encumbered assets provides, where necessary, special rules for the disposition of some types of asset. This is especially true of receivables, negotiable instruments, funds credited in a bank account or drawing proceeds from an independent undertaking, whether they are the original encumbered assets or they just secure payment or other performance of other obligations (see A/CN.9/WG.VI/WP.26, recs. 102 and 103; A/CN.9/WG.VI/WP.26/Add.1, recs. 106 bis-108). For example, a secured creditor with a security right in a receivable is normally entitled to inform the account debtor on the receivable to make payments directly to the secured creditor following the grantor's default. The notification and payment instruction can be sent by the secured creditor/assignee even in violation of an agreement with the grantor/assignor (see A/CN.9/WG.VI/WP.26, rec. 16 quater (b)). Otherwise, in the case of default on the part of the grantor/assignor (where the grantor/assignor will be reluctant to cooperate with the secured creditor/assignee), the secured creditor/assignee may be prevented from enforcing its security right. A secured creditor is also entitled to dispose of or retain a receivable (see A/CN.9/WG.VI/WP.24/Add.1, recs. 93 (d) and (e), 110 and 113).

38. If the security right is in funds credited to a bank account, the secured creditor may collect or otherwise enforce its right to payment of the funds after default or even before default if so agreed with the grantor. In any case, the depositary bank (i) has the same rights and obligations, (ii) the same rights of set-off, (iii) is not obliged to pay any person other than the person that has control of the account and (iv) respond to any requests for information (see A/CN.9/WG.VI/WP.26/Add.1, recs. X, Y and 106 bis-108). Unlike a secured creditor who has to collect first the funds and then apply them to the secured obligation, a depositary bank acting as a secured creditor may apply the funds directly to the secured obligation. The enforcement of the depositary bank's rights of set-off remains subject to other law.

39. If the security right is a negotiable instrument, the secured creditor may collect or otherwise enforce its security right (see A/CN.9/WG.VI/WP.26/Add.2, rec. 104). However, as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments. For example, (i) the person obligated on the negotiable instrument may be obligated to pay only a holder or other person entitled to enforce the instrument under the law governing negotiable instruments; and (ii) the right of the person obligated on the instrument to raise defences to that obligation is determined by the law governing negotiable instruments.

40. If the security right is in a negotiable document, the general rules on the enforcement of security rights apply. Special rules may apply to preserve the rights of certain persons protected under law governing negotiable documents (see A/CN.9/WG.VI/WP.26/Add.3,

rec. 109). In particular, the issuer may be obligated to deliver the goods only to a holder of the negotiable document relating to them.

41. The general enforcement rules apply also to the enforcement of security rights in proceeds (except if the proceeds are receivables or other specific assets like the ones mentioned in the preceding paragraphs, in which case the asset-specific enforcement recommendations apply, see A/CN.9/WG.VI/WP.26/Add.4, note on enforcement of a security right in proceeds).

42. The same applies to the enforcement of security rights in attachments to movable property (e.g. automobile engines). As to the enforcement of security rights in attachments to immovable property, special rules apply to preserve the rights of creditors in the immovable property (see A/CN.9/WG.VI/WP.26/Add.4, note on enforcement of a security right in attachments). Such rules deal, for example, with the problem of severing an attachment (e.g. an elevator) from immovable property owned by someone other than the grantor.

43. Similarly, the general enforcement recommendations apply to the enforcement of security rights in masses (e.g. grain in a silo or oil in a tank) or products (e.g. cake produced from sugar, flour, eggs and water). For example, if the encumbered assets are oil of value 5 in a tank with oil worth 100, the secured creditor should be able to enforce its right only in oil of value 5. If the encumbered asset can be separated, the secured creditor should be able to dispose of that part only in a commercially reasonable manner. If the encumbered asset cannot be easily separated, the whole mass or product may have to be sold.

[Note to the Working Group: As to the enforcement of security rights in movables by anticipation or crops, the Working Group may wish to consider first whether these types of asset should be covered at all (see A/CN.9/WG.VI/WP.26/Add.4, note on movables by anticipation and crops).]

(m) Judicial proceedings brought by other creditors

44. Other creditors of the grantor may resort to the courts to enforce their claims against the grantor and procedural law may give these creditors the right to force the disposition of encumbered assets, subject to the interests of the secured creditor. The secured creditor will look to procedural law for rules on intervening in these judicial actions in order to protect its priority. In rare cases, procedural law may provide exceptions to general rules of priority. In some legal systems, for example, a court may order a person who owes money to a judgement debtor to pay the judgement creditor. If the court order may effectively give priority to the judgement creditor in an encumbered asset in which the secured creditor's security right is effective against third parties, the result is bound to affect the availability and cost of credit extended on the basis of encumbered assets.

B. Recommendations

[Note to the Working Group: The Working Group may wish to note that the general recommendations on enforcement are contained in document A/CN.9/WG.VI/WP.24/Add.1, while the asset-specific recommendations on enforcement are contained in documents A/CN.9/WG.VI/WP.24/Add.2, as well as documents A/CN.9/WG.VI/WP.26 and Addenda 1 to 4.]

I. Note by the Secretariat on security interests: draft Legislative Guide on Secured Transactions: security rights in receivables

(A/CN.9/611 and Add.1-3) [Original: English]

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Security rights in receivables

[Note to the Commission: In the context of its discussion on security rights in receivables, the Commission may wish to consider the definitions (a) ("security right"), (d) ("secured creditor"), (f) ("grantor"), (p) ("receivable"), (q) ("assignment"), (r) ("assignor"), (s) ("assignee"), (t) ("subsequent assignment"), (u) ("debtor of the receivable"), (v) ("notification of the assignment") and (w) ("original contract") (see A/CN.9/WG.VI/WP.27/Add.1).]

Parties, security rights, secured obligations and assets covered

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and attachments, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, contractual and non-contractual receivables, contractual non-monetary obligations, negotiable instruments, negotiable documents, rights to payment of funds credited to bank accounts, proceeds under independent undertakings, and intellectual property rights;

[Note to the Commission: As to non-contractual receivables, the Commission may wish to refer to the note after definition (p) ("receivable") in A/CN.9/WG.VI/WP.27/Add.1. As to contractual non-monetary obligations, the Commission may wish to note that the commentary will explain that the general recommendations apply to contractual non-monetary obligations. The commentary will also explain that general law other than the law recommended in the draft Guide applies to the rights of obligors of contractual non-monetary obligations.]

...

(f) Generally, outright transfers of receivables;

[Note to the Commission: The Commission may wish to note that, as the definition of "receivable" excludes rights to payment under a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account, recommendation 3 (f) does not apply to an outright transfer of a negotiable instrument, proceeds under an independent undertaking or a right to payment of funds credited to a bank account. However, the recommendations apply to transfers of such assets for security purposes, as they are treated as secured transactions. For example, the transfer for security purposes of a right to payment of funds credited to a bank account is covered as a method of achieving control (see definition of "control" in A/CN.9/WG.VI/WP.27/Add.1, para. 21 (ee) and (gg)). The commentary will explain that outright transfers of negotiable instruments, proceeds under an independent undertaking

and funds credited to a bank account have been excluded as: (i) they raise different issues and would require special rules, (ii) unlike receivables in which a security transfer and an outright transfer would compete for priority based on the order of registration, with respect to negotiable instruments a secured creditor could always obtain a superior right by taking possession of the instrument, while, in the case of proceeds under an independent undertaking and funds credited to a bank account, a secured creditor could obtain a superior right by control. The commentary will also discuss issues arising in outright transfers of negotiable instruments other than cheques for the benefit of States that may wish to address them in the law.]

4. Except to the limited extent provided in recommendations 16 and 37 relating to a personal or property right that secures a receivable, negotiable instrument or other obligation that is within the scope of the Guide, the law should not apply to security rights in [see A/CN.9/WG.VI/WP.26/Add.7].

Creation of a security right in receivables

[Note to the Commission: The Commission may wish to note that the commentary will explain that the general recommendations apply unless modified by asset-specific recommendations.]

Assets and obligations subject to a security agreement

13. The law should provide that a security right may secure all types of obligation, including future, conditional and fluctuating obligations. It should also provide that a security right may be given in all types of asset, including parts of assets and undivided interests in assets and assets which, at the time of the security agreement, the grantor may not yet own or have the power to dispose of, or which may not yet exist, as well as in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

Effectiveness of a bulk assignment and an assignment of future, parts of and undivided interests in receivables

14. The law should provide that:

(a) The assignment of receivables that are not specifically identified, future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee and as against the debtor of the receivable, as long as, at the time of the assignment or, in the case of future receivables, at the time they arise, they can be identified to the assignment to which they relate; and

(b) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable. [See article 8 of the United Nations Assignment Convention.]

Effectiveness of an assignment made despite an anti-assignment clause

15. The law should provide that:

(a) An assignment is effective as between the assignor and the assignee and as against the debtor of the receivable notwithstanding an agreement between the initial or any subsequent assignor and the debtor of the receivable or any subsequent assignee limiting in any way the assignor's right to assign its receivables;

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 15 (a) makes ineffective only an agreement between an

obligor and an obligee that limits the obligee's right to assign a receivable owed by the obligor to the obligee. If such a receivable is assigned, the obligor is the "debtor of the receivable" and the obligee is the "assignor".

For example, if an agreement for the lease of goods limits the lessor's right to assign the rents due to it under the lease, recommendation 15 (a) makes the limitation on assignment ineffective, because the agreement is between the obligor (the lessee) and the obligee (the lessor) of the receivable (the rent arising from the lease agreement). By way of contrast, if the lease agreement between the lessor and the lessee limits the lessee's right to assign a receivable consisting of the lessee's claim to rents due to the lessee from the sublessee under a sublease, recommendation 15 (a) has no application, and nothing in this Guide makes the limitation ineffective. That is because the agreement limiting the right of the lessee to assign its claim for rents due to it from the sublessee under the sublease is not an agreement between the lessee (sublessor and obligee in a sublease) and the sublessee (obligor in the sublease). Whether the limitation in the lease is enforceable against the lessee would be determined by the law other than the law recommended in this Guide.

The same analysis would apply if the restriction on transfer was contained in a licence of intellectual property. Recommendation 15 (a) would render ineffective a term in the licence agreement that restricted the licensor from assigning fees due from the licensee. However, it would not render ineffective a term in the licence agreement restricting the licensee from assigning sublicense fees. Whether the latter term would be effective would be determined by law other than that recommended in the draft Guide.]

(b) If other law creates any obligation or liability of the assignor for breach of such an agreement, the other party to such an agreement may not avoid the contract from which the assigned receivables arise or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement;

(c) This recommendation applies only to assignments of receivables:

- (i) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;
- (ii) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
- (iii) Representing the payment obligation for a credit card transaction;
- (iv) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[Note to the Commission: The Commission may wish to note that the commentary will clarify that contract avoidance referred to in paragraph (b) means contract termination in general.]

Creation of a security right in a right that secures an assigned receivable, a negotiable instrument or any other obligation

16. The law should provide that:

- (a) A security right in a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this law automatically extends, without further action

by either the grantor or the secured creditor, to any personal or property right that secures payment or performance of the receivable, negotiable instrument or other obligation;

(b) If the personal or property right is an independent undertaking, the security right automatically extends to the proceeds under the independent undertaking but does not extend to the right to draw under the independent undertaking;

(c) This recommendation does not apply to a right in immovable property that under law other than this law is transferable separately from a receivable, negotiable instrument or other obligation that it may secure;

(d) A security right is created under paragraph (a) of this recommendation in any personal or property right securing payment of a receivable, negotiable instrument or other obligation notwithstanding any agreement between the grantor and the debtor of the receivable or the obligor of the negotiable instrument or other obligation limiting in any way the grantor's right to create a security right in the receivable, negotiable instrument or other obligation, or in any personal or property right securing the receivable, negotiable instrument or other obligation;

(e) If other law creates any obligation or liability of the grantor for breach of the agreement mentioned in paragraph (d) of this recommendation, the other party to such an agreement may not avoid the contract from which the receivable, negotiable instrument or other obligation arise, or the security agreement creating the personal or property security right on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement;

(f) Paragraphs (d) and (e) of this recommendation apply only to security rights in receivables, negotiable instruments or other obligations:

(i) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(ii) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(iii) Representing the payment obligation for a credit card transaction;

(iv) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

(g) The creation of a security right in a possessory property right under paragraph (a) of this recommendation does not affect any obligations of the grantor to the debtor of the receivable or the obligor of the negotiable instrument or other obligation with respect to the relevant property existing under the law governing that property right;

(h) To the extent that the automatic creation under paragraph (a) of this recommendation and the automatic third-party effectiveness under recommendation 37 of a security right in any personal or property security right securing payment of a receivable, negotiable instrument or other obligation is not impaired, this recommendation does not affect any requirement under law other than this law relating to the form or registration of the creation of security rights in any assets, securing payment of a receivable, negotiable instrument or other obligation, that are outside the scope of this law.

[Note to the Commission: The Commission may wish to note that the commentary will explain that the purpose of recommendation 16 is to facilitate financing transactions, such as securitizations of pools of loans secured by security rights in movables and immovables. In these cases the buyer of the loans will want to be able to look to the

security rights securing the loans but would not want to incur, at the outset of the purchase, the additional expense of a separate act of transfer (if required under law other than the law recommended in the draft Guide) for each loan in the pool of loans, that could number in the hundreds or thousands. Separate acts of transfer, if any, would be necessary (if required under other law) to enforce only those loans that are later in default, typically a small proportion of the loans in the pool actually purchased. The buyer could decide whether to accept the expense of separate acts of transfer at the time of enforcement, whether voluntarily from the seller or with the assistance of a court. But, in deciding whether to purchase the loans and at what price, the buyer would take into account the expense of separate acts of transfer only for the small portion of the loans expected to be in default, not for the entire pool of loans. As a result of the expense savings, the seller should be able to obtain a higher purchase price, thereby making more funds available to the seller.

The commentary will also make it clear that recommendation 16 applies to outright transfers of receivables (but not of negotiable instruments or other obligations) as the draft Guide generally applies only to outright transfers of receivables.

The commentary will also clarify that paragraphs (a) to (c) track the language of article 10 (1) of the United Nations Assignment Convention with appropriate adjustments necessary in view of the nature of the law in the draft Guide as domestic law, while paragraphs (d) to (f) track the language of recommendation 15 and article 10 (2) to (4) of the United Nations Assignment Convention.

In addition, the commentary will clarify that paragraph (g) tracks the language of article 10 (5) of the United Nations Assignment Convention, according to which, if the security right involves the delivery of possession of an asset and such delivery causes damage to the debtor of the receivable or the obligor of the negotiable instrument or other obligation, any liability that may exist under law applicable outside the law recommended in the draft Guide is not affected. This may arise, for example, in the case of a delivery of possession of an item of valuable tangible property if the secured creditor or transferee damages or loses the property.

Furthermore, the commentary will clarify that paragraph (h), which tracks the language of article 10 (6) of the United Nations Assignment Convention, makes it clear that, the form of transfer of a security right in an asset outside the scope of this law (e.g. an immovable) is left to law other than this law, at least to the extent that the automatic creation and third-party effectiveness of a security right is not impaired. Accordingly, a notarized document and registration may be necessary for the transferee of a mortgage to obtain various rights under immovables law, such as the right to enforce the mortgage. The commentary will further explain that the form of transfer of a security right in an asset within the scope of this law will be subject to this law.]

Pre-default rights and obligations of the assignor and the assignee

[Note to the Commission: The Commission may wish to note that the following recommendations, based on articles 11 to 14 of the United Nations Assignment Convention, will be included in the new chapter on pre-default rights and obligations of the parties.]

Rights and obligations of the assignor and the assignee

16 bis. The law should provide that:

(a) The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein;

(b) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

Representations of the assignor

16 ter. The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:

(i) The assignor has the right to assign the receivable;

(ii) The assignor has not previously assigned the receivable to another assignee; and

(iii) The debtor of the receivable does not and will not have any defences or rights of set-off;

(b) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor of the receivable has, or will have, the ability to pay.

Right to notify the debtor of the receivable

16 quater. The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor of the receivable notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction; and

(b) Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph (a) of this recommendation is not ineffective for the purposes of recommendation 19 by reason of such breach. However, nothing in this recommendation affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Right to payment

16 quinquies. The law should provide that:

(a) As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(i) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(ii) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

- (iii) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable;
- (b) The assignee may not retain more than the value of its right in the receivable.

Rights and obligations of the debtor of the receivable and the assignee

Protection of the debtor of the receivable

[Note to the Commission: The Commission may wish to note that recommendations 17 to 23, which are based on articles 15-21 of the United Nations Assignment Convention, will be placed in a separate chapter dealing with rights and obligations of third-party obligors, along with the recommendations dealing with the rights and obligations of an obligor under a negotiable instrument, a depositary bank, the issuer of a negotiable document and the guarantor/issuer, confirmer or nominated person under an independent undertaking.]

17. The law should provide that:

- (a) Except as otherwise provided in this law, an assignment does not, without the consent of the debtor of the receivable, affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the original contract;
- (b) A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:
 - (i) The currency of payment specified in the original contract; or
 - (ii) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Notification of the debtor of the receivable

18. The law should provide that:

- (a) Notification of the assignment or a payment instruction is effective when received by the debtor of the receivable if it is in a language that is reasonably expected to inform the debtor of the receivable about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract; and
- (b) Notification of the assignment or a payment instruction may relate to receivables arising after notification and that notification of a subsequent assignment constitutes notification of all prior assignments.

Discharge of the debtor of the receivable by payment

19. The law should provide that:

- (a) Until the debtor of the receivable receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract;
- (b) After the debtor of the receivable receives notification of the assignment, subject to paragraphs (c) to (h) of this recommendation, it is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor of the receivable, in accordance with such payment instruction;

(c) If the debtor of the receivable receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment;

(d) If the debtor of the receivable receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received;

(e) If the debtor of the receivable receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments;

(f) If the debtor of the receivable receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this recommendation as if the debtor of the receivable had not received the notification. If the debtor of the receivable pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid;

(g) If the debtor of the receivable receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor of the receivable is discharged by paying in accordance with this recommendation as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place;

(h) This recommendation does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Defences and rights of set-off of the debtor of the receivable

20. The law should provide that:

(a) In a claim by the assignee against the debtor of the receivable for payment of the assigned receivable, the debtor of the receivable may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the assignment had not been made and such claim were made by the assignor;

(b) The debtor of the receivable may raise against the assignee any other right of set-off, provided that it was available to the debtor of the receivable at the time notification of the assignment was received by the debtor of the receivable;

(c) Notwithstanding paragraphs (a) and (b) of this recommendation, defences and rights of set-off that the debtor of the receivable may raise pursuant to recommendations 15 (b) and 16 (d) against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor of the receivable against the assignee.

[Note to the Commission: The Commission may wish to note that, under recommendation 3 (a) (see A/CN.9/WG.VI/WP.26/Add.7), the draft Guide applies to consumers but does affect the rights of consumers under consumer-protection law.]

Agreement not to raise defences or rights of set-off

21. The law should provide that:

(a) The debtor of the receivable may agree with the assignor in a writing signed by the debtor of the receivable not to raise against the assignee the defences and rights of set-off that it could raise pursuant to recommendation 20. Such an agreement precludes the debtor of the receivable from raising against the assignee those defences and rights of set-off;

(b) The debtor of the receivable may not waive defences:

(i) Arising from fraudulent acts on the part of the assignee; or

(ii) Based on the debtor of the receivable's incapacity;

(c) Such an agreement may be modified only by an agreement in a writing signed by the debtor of the receivable. The effect of such a modification as against the assignee is determined by recommendation 22, paragraph (b).

[Note to the Commission: The Commission may wish to note that recommendation 21 is based on article 19 of the United Nations Assignment Convention, which refers to a signed writing only for a waiver of defences or its modification. If the Commission decides not to refer to signature in recommendation 8 (see A/CN.9/WG.VI/WP.26/Add.7) but rather to evidence that the grantor intended to grant a security right, it may wish to reconsider the reference to signature in recommendation 21. If reference to signature is retained in recommendation 8, an electronic signature should be sufficient (see note after definition (v) ("notification of the assignment") in A/CN.9/WG.VI/WP.27/Add.1.)]

Modification of the original contract

22. The law should provide that:

(a) An agreement concluded before notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights;

(b) An agreement concluded after notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is ineffective as against the assignee unless:

(i) The assignee consents to it; or

(ii) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(c) Paragraphs (a) and (b) of this recommendation do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Recovery of payments

23. The law should provide that failure of the assignor to perform the original contract does not entitle the debtor of the receivable to recover from the assignee a sum paid by the debtor of the receivable to the assignor or the assignee.

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 23 does not affect any liability of the assignor towards the debtor of the receivable for breach of contract.]

Third-party effectiveness of a security right in receivables

37. The law should provide that, if a security right in a receivable, negotiable instrument or any other obligation covered as an encumbered asset by this law is effective against third parties, the security right is automatically effective against third parties with respect to any personal or property right that secures payment or performance of the receivable, negotiable instrument or other obligation, without further action by either the grantor or the secured creditor. If the personal or property right is an independent undertaking, a security right in the proceeds under the independent undertaking is automatically effective against third parties (but, as provided in recommendation 16, the security right does not extend to the right to draw under the independent undertaking). This recommendation does not apply to a right in immovable property that under applicable law is transferable separately from a receivable, negotiable instrument or other obligation that it may secure.

[Note to the Commission: The Commission may wish to note that the commentary will explain that the general third-party effectiveness recommendations apply to security rights in receivables, as well as to outright transfers of receivables. The language in parenthesis in the second sentence explains that the security right does not extend to the right to draw. Thus there is no issue of third-party effectiveness in that regard.]

Priority of security rights in receivables

[Note to the Commission: The Commission may wish to note that the commentary will explain that the general priority recommendations apply to security rights in receivables as well as to outright transfers of receivables.]

Enforcement of a security right in receivables

Application of this chapter to outright transfers of receivables

88. The law should provide that, with the following exceptions, this chapter does not apply to an outright transfer of receivables:

- (a) Recommendation 89 in the case of an outright transfer with recourse; and
- (b) Recommendations 102 and 103.

General standard of conduct

89. The law should provide that all parties must exercise their rights and perform their obligations under the recommendations of this chapter in good faith and in a commercially reasonable manner.

Collection of receivables

102. The law should provide that, in the case of an outright transfer of a receivable, the assignee has the right to collect or otherwise enforce the receivable. In the case of a transfer of a receivable by way of security, the assignee is entitled, subject to recommendations 17 to 23, to collect or otherwise enforce the receivable only after default or before default with the agreement of the assignor.

[Note to the Commission: The Commission may wish to note that the commentary will explain that the secured creditor may, as an alternative to collection, elect to dispose of or retain a receivable pursuant to recommendations 93 (d), (e), 110 and 113 (see A/CN.9/611/Add.2). The commentary will also explain that the assignee may send a notification and a payment instruction even in breach of an agreement with the assignor (see rec. 16 quater above).]

103. The law should provide that the assignee's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable (such as a guarantee or security right).

[Note to the Commission: The Commission may wish to note that the commentary will discuss how other recommendations of the chapter on enforcement may apply to the enforcement of a right securing payment of an assigned receivable.]

Law applicable to security rights in intangible property

137. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are governed by the law of the State in which the grantor is located. [However, with respect to security rights in intangible property that is subject to a title registration system, the law should provide that such issues are governed by the law of the State in which [...].]

137 bis. The law should provide that the law of the State in which the assignor is located governs the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale or lease of, or a security agreement relating to, an immovable over the rights of competing claimants. However, a priority conflict involving the rights of a competing third party registered in the immovables registry of the State in which the immovable is located is governed by the law of that State.

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 137 bis is designed to address the law applicable to assignments of receivables owing to the grantor under an agreement for the sale or lease of an immovable or under a security agreement over an immovable. In a number of States, it is not possible to create rights in such receivables independently of the related immovable with the result that the effectiveness as between the parties, the third-party effectiveness and the priority of a security right in the receivables is governed by the law (and, in particular, the registry regime) that applies to the related immovable. In other States, it is possible to grant a security right in such receivables independently of the related immovable but the secured creditor is subordinated to third-party rights that are registered against the related immovable in the immovables registry. The second sentence of recommendation 137 bis is designed to preserve the application of the law of the State where the related immovable is located in order to protect third parties who rely on the registration in the immovables registry of that State. Reference is made to rights of a competing third party as the term "competing claimant" is defined by reference to security rights in movables. Reference is also made to "rights" of such parties, since rights of third parties could include not just competing mortgagees but also assignees or buyers of the immovable or the related intangible and indeed any class of third party right for which the immovables regime makes provision for registration. In addition, reference is made to a right "registered in the immovables registry" rather than "that became effective against third parties by registration", since: (i) some immovables registries do not distinguish between inter-parties and third party effectiveness, and (ii) immovables registries do not necessarily require registration for general third-party effectiveness but only for effectiveness against third parties whose rights are also registrable in the immovables

registry (e.g. registration may not be needed for effectiveness against an insolvency administrator or a judgement creditor.)

Law applicable to the rights and obligations of the grantor and the secured creditor

146. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Law applicable to the rights and obligations of the debtor of the receivable and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor

147. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, or a negotiable instrument or a negotiable document in which a security right has been created:

(a) The relationship between an debtor of the receivable and an assignee of the receivable, between an obligor under a negotiable instrument and a creditor with a security right in that instrument or between an issuer of a negotiable document and a creditor with a security right in that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the debtor of the receivable, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the debtor of the receivable, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[Note to the Commission: The Commission may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a receivable (A/CN.9/WG.VI/WP.24), and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in receivables.]

A/CN.9/611/Add.1

**Security rights in rights to payment of funds credited to a bank account,
proceeds under an independent undertaking,
negotiable instruments and negotiable documents**

ADDENDUM

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I. Security rights in rights to payment of funds credited to a bank account

[Note to the Commission: In the context of its discussion of security rights in rights to payment of funds credited to a bank account, the Commission may wish to consider definitions (ff) (“bank account”) and (gg) (“control”) (see A/CN.9/WG.VI/WP.27/Add.1). The Commission may also wish to note that the commentary will explain that the term “bank account” does not include accounts held by central banks or payment, clearing and settlement institutions. The commentary will also explain that the secured creditor has control by becoming the account holder where: (i) an existing account is transferred to the secured creditor, (ii) the secured creditor agrees with the grantor that funds should be deposited to an account to be opened later, and (iii) the secured creditor is the only account holder (i.e. not merely a joint account holder).]

Creation of a security right in a right to payment of funds credited to a bank account

[Note to the Commission: The Commission may wish to note that the commentary will explain that, pursuant to recommendation 8 (see A/CN.9/WG.VI/WP.26/Add.7), a security right in a right to payment of funds credited to a bank account may be created by agreement between the grantor and the secured creditor.]

26. The law should provide that a security right in a right to payment of funds credited to a bank account is effective notwithstanding an agreement between the grantor and the depositary bank limiting in any way the grantor’s right to create a security right in its right to payment of funds credited to the bank account. However, the depositary bank has no duty to recognize the secured creditor and no obligation is otherwise imposed on the depositary bank with respect to the security right, without the depositary bank’s consent.

[Note to the Commission: The Commission may wish to note that the commentary to recommendation 3 (a) (see A/CN.9/WG.VI/WP.26/Add.7) will clarify that enacting States

may wish to take into account any impact that the recommendations in this Guide might have on consumer-protection law.]

Rights and obligations of the depositary bank

V. The law should provide that:

(a) The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the depositary bank without its consent; and

(b) The rights of set-off of the depositary bank are not impaired by reason of any security right that the depositary bank may have in a right to payment of funds credited to a bank account.

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendations V and W are supplemented by recommendations 76, 77 (to the extent that there is a priority conflict between a security right or right of set-off of the depositary bank and a security right of another person) and 106 bis, 107 and 108 (enforcement against the depositary bank).]

The commentary will also explain that recommendation V (b) does not deal with a priority conflict but with the situation where the depositary bank itself has both a right of set-off against and a security right in a right to payment of funds credited to a bank account. In this situation, according to recommendation V (b), the bank's rights of set-off are not impaired or subsumed into (i.e. they remain distinct from) the bank's security right.]

W. The law should provide that nothing in these recommendations obligates a depositary bank to:

(a) Pay any person other than a person that has control with respect to funds credited to a bank account; or

(b) Respond to requests for information about whether a control agreement or a security right in its own favour exists and whether the grantor retains the right to dispose of the funds credited in the account.

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation W does not affect the bank-customer relationship and the rights and obligations arising from other law governing bank accounts (e.g. money-laundering and bank secrecy).]

Third-party effectiveness of a security right in a right to payment of funds credited to a bank account

43. The law should provide that a security right in a right to payment of funds credited to a bank account is effective against third parties also if the secured creditor obtains control with respect to the right to payment of the funds credited to the bank account.

[Note to the Commission: The Commission may wish to note that the commentary will explain that, pursuant to recommendation 35 (see A/CN.9/WG.VI/WP.26/Add.5), a security right in a right to payment of funds credited to a bank account may also become effective against third parties by registration of a notice in the general security rights registry.]

Priority of a security right in a right to payment of funds credited to a bank account

76. The law should provide that a security right in a right to payment of funds credited to a bank account, which has been made effective against third parties by control, has priority over a security right in a right to payment of the funds, which has been made effective against third parties by any other method. If a depositary bank has concluded more than one control agreement, among those secured creditors, priority is determined according to the order in which the control agreements were concluded. If the secured creditor is the depositary bank, the depositary bank's security right has priority over any other security right (including a security right made effective against third parties by a control agreement with the depositary bank even if the depositary bank's security right is later in time) other than a security right of a secured creditor who has acquired control with respect to the right to payment of the funds credited to the bank account by becoming the account holder.

[Note to the Commission: The Commission may wish to note that the commentary will explain that a security right of the depositary bank always has priority even over a security right with respect to which the depositary bank has earlier entered into a control agreement because: (i) a security right of the depositary bank should have the same priority as its set-off right, which has always priority; (ii) if the depositary bank's security right had no priority, the bank would not enter into any control agreement; (iii) a secured creditor could always seek to obtain a subordination agreement from the depositary bank. The commentary will also explain that, depending on the terms of the control agreement, the depositary bank may have a contractual obligation to a secured creditor with a control agreement even though the secured creditor might not have priority.]

In addition, the Commission may wish to note that, at its tenth session, the Working Group agreed that tracing of funds credited to a bank account will be discussed together with the issue of tracing of proceeds (see A/CN.9/603, para. 67). The Commission may wish to deal with that issue as an issue of priority. The commentary to recommendation 76 will make clear that, if a secured creditor has control of a right to payment of funds credited to a bank account, its security right has priority over a security right in cash proceeds of an encumbered asset of another secured creditor that are credited to the same bank account, even if the other secured creditor is able to trace proceeds to the bank account. This is the case even if the competing security right became effective against third parties earlier than the security right held by the secured creditor with control.]

77. The law should provide that any right of the depositary bank to set-off against the right to payment of funds credited to a bank account obligations owed to the depositary bank by the grantor has priority over the security right of any secured creditor other than a secured creditor that has acquired control with respect to the funds credited to the bank account by becoming the account holder.

[Note to the Commission: The Commission may wish to note that the commentary will explain that these priority recommendations mean that third parties are taken to know that they cannot rely on a right to payment of funds credited to a bank account as a primary source of security for extensions of credit and can do so only by obtaining a subordination agreement from the depositary bank or having the account entered in their own name. Consequently, the absence of publicity of the security right is not seen as problematic. The commentary will also explain that, unlike recommendation V (b), recommendation 77 deals with priority conflicts between rights of set-off of the depositary bank and security rights of other persons. In addition, the commentary will explain that recommendation 77 does not create any rights of set-off, a matter which remains subject to other law. Moreover, the commentary will explain that the exception in

recommendation 77 refers to a secured creditor that acquired control by becoming the sole account holder. Where the secured creditor would be just a joint account holder, the grantor will still be able to dispose of the funds credited to the account and thus the secured creditor would not have control (see definition of “control” in A/CN.9/WG.VI/WP.27/Add.1).]

78. In the case of a transfer of funds from a bank account initiated by the grantor, the law should provide that the transferee of the funds takes free of a security right in the right to payment of funds credited to the bank account, unless the transferee had knowledge that the transfer violated the terms of the security agreement. This recommendation does not lessen the rights of transferees of funds from bank accounts under law other than this law.

[Note to the Commission: The Commission may wish to note that the commentary will explain that the general priority recommendations apply to security rights in rights to payment of funds credited to a bank account subject to recommendations 76 to 78. The Commission may wish to note that recommendation 79 (see A/CN.9/WG.VI/WP.26/Add.6) may have to be aligned with recommendation 78 to refer to knowledge rather than collusion.]

Enforcement of a security right in a right to payment of funds credited to a bank account

106 bis. The law should provide that after default, or before default with the agreement of the grantor, a secured creditor with a security right in a right to payment of funds credited to a bank account is entitled, subject to recommendations V and W, to collect or otherwise enforce its right to payment of the funds.

107. The law should provide that after default, or before default with the agreement of the grantor, a secured creditor that has control with respect to a right to payment of funds credited to a bank account is entitled, subject to recommendations V and W, to enforce its security right without having to apply to a court or other authority.

[Note to the Commission: The Commission may wish to note that the commentary will explain that, unlike a secured creditor that has to collect the funds to apply them to the secured obligation according to recommendation 116 (see A/CN.9/611), a depositary bank as a secured creditor may apply the funds to the secured obligation directly. The commentary will also explain that enforcement of the bank’s rights of set-off remains subject to other law.]

108. The law should provide that a secured creditor that does not have control with respect to funds credited to a bank account is entitled, subject to recommendations V and W, to collect or otherwise enforce the security right against the depositary bank only pursuant to a court order, unless the depositary bank agrees otherwise.

Law applicable to a security right in a right to payment of funds credited to a bank account

139. Except as otherwise provided in recommendation 140, the law should provide that the creation, the effectiveness against third parties, the priority over the rights of competing claimants, the rights and duties of the depositary bank with respect to the security right and the enforcement of the security right in a right to payment of funds credited to a bank account are governed by

Alternative A

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. However, the law of the State determined pursuant to the preceding sentence applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State which is engaged in the regular activity of maintaining bank accounts. The law should also specify that, if the applicable law is not determined pursuant to the preceding two sentences, the applicable law is to be determined pursuant to fallback rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

[Note to the Commission: Alternative A is an abbreviated version of the approach followed in articles 4.1 and 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With An Intermediary (“the Hague Securities Convention”). The commentary will include the detailed fallback rules in article 5 of the Hague Securities Convention with sufficient explanation.]

Alternative B

the law of the State in which the bank that maintains the bank account has its place of business. In the case of more than one place of business, reference should be made to the place where the branch maintaining the account is located.

[Note to the Commission: The Commission may wish to consider, as an alternative or supplementary provision, the law governing the control agreement (see A/CN.9/603, para. 77). The Commission may also wish to note that the commentary will explain that the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in rights to payment of funds credited to a bank account.]

II. Security rights in proceeds under an independent undertaking

[Note to the Commission: In the context of its discussion of security rights in proceeds under an independent undertaking, the Commission may wish to consider definitions (z) (“independent undertaking”), (aa) (“proceeds under an independent undertaking”), (bb) (“guarantor/issuer”), (cc) (“confirmer”), (dd) (“nominated person”) and (ee) (“control”) (see A/CN.9/WG.VI/WP.27/Add.1).]

Creation of a security right in proceeds under an independent undertaking

25. The law should provide that a beneficiary may grant a security right in proceeds under an independent undertaking, even if the right to draw under the independent undertaking is not itself transferable under law and practice governing independent undertakings. The grant of a security right in proceeds under an independent undertaking is not a transfer of the right to draw under an independent undertaking.

[Note to the Commission: The Commission may wish to note that the commentary will make clear that the second part of the first sentence makes clear the important point that transferability of an independent undertaking itself (i.e. the right to draw) is irrelevant to the right to create a security right in the proceeds under the independent undertaking.]

The commentary will also explain that the second sentence distinguishes a right to request payment under an independent undertaking from a right to receive the proceeds under an independent undertaking.]

Rights and obligations of the guarantor/issuer, confirmer or nominated person of an independent undertaking

25 bis. The law should provide that:

(a) A secured creditor's rights in proceeds under an independent undertaking are subject to the rights, under the law and practice that govern independent undertakings, of the guarantor/issuer, confirmer or nominated person and of any other beneficiary named in the undertaking or to whom a transfer of drawing rights has been effected;

(b) The rights of a transferee-beneficiary of an independent undertaking are superior to a security right in proceeds under the independent undertaking acquired from the transferor [or any prior transferor]; and

(c) The independent rights of a guarantor/issuer, confirmer, nominated person or transferee-beneficiary under an independent undertaking are not impaired by reason of any security rights it may have in proceeds under the independent undertaking, including any right in proceeds under the independent undertaking that may result from a transfer of drawing rights to a transferee-beneficiary.

[Note to the Commission: The Commission may wish to note that the commentary will make clear that this recommendation is intended to ensure that the rights of holders of independent rights to payment, notably nominated persons that have given value and transferee-beneficiaries to whom a transfer has been effected, are superior to mere assignees of rights to proceeds under a drawing by the original beneficiary. The commentary will also explain that their independent rights are distinct and are not impaired because of their rights as secured creditors of the original beneficiary (in other terms, their status as protected holders of independent rights should not be confused with their status as secured creditors). When a nominated person gives value and obtains reimbursement from the guarantor/issuer, it does so on the basis of its independent reimbursement rights and not as an acquirer of the rights of the beneficiary.]

25 ter. Neither a guarantor/issuer nor a confirmer nor a nominated person is obligated to pay any person other than a named beneficiary, an acknowledged transferee-beneficiary or an acknowledged assignee of proceeds under an independent undertaking.

25 quater. The law should provide that, if a secured creditor has obtained control with respect to proceeds under an independent undertaking by becoming an acknowledged assignee of the proceeds, the secured creditor has the right to enforce the acknowledgement against the guarantor/issuer, confirmer or nominated person that made the acknowledgement

Third-party effectiveness of a security right in proceeds under an independent undertaking

49. The law should provide that a security right in proceeds under an independent undertaking is made effective against third parties by control with respect to the proceeds under the independent undertaking.

[Note to the Commission: The Commission may wish to note that recommendation 49 has been revised on the basis of the assumption that neither possession of an independent undertaking nor registration of a notice should be a method

of achieving third-party effectiveness of a security right in a right to proceeds under an independent undertaking. Possession of an independent undertaking (even when it is in tangible form) plays only a limited role in the modern use of independent undertakings. In addition, if possession were included in this Guide as a method of achieving effectiveness against third parties, there would be a need for complex rules dealing with priority and conflict of laws. It should be noted, however, that, although possession does not constitute a method of achieving effectiveness against third parties, as a practical matter, possession would give protection to a secured creditor when the terms of the independent undertaking require the physical presentation of the independent undertaking to make a draw under the independent undertaking. In such a circumstance, the beneficiary could not make an effective draw without the secured creditor's cooperation, so the secured creditor could take steps to assure itself of payment (e.g. the secured creditor could require the beneficiary to obtain an acknowledgement that would achieve control for the secured creditor before surrendering the independent undertaking and allowing it to be presented to the guarantor/issuer or nominated person that gave the acknowledgement).]

Priority of a security right in proceeds under an independent undertaking

62. The law should provide that a security right in proceeds under an independent undertaking, which has been made effective against third parties by control has, with respect to a particular guarantor/issuer, confirmer or nominated person agreeing to give value under an independent undertaking, priority over the rights of all other secured creditors who have not, with respect to that person, made their security right effective against third parties by control. If control has been achieved by acknowledgement and inconsistent acknowledgements have been given to more than one secured creditor by a person, among those secured creditors, priority is determined according to the order in which the acknowledgements were given.

[Note to the Commission: The Commission may wish to note that the commentary will explain that, as the typical method of achieving control is by obtaining an acknowledgment, in the case of several potential payors (e.g. the guarantor/issuer, confirmer and several nominated persons), control is achieved only vis-à-vis the particular guarantor/issuer(s), confirmer(s) or nominated person(s) who gave the acknowledgment(s). Thus, the priority rule must focus on the particular person who is the payor. The basic priority rule makes clear that a secured creditor that has control of the right to proceeds under an independent undertaking has priority over a secured creditor whose security right became effective against third parties automatically. The commentary will also explain that the guarantor/issuer may have a contractual obligation to an acknowledged secured creditor even though the secured creditor might not have priority.]

Enforcement of a security right in proceeds under an independent undertaking

106. The law should provide that effectiveness against third parties of a security right in proceeds under an independent undertaking (whether achieved by control or automatically) is not a prerequisite to enforcing the security right. However, as against the guarantor/issuer, confirmer, nominated person or beneficiary other than the grantor, the security right must be exercised in accordance with recommendations 25 bis, 25 ter and 25 quater.

[Note to the Commission: The Commission may wish to note that the commentary will make clear that no separate act of transfer by the grantor is necessary for the secured creditor to enforce a security right in a right to proceeds under an independent undertaking when the security right is created automatically under recommendation 16. The commentary will also explain that any obligations of the guarantor/issuer or

nominated person to the secured creditor are governed by recommendations 25 bis, 25 ter and 25 quater. Furthermore, the commentary will explain that recommendation 106 is not intended to disturb any pre-default arrangements agreed upon between the grantor and the secured creditor by which, prior to the grantor's default, the secured creditor may receive the proceeds under an independent undertaking.]

Law applicable to security rights in proceeds under an independent undertaking

138. The law should provide that: (i) the rights and duties of a guarantor/issuer, confirmer or nominated person that has received a request for an acknowledgement or that has or may pay or otherwise give value under an independent undertaking; (ii) the right to enforce a security right in proceeds under an independent undertaking against a guarantor/issuer, confirmer or nominated person; and (iii) except to the extent otherwise provided in recommendation 138 bis, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in proceeds under the independent undertaking are governed, separately with respect to a particular guarantor/issuer, confirmer or nominated person, by the law of the State determined as follows:

(a) If the guarantor/issuer has issued an independent undertaking, the confirmer has issued a confirmation or the nominated person has issued an acknowledgement that specifies that it is governed by the law of a State, the applicable law is the law of the specified State;

(b) If the applicable law is not determined under the preceding paragraph, the applicable law is the law of the State of the location of the branch or office of the guarantor/issuer, confirmer or nominated person indicated in the independent undertaking of the guarantor/issuer, confirmer or nominated person. However, in the case of a nominated person that has not issued an independent undertaking, the applicable law is the law of the State of the location of the nominated person's branch or office that has or may pay or otherwise give value under the independent undertaking.

138 bis. The law should provide that, if a security right in proceeds under an independent undertaking is created and is made effective against third parties automatically as a result of the effectiveness against third parties of a security right in a receivable, negotiable instrument or other obligation which the independent undertaking secures, the creation and the effectiveness against third parties of the security right in the proceeds under the independent undertaking is governed by the law of the State whose law governs the creation and the effectiveness against third parties of the security right in the secured receivable, negotiable instrument or other obligation.

[Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 138 follows the conflict-of-laws rules applicable with respect to the rights and obligations of guarantor/issuers, confirmers or nominated persons. The only exception to the principle embodied in recommendation 138 is recommendation 138 bis for the limited issues of creation and third-party effectiveness in the cases where a security right arises or is made effective against third parties automatically.]

In addition, the commentary will explain that each bank (or sometimes non-bank) filling one of these roles acts pursuant to the law where it is located, meaning where its relevant branch or office is located (or the law it chooses, which is typically the law of the State where its relevant branch or office is located). Accordingly, different laws govern the different banks involved, and a choice of law in an independent undertaking governs only the particular issuer's obligations (see URDG article 27, UCC 5-116 (b), and United Nations Assignment Convention article 29). The commentary will also explain that what

recommendation 138 strives to do is be clear that a request for acknowledgement or for payment (without prior acknowledgement) made by a secured creditor (or the beneficiary on its behalf) is to be handled by the affected bank branch under its local law.

Under recommendation 138, all priority conflicts are subject to the law chosen by a guarantor/issuer, confirmer or nominated person or, in the absence of a choice of law, to the law of the relevant branch or office. The Commission may wish to consider the question whether: (i) if that bank branch pays (or gives value to) that secured creditor, then that same law should apply to that secured creditor's priority contest with third parties; and (ii), if the payment is to the beneficiary and the priority contest is among third parties, recommendation 138 should be inapplicable and residual conflict-of-laws rules apply (i.e. recommendation 137).

The commentary will further explain that: (i) creation of the security right is governed by the general conflict-of-laws rule in recommendation 137 for security rights in intangibles (except as provided in recommendation 138 bis for automatic creation); and (ii) enforcement of the security right is governed by the general conflict-of-laws rule in recommendation 148, except to the extent otherwise provided in recommendation 138.]

III. Security rights in negotiable instruments

[Note to the Commission: In the context of its discussion of security rights in negotiable instruments, the Commission may wish to consider definitions (i) ("tangibles") and (x) ("negotiable instrument") (see A/CN.9/WG.VI/WP.27/Add.1).]

Parties, security rights, secured obligations and assets covered

3. In particular, the law should provide that it applies to:

...

(f) Generally, outright transfers of receivables;

[Note to the Commission: The Commission may wish to note that, at its tenth session, the Working Group agreed that, while outright transfers of negotiable instruments should not be covered in the draft Guide, a discussion of the relevant issues might be included in the commentary for the benefit of States that might wish to address outright transfers of negotiable instruments because of their importance to financing practices (see A/CN.9/603, para. 50).

In that connection, the Commission may wish to note that the commentary will explain that, while principles of secured transactions law can easily be made to apply to the outright transfer of promissory notes and, perhaps, bills of exchange other than cheques, in a manner similar to this Guide's coverage of the outright transfer of receivables, those principles do not apply well to the outright transfer of cheques. The latter topic is sufficiently covered by the law of negotiable instruments and the law of bank collections.

The commentary will also explain that an enacting State that wishes to expand the scope of its secured transactions law to apply to outright transfers of negotiable instruments that are either promissory notes or bills of exchange (and to expand its definition of "security right" to cover the right of the transferee in such a transaction) might wish to consider providing that a security right that is an outright transfer of such a negotiable instrument is automatically effective against third parties upon the transfer. Such a rule would avoid disrupting existing financial practices.

In addition, the commentary will explain that, with respect to the priority of such a security right, the general principles of priority would apply. Most particularly, the general principle in recommendation 63 (see A/CN.9/WG.VI/WP.26/Add.6), as qualified by recommendation 74, would govern. As in the case of an outright transfer of a receivable, the outright transferee of such a negotiable instrument should be able to enforce the instrument without further consent of the assignor subject, of course, to the rights of the obligors on the negotiable instrument as described in the chapter on enforcement.]

Creation of a security right in a negotiable instrument

[Note to the Commission: The Commission may wish to note that the commentary will explain that, pursuant to recommendation 8 (see A/CN.9/WG.VI/WP.26/Add.7), a security right in a negotiable instrument may be created by a written and possibly signed agreement between the grantor and the secured creditor or by even an oral agreement and delivery of possession of the instrument to the secured creditor. The commentary will also explain that creation of a security right under this recommendation will not affect rights obtained by endorsement of the negotiable instrument under the law governing negotiable instruments.]

Rights and obligations of the obligor under a negotiable instrument

X. The law should provide that, as between the secured creditor and (i) the person obligated on the negotiable instrument or (ii) other persons claiming rights under the law governing negotiable instruments, the obligations and rights of those persons are determined by the law governing negotiable instruments.

Third-party effectiveness of a security right in a negotiable instrument

[Note to the Commission: The Commission may wish to note that the commentary will explain that, according to the general third-party effectiveness recommendation 35 (see A/CN.9/WG.VI/WP.26/Add.5), a security right in a negotiable instrument may be made effective against third parties by registration of a notice in the general security rights registry. Recommendation X addresses a special issue.]

Y. The law should provide that a security right in a negotiable instrument that was made effective against third parties by dispossession continues to be effective against third parties for a short period of [to be specified] days after the negotiable instrument has been relinquished to the grantor for the purpose of presentation, collection, enforcement or renewal.

[Note to the Commission: The Commission may wish to note that a secured creditor may have to return an encumbered negotiable instrument to the grantor for presentation, collection, enforcement or renewal, if the secured creditor does not have that right. The commentary will also explain that, by returning the encumbered negotiable instrument to the grantor, the secured creditor would be exposed to the risk of losing its security only for a short period of time and only if it had not registered a notice about its security right in the general security rights registry.]

Priority of a security right in a negotiable instrument

[Note to the Commission: The Commission may wish to note that the commentary will explain that the general priority recommendations (see A/CN.9/WG.VI/WP.26/Add.6)

apply to priority with respect to security rights in negotiable instruments, while recommendations 74 and 74 bis deals with additional priority conflicts.]

74. The law should provide that a security right in a negotiable instrument that was made effective against third parties by dispossession of the grantor with respect to the instrument has priority over a security right in a negotiable instrument that was made effective against third parties by any other method.

74 bis. The law should provide that a security right in a negotiable instrument that was made effective against third parties by a method other than by dispossession of the grantor with respect to the instrument is subordinate to the rights of another secured creditor, buyer or other transferee (in a consensual transaction) that either:

(a) Qualifies as a protected holder under the law governing negotiable instruments; or

(b) Takes possession of the negotiable instrument and gives value in good faith and without knowledge that the transfer was in violation of the rights of the holder of the security right.

Enforcement of a security right in a negotiable instrument

104. The law should provide that after default, or before default with the agreement of the grantor, the secured creditor, is entitled, subject to recommendation X, to collect or otherwise enforce a negotiable instrument that is an encumbered asset against a person obligated on that instrument.

[Note to the Commission: The Commission may wish to note that commentary will explain that as between the secured creditor and (i) the person obligated on the negotiable instrument, or (ii) other persons claiming rights under the law governing negotiable instruments, the enforcement rights of the secured creditor are subject to the law governing negotiable instruments. The commentary will also include the following examples of such persons:

(a) *The person obligated on the negotiable instrument may be obligated to pay only a holder or other person entitled to enforce the instrument under the law governing negotiable instruments; and*

(b) *The right of the person obligated on the instrument to raise defences to that obligation is determined by the law governing negotiable instruments.]*

105. The law should provide that the secured creditor's right to collect or otherwise enforce a negotiable instrument includes the right to collect or otherwise enforce any personal or property right that secures payment of the negotiable instrument (such as a guarantee or security right).

Law applicable to security rights in tangibles

136. The law should provide that, except as otherwise provided in recommendations 140 and 142, the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in tangible property are governed by the law of the State in which the encumbered asset is located. However, with respect to security rights in tangible property of a type ordinarily used in more than one State, the law should provide that such issues are governed by the law of the State in which the grantor is located. [With respect to security rights in the type of tangible property mentioned in the preceding sentence that is subject to a title registration system, the law should provide that

such issues are governed by the law of the State under the authority of which the registry is maintained.]

[Note to the Commission: The Commission may wish to note that the commentary will explain that “tangible property of a type ordinarily used in more than one State” refers to mobile goods, such as motor vehicles. The same term in the bracketed sentence in recommendation 136 refers to mobile goods, such as ships and aircraft.]

Law applicable to third-party effectiveness of security rights in specified types of asset by registration

140. If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument and rights to payment of funds credited to a bank account, the law of that State determines whether the effectiveness against third parties of a security right in such encumbered assets has been achieved by registration under the laws of that State.

Law applicable to the rights and obligations of the grantor and the secured creditor

146. *[See A/CN.9/611.]*

Law applicable to the rights and obligations of the debtor of the receivable and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor

147. *[See A/CN.9/611.]*

[Note to the Commission: The Commission may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a negotiable instrument (A/CN.9/WG.VI/WP.24); and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in negotiable instruments.]

IV. Security rights in negotiable documents

[Note to the Commission: In the context of its discussion of security rights in negotiable documents, the Commission may wish to consider definitions (y) (“negotiable document”), (nn) (“possession”) and (oo) (“issuer”) (see A/CN.9/WG.VI/WP.27/Add.1).]

Creation of a security right in a negotiable document

[Note to the Commission: The Commission may wish to note that, the commentary will explain that, pursuant to recommendation 8 (see A/CN.9/WG.VI/WP.26/Add.7), a security right in a negotiable document may be created by a written and possibly signed agreement between the grantor and the secured creditor or even by an oral agreement and delivery of possession of the document to the secured creditor. For the benefit of enacting States that may wish to consider addressing multi-modal transport documents, the commentary will explain that, as the definition of a negotiable document in the draft Guide is left to the law governing negotiable documents, the negotiability of multi-modal transport documents is also left to that law.]

28. The law should provide that the creation of a security right in a negotiable document also gives rise to a security right in the goods represented by the document, provided that

the issuer is in possession of the goods, directly or indirectly, at the time the security right in the document is created.

[Note to the Commission: The Commission may wish to note that the commentary will clarify that a security right in goods covered by a negotiable document may be created pursuant to recommendation 8 directly in the goods or pursuant to recommendation 28 through the creation of a security right in the negotiable document covering the goods. The commentary will also clarify that recommendation 28 is intended to negate that, in situations where a security right exists in a negotiable document, a separate security right needs to be created in the goods covered by the document. Moreover, the commentary will explain that neither recommendation 8 nor recommendation 28 nor any other recommendation affects rights in negotiable documents acquired under the law governing negotiable documents.]

Rights and obligations of the issuer of a negotiable document

Z. The law should provide that as between the secured creditor and the issuer or other person obligated on the negotiable document, the rights and obligations of those persons are determined by the law governing negotiable documents.

[Note to the Commission: The Commission may wish to note that this recommendation will be placed in a separate chapter dealing with the rights and obligations of third-party obligors.]

Third-party effectiveness of a security right in a negotiable document

44. The law should provide that a security right in a negotiable document is made effective against third parties by delivery of possession of the document to the secured creditor.

44 bis. The law should provide that, if a security right in a negotiable document is effective against third parties, the corresponding security right in the goods covered by the document is also effective against third parties. As long as a negotiable document covers goods, a security right in the goods may be made effective against third parties by dispossession of the grantor with respect to the document.

44 ter. The law should provide that a security right in a negotiable document that was made effective against third parties by dispossession of the grantor remains effective against third parties for a short period of [to be specified] days after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the goods covered by the negotiable document.

Priority of a security right in a negotiable document

[Note to the Commission: The Commission may wish to note that the commentary will clarify that the general priority recommendations apply to security rights in negotiable documents, while recommendations 80 and 81 deal with additional priority conflicts.]

80. The law should provide that, while goods are in the possession of the issuer of a negotiable document with respect to them, a security right in those goods that became effective against third parties as a result of the security right in the negotiable document becoming effective against third parties has priority over another security right in the

goods that was made effective against third parties by a different method while the goods were covered by the document.

81. The law should provide that a security right in a negotiable document and the goods covered thereby is subject to the rights under the law governing negotiable documents of a person to whom the negotiable document has been duly negotiated.

Enforcement of a security right in a negotiable document

[Note to the Commission: The Commission may wish to note that the commentary will also explain that the general recommendations on enforcement of security rights apply here as well, while recommendation 109 deals with a special issue.]

109. The law should provide that after default, or before default with the agreement of the grantor, the secured creditor is entitled, subject to recommendation Z, to enforce a security right in negotiable document against the issuer or any other person obligated on the negotiable document.

[Note to the Commission: The Commission may wish to note that the commentary will explain that, under law governing negotiable documents, the issuer may be obligated to deliver the goods only to a holder of the negotiable document with respect to them.]

Law applicable to security rights in tangibles

136. *[See recommendation 136 under III above.]*

[Note to the Commission: The Commission may wish to note that a security right may be created in goods either pursuant to recommendation 8 or by the creation of a security right in a negotiable document representing those goods pursuant to recommendation 28 (see above). In either case, recommendation 136 provides that the creation, third-party effectiveness and priority of the security right are governed by the law of State of the location of the goods or document, as applicable. Because goods in transit and export goods, by their nature, move from State to State and, therefore, the location of the goods at any particular moment might be fortuitous and temporary, recommendation 142 provides an alternative method for creation and third-party effectiveness of a security right in such goods referring to the law of the State of the ultimate destination of the goods, provided that the goods reach that destination within a reasonable period of time. Recommendation 142 thus addresses the problems that could result from unwavering adherence to the “location of the tangible asset rule” in the context of goods whose location will certainly change as a result of the very nature of the financing transaction.]

The Commission may also wish to note, though, that, at its tenth session, the Working Group considered that, in many financing transactions involving negotiable documents it is also the nature of the transaction that the location of the negotiable document changes, as, for example, a bill of lading may move from the consignor to the consignee to the secured creditor or other financier (see A/CN.9/603, para. 60). In addition, the Working Group noted that, in such transactions, at any particular time the negotiable document might be located in a different State than the goods that it represents, even though the goods and the negotiable document will ultimately be located in the same State. Accordingly, at that session, the suggestion was made that the practical issue with respect to the goods that is addressed by recommendation 142 might also be present for the negotiable documents representing those goods and that, accordingly, there may be some advantage in broadening the rule in recommendation 142 to cover negotiable documents. Thus, the Commission may wish to consider extending the application of

recommendation 142 to negotiable documents. In that connection, the Commission may wish to take into consideration that, under recommendations 136 and 142, the priority of a security right in goods covered by a negotiable document is always subject to the law of the location of the document. If the applicable law is the law of a State that has enacted the recommendations of this Guide, under recommendation 80, the security right in the goods that became effective against third parties as a result of the security right in the negotiable document becoming effective against third parties will have priority over a security right in the goods that became effective against third parties by another method. The Commission may also wish to note that, under recommendation 148, the enforcement of the security right in the goods or the document is always subject to the law of the State where enforcement takes place or the law governing the security agreement (depending on which alternative is retained).]

Law applicable to third-party effectiveness of security rights in specified types of asset by registration

140. *[See recommendation 140 under III above.]*

Security rights in goods in transit and export goods

142. The law should provide that a security right in tangible property (other than negotiable instruments or negotiable documents) in transit or to be exported from the State in which it is located at the time of the creation of the security right may also be created and made effective against third parties under the law of the State of the ultimate destination, provided that the property reaches that State within a short time period of [to be specified] days after the time of creation of the security right.

[Note to the Commission: The Commission may wish to note that the commentary will explain that a security right in goods in transit and export goods can be created and made effective against third parties, under recommendation 136, in accordance with the law of the State of their location at the time of creation, or, under recommendation 142, in accordance with the law of the State of their ultimate destination. The commentary will also explain that the law of the State of the ultimate destination that governs creation and third-party effectiveness will apply even in the case of a contest with competing rights that were created and made effective against third parties while the export goods were located in the State of origin. In addition, the commentary will explain that the rule in this recommendation: (i) is applicable to encumbered assets that travel whether or not negotiable documents relating to the goods accompany the goods; (ii) is not applicable to encumbered goods that do not travel, whether or not negotiable documents relating to the goods do travel; and (iii) is not applicable to encumbered negotiable documents whether or not they travel.]

Law applicable to the rights and obligations of the grantor and the secured creditor

146. *[See A/CN.9/611.]*

Law applicable to the rights and obligations of the debtor of the receivable and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor

147. *[See A/CN.9/611.]*

[Note to the Commission: The Commission may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a negotiable document (A/CN.9/WG.VI/WP.24); and (ii) the recommendations on the

impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in negotiable documents.]

A/CN.9/611/Add.2

Recommendations of the draft Legislative Guide on Secured Transactions

ADDENDUM

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VII. Pre-default rights and obligations of the parties

Purpose

The purpose of the provisions of the law on pre-default rights and obligations of the parties is to enhance efficiency of secured transactions and reduce transaction costs and potential disputes by:

- (a) Providing rules on additional terms for the security agreement;
- (b) Eliminating the need to negotiate and draft terms to be included in the security agreement where the rules provide an acceptable basis for agreement;
- (c) Providing a drafting aid or checklist of issues the parties may wish to address at the time of negotiation and conclusion of the security agreement; and
- (d) Encouraging party autonomy.

Party autonomy

86. The law should provide that, except as otherwise provided in [specify the provisions that may not be derogated from or varied by agreement, e.g. standard of conduct in the context of enforcement], the secured creditor and the grantor may derogate from or vary by agreement its provisions relating to their respective rights and obligations. Such an agreement does not affect the rights of any person that is not a party to the agreement.

[Note to the Commission: The Commission may wish to note that, at its tenth session, the Working Group agreed that recommendation 86 should be moved to the general part of the draft Guide (see A/CN.9/603, para. 90). As that part had already been issued before the tenth session of the Working Group, this decision will be implemented at the next version of the general part.]

Additional terms for the security agreement

87. The law should include rules that provide, in particular, for:

- (a) An obligation of the secured creditor or the grantor in possession of the encumbered assets to take any steps necessary to preserve, insure and pay taxes for the encumbered assets;

- (b) A right of the secured creditor to make reasonable use of the encumbered assets in its possession or to inspect encumbered assets in the possession of the grantor;
- (c) A right of the secured creditor to receive any proceeds derived from the encumbered assets in its possession or to have the security right extended in any proceeds of encumbered assets in the possession of the grantor;
- (d) A right of the secured creditor to freely assign the secured obligation in which case the security right follows, unless otherwise provided by law;
- (e) A right of the secured creditor to be reimbursed for reasonable expenses for the preservation of encumbered assets in its possession;
- (f) An obligation of the grantor to make up for an unexpected devaluation of the encumbered assets;
- (g) An obligation of the secured creditor to return the encumbered assets in its possession or terminate the notice registered upon full payment of the secured obligation and termination of all commitments to extent credit.

VIII. Default and enforcement

Purpose

The purpose of the provisions of the law on default and enforcement is to:

- (a) Provide clear and simple procedures for the enforcement of security rights after debtor default in a predictable and efficient manner;
- (b) Provide procedures that maximize the potential realization value of the encumbered assets for the benefit of the grantor, the debtor or any other person that owes payment of the secured obligation, the secured creditor and other creditors with a right in the encumbered assets;
- (c) Provide for expeditious judicial and, subject to appropriate safeguards, non-judicial methods for the secured creditor to realize the value of the encumbered assets;
- (d) Coordinate the secured transactions enforcement regime with other law governing the enforcement of claims in encumbered assets, including insolvency law.

Application of this chapter to outright transfers of receivables

88. [See A/CN.9/611]

General standard of conduct

89. The law should provide that all parties must exercise their rights and perform their obligations under the recommendations of this chapter in good faith and in a commercially reasonable manner.

Liability for failure to comply with recommendations of this chapter

90. The law should provide that any party that fails to comply with the obligations arising under the recommendations of this chapter is liable for any damages caused by that failure.

Limitations to party autonomy in the context of the enforcement of a security right

91. The law should provide that rights arising under recommendation 89 cannot be waived unilaterally or varied by agreement at any time. Subject to that exception: (i) the grantor and any other person that owes payment or other performance of the secured obligation may waive unilaterally or vary by agreement any of their rights and remedies under the recommendations of this chapter only after default, and (ii) the secured creditor may waive unilaterally or by agreement any of its rights and remedies under the recommendations of this chapter at any time. A variation by agreement does not affect the rights of any person not a party to the agreement. A person challenging an agreement has the burden of showing that it was made prior to default or is inconsistent with recommendation 90.

[Note to the Commission: The Commission may wish to consider whether a waiver or variation of the liability arising under recommendation 90 should be addressed in recommendation 91 or left to other law.]

Rights and remedies after default

92. As more specifically provided in other recommendations of this chapter, the law should provide that after default the grantor and the secured creditor have the rights and remedies provided in the recommendations of this chapter, in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) and in any other law.

Secured creditor rights and remedies

93. As more specifically provided in other recommendations of this chapter, the law should provide that after default the secured creditor is entitled to:

- (a) Obtain possession of a tangible encumbered asset;
- (b) Collect on an encumbered asset that is a receivable, negotiable instrument, right to payment of funds credited to a bank account or proceeds under an independent undertaking;
- (c) Enforce rights under a negotiable document;
- (d) Sell or otherwise dispose of, lease or license an encumbered asset;
- (e) Propose to the grantor that the secured creditor accept an encumbered asset in total or partial satisfaction of the secured obligation; and
- (f) Exercise any other right or remedy provided in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) or any other law.

Judicial and extrajudicial enforcement

94. As more specifically provided in other recommendations of this chapter, the law should provide that after default the secured creditor is entitled to exercise the rights and remedies described in recommendation 93:

- (a) By applying to a court or other authority; or
- (b) Without applying to a court or other authority.

Grantor rights and remedies

95. As more specifically provided in other recommendations of this chapter, the law should provide that after default the grantor is entitled to:

(a) Pay in full the secured obligation after default and until the disposition, acceptance or collection of an encumbered asset by the secured creditor, and thereby obtain a release from the security right of all encumbered assets securing that obligation, provided that all commitments of the secured creditor to extend credit have terminated;

(b) Apply to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the recommendations of this chapter with respect to extrajudicial enforcement;

(c) Reject the proposal of the secured creditor to accept an encumbered asset in total or partial satisfaction of the secured obligation within the time limits prescribed by the recommendations of this chapter; and

(d) Exercise any other right or remedy provided in the security agreement (except to the extent inconsistent with the mandatory recommendations of this chapter) or any other law.

Summary judicial proceedings

96. The law should provide for summary judicial proceedings with respect to the exercise of rights and remedies of the secured creditor, the grantor, and any other person who owes performance of the secured obligation or claims to have a right in the encumbered assets.

Cumulative rights and remedies

97. The law should provide that the exercise of a right or remedy does not prevent the exercise of another right or remedy.

Rights and remedies with respect to the secured obligation

98. The law should provide that the exercise of rights or remedies with respect to an encumbered asset under this law does not prevent the secured creditor from exercising its rights or remedies with respect to the obligation secured by that encumbered asset. The exercise of rights or remedies with respect to a secured obligation does not prevent the secured creditor from exercising its rights or remedies with respect to an encumbered asset that secures that obligation.

Release of the encumbered assets after full payment

99. The law should provide that, after default and until the disposition, acceptance or collection of an encumbered asset by the secured creditor, the debtor, the grantor or any other interested party (e.g. a secured creditor whose security right has lower priority than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) is entitled to pay the secured obligation in full. If all commitments to extend credit have terminated, the effect of such payment is to release from the security right all encumbered assets securing that obligation or, to the extent provided in other law, to subrogate any other interested party that makes the payment to the rights of the secured creditor.

Relief with respect to extrajudicial enforcement

100. The law should provide that the debtor, the grantor or other interested parties (e.g. a secured creditor, a guarantor or a co-owner of the encumbered assets) are entitled to apply to a court or other authority for relief if the secured creditor has not complied or is not complying with its obligations under the recommendations of this chapter. The law should build safeguards into the process to discourage unfounded applications and to prevent any improper interference with or undue delay of the secured creditor's ability to enforce its security right.

Secured creditor's right to possession of an encumbered asset

101. The law should provide that after default the secured creditor is entitled to possession of a tangible encumbered asset.

Alternative A

The secured creditor is entitled to take possession of the encumbered asset without applying to a court or other authority if: (i) it has given the grantor and any person in possession of the encumbered asset notice of default and (ii) possession can be taken without the use or threat of force.

Alternative B

The secured creditor is entitled to take possession of the encumbered asset without applying to a court or other authority, if: (i) it has given the grantor and any person in possession of the encumbered asset notice of default and of its intention to pursue extrajudicial enforcement and (ii) possession can be taken without the use or threat of force, or other similar illegal act.

Collection of receivables

102. [*For recommendations 102 and 103, see A/CN.9/611.*]

Negotiable instruments

104. [*For recommendations 104 and 105, see A/CN.9/611/Add.1.*]

Proceeds under an independent undertaking

106. [*See A/CN.9/611/Add.1.*]

Rights to payment of funds credited to a bank account

106 bis. [*For recommendations 106 bis, 107 and 108, see A/CN.9/611/Add.1.*]

Negotiable documents

109. [*See A/CN.9/611/Add.1.*]

Disposition of encumbered assets

110. As more specifically provided in other recommendations of this chapter, the law should provide that after default a secured creditor is entitled to sell or otherwise dispose of, lease or license an encumbered asset pursuant to recommendation 93 (d).

110 bis. The law should provide that a secured creditor that disposes of encumbered assets without applying to a court or other authority may select the method, manner, time, place, and other aspects of the disposition.

[Note to the Commission: The Commission may wish to note that the commentary will explain that this recommendation is subject to the standard of good faith and commercial reasonableness set out in recommendation 89. It will also explain that the purpose and effect of this recommendation is to provide a balance between the interests of both the grantor (and its other creditors) and the secured creditor in enabling flexibility in the methods used to dispose of the encumbered assets toward the end of obtaining an economically effective enforcement, while at the same time protecting the grantor against actions taken by the secured creditor that, in the commercial context, are not reasonable. The commentary will also explain that the secured creditor need not be in possession of the encumbered assets to exercise its rights and remedies under this chapter.]

Advance notice with respect to extrajudicial disposition of encumbered assets

111. The law should require the secured creditor to give notice with respect to extrajudicial disposition of an encumbered asset after default. The law should:

(a) Specify that the notice should be given to: (i) the grantor, the debtor and any other person that owes payment of the secured obligation, (ii) any person with rights in the encumbered asset that, prior to the sending of the notice by the secured creditor to the grantor, has notified in writing the secured creditor of those rights, and (iii) any other secured creditor that, more than [...] days before the notice is sent to the grantor, has registered a notice of a security right in the encumbered asset under the name of the grantor or that was in possession of the encumbered asset at the time it was seized by the secured creditor;

(b) State the manner in which the notice is to be given, its timing, and its minimum contents, including whether the notice to the grantor should contain an accounting of the amount then owed and a reference to the right of the debtor or the grantor to obtain the release of the encumbered assets from the security right under recommendation 98;

(c) Provide that the notice should be in a language that is reasonably expected to inform its recipients about its contents (notice to the grantor is sufficient if it is in the language of the security agreement and, if the security right was made effective against third parties by registration, notice to all other persons is sufficient if it is in the language of the registry);

(d) Address the legal consequences of failure to comply with the recommendations governing the notice; and

(e) List circumstances in which the notice need not be given either because the time delay associated with requiring advance notice could have a negative effect on the realization value of the encumbered assets (as in the case of perishable tangibles or other assets whose value may decline speedily) or because the encumbered assets are of a sort sold on a recognized market (thereby obviating the need for advance notice).

112. The law should provide rules ensuring that the notice referred to in recommendation 111 can be given in an efficient, timely and reliable way so as to protect the grantor or other interested parties, while, at the same time, avoiding having a negative effect on the secured creditor's remedies and the potential realization value of the encumbered assets.

[Note to the Commission: The Commission may wish to note that the commentary will explain that these rules should balance the interest of the secured creditor in having the flexibility to dispose of the encumbered asset promptly in order to take advantage of favourable market conditions (an interest that also benefits the grantor and other interested parties) with the interest of the grantor and those other parties in obtaining notice of the disposition sufficiently before the disposition in order to take actions that might further protect their interests (such as locating potential buyers for the encumbered asset or attending a public disposition of the encumbered asset to verify the secured creditor's compliance with its obligations under this chapter. The commentary will also explain that the recommendation does not require registration of the notice because the notice meets the policy goals that could be served by registration. The Working Group may wish to define notice as written notice, except where otherwise provided in the law.]

Acceptance of encumbered assets in satisfaction of the secured obligation

113. The law should provide that after default a secured creditor may propose to accept, without applying to a court or other authority, one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

114. The law should provide that a secured creditor that proposes to accept an encumbered asset in total or partial satisfaction of the secured obligation must send the proposal, specifying the amount owed as of the date the proposal is sent and the amount of the obligation that is proposed to be satisfied by accepting the encumbered asset to:

(a) The grantor, the debtor and any other person that owes payment of the secured obligation (e.g. a guarantor);

(b) Any person with rights in the encumbered asset that, more than [...] days prior to the sending of the proposal by the secured creditor to the grantor, has notified in writing the secured creditor of those rights; and

(c) Any other secured creditor that, more than [...] days before the proposal is sent to the grantor, has registered a notice of a security right in the encumbered asset in the name of the grantor or that was in possession of the encumbered asset at the time it was seized by the secured creditor.

115. The law should provide that, if a person to which a proposal to accept an encumbered asset in total or partial satisfaction of the secured obligation must be sent under recommendation 114 objects in writing to such a proposal within [a short time, such as 20 days] after the proposal is sent, the secured creditor may not proceed with the proposal.

Distribution of proceeds of enforcement

116. The law should provide that, in the case of extrajudicial enforcement, the enforcing secured creditor must apply the net proceeds of its enforcement (after deducting costs of enforcement) to the secured obligations. Except as provided in recommendation 117, the enforcing secured creditor must pay any surplus remaining after such application to subordinate competing claimants, that, prior to any distribution of the surplus, gave written notice of their claims to any surplus to the enforcing secured creditor. Any balance remaining must be remitted to the grantor.

117. The law should also provide that, in the case of extrajudicial enforcement, whether or not there is any dispute as to the entitlement of any competing claimant or as to the priority of payment, the enforcing secured creditor may, in accordance with generally

applicable procedural rules, pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution. In the case of such payment, the surplus should be applied in accordance with the priority rules of this law.

118. The law should provide that distribution of the proceeds realized by a judicial disposition or other officially administered process is to be made in accordance with general rules of the State governing execution proceedings, but in accordance with the priority rules of this law.

119. The law should provide that the debtor and any other person that owes payment of the secured obligation are liable for any shortfall still owing after application of the net proceeds of enforcement to the secured obligation.

Right of prior-ranking secured creditor to take over enforcement

120. The law should provide that, at any time before final disposition, acceptance or collection of an encumbered asset, a secured creditor whose security right has priority over that of the enforcing secured creditor or judgement creditor is entitled to take control of the enforcement process. The right to take control includes the right to continue enforcement, enforce by a different method provided in the recommendations of this chapter, and choose whether or not any remedy under the recommendations of this chapter will be administered by a court or other authority.

[Note to the Commission: The Commission may wish to note that the commentary will explain that the secured creditor with priority has the right to substitute its own enforcement process under this law for judgement enforcement proceedings initiated by a subordinate judgement creditor under other law but does not have the right to continue the enforcement process initiated by the judgement creditor under that other law.]

Title or other right acquired through non-judicial disposition

121. The law should provide that, if a secured creditor disposes of an encumbered asset without applying to a court or other authority, the person that acquires the asset in good faith pursuant to the disposition (i) acquires the grantor's right in the asset subject to rights that had priority over the security right of the enforcing secured creditor and (ii) takes free of the rights of, the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor. The same rule applies to an encumbered asset acquired by a secured creditor that has accepted the encumbered asset in total or partial satisfaction of the secured obligation.

122. The law should provide that, if a secured creditor disposes of a partial right in an encumbered asset or leases or licenses an encumbered asset without applying to a court or other authority, the person that acquires the partial right, lease or licence in good faith pursuant to the disposition, lease or licence (i) acquires the grantor's right in the asset to the extent of the disposition, lease or licence subject to rights that had priority over the security right of the enforcing secured creditor and (ii) takes free of the rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor.

Title or other right acquired through judicial disposition

123. The law should provide that, if a secured creditor disposes of an encumbered asset through a judicial or other officially administered process, the title or other right acquired by the transferee is determined by the general rules of the State governing execution proceedings.

Intersection of movable and immovable property enforcement regimes

124. The law should provide that:

(a) A security right in attachments to immovable property may be enforced in accordance with either this law or the law governing enforcement of encumbrances on immovable property; and

(b) If an obligation to a secured creditor is secured by both a security right in an encumbered asset of the grantor and by an encumbrance on an immovable property of the grantor, the secured creditor may enforce: (i) both the security right and the encumbrance under the law governing enforcement of encumbrances on immovable property or (ii) the security right under this law and the encumbrance under the law governing enforcement of encumbrances on immovable property.

[Note to the Commission: The Commission may wish to note that the law should be coordinated with general civil procedure law to provide a right for secured creditors to intervene in court proceedings initiated by other creditors of the grantor so as to protect security rights and to ensure the same priority status of security rights as under the law.]

A/CN.9/611/Add.3**Draft Legislative Guide on Secured Transactions****ADDENDUM**

1. At its current session, the Commission is expected to consider and approve in principle the substance (i.e. the policy rather than the formulation) of the recommendations of the draft UNCITRAL Legislative Guide on Secured Transactions (“the draft Guide”).
2. The recommendations and the commentaries thereto are contained in various documents. In order to assist the Commission in identifying the document in which each chapter is contained, the Secretariat has included in an annex to this note a list of the chapters of the draft Guide indicating in which document the recommendations and the commentary relating to each chapter may be found.

ANNEX

I. Recommendations**

Chapter I. Key objectives	A/CN.9/WG.VI/WP.26/Add.7
Chapter II. Scope of application	A/CN.9/WG.VI/WP.26/Add.7
Chapter III. Basic approaches to security	A/CN.9/WG.VI/WP.26/Add.7
Chapter IV. Creation of the security right (effectiveness as between the parties)	A/CN.9/WG.VI/WP.26/Add.7
Chapter V. Effectiveness of the security right against third parties and registration	A/CN.9/WG.VI/WP.26/Add.5
Chapter VI. Priority of the security right over the rights of competing claimants	A/CN.9/WG.VI/WP.26/Add.6
Chapter VII. Pre-default rights and obligations of the parties	A/CN.9/611/Add.2
Chapter VIII. Default and enforcement	A/CN.9/611/Add.2
Chapter IX. Insolvency	A/CN.9/WG.VI/WP.21/Add.3
Chapter X. Acquisition financing devices	A/CN.9/WG.VI/WP.24/Add.5
Chapter XI. Conflict of laws	A/CN.9/WG.VI/WP.24
Chapter XII. Transition	A/CN.9/WG.VI/WP.26/Add.8
Security rights in proceeds, attachments, masses of goods and products	A/CN.9/WG.VI/WP.26/Add.4
Security rights in receivables	A/CN.9/611
Security rights in rights to payment of funds credited to a bank account	A/CN.9/611/Add.1
Security rights in proceeds under an independent undertaking	A/CN.9/611/Add.1
Security rights in negotiable instruments	A/CN.9/611/Add.1
Security rights in negotiable documents	A/CN.9/611/Add.1

II. Commentaries***

Background remarks	A/CN.9/WG.VI/WP.27
Chapter I. Introduction	A/CN.9/WG.VI/WP.27/Add.1
Chapter II. Key objectives	A/CN.9/WG.VI/WP.27/Add.1

** The numbering of the chapters may not correspond to the numbering on the documents above, as chapters were merged or moved at different points of time. The titles, however, of the chapters remain essentially the same.

*** With the exception of A/CN.9/WG.VI/WP.27 and Addenda 1 and 2, which have already been updated, the commentaries need to be updated.

Chapter III. Basic approaches to security	A/CN.9/WG.VI/WP.9/Add.1
Chapter IV. Creation	A/CN.9/WG.VI/WP.11/Add.2
Chapter V. Effectiveness against third parties	A/CN.9/WG.VI/WP.14
Chapter VI. Priority	A/CN.9/WG.VI/WP.14/Add.1
Chapter VII. Pre-default rights and obligations of the parties	A/CN.9/WG.VI/WP.9/Add.4
Chapter VIII. Default and enforcement	A/CN.9/WG.VI/WP.27/Add.2
Chapter IX. Insolvency	A/CN.9/WG.VI/WP.9/Add.6
Chapter X. Acquisition financing devices	A/CN.9/WG.VI/WP.17 and Add.1
Chapter XI. Conflict of laws	A/CN.9/WG.VI/WP.19
Chapter XII. Transition issues	A/CN.9/WG.VI/WP.26/Add.8
Security rights in proceeds, attachments, masses of goods and products	commentaries in the relevant chapters
Security rights in receivables	not issued yet
Security rights in rights to payment of funds credited to a bank account	A/CN.9/WG.VI/WP.18 and Add.1
Security rights in proceeds under an independent undertaking	not issued yet
Security rights in negotiable instruments	not issued yet
Security rights in negotiable documents	not issued yet

II. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. Report of the Working Group on Arbitration on the work of its forty-third session (Vienna, 3-7 October 2005)

(A/CN.9/588) [Original: English]

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I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, *inter alia*, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection and the requirement that an arbitration agreement be in writing.
2. The most recent summary of the discussions of the Working Group on interim measures of protection and the written form requirement for the arbitration agreement is contained in document A/CN.9/WG.II/WP.135, paragraphs 5 to 24. The Secretariat was asked to prepare revised versions of draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration (“the Arbitration Model Law”) relating to the power of an arbitral tribunal to order interim measures of protection, of a new article to the Arbitration Model Law relating to the recognition and enforcement of interim measures of protection (tentatively numbered article 17 bis), of a new article to the Arbitration Model Law relating to court-ordered interim measures (tentatively numbered article 17 ter), as well as of draft article 7 of the Arbitration Model Law relating to the definition and form of the arbitration agreement, for consideration by the Working Group at its forty-third session.
3. The Working Group, which was composed of all States members of the Commission, held its forty-third session in Vienna, from 3-7 October 2005. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).
4. The session was attended by observers from the following States: Finland, Indonesia, Iraq, Ireland, Latvia, Malaysia, Netherlands, New Zealand, Philippines, Romania, Slovakia, United Arab Emirates and Viet Nam.
5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.
6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Asia Pacific Regional Arbitration Group (APRAG), Association Suisse de l'Arbitrage (ASA), Club of Arbitrators of the Milan Chamber of Arbitration, Council of Bars and Law Societies of Europe (CCBE), Forum for International Commercial Arbitration (FICA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRC), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos) and Vienna International Arbitral Centre (VIAC).

7. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Ms. Izabela WERESNIAK (Poland).

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.135); (b) a note by the Secretariat containing a newly revised draft of article 7, paragraph (2), of the Arbitration Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-sixth session (A/CN.9/WG.II/WP.136); (c) a note by the Secretariat containing a proposal made by a delegation for a revision of article 7, paragraph (2) of the Arbitration Model Law (A/CN.9/WG.II/WP.137); (d) a note by the Secretariat containing newly revised draft provisions on interim measures of protection pursuant to the decisions made by the Working Group at its fortieth, forty-first and forty-third sessions (A/CN.9/WG.II/WP.138); and (e) the report of the Working Group on the work of its forty-second session (A/CN.9/573).

9. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Preparation of uniform provisions on interim measures of protection and on the requirement that an arbitration agreement be in writing;
5. Other business;
6. Adoption of the report.

II. Deliberations and decisions

10. The Working Group discussed agenda item 4 on the basis of the text contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.136, A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.138). The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters III to VIII. The Secretariat was requested to prepare revised draft provisions on interim measures of protection and the written form requirement for arbitration agreements, based on the deliberations and conclusions of the Working Group.

III. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

General remarks

11. The Working Group noted that the Commission, at its thirty-eighth session (Vienna, 4-15 July 2005), had expressed its expectation that the Working Group would be able to present its proposals for the revision of both articles 7 and 17 of the Arbitration Model Law for final review and adoption to the Commission at its thirty-ninth session in 2006 (A/60/17, paras. 175-177).

12. The Working Group recalled that, at its fortieth session (New York, 23-27 February 2004), it had undertaken a detailed review of the text of the revised version of article 17 (“draft article 17”) regarding the power of an arbitral tribunal to grant interim measures of protection. The Working Group resumed discussions on draft article 17, on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group as set out in A/CN.9/WG.II/WP.138.

Paragraph (1)

13. A proposal was made to add the words “or modify them” at the end of paragraph (1) and to delete paragraph (6). In support of the proposal, it was suggested that these additional words were intended to extend the scope of paragraph (1) to encompass the situation provided for in paragraph (6) where a party requested an arbitral tribunal to modify, suspend or terminate an interim measure. The other situation covered by paragraph (6) namely, the power of an arbitral tribunal to modify, suspend or terminate an interim measure upon its own initiative was said to be inherent to the arbitral process and therefore that part of paragraph (6) was said to be unnecessary.

14. While some support was expressed for that proposal, it was said that paragraphs (1) and (6) dealt with the power of an arbitral tribunal to grant interim measures at the request of the parties at different stages of the arbitral process and therefore both paragraphs should be retained.

15. It was pointed out that the reference to modification, suspension or termination of an interim measure by an arbitral tribunal on its own initiative, as provided for under paragraph (6), was necessary to address the situation of non-participating respondents.

16. In the context of that discussion, it was also stated that the terms “suspend” or “terminate” would not necessarily be encompassed within the term “modify”.

17. After discussion, the Working Group agreed to adopt paragraph (1) without modification. It was agreed that the questions raised in relation to paragraph (6) might need to be further discussed (see below, paras. 45 and 46).

Paragraph (2)

Chapeau

18. The Working Group adopted the substance of the chapeau of paragraph (2) without modification.

Subparagraph (a)

19. The Working Group adopted the substance of subparagraph (a) without modification.

Subparagraph (b)

“[, or to prejudice the arbitral process itself]”

20. The Working Group considered whether the bracketed words “or to prejudice the arbitral process itself”, at the end of subparagraph (b), should be retained in order to clarify that an arbitral tribunal has the power to prevent obstruction or delay of the arbitral process, including by issuing anti-suit injunctions.

21. The Working Group recalled its earlier discussions on the question whether paragraph (2) of draft article 17 should be interpreted as encompassing a power of an

arbitral tribunal to order an anti-suit injunction (i.e., an interim measure by which an arbitral tribunal would order a party not to pursue court proceedings or separate arbitral proceedings) (A/CN.9/547, paras. 84-92). It was suggested, however, that the bracketed text should not be understood as merely covering injunctions against suits but rather as more broadly covering injunctions against the large variety of actions that existed and were used in practice to obstruct the arbitral process.

22. Reservations were expressed against draft article 17 directly or indirectly allowing the use of anti-suit injunctions given that these types of injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well it was said that such anti-suit injunctions did not always have the provisional nature of interim measures and related to the question of the competence of the arbitral tribunal, which was a matter not to be confused with the granting of an interim measure.

23. However, in favour of dealing with anti-suit injunctions under draft article 17, it was stated that these injunctions were becoming more common and served an important purpose in international trade. It was stated that, notwithstanding the fact that, in a number of countries, the law did not recognize these injunctions, there was evidence that arbitral tribunals sitting in such countries were increasingly faced with tactics aimed at obstructing or undermining the arbitral process. It was also stated that it was legitimate for arbitral tribunals to seek to protect their own process.

24. It was stated that, at previous sessions, the Working Group had expressed preference for inclusion of anti-suit injunctions in draft article 17. It was suggested that, even if no express words were included in paragraph (2) (b) regarding the power to issue anti-suit injunctions, there would nevertheless be implicit support for the existence of such a power. In that respect, it was noted that some State courts had identified the power to order anti-suit injunctions and to prevent other obstructions of the arbitral process as an inherent power of the arbitral tribunal. It was said that paragraph (2) (a) of draft article 17 was flexible, open-ended and probably broad enough to encompass anti-suit injunctions but for the sake of clarity, it would be preferable to include the proposed words.

25. It was said that that interpretation had been strengthened by the fact that the requirement that the interim measure be connected to the subject matter of the dispute (as contained in the original version of article 17 of the Arbitration Model Law) had been deleted from draft article 17 at a previous session. It was noted that the requirement that interim measures should be linked to the subject matter of the dispute also appeared in article 26 of the UNCITRAL Arbitration Rules and had been understood in some jurisdictions as limiting the availability of anti-suit injunctions.

26. After discussion, the Working Group agreed to retain the bracketed words at the end of paragraph (2) (b) and to delete the brackets, so that paragraph (2) (b) would, in substance, read: "Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process itself".

Subparagraph (c)

27. The Working Group adopted the substance of subparagraph (c) without modification.

Subparagraph (d)

28. It was proposed that subparagraph (d) be deleted. It was said that the reference to evidence that "may be relevant and material" was too broadly cast and could open the

floodgates of legal arguments relating to whether a matter was relevant but not material or material but not relevant. As well, it was suggested that the question of evidence was already covered by article 19 (2) of the Arbitration Model Law, which provided that the power conferred upon the arbitral tribunal included a power to determine the admissibility, relevance, materiality and weight of any evidence. It was said that the arbitral tribunal should not be requested to prejudge the relevance and materiality of evidence at the stage of a granting of an interim measure.

29. However, the Working Group observed that the phrase “relevant and material” was already included in the IBA Rules on the Taking of Evidence in International Commercial Arbitration (adopted by resolution of the IBA Council, June 1999), which had been the product of much debate. It was noted that the phrase had taken on a meaning such that the term “relevant” required that the evidence be connected to the dispute and the term “material” referred to the significance of the evidence. In support of its retention, it was said that the phrase was commonly used and understood in international arbitration.

30. It was said that subparagraph (d) did not in any way diminish the power contained in article 19 (2) in the Arbitration Model Law but rather dealt with different issues. While article 19 (2) dealt with the power of an arbitral tribunal to assess the admissibility and value of evidence, subparagraph (d) dealt with the right of an arbitral tribunal at an earlier stage to grant an order to preserve evidence.

31. After discussion, the Working Group agreed to retain the text of subparagraph (d) unchanged.

Paragraph (3)

Chapeau—interplay with paragraph (2) (d)

32. A proposal was made that the general requirements contained in paragraph (3) should not apply to all types of interim measures described in paragraph (2). For example, it was said that it would not be appropriate in all circumstances that a party applying for an interim measure to preserve evidence under subparagraph (d) necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered or to require the requesting party to otherwise meet the very high threshold established in paragraph (3) (A/CN.9/547, para. 91). For that reason, a proposal was made to add, as opening words to paragraph (3), the words: “Except with respect to the measure referred to in subparagraph (d) of paragraph (2),”. Support was expressed for that proposal for the reason that the preservation of evidence should not be subject to the tests contained in paragraph (3). An alternative proposal was to phrase the chapeau of paragraph (3) in an affirmative form, so that it would read as follows: “The party requesting the interim measure of protection under subparagraphs (2) (a), (b) and (c) shall satisfy the arbitral tribunal that:”. That proposal was agreed to in substance by the Working Group.

33. It was suggested that explanatory material accompanying article 17 could indicate that the fact that the type of measure contained in subparagraph (d) was not subject to paragraph (3) did not mean that an arbitral tribunal would not examine and weigh the circumstances in determining the appropriateness of ordering the measure.

34. An arbitral tribunal having to decide on the granting of an interim measure to preserve evidence would likely engage in balancing the degree of harm suffered by the applicant if the interim measure was not granted with the degree of harm suffered by the party opposing the measure if that measure was granted. It was generally felt by the Working Group that that matter should be dealt with in article 17, instead of being left to explanatory material accompanying article 17. Therefore, it was proposed to add a new

paragraph, after paragraph (3) providing as follows: “With regard to requests for interim measures of protection under paragraph (2) (d), the requirements in paragraphs (3) (a) and (3) (b) shall apply only to the extent the arbitral tribunal considers appropriate.” That proposal was agreed to, in substance, by the Working Group.

35. It was pointed out that the granting of interim measures to preserve evidence might have a negative effect, and the conditions defined under paragraph (3) (b) should nevertheless apply in relation to the granting of an interim measure of protection on the preservation of evidence. An alternative proposal was to add the proposed opening words “Except with respect to the measure referred to in subparagraph (d) of paragraph (2),” in paragraph (3) (a) instead of adding these words in the chapeau. That proposal did not receive support.

Subparagraph (a)

36. The Working Group recalled that, at its fortieth session, concern had been expressed that subparagraph (a) could be narrowly interpreted as excluding from the field of interim measures any loss that might be cured by an award of damages.

37. The Working Group agreed to retain the word “adequately” and to clarify, in any explanatory material accompanying paragraph (3), that the paragraph should be interpreted in a flexible manner requiring a balancing of the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.

38. Taking account of these views, the Working Group agreed to retain the substance of subparagraph (a) without modification.

Subparagraph (b)

39. Concern was expressed that subparagraph (b) did not sufficiently guard against the danger or the perception that an arbitral tribunal might prejudge the merits of the dispute at the stage of granting an interim measure. In order to address that concern, various proposals were made.

40. A proposal was made to delete the words “provided that” and express the two limbs as two separate sentences. An alternative proposal was to replace the words “provided that” with the word “but” in order to clarify that a determination as to the possible success on the merits of the requesting party should not be considered as a condition for the granting of an interim measure but rather as a conclusion in respect thereof. Those proposals were not widely supported.

41. Yet another proposal was to clarify that the words “any subsequent determination” related to a determination on the merits and therefore to replace the words “any subsequent determination” by words along the following lines: “determination as to the merits”.

42. However, it was pointed out that the words “any subsequent determination” did not only refer to an award as to the merits but also a procedural order. After discussion, it was agreed to retain subparagraph (b) as drafted.

Paragraph (4)

43. The substance of paragraph (4) was adopted without modification.

Paragraph (5)

44. A proposal was made to add as opening words to paragraph (5): “If so ordered by the arbitral tribunal” for the reason that, given the divergent rules in civil and common law systems with respect to the duty of disclosure, it would be unwise to provide for a general rule on that question. That proposal was not supported and the Working Group adopted the substance of paragraph (5) without modification.

Paragraph (6)

45. Taking account of its earlier related discussions under paragraph (1) (see above, paras. 13 to 17), the Working Group agreed that “suspension” or “termination” while possibly encompassed by the term “modification” were special types of modification and thus should be expressly mentioned.

46. In the interests of clarity, it was proposed that paragraph (6) be restructured as follows: “The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time: (a) upon application of any party; or (b) in exceptional circumstances, on the arbitral tribunal’s own initiative, upon prior notice to the parties.” That proposal was adopted by the Working Group.

Paragraph (6 bis)

47. It was pointed out that, as drafted, the text did not appear to envisage liability in the situation where the requirements for the granting of the interim measure had been met but the measure was ultimately found to be unjustified. It was proposed that the words “the interim measure should not have been granted” be replaced by the words “the interim measure was unjustified”. That proposal was objected to on the ground that it might be seen as inviting discussion about whether or not the arbitral tribunal had been justified in granting the interim measure and potentially creating liability for the arbitral tribunal itself. After discussion, the proposal was not adopted.

48. Another proposal was made to replace the words “order an award of” in the second sentence of paragraph (6 bis) with the words “award” so that it would be clear that the action was an award not an order. The sentence would read: “The arbitral tribunal may award costs and damages at any point during the proceedings”. It was said that, in order to permit a challenge of a decision of an arbitral tribunal regarding costs and damages it should be made clear that such a decision should be rendered in the form of an award. That proposal was adopted.

Paragraph (7)**General discussion**

49. The Working Group recalled that, at its forty-first (Vienna, 13-17 September 2004), and forty-second (New York, 10-14 January 2005) sessions, it undertook a detailed review of the text of paragraph (7) of draft article 17 regarding the power of an arbitral tribunal to grant protective measures on an ex parte basis. The Working Group also recalled that, notwithstanding a wide divergence of views, it had reached agreement upon a compromise text of paragraph (7) (referred to as “the compromise”) on the basis of the principles that, that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added (A/CN.9/573, para. 27). That compromise was reflected in the

note by the Secretariat (A/CN.9/WG.II/WP.138, para. 5) (referred to as “the compromise text”).

50. The Working Group observed that, at its thirty-eighth session, the Commission had noted that the issue of *ex parte* interim measures remained contentious. While some delegations had expressed the hope that the compromise text reached was the final one, other delegations had expressed doubts as to the value of that compromise, in particular in view of the fact that it did not provide for enforcement of preliminary orders (A/60/17, para. 175).

51. Repeating a proposal that had been made at that session, it was suggested that paragraph (7) be redrafted in the form of an opt-in provision, applying only where the parties had expressly agreed to its application (A/60/17, para. 175). Another proposal was to place the provision on preliminary orders, including any aspect of an enforcement regime applicable to those measures, in a separate article to draft article 17. It was said that that proposal would also facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176). In addition to the proposals made at the Commission, it was suggested that paragraph (7) be optional for States, for example, providing for an opt-in mechanism modelled on article X as appended to article 4 of the UNCITRAL Model Law on Conciliation (A/CN.9/WG.II/WP.138, para. 68).

52. Some delegations urged the Working Group to reconsider whether it was still appropriate to retain the compromise text. It was said that there remained strong and enduring opposing views on the notion of interim measures being granted on an *ex parte* basis and that the Working Group should be careful not to create a controversy in the Commission on that matter, which might be harmful to the reputation of the Arbitration Model Law and that of UNCITRAL. It was also felt that the compromise text might create potential disharmony or confusion for countries having adopted or wishing to adopt the Arbitration Model Law. It was also stated that key bodies, active in the field of arbitration, had voiced concerns on the compromise text.

53. The largest number of delegations who spoke expressed strong opposition to any proposal which sought to revisit and reopen discussion on the compromise text. It was recalled that the compromise text was the result of lengthy discussions, and of significant efforts from both those opposing and those supporting *ex parte* measures. It was observed that the compromise text represented an innovative approach and provided carefully drafted safeguards, including limiting the availability and duration of measures granted under paragraph (7) which were characterized as preliminary orders rather than as interim measures granted on an *ex parte* basis. It was said that the doubts and concerns expressed at the Commission, as well as the proposals made at that session reflected debate that had already taken place in the Working Group, but did not raise any new developments or compelling reasons to revisit the compromise.

54. In response to the suggestion that that provision be presented as an “opt-in” provision for States, it was said that it would be unnecessary given that the very nature of a model law provided States with the freedom to adopt certain provisions or not and that such an opt-in format had been discussed and rejected in reaching the compromise.

55. Following a lengthy discussion, the Working Group agreed that the compromise should be retained without modification. The Working Group also agreed that questions relating to the placement of paragraph (7) and the overall structure of draft article 17 would be further considered in the context of the discussion regarding the form in which the revised provisions (comprising draft articles 17, 17 bis and 17 ter) could be presented in the Arbitration Model Law. In determining the final structure of draft article 17 and the

placement of paragraph (7), it was suggested that the Working Group keep in mind that the terms “interim measures” and “preliminary orders” represented different legal concepts, and, therefore, it would be advisable to place the provisions dealing with those concepts in separate articles. On the other hand, it was said by some delegations that the provisions regarding preliminary orders should not be separated from the rest of draft article 17 in a way that made them a target for deletion.

Subparagraph (a)

56. To reflect the principle contained in the compromise text that a preliminary order could only be issued as a procedural order and not as an award, a proposal was made that subparagraph (a) should expressly clarify that a preliminary order could only be issued in the form of a procedural order. It was suggested that wording along the lines of “in the form of a procedural order” should be inserted in subparagraph (a). It was said that that clarification would distinguish preliminary orders from interim measures, which, according to draft article 17 (2), could be issued in the form of an award or in another form (eventually inserted in subparagraph (c) by the drafting group: see Annex).

57. It was recalled that the Working Group, at its thirty-second session, already pointed out that the distinction between a procedural order and an interim measure was not only a matter of form but also a matter of substance, since it was said by some that procedural decisions were not enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) or article 36 of the Arbitration Model Law, and that it was difficult to rule on procedural matters (A/CN.9/573, para. 36). Also, it was pointed out that the meaning of “procedural” was often disputed and therefore the use of that term should be avoided. After discussion, the Working Group agreed that, to avoid any uncertainty regarding the scope and nature of procedural orders, subparagraph (a) should indicate that a preliminary order should not be issued in the form of an award.

Subparagraph (b)

58. The Working Group adopted the substance of subparagraph (b) without modification.

Subparagraph (c)

59. The Working Group noted that, as presently drafted, subparagraph (c) appeared to duplicate the test that the interim measure would be frustrated. To address that concern, a proposal was made to amend subparagraph (c) along the following lines: “The arbitral tribunal may grant a preliminary order provided it considers that there is a reasonable concern that the purpose of the requested interim measure will be frustrated by prior disclosure of the interim measure to the party against whom it is directed.” That proposal did not receive support. Another proposal was made to redraft subparagraph (c) to remove the words: “that there is a reasonable concern that the purpose of the requested interim measure will be frustrated where” such that subparagraph (c) would then read: “The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.” After discussion, that proposal was adopted by the Working Group.

Subparagraph (d)

60. The Working Group adopted the substance of subparagraph (d) without modification.

Subparagraph (e)

“at the same time”

61. A proposal was made to delete the words “at the same time” for the reason that the formulation appeared to be redundant in light of the words “at the earliest practicable time,” at the end of the first sentence in subparagraph (e). In response, the Working Group was reminded that, when this provision had been discussed at its forty-second session, a distinction had been made between the obligation of the arbitral tribunal to decide on the preliminary order as promptly as required under the circumstances and the obligation of the party against whom the preliminary order was directed to present its case at the earliest practicable time (A/CN.9/573, para. 48). After discussion, the Working Group agreed to retain the words “at the same time”.

“any party”—“a preliminary order”

62. For the sake of consistency with subparagraph (d), which referred to “any party”, it was proposed that the reference in the first sentence to “the party” should be changed to “any party”. Also, given that subparagraph (d) envisaged that an arbitral tribunal might not have granted the preliminary order, it was proposed that the reference to “the preliminary order” be changed to refer to “a preliminary order”. Both proposals were agreed to by the Working Group.

“The arbitral tribunal shall decide as promptly as required under the circumstances”

63. It was noted that, as drafted, subparagraph (e) was ambiguous in that it was not clear, in the second sentence, to what decision the words “the arbitral tribunal shall decide as promptly as required under the circumstances” referred. It was widely felt that that matter ought to be clarified. The view was expressed that that sentence was intended to refer to the decision of the arbitral tribunal to adopt or modify the preliminary order after the party against whom it is directed had been given notice and an opportunity to be heard, as provided for under subparagraph (f). Consistent with that view, it was proposed to either include in the second sentence of subparagraph (e) a reference to subparagraph (f) or to merge the second sentence of subparagraph (e) with the second sentence of subparagraph (f). Those proposals did not receive support.

64. The prevailing view was that the words “the arbitral tribunal shall decide as promptly as required under the circumstances” was intended to refer to the decision to be made by the arbitral tribunal in response to any objection that might be raised by the party affected by the preliminary order. In accordance with that view, it was suggested that the second sentence of subparagraph (e) should be expanded in a separate subparagraph and reworded as follows: “The arbitral tribunal shall decide on any objection to the preliminary order as promptly as required under the circumstances.”

65. It was pointed out that the drafting of that proposed new subparagraph could be simplified by removing the words “as promptly as required under the circumstances” as, in any case, a decision on a preliminary order ought to be prompt, as shown by the time limit of twenty days for the validity of a preliminary order provided under the existing subparagraph (f). The Working Group adopted the following text as a new subparagraph: “The arbitral tribunal shall decide promptly on any objection to the preliminary order.”

Multi-party arbitration

66. It was suggested that paragraph (7) appeared to contemplate only situations where there were two parties to the arbitration proceedings and thus did not accommodate multi-party arbitrations. For that reason, it was proposed that, for example, in subparagraph (a), the reference to “the other party” could be changed to “any other party”. As well, it was pointed out that the communication of information as contemplated under subparagraph (d) only referred to the party against whom the preliminary order was requested. It was pointed out that, in the case of multi-party arbitrations, all parties might have an interest in receiving such information. Similarly, it was said that subparagraph (e) only provided the party against whom the measure was requested the opportunity to be heard and thus did not accommodate multi-party situations. It was suggested that the drafting pattern followed by the text of the Arbitration Model Law, as adopted in 1985, appeared to refer to two-party arbitrations, leaving the question of multi-party arbitrations to the enacting jurisdictions to decide upon. It was suggested that the issues raised by multi-party arbitrations might need to be resolved uniformly in the text of the Arbitration Model Law as a whole and not just in provisions relating to interim measures.

67. While the Working Group agreed that an arbitral tribunal had no jurisdiction to bind parties that were not party to the arbitration agreement, it noted that that matter was of particular importance in the context of granting of preliminary orders. It was highlighted that there had been developments, for example, in a case involving investment arbitration where standing had been given to third parties that might be affected by a decision of the arbitral tribunal. The Working Group agreed that these matters could be considered as items for future work of the Working Group.

Subparagraph (f)

68. The Working Group adopted the substance of subparagraph (f) without modification.

Subparagraph (g)

“shall”—“may”

69. In response to a question as to whether the rules contained in paragraph (4) and subparagraph (g) led to different results in practice, it was explained that there was a difference of emphasis between paragraph (4) and subparagraph (g). Whereas subparagraph (g) provided that the arbitral tribunal “shall” require the provision of security, paragraph (4) provided that the arbitral tribunal “may” require the provision of security. To explain that difference, it was recalled that the Working Group had, in earlier discussions, concluded that the provision of security should be a mandatory requirement, and was an important safeguard, to the granting of a preliminary order (A/CN.9/569, para. 35). It was recalled as well that the Working Group agreed to add discretionary language to subparagraph (g), namely “unless the arbitral tribunal considers it inappropriate to do so” in order to address the concern that, in some circumstances, requiring security in connection with the granting of a preliminary order would not be feasible (A/CN.9/569, paras. 36 and 37). While it was widely recognized that in practice the two rules might produce largely similar results, it was agreed that the two provisions should be maintained.

“any other party”

70. It was noted that, whereas paragraph (4) of draft article 17 referred to the arbitral tribunal requiring the requesting party “or any other party” to provide appropriate security, subparagraph (g) merely referred to “the requesting party”. It was suggested that the words “or any other party” be included following the words “requesting party” in subparagraph (g) to cover situations where it would be appropriate to seek security from a party other than the requesting party, for example, where the requesting party had no funds, was a shell company or was insured. After discussion, that proposal was withdrawn as it was agreed that a decision of the arbitral tribunal could only bind the requesting party regardless of whether a third party, such as a bank or an insurance company, provided that security on behalf of the requesting party.

Subparagraph (h)

Interplay between paragraph (5) and subparagraph (h)

71. The view was expressed that paragraph (5) and subparagraph (h) contained overlapping obligations and that, therefore, subparagraph (h) might be redundant. In response, it was observed that subparagraph (h) established a broad obligation requiring disclosure of all circumstances that the arbitral tribunal was likely to find relevant to its determination, whether or not related to the application, whereas paragraph (5) only referred to any material change in the circumstances on the basis of which the request was made or the interim measure was granted. In addition, it was said that, while paragraph (5) as incorporated by paragraph (7) (b) addressed any material change in the circumstances after the interim measure had been granted, subparagraph (h) provided a broader duty of disclosure that applied from the time the preliminary order was sought until the responding party had presented its case. Given the different purpose and scope of these provisions, the Working Group agreed that subparagraph (h) should be retained to ensure that the requesting party was obliged to provide full disclosure until the other party had been heard (A/CN.9/569, para. 68).

72. It was observed that there appeared to be a lack of clarity concerning the obligation to disclose in that the obligation under subparagraph (h) was described as only applying until the party against whom the preliminary order had been requested had presented its case without stating when the obligation began. As well, it was said that subparagraph (h) did not contemplate the situation where the party against whom the preliminary order was requested was a non-participating party.

73. In order to address those concerns, a proposal was made to amend subparagraph (h) as follows: “Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal in reaching its determination whether to grant a preliminary order and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case.” It was said that the proposal did not intend to effect any substantive change in the purpose and scope of subparagraph (h) and paragraph (5) but was intended merely to determine precisely the time when the disclosure obligation in relation to a preliminary order began and ended. As well, the proposal acknowledged the reality that, in certain circumstances, a party might choose not to present its case, and for that reason it would be more appropriate to refer to that party being given an opportunity to present its case. A further proposal was made to include the word “or maintain” after the word “grant”.

74. It was suggested that, to better address the uncertainties raised by the interaction between paragraph (5) and subparagraph (h), the following text could be added to the end

of the proposal: “Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that the requesting party has with respect to an interim measure under paragraph (5).” It was explained that the term “applying party” had been used in the proposal to be consistent with the fact that the draft provisions referred to an “application” for a preliminary order but referred to a “request” in relation to an interim measure. It was suggested that a consequential amendment flowing from that proposal would be the deletion of the reference to paragraph (5) in paragraph (7) (b).

75. Those proposals were accepted in substance. Subparagraph (h) would therefore read as follows: “Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal in reaching its determination whether to grant or maintain a preliminary order and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that the requesting party has with respect to an interim measure under paragraph (5).”

IV. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)

Paragraph (1)

76. It was proposed that, having regard to the language used in article 36 (1)(a)(v) of the Arbitration Model Law, paragraph (1) should indicate that an interim measure granted by an arbitral tribunal was binding upon the parties only and the words “on the parties” should therefore be inserted after the term “binding”. However, it was pointed out that paragraph (1) of article 17 bis was drafted so as to be consistent with article 35 (1) of the Arbitration Model Law, which did not include any reference to the parties. For that reason, it was agreed that that proposal should not be adopted. The Working Group adopted the substance of paragraph (1) without modification.

Interplay between paragraph 1 and articles 35 and 36

77. A proposal was made to expressly clarify the relationship between the enforcement regime created by article 17 bis and that set out in articles 35 and 36 of the Arbitration Model Law. Diverging views were expressed on the question whether the regime of enforcement under chapter VIII of the Arbitration Model Law could still apply in the context of recognition and enforcement of an interim measure granted by an arbitral tribunal in the form of an award.

78. A view was that, despite the fact that article 17 bis was designed specifically as a regime for recognition and enforcement of interim measures, an award that included an interim measure could nevertheless be subject to enforcement subject to the grounds in articles 35 and 36. It was said that the question whether interim measures granted in the form of an award were included in the scope of the New York Convention had been the subject of diverging opinions in different jurisdictions. Another view was that the form in which an interim measure was issued did not affect its nature and irrespective as to the form, in the area of recognition and enforcement, it would still be considered to be an interim measure to which article 17 bis applied.

79. It was said that the recognition and enforcement regime of interim measures set out in article 17 bis was autonomous but that it might be necessary to expressly exclude the application of articles 35 and 36 to avoid confusion by users. To address that matter, a proposal was made to add, at the end of paragraph (1), the following words: “and excluding the application of articles 35 and 36”. It was said that, if that proposal were to be adopted, the provision contained under article 35 (2) should be expressly included under article 17 bis. Some support was expressed for that proposal on the basis that it clarified the understanding that article 17 bis applied to interim measures to the exclusion of chapter VIII. However, it was said that articles 35 and 36 dealt with recognition and enforcement of awards whereas article 17 bis dealt expressly with recognition and enforcement of interim measures and adding the proposed words might create further ambiguity. The Working Group agreed not to adopt that proposal but noted that the question it raised might need to be further considered at a later stage.

Paragraph (2)

Subparagraph (a)

Chapeau

80. For the sake of consistency with article 36 (1), a proposal was made to replace the chapeau of paragraph (2) by the following words: “Recognition and enforcement of an interim measure may be refused only:”. That proposal was adopted in substance.

Subparagraph (a)(i)

81. The Working Group adopted the substance of subparagraph (a)(i) without modification.

Subparagraph (a)(ii)

82. The Working Group adopted the substance of subparagraph (a)(ii) without modification.

Subparagraph (a)(iii)

83. It was proposed to delete the words “where so empowered” for the reason that it introduced an element that was self-evident and might give the impression that State courts were empowered to review an interim measure *de novo*. However, that proposal did not receive support as it was considered necessary to retain those words, which limited the possibility of intervention of State courts to situations where they were specifically empowered to revise an interim measure issued by the arbitral tribunal.

84. A proposal was made to delete the words “or where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted”. In support of that proposal, it was said that, in the absence of a specific treaty between States, there might be no legal basis for a State court to refuse to recognize an interim measure of protection issued by an arbitral tribunal, which had been terminated or suspended, by the court of another State. That proposal did not receive support.

“modified, terminated or suspended”

85. A proposal was made to add the word “modified” after the word “suspended” for the sake of consistency with the language used under paragraph (4). That proposal did not

receive support for the reason that, once an arbitral tribunal had modified an interim measure, the original measure was terminated expressly or impliedly and could no longer be recognized and enforced. However, the Working Group agreed that any explanatory material accompanying article 17 bis should clarify that the enforcement regime set out in article 17 bis applied in respect of any interim measure, whether or not it was modified by the arbitral tribunal.

Subparagraph (b)

Subparagraph (b)(i)

86. The Working Group adopted the substance of subparagraph (b)(i) without modification.

Subparagraph (b)(ii)

87. The Working Group adopted the substance of subparagraph (b)(ii) without modification.

Paragraph (3)

88. A proposal was made to replace the phrase “in exercising that power” with words along the following lines: “in making its determination”, so as to be consistent with the language used earlier in that paragraph which referred to “any determination made by the court”. That proposal was adopted in substance.

Paragraph (4)

89. The Working Group adopted the substance of paragraph (4) without modification.

Paragraph (5)

90. It was proposed that the conditions to be satisfied in relation to a request for security set out in paragraph (5) be cumulative rather than alternative conditions by replacing “, or” when appearing after the word “security” by the word “and”. That proposal was not adopted and the Working Group recalled that it was intended that satisfaction of either of these conditions would permit a request for security.

91. For the sake of consistency with paragraph (4) of draft article 17, which provided that an arbitral tribunal might require not only the requesting party but also any other party to provide security, it was suggested that the words “or any other party” should be added after the words “requesting party” in paragraph (5). That proposal was withdrawn for the reasons set out above in paragraph 70.

Paragraph (6)

92. It was suggested that paragraph (6) could be shortened to reflect the principle, which it was recalled had been agreed as an integral part of the compromise text, that a preliminary order was not enforceable by a State court rather than referring to an interim measure that was issued under standards substantially equivalent to those set forth in paragraph (7). Alternatively, it was proposed that paragraph (6) should simply provide that article 17 bis only applied to interim measures made by an arbitral tribunal under paragraphs (1) to (6) of draft article 17. It was said that that approach respected the principle that preliminary orders would be binding as between the parties and also did not exclude the application of other enforcement regimes to preliminary orders. Yet another

approach suggested that inclusion of a statement that preliminary orders were not enforceable sat uncomfortably in article 17 bis, which dealt with recognition and enforcement of interim measures. For that reason it was suggested that that matter be addressed under a new subparagraph to be inserted in paragraph (7) of draft article 17. In addition, it was suggested that in order to deal with an interim measure issued on an ex parte basis which a party sought to enforce in a State that had enacted the Model Law as revised, a new paragraph could be added at the end of article 17 bis along the following lines: “interim measures issued on an ex parte basis will not be enforced”.

93. A proposal was made to delete paragraph (6) from article 17 bis and add a new paragraph following paragraph (7) of draft article 17 along the following lines: “a preliminary order made under article 17 (7) shall be binding on the parties but shall not be subject to enforcement by a court”. It was suggested that that formulation had the benefit of recognizing that a preliminary order would not be enforceable whether on the basis of the Arbitration Model Law or on any other grounds and avoided the use of the word “unenforceable”, which had a further connotation that might undermine the concept of “binding”.

94. Various comments of a drafting nature were made on that proposal. It was suggested that the reference to “a court” be changed to “any court” so as to encompass a preliminary order whether made by an arbitral tribunal in the jurisdiction of the court in which enforcement was sought or in any other jurisdiction. In response, it was said that such a provision could potentially give rise to complex private international law issues and might, in practice, have a very limited effect. Another comment was that the use of the phrase “shall not be subject to enforcement by a court” might have a different meaning from the use of the phrase “shall not be enforceable”, namely that that amendment could be interpreted as meaning that the parties had the obligation not to seek enforcement of the preliminary order, but that the preliminary order, of its nature, remained enforceable. It was pointed out that the non-enforceability of preliminary measures was a central feature of the compromise that should be maintained.

95. Concerns were raised that, as drafted, the provision exceeded the competence of the Arbitration Model Law, in that it sought to rule on procedural matters pertaining to State courts and it was said that it was unlikely that the jurisdiction of State courts could be impacted upon by paragraph (6). It was suggested that a better approach would be simply to omit paragraph (6) altogether, which would still have the effect that the preliminary order was not enforceable. A number of delegations stated that this was their preferred solution but that, in the interests of consensus and joint position of all members of the Working Group, they were prepared to accept wording in draft article 17 (7) or article 17 bis (6) by which enforcement of a preliminary order was expressly excluded. It was observed that there was evidence that parties to arbitration agreements were often reluctant to disobey orders of the arbitral tribunal and that there were a series of practical problems in drafting enforcement provisions for a preliminary order, which was expected, in practice, to have a very short lifespan that, in any event, could not exceed 20 days. An alternative proposal was made to include under article 17 bis a provision clarifying that “the provisions of this article are not applicable to preliminary orders issued in accordance with paragraph (7) of article 17”. It was said that inclusion of that express language under article 17 bis remained important for the sake of clarity. The Working Group took note of that suggestion.

96. After discussion, the Working Group agreed to delete paragraph (6) from article 17 bis and add a new paragraph following paragraph (7) of draft article 17 along the following lines: “a preliminary order made under article 17 (7) shall be binding on the parties but shall not be subject to enforcement by a court”.

Footnote to article 17 bis

97. The footnote was adopted, in substance, by the Working Group.

V. Draft provision on court-ordered interim measures in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter)

98. The Working Group recalled that there had been an exchange of views, at its forty-second session, on a possible draft provision expressing the power of State courts to order interim measures of protection in support of arbitration (tentatively numbered article 17 ter). The Working Group resumed discussions on draft article 17, on the basis of the text contained in A/CN.9/WG.II/WP.138.

99. A concern was expressed that the text, as drafted, only empowered a State court to issue an interim measure in support of arbitration if that State court was situated in the same jurisdiction as the place of arbitration. It was said that article 17 ter should be broadened to encompass the situation where a State court was asked to order an interim measure in respect of an arbitration that took place in another jurisdiction. It was stated that it was important from a practical point of view to broaden article 17 ter to clarify that an interim measure could be granted by a State court in a jurisdiction other than that of the place of the arbitration. It was noted that it was a feature of modern practice in international arbitration to seek to secure assets, follow a vessel, preserve evidence, or ask for actions to be taken in a different jurisdiction from that where the arbitration took place.

100. In order to address that concern, a proposal was made to amend article 17 ter by adding the words: “taking place in the country of the court or in another country” after the words “arbitration proceedings”. That proposal received support.

101. It was noted that article 1, paragraph (2), of the Arbitration Model Law provided that: “The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.” It was further noted that, given the intention that article 17 ter should apply to arbitrations occurring in a jurisdiction different to that of the State court, article 17 ter should be added to the list contained under article 1, paragraph (2). However, it was pointed out that article (1), paragraph (2), of the Arbitration Model Law defined the scope of the Arbitration Model Law and the Working Group had not been specifically requested by the Commission to work on revisions of that part of the Arbitration Model Law. It was suggested that consistency between article 17 ter and article 1, paragraph (2), of the Arbitration Model Law could still be achieved by adding to the opening words of article 17 ter the following words: “Notwithstanding article 1, paragraph (2)”. That proposal was supported.

102. After discussion, the Working Group agreed to adopt, in substance, the following revised version of article 17 ter: “The court shall have the same power of issuing interim measures of protection for the purposes of and in relation to arbitration proceedings taking place in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts, and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration. This article shall apply notwithstanding the provisions of article 1, paragraph (2).”

103. A view was expressed that article 17 bis might not fully address the potential problems which might arise with respect to the relationship between the power of State courts to issue interim measures and the power of arbitral tribunals to issue interim orders. It was said that it was unclear whether these powers were coextensive or the exercise of the State court power overrode the power of the arbitral tribunal. That uncertainty could allow parties to defeat the power of arbitral tribunals to issue interim measures by seeking such measures from the State courts. It was suggested that to better delineate the interaction of these powers, article 17 ter could provide that a State court could only act in circumstances where, and to the extent that, the arbitral tribunal did not have the power to so act or was unable to act effectively, for example, if an interim measure was needed to bind a third party or the arbitral tribunal was not yet constituted or the arbitral tribunal had only made a preliminary order. The principle upon which that proposal was based received some support but it was agreed that that proposal had far-reaching legal and practical implications and raised complex issues that the Working Group might wish to consider at a later stage.

VI. Possible options on the issue of the form in which the current and revised provisions could be presented in the UNCITRAL Model Law on International Commercial Arbitration

104. At its forty-second session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions on interim measures could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/573, para. 99).

105. The Working Group agreed that the provisions of articles 17, 17 bis and 17 ter be placed in a new chapter, numbered chapter IV bis. Diverging views were expressed on whether the title of that new chapter should refer to “interim measures” only or include as well the words “preliminary orders”.

106. It was suggested that paragraph (7) of draft article 17 on preliminary orders be dealt with in a separate article. Another suggestion was that draft articles 17 and 17 bis should be restructured by grouping paragraphs relating to similar issues under separate articles. It was said that the advantage of that presentation would be that the drafting style of the Arbitration Model Law could thereby be preserved and it would allow for a more logical presentation of the provisions. Cautioning that restructuring of these provisions could prove to be a time-consuming exercise, the Working Group requested the Secretariat to prepare a revised draft of articles 17 and 17 bis taking account of these comments and agreed to consider that presentation at its next session.

VII. Report of the drafting group

107. The Working Group having completed its deliberations regarding draft articles 17, 17 bis and 17 ter, a drafting group was established by the Secretariat to implement decisions by the Working Group and ensured consistency between the various language versions of the text. The report of the drafting group, as adopted by the Working Group is annexed to this report.

VIII. Preparation of a model legislative provision on written form for the arbitration agreement

108. The Working Group recalled that it had considered, at its thirty-sixth session (New York, 4-8 March 2002), a draft model legislative provision revising article 7 of the Arbitration Model Law and had discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention. The Working Group agreed to resume discussions with respect to the preparation of that draft legislative provision and had before it a text prepared by the Secretariat on the basis of the discussions in the Working Group held at its thirty-sixth session (A/CN.9/508, paras. 18-39) (“the revised draft article 7”). The Working Group also considered a proposal by a delegation regarding that issue reproduced in A/CN.9/WG.II/WP.137, as modified by A/CN.9/WG.II/WP.137/Add.1 (“the proposed new text”).

109. The proposed new text suggested that the writing requirement for arbitration agreements be omitted from article 7 (2). It was said that, if the proposed new text were adopted, the question of the conclusion of the arbitration agreement and its content would be solely a matter of proof. It was suggested that the proposed new text established a more favourable regime for recognition and enforcement of arbitral awards than was provided for under the New York Convention. It was said that, therefore, by virtue of the “more favourable law provision” contained in article VII of the New York Convention, the Arbitration Model Law would apply instead of article II of the New York Convention. It was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, oral arbitration agreements were rarely used and had not given rise to significant disputes as to their validity.

110. While the proposed new text was considered useful to highlight the problems raised by the written form requirements, it was said that removal of the form requirement and of every reference to “writing” could create uncertainty. It was said that the revised draft article 7 reflected the Working Group’s understanding of the minimum requirements that should apply in respect of the form of an arbitration agreement, whereas the proposed new text went much further including recognition of the validity of oral arbitration agreements.

111. It was suggested that promoting or recognizing oral agreements too broadly could lead to the generation of awards that would not be capable of being recognized and enforced under the New York Convention for the reason that the arbitration agreement in respect of which the award was made would not fulfil the written form required under article II (2) of that Convention. Another argument was that article VII of the New York Convention expressly referred to “arbitral awards” and, therefore, it was uncertain whether article VII would universally be interpreted as applying in respect of arbitration agreements. It was also suggested that retention of a very flexible type of form requirement mirrored similar provisions that existed in respect of litigation, for example, article 3 (c) of the Convention on Choice of Court Agreements (adopted 30 June 2005) which provided that “an exclusive choice of court agreement is required to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference”. As well, it was recalled that the Commission had recently agreed to include the New York Convention in a list of international instruments to which the Convention on the Use of Electronic Communications in International Contracting would apply.

112. Views were expressed that both the proposed new text and the revised draft article 7 provided useful options to address concerns relating to the writing requirement. It was suggested that both options might be presented to the Commission as alternative variants.

However, it was said that, since both alternatives had the same function to relax the form requirements, it might be possible to reconcile them. One way to achieve that purpose was to amend paragraph (2) of the revised draft by restricting the form requirement to the question of proof rather than validity. That proposal was to include text along the following lines: “The arbitration agreement may be evidenced in writing”. Another proposal was made to amend the revised draft article 7 so that it reflected the wording used in the Convention on Choice of Court Agreements as set out above.

ANNEX

Report of the drafting group

Chapter IV bis. Interim measures and preliminary orders

Draft article 17

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

(3) The party requesting the interim measure under paragraphs (2) (a), (b) and (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(4) With regard to requests for interim measures under paragraph (2) (d), the requirements in paragraphs (3) (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

(5) The arbitral tribunal may require the requesting party to provide appropriate security in connection with such interim measure.

(6) The requesting party shall promptly disclose any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure.

(7) The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunals own initiative.

(8) The requesting party shall be liable for any costs and damages caused by the interim measure to the party against whom it is directed if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

(9) (a) Unless otherwise agreed by the parties, a party may file, without notice to any other party, a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested;

(b) The provisions of paragraphs (3), (4), (7) and (8) of this article relating to interim measures also apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph;

(c) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure. Such preliminary order does not constitute an award;

(d) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto;

(e) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time;

(f) The arbitral tribunal shall decide promptly on any objection to the preliminary order;

(g) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case;

(h) The arbitral tribunal shall require the applying party to provide security in connection with such preliminary order unless the arbitral tribunal considers it inappropriate or unnecessary to do so;

(i) Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunals determination whether to grant or maintain a preliminary order, and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (6);

(j) A preliminary order made under this paragraph shall be binding on the parties, but shall not be subject to enforcement by a court.

Draft article 17 bis

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.*

(2) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraphs (1) (b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

(4) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(5) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Draft article 17 ter

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are

* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

relevant to the specific features of an international arbitration. This article shall apply notwithstanding the provisions of article 1, paragraph (2).

**B. Note by the Secretariat on settlement of commercial disputes:
preparation of a model legislative provision on written form
for the arbitration agreement, submitted to the Working Group
on Arbitration at its forty-third session**

(A/CN.9/WG.II/WP.136) [Original: English]

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Introduction

1. At its thirty-fifth session (New York, 17-28 June 2002), the Commission noted that the Working Group had considered, at its thirty-sixth session (New York, 4-8 March 2002), a draft model legislative provision revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and discussed a draft interpretative instrument regarding article II, paragraph (2), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ ("the New York Convention").² The Commission noted that the Working Group had not reached consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions regarding the requirement of written form for the arbitration agreement.

2. At its thirty-seventh session (New York, 14-25 June 2004), the Commission noted that the Working Group had yet to complete its work in relation to the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the Model Law and article II, paragraph (2), of the New York Convention.³ At its forty-second session (New York, 10-14 January 2005), the Working Group agreed that discussions on that matter would be resumed at its next two coming sessions, with a view to presenting a model legislative provision revising article 7 of the Model Law, for adoption by the Commission at its thirty-ninth session, in 2006 (A/CN.9/573, para. 98).

¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

² *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17 (A/57/17)*, para. 183.

³ *Ibid.*, *Fifty-ninth session, Supplement No. 17 (A/59/17)*, para. 59.

3. The present note has been prepared on the basis of the discussions in the Working Group held at its thirty-sixth session, with respect to the preparation of a model legislative provision on written form for the arbitration agreement, revising article 7 of the Model Law (A/CN.9/508, paras. 18-39).⁴

I. Draft text of model legislative provision on written form for the arbitration agreement, revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration

4. The Working Group may wish to use the following revised text as a basis for its deliberations:

“Article 7. Definition and form of the arbitration agreement

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

⁴ Previous discussions regarding that topic may be found in the following documents published by UNCITRAL:

- Report of the Commission on the work of its thirty-seventh session (New York, 14-25 June 2004): *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 17, A/59/17*, para. 59;
- Report of the Commission on the work of its thirty-fifth session (New York, 17-28 June 2002): *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17, A/57/17*, paras. 182-183;
- Report of Working Group on the work of its thirty-sixth session (New York, 4-8 March 2002): A/CN.9/508, paras. 18-39;
- Working paper: A/CN.9/WG.II/WP.118 (February 2002, paras. 8-24);
- Report of the Commission on the work of its thirty-fourth session (Vienna, 25 June-13 July 2001): *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 17, A/56/17*, paras. 312-313;
- Report of Working Group on the work of its thirty-fourth session (New York, 21 May-1 June 2001): A/CN.9/487, paras. 22-41;
- Working paper: A/CN.9/WG.II/WP.113 (March 2001);
- Report of Working Group on the work of its thirty-third session (Vienna, 20 November-1 December 2000): A/CN.9/485, paras. 21-59;
- Working paper: A/CN.9/WG.II/WP.110 (September 2000, paras. 10-26);
- Report of the Commission on the work of its thirty-third session (New York, 12 June-7 July 2000): *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 17, A/55/17*, paras. 389-399;
- Report of Working Group on the work of its thirty-second session (Vienna, 20-31 March 2000): A/CN.9/468, paras. 88-106;
- Working paper: A/CN.9/WG.II/WP.108/Add.1 (January 2000, paras. 1-40);
- Report of the Commission on the work of its thirty-second session (17 May-4 June 1999): *Official Records of the General Assembly, Fifty-fourth session, Supplement No. 17, A/54/17*, paras. 344-350;
- Note on possible future work in the area of international commercial arbitration: A/CN.9/460 (April 1999, paras. 20-31).

These documents may also be found on the UNCITRAL website (www.uncitral.org) under “Working Groups” and “Working Group on Arbitration”.

“(2) The arbitration agreement shall be in writing. ‘Writing’ means any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference.

“(3) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a writing containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing. In such a case, the writing containing the arbitration clause constitutes the arbitration agreement for the purposes of article 35.”

II. Remarks on the draft text of model legislative provision on written form for the arbitration agreement, revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration

Paragraph (1)

5. Paragraph (1) reproduces the unchanged text of article 7, paragraph (1), of the Model Law. The Working Group approved the substance of paragraph (1), noting that the provision itself was not controversial (A/CN.9/508, para. 20).

Paragraph (2)

6. Drafting comments were essentially concerned with refining the provision to make it unambiguously clear that arbitration agreements could be validly concluded by means other than in the form of paper-based documents, for example, by electronic communications (A/CN.9/508, para. 21). A prevailing view held in the Working Group was that it was important to combine the traditional notion of “record” with the newer concept of “data message” (as defined in article 2 (a) of the UNCITRAL Model Law on Electronic Commerce) in order to clarify that records other than traditional paper documents were included among the acceptable forms of recording an arbitration agreement (A/CN.9/508, para. 23).

7. The Working Group also agreed that it was necessary to retain the qualifying phrase, “accessible so as to be usable for subsequent reference” (inspired from article 6, paragraph (1), of the UNCITRAL Model Law on Electronic Commerce) in order to set out the conditions whereby any message, including data messages, might meet writing requirements established by the law (A/CN.9/508, para. 24).

8. Paragraph (2) has been redrafted along the lines agreed to by the Working Group (A/CN.9/508, para. 25).

Paragraph (3)

9. Given that the term “data message” is used in paragraph (2), the Working Group agreed to retain that definition (A/CN.9/508, para. 26), which reproduces article 2 (a) of the UNCITRAL Model Law on Electronic Commerce.

Paragraph (4) (formerly paragraph (5) of the draft model legislative provision contained in A/CN.9/508, para. 18)

10. The Working Group agreed to retain paragraph (4) notwithstanding some reservations that it appeared to be misleading and already covered by articles 4 and 16 (2) of the Model Law (A/CN.9/508, paras. 32 and 33). It was said that draft paragraph (4) was needed, since the narrow scope of article 4 of the Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence thereof, by virtue of the exchange of statements of claim and defence (A/CN.9/508, para. 34).

Paragraph (5) (formerly paragraph (6) of the draft model legislative provision contained in A/CN.9/508, para. 18)

11. It is recalled that one of the main purposes of a revision of article 7 of the Model Law is to recognize the formal validity of arbitration agreements that come into existence in certain factual situations as to which courts or commentators have differing views on whether the form requirement set forth in the current text of article 7, paragraph (2), of the Model Law was met. The Working Group agreed that a purely oral arbitration agreement should not be regarded as formally valid under the Model Law (A/CN.9/508, para. 27). However, it was also agreed that, as a matter of general policy, the reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement (ibid.). Examples were given of situations where such a reference in an oral contract to a set of arbitration rules should be accepted as expressing sufficiently the existence and contents of the arbitration agreement, particularly when the set of rules includes a model arbitration clause (ibid.). To accommodate the objection that the mere reference in an oral contract to a set of arbitration rules should not always be regarded as sufficient to meet the written form requirement, since a set of procedural rules should not be regarded, in and of itself, as equivalent to a contractual document containing an arbitration clause (ibid.), the Working Group agreed to the insertion of a proviso, the effect of which is to rely on domestic or other applicable law to determine whether the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

12. In that context, the Working Group agreed to delete paragraph (4) of the draft model legislative provision contained in A/CN.9/508, para. 18, and to redraft paragraph (5) so as to better reflect the above-mentioned general policy (A/CN.9/508, para. 31). It is recalled that the Working Group agreed to delete paragraph (7) of the draft model legislative provision contained in A/CN.9/508, para. 18, and, instead, include an extra sentence at the end of paragraph (5) in order to clarify that the writing referred to under paragraph (5), containing the arbitration clause, constitutes the arbitration agreement for the purposes of article 35 of the Model Law. It was stated as well that this sentence was consistent with the New York Convention (A/CN.9/508, para. 39).

A/CN.9/WG.II/WP.137**C. Settlement of commercial disputes: preparation of uniform provisions on written form for arbitration agreements, proposal by the Mexican delegation, submitted to the Working Group on Arbitration at its forty-third session**

(A/CN.9/WG.II/WP.137 and Add.1) [Original: Spanish]

Note by the Secretariat

In preparation for the forty-third session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to proceed with its review of a revised draft article 7 of the UNCITRAL Model Law on International Commercial Arbitration (see the report of the forty-second session, A/CN.9/573, para. 98), the Government of Mexico, on 15 February 2005, submitted the text of a proposed revised version of article 7 for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

ANNEX**Proposal by the Government of Mexico regarding written form for arbitration agreements, to be submitted to the UNCITRAL Working Group on Commercial Arbitration****I. Introduction**

- I.1. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) requires arbitration agreements to be in writing.
- I.2. Written form is required for a number of purposes:
 - (i) For the validity of the arbitration agreement (New York Convention, article II (1) and (2);
 - (ii) To request a court before which an action has been brought relating to a dispute forming the subject of an arbitration agreement to refer the parties to arbitration (New York Convention, article II(3)); and
 - (iii) To comply with the essential requirement that the arbitration agreement be supplied when application is made to a court or competent authority for recognition and enforcement of an award (New York Convention, article IV(1)).
- I.3. Articles 7, 8(1) and 35 of the UNCITRAL Model Law on International Commercial Arbitration (MAL) contain provisions similar to those of the New York Convention. They differ only in that the MAL gives a broader definition of what is meant by “in writing”.
- I.4. UNCITRAL has identified various contemporary practices that do not correspond to the literal definition of “writing” either in the New York Convention or in the MAL (see A/CN.9/WG.II/WP.108/Add.1)
- I.5. In addition to the above, the practice exists whereby arbitration agreements are concluded by electronic means.

I.6. Some courts have interpreted the New York Convention and the MAL flexibly, holding such cases that the written form requirement has been met. Others—apparently a minority—have ruled to the contrary.

I.7. UNCITRAL tasked the Working Group on Arbitration with examining the possibility of resolving the problems created by these practices, which give rise to uncertainty. The literal application of the New York Convention and the MAL may, because of a formality, frustrate the legitimate expectations of the parties.

I.8. The view prevailing within the Working Group is that it is not recommendable to make any amendment to the New York Convention, since this would create more problems than benefits:

- (i) Uncertainty would arise regarding agreements in which there is doubt as to whether the written form requirement has been met;
- (ii) It would take a great deal of time to incorporate the amendment and even longer for countries to ratify or accede to it (there are currently 134 parties to the New York Convention).

I.9. The Working Group prepared a draft declaration calling upon courts and authorities to interpret the New York Convention flexibly (A/CN.9/487, paragraph 63).

I.10. The Working Group drafted an amendment to article 7 of the MAL (A/CN.9/487, paragraphs 22-41).

I.11. However, there is a widely held view in the Working Group that neither draft is satisfactory. The interpretative declaration of the New York Convention is not considered to have binding force. As regards the MAL, some believe that the draft definition takes the written form into consideration, which it plainly does not.

I.12. The Working Group suspended its deliberations in order to complete the UNCITRAL Model Law on International Commercial Conciliation and the draft provisions relating to interim measures in arbitration. The Working Group is expected to re-examine the question of written form at its next session, provisionally scheduled for October 2005 in Vienna.

II. Reasons for the proposal

II.1. Arbitration is now more widely accepted than when the New York Convention and the MAL were negotiated. The written form requirement is for many a formality that is no longer justified. This formality may frustrate the legitimate expectations of the other parties. The form of the arbitration agreement is more restrictive than the freedom of form in commercial contracts; a contract involving a transaction worth a hundred million dollars may be concluded verbally, but the arbitration agreement relating to that contract must be in writing. There are some countries in which the arbitration agreement is no longer required to be in writing.⁵ In others, the definition is so broad that the requirement has practically disappeared.⁶

⁵ For example, in France, Belgium, Sweden, Switzerland, the Netherlands and Italy, the written form requirement has been dropped, since no formal requirement is established for the arbitration agreement.

⁶ For example, in England, “in writing” covers verbal agreements (see *Zambia Steel v. James Clark*, Court of Appeal [1986], 2 Lloyd’s Rep. 225, followed by *Abdullah M. Fahem v. Mareb*

II.2. Consequently, the Government of Mexico proposes that the written form requirement for arbitration agreements be omitted from the MAL. If this amendment were adopted, the question of the conclusion of the arbitration agreement and its content would become a problem of proof.

II.3. The problem of the legal validity of the arbitration agreement would disappear in countries adopting the amendment to the MAL. With regard to recognition and enforcement, since there would be no requirement to submit the arbitration agreement, by application of the principle of most favourable regime as provided for in article VII of the New York Convention the problem in that Convention would be resolved.

III. Proposal

A. Article 7. Definition of arbitration agreement⁷

It is proposed that the references to written form be omitted. The article would read as follows:

“An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. [An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.]”⁸

B. Article 35. Recognition and enforcement

It is proposed that article 35(2) be amended to omit the requirement to supply the arbitration agreement. The proposed text would read as follows:

“(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a certified copy thereof. If the award is not made in Spanish, the party relying on it shall supply a translation thereof into such language done by an official expert.”

Yemen Insurance and Tomen, Queen’s Bench Reports [1997] 2 Lloyd’s Rep. 738, Yearbook of Commercial Arbitration, 1998, p. 789).

⁷ The proposed text replaces the draft of article 7 considered by the Working Group (A/CN.9/508).

⁸ The second sentence is proposed within square brackets as it may prove unnecessary since the first sentence provides that the arbitration agreement may cover disputes that have arisen or that may arise between the parties. The distinction between “arbitration clause” and “arbitration agreement” is no longer relevant.

A/CN.9/WG.II/WP.137/Add.1**Amendment to proposal by the Mexican delegation****ADDENDUM****Note by the Secretariat**

In preparation for the forty-third session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to proceed with its review of a revised draft article 7 of the UNCITRAL Model Law on International Commercial Arbitration (see the report of the forty-second session, A/CN.9/573, para. 98), the Government of Mexico, on 15 February 2005, submitted the text of a proposed revised version of article 7 for consideration by the Working Group. The text of that proposal is contained in A/CN.9/WG.II/WP.137. On 31 August 2005, the Government of Mexico submitted an amendment to that proposed revised version of article 7. That amendment is reproduced as an annex to this note in the form in which it was received by the Secretariat.

ANNEX**Amendment to Proposal by the Government of Mexico regarding written form for arbitration agreements, to be submitted to the UNCITRAL Working Group on Commercial Arbitration**

The Permanent Mission of Mexico would like to inform the Secretariat of the Commission of an amendment to article 35, paragraph 2, of the proposal formulated by Mexico, which reads: "If the award is not made in Spanish, the party relying on it shall supply a translation thereof into such language done by an official expert", and which should read: "*If the award is not made in an official language of this State, the party shall supply a duly certified translation into such language.*"

As can be seen from reading this new wording, it has a more general nature than the proposal originally formulated and the Mexican Mission accordingly requests the Secretariat to notify the Member States of UNCITRAL of the amendment set out in the preceding paragraph and to inform the Mexican Mission of the publication of the amended text.

**D. Note by the Secretariat on settlement of commercial disputes:
interim measures of protection, submitted to the Working
Group on Arbitration at its forty-third session
(A/CN.9/WG.II/WP.138) [Original: English]**

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Introduction

1. At its fortieth session (New York, 23-27 February 2004), the Working Group discussed draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) relating to the power of an arbitral tribunal to order interim measures of protection, based on a draft contained in A/CN.9/WG.II/WP.128 and considered various proposals for a revision of that article. A revised version of draft article 17, taking account of the discussions and decisions of the Working Group at its fortieth session, is contained in A/CN.9/WG.II/WP.131, paragraph 4. At its forty-first session, the Working Group took note of a text proposed by one delegation as a possible alternative to draft article 17 (A/CN.9/569, para. 22).¹

2. At its forty-first (Vienna, 13-17 September 2004) and forty-second (New York, 10-14 January 2005) sessions, the Working Group discussed the text of paragraph (7) of draft article 17 relating to preliminary orders, based on drafts prepared by the Secretariat (as reproduced in documents A/CN.9/WG.II/WP.131, para. 4 and A/CN.9/WG.II/WP.134, respectively). The Working Group recalled that paragraph (7) had been the subject of earlier discussions in the Working Group.² It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session (A/59/17, para. 58). At its thirty-eighth session (Vienna, 4-15 July 2005), the Commission noted that, notwithstanding the wide divergence of views, the Working Group agreed, at its forty-second session, to include a compromise text of the revised draft of paragraph (7) in draft article 17. The Commission expressed doubts as to the value of the proposed compromise text, particularly in light of the fact that it did not provide for enforcement of preliminary orders. Concerns were also expressed that the inclusion of such a provision was contrary to the principle of equal access of the parties to the arbitral tribunal and could expose the revised text of the Model Law to criticism (A/60/17, para. 175). In respect of the structure of draft article 17, it was proposed that the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176).

3. At its forty-second session (New York, 10-14 January 2005), the Working Group considered a draft provision on recognition and enforcement of interim measures of protection (tentatively numbered article 17 bis), as reproduced in document A/CN.9/WG.II/WP.131, paragraph 46.³ The Working Group also exchanged views on a possible draft provision expressing the power of State courts to order interim measures of

¹ For earlier discussions on draft article 17, see A/CN.9/545, paras. 19-92; A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 51-94; A/CN.9/487, paras. 64-87; A/CN.9/485, paras. 78-106; A/CN.9/468, paras. 60-87.

² For earlier discussions on paragraph 7 of draft article 17, see A/CN.9/569, paras. 12-72; A/CN.9/547, paras. 109-116; A/CN.9/545, paras. 49-92; A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 77-79; A/CN.9/487, paras. 69-76; A/CN.9/485, paras. 89-94; A/CN.9/468, para. 70.

³ For earlier discussions on draft article 17 bis, see A/CN.9/545, paras. 93-112; A/CN.9/524, paras. 16-75; A/CN.9/523, paras. 78-80; A/CN.9/487, paras. 76-87; A/CN.9/485, paras. 78-103; A/CN.9/468, paras. 60-79.

protection in support of arbitration (tentatively numbered article 17 ter), on the basis of variants reproduced in A/CN.9/WG.II/WP.125, paragraph 42.⁴

4. To facilitate the resumption of discussions, this note sets out newly revised versions of draft articles 17, 17 bis and 17 ter of the Model Law, contained in parts I, II and III of this note, respectively. Part IV contains proposals from the Secretariat on the issue of the form in which the current and the revised provisions could be presented in the Model Law, with possible variants to be considered by the Working Group, as requested by the Working Group at its forty-second session (A/CN.9/573, para. 99).

Part I

Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

A. Text of draft article 17

5. The following text sets out a newly revised version of draft article 17 of the Model Law (herein referred to as “draft article 17”). Paragraphs (1) to (6 bis) of draft article 17 are based on discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116). Paragraph (7) of draft article 17 is based on discussions and decisions made by the Working Group at its forty-second session (A/CN.9/573, paras. 11-69):

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

“(a) Maintain or restore the status quo pending determination of the dispute;

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];

“(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

“(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

“(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

“(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

⁴ For earlier discussions on draft article 17 ter, see A/CN.9/524, paras. 76-78; A/CN.9/523, para. 77; A/CN.9/WG.II/WP.125, para. 44; A/CN.9/WG.II/WP.119, paras. 19-33, 37-40, 44-48 and 75-82.

“(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

“(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

“(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

“(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the arbitral tribunal’s own initiative, upon prior notice to the parties.

“(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

“(7) (a) Unless otherwise agreed by the parties, a party may file, without notice to the other party, a request for an interim measure of protection together with an application for a preliminary order directing the other party not to frustrate the purpose of the interim measure requested.

“(b) The provisions of paragraphs (3), (5), (6) and (6 bis) of this article relating to interim measures also apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

“(c) The arbitral tribunal may grant a preliminary order provided it considers that there is a reasonable concern that the purpose of the requested interim measure will be frustrated where prior disclosure of the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

“(d) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to the party against whom the preliminary order is requested of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

“(e) At the same time, the arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. The arbitral tribunal shall decide as promptly as required under the circumstances.

“(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

“(g) The arbitral tribunal shall require the requesting party to provide security in connection with such preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

“(h) Until the party against whom the preliminary order has been requested has presented its case, the requesting party shall have a continuing obligation to disclose to the arbitral tribunal all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order.”

B. Notes on draft article 17

Paragraph (1)

6. At the fortieth session of the Working Group, the text of paragraph (1) as contained in document A/CN.9/547, paragraph 68 was adopted (A/CN.9/547, para. 69).⁵

7. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add at the end of paragraph 1 the words “or modify them”, so that the paragraph would read:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection or modify them.”

That proposal was not discussed by the Working Group.

Paragraph (2)⁶

Chapeau—“whether in the form of an award or in another form”

8. After discussing the form in which an interim measure might be issued by an arbitral tribunal, the Working Group reiterated its decision not to modify the chapeau of paragraph (2) (A/CN.9/547, paras. 70-72). The Working Group agreed that any explanatory material to be prepared at a later stage, possibly in the form of a guide to enactment of draft article 17, should make it clear that the wording used to describe the form in which an interim measure might be issued should not be misinterpreted as taking a stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (A/CN.9/547, para. 72).⁷

Subparagraph (a)

9. Subparagraph (a) is reproduced without modification from the draft contained in document A/CN.9/547, paragraph 68.

Subparagraph (b)—Anti-suit injunction

10. Subparagraph (b) reflects the decision of the Working Group that, in the interests of clarity, the power to issue anti-suit injunctions should expressly be conferred upon arbitral tribunals and that, for that purpose, the words “or to prejudice the arbitral process itself” should be added at the end of subparagraph (b). Noting that the implications of the proposed amendment had not been fully considered, the Working Group agreed to insert

⁵ A/CN.9/569, para. 22; A/CN.9/545, para. 20; A/CN.9/523, para. 34; A/CN.9/508, paras. 52-54.

⁶ A/CN.9/545, paras. 21-27; A/CN.9/523, paras. 35-38; A/CN.9/508, paras. 64-76.

⁷ A/CN.9/523, para. 36; A/CN.9/508, paras. 65-68.

that proposal in square brackets, for further consideration by the Working Group at a future session (A/CN.9/547, para. 83).

Subparagraph (c)—[preliminary]; [securing]—[preserving]

11. The word “preliminary” has been deleted for the reason that it was considered to be confusing and added nothing to the meaning of the provision (A/CN.9/547, para. 73; for earlier discussion on that matter, see A/CN.9/545, para. 26) and the term “preserving” has been retained instead of the term “securing” because it was considered that the latter term could be interpreted narrowly as indicating a particular method for protecting assets (A/CN.9/547, para. 74).⁸

Subparagraph (d)

12. Subparagraph (d) is reproduced without modification from the draft contained in document A/CN.9/547, paragraph 68.

Paragraph (3)⁹

Subparagraph (a)—interplay with paragraph (2)

13. The Working Group might wish to further consider whether or not the general requirements set forth in paragraph (3) adequately apply to all types of interim measures listed under paragraph (2). It is recalled that, at the fortieth session of the Working Group, it was stated, for example, that it would not be appropriate to require in all circumstances that a party applying for an interim measure to preserve evidence under paragraph (2) (d) should necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered, or to require that requesting party to otherwise meet the very high threshold established in paragraph (3) (A/CN.9/547, para. 91).

14. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add as opening words to paragraph 3 the words “Except with respect to the measure referred to in subparagraph (d) of paragraph (2),” so that the chapeau of paragraph 3 would read:

“Except with respect to the measure referred to in subparagraph (d) of paragraph (2), the party requesting the interim measure of protection shall satisfy the arbitral tribunal that:”

That proposal was not discussed by the Working Group.

Subparagraph (a)—interplay with paragraph (2) (b)

15. At the fortieth session of the Working Group, a view was expressed that the reference to “harm” in subparagraph (a) of paragraph (3) might lend itself to confusion with the words “current or imminent harm” in subparagraph (b) of paragraph (2), thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of subparagraph (b) of paragraph (2) (A/CN.9/547, para. 90). It is however submitted that the broad definition of interim measures under paragraph (2) does not conflict with the need for the party requesting the

⁸ A/CN.9/545, para. 26.

⁹ A/CN.9/569, para. 22; A/CN.9/545, paras. 28-32; A/CN.9/523, paras. 39-44; A/CN.9/508, paras. 55-58.

interim measure to show evidence of “harm not adequately reparable by an award of damages” (see A/CN.9/WG.II/WP.123, para. 15).¹⁰

Subparagraph (a)—“Irreparable harm”

16. Subparagraph (a) follows the proposal made by the Working Group to replace the words “irreparable harm” with the words “harm not adequately reparable by an award of damages” (A/CN.9/547, para. 89). It was stated that that proposal addressed the concerns that irreparable harm might present too high a threshold and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure (A/CN.9/547, paras. 84-89).¹¹ At its fortieth session, the Working Group expressed concerns that that provision could be interpreted in a very restrictive manner, potentially excluding from the field of interim measures any loss that might be cured by an award of damages. The Working Group also noted that, in current practice, it was not uncommon for an arbitral tribunal to issue an interim measure merely in circumstances where it would be comparatively complicated to compensate the harm with an award of damages. The Working Group might wish to further consider whether the word “adequately” addresses those concerns or whether to clarify, in any explanatory material accompanying paragraph (3), that the paragraph should be interpreted in a flexible manner, keeping in mind balancing the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.

Subparagraph (b)

17. Subparagraph (b) is reproduced without modification from the draft contained in document A/CN.9/547, paragraph 68.¹²

Paragraph (4)¹³

18. Paragraph (4) takes account of the proposal made by the Working Group at its fortieth session that the provision of security should not be considered as a condition precedent to the granting of an interim measure (A/CN.9/547, para. 92), but rather as a free-standing provision allowing the tribunal to order security at any time during the procedure, or as limiting the ordering of security only at the time that the application was brought (A/CN.9/547, para. 94).

“in connection with”

19. The Working Group clarified its understanding that, in paragraph (4), as adopted, the term “in connection with” should be interpreted in a narrow manner to ensure that the fate of the interim measure was linked to the provision of security (A/CN.9/547, para. 94).

“or”

20. As a matter of drafting, it was stated that the use of the word “or” was more appropriate than the word “and” to indicate that the arbitral tribunal could require either the requesting party or any other party to provide appropriate security (A/CN.9/547, para. 95).

¹⁰ A/CN.9/523, para. 42.

¹¹ A/CN.9/545, para. 29 and A/CN.9/508, para. 56.

¹² A/CN.9/545, paras. 31 and 32.

¹³ A/CN.9/545, paras. 33-34; A/CN.9/523, paras. 45-48; A/CN.9/508, paras. 59-63.

Paragraph (5)¹⁴

21. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to add as opening words to paragraph 5 the words “If so ordered by the arbitral tribunal,” so that paragraph 5 would read:

“If so ordered by the arbitral tribunal, the requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.”

That proposal was not discussed by the Working Group.

Obligation to inform

22. Paragraph (5) reflects the decision of the Working Group that the obligation to inform be expressed in a more neutral way to avoid any inference being drawn that the paragraph excluded the obligation under article 24 (3) of the Model Law (A/CN.9/547, paras. 97-98).¹⁵

Sanction for non-compliance

23. At its fortieth session, the Working Group agreed that the express inclusion of a sanction under paragraph (5) in case of non-compliance with the obligation to disclose any material change in the circumstances of paragraph (6) was not necessary, as in any case the usual sanction for non-compliance with that obligation was either suspension or termination of the measure, or the award of damages (A/CN.9/547, paras. 99-100).¹⁶

Paragraph (6)¹⁷*“it has granted”*

24. The words “it has granted” have been retained without square brackets, to reflect that the arbitral tribunal may only modify or terminate the interim measure issued by that arbitral tribunal (A/CN.9/547, paras. 102-104).

25. At the forty-first session of the Working Group (A/CN.9/569, para. 22), an alternative proposal was made, and not discussed, to delete paragraph 6.

Paragraph (6 bis)

26. In order to assist deliberations on paragraph (6 bis), the Secretariat had prepared a note (A/CN.9/WG.II/WP.127) containing information received from States on the liability regimes that applied under their national laws in respect of interim measures of protection. It was observed that, of the legislation contained therein, the national laws did not distinguish between inter partes and ex parte measures in relation to the liability regimes that applied. It was suggested that, for that reason, the square brackets around that

¹⁴ A/CN.9/545, paras. 44-48; A/CN.9/523, para. 49.

¹⁵ A/CN.9/454, para. 45.

¹⁶ A/CN.9/523, para. 49.

¹⁷ A/CN.9/454, paras. 35-43; A/CN.9/523, paras. 50-52.

paragraph should be deleted and the Working Group should consider possible improvements to the text (A/CN.9/547, para. 105).¹⁸

27. Paragraph (6 bis) contains the proposal which was adopted by the Working Group at its fortieth session (A/CN.9/547, paras. 106-108) and reflects the agreement of the Working Group that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not.

28. It was also agreed that any explanatory material accompanying paragraph (6 bis) should clarify that the reference to “proceedings” referred to the arbitral proceedings and not to the proceedings relating to the interim measure (A/CN.9/547, para. 108).

29. At the forty-first session of the Working Group (A/CN.9/569, para. 22), a proposal was made to replace the words “the interim measure should not have been granted” at the end of the first sentence of paragraph 6 bis by the words, “the interim measure was unjustified”, so that paragraph 6 bis would read:

“The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure was unjustified. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.”

Paragraph 7

30. At its forty-first (Vienna, 13-17 September 2004), and forty-second (New York, 10-14 January 2005) sessions, the Working Group undertook a detailed review of the text of paragraph (7) of draft article 17 regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis. In draft article 17, the notion of interim relief being granted on an ex parte basis is generally reflected by the term “preliminary order(s)”.

31. Notwithstanding the wide divergence of views, the Working Group agreed to include the revised draft of paragraph (7) in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added (A/CN.9/573, para. 27).

32. The Working Group might wish to note that, at the thirty-eighth session of the Commission, a proposal was made that, in respect of the structure of draft article 17, the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that would not wish to adopt provisions relating to preliminary orders (A/60/17, para. 76). As well, it was said that if paragraph (7) were to be included in draft article 17, it should be drafted in the form of an opting-in provision, applying only where the parties had expressly agreed to its application (A/60/17, para. 175).

33. As well, the Working Group might wish to consider whether interim measures ordered ex parte by an arbitral tribunal would still present any practical value to practitioners if the revised text of the Model Law made them unenforceable. In that respect, the Working Group might wish to recall that it was observed, at the thirty-sixth session of the Working Group that, in certain countries where the court system would experience difficulties in reacting expeditiously to a request for a preliminary order, it

¹⁸ A/CN.9/545, paras. 48, 60-61, 64-66, A/CN.9/524, paras. 32-34.

would be essential to establish the enforceable character of such an interim measure when ordered by an arbitral tribunal (A/CN.9/508, paragraph 79).

Subparagraph (a)

Opt-out option

34. In order to reflect the decision made by the Working Group concerning the retention of the opt-out option for the parties, the words “unless otherwise agreed by the parties” have been retained and the words “if expressly agreed by the parties” deleted (A/CN.9/573, paragraph 28). In light of the comments made by the Commission at its thirty-eighth session (see paragraph 32 above), the Working Group might wish to give further consideration to that issue.

“take no action”

35. The revised draft reflects the decision of the Working Group to substitute the words “take no action” with the word “not” in order to clarify that a preliminary order might be aimed not only at preventing a party from taking an action but also at requiring a party to take an action such as, for instance, to protect goods from deterioration or some other threat (A/CN.9/573, paragraph 29).

Subparagraph (b)

36. As agreed by the Working Group, the words “relating to interim measures also” have been included after the word “article” on the basis that those words clarified that the intention of subparagraph (b) was to make the obligations set out in paragraphs (3), (4), (5), (6) and (6 bis) applicable to preliminary orders (A/CN.9/573, paragraph 31).

Subparagraph (c)

Power of the arbitral tribunal to grant preliminary orders

37. The revised draft reflects the decision of the Working Group that, in order to expressly empower the arbitral tribunal to grant preliminary orders, the word “only” appearing before the word “grant” be deleted, and the word “if” be replaced by the word “provided” (A/CN.9/573, paragraph 32).

“reasonable basis for concern”

38. The Working Group agreed to simplify the existing language by deleting the words “basis for” (A/CN.9/573, paras. 33 and 34).

Definition of the risk

39. It was suggested that the risk defined under subparagraph (c) that the measure be frustrated before all the parties could be heard did not include the risk that the preliminary order be disclosed to the party against whom it was made, and it was therefore proposed to amend subparagraph (c) to better reflect that risk. Accordingly, it was suggested that the words “before all parties can be heard” should be deleted. In that connection, it was said that the formulation contained in a previous draft of paragraph 7 (a), reproduced in A/CN.9/WG.II/WP.131, paragraph 4 and A/CN.9/569, paragraph 12, stating that “where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure”, was preferable. The revised draft takes that suggestion into account (A/CN.9/573, para. 35).

Subparagraph (d)*Communication of information*

40. A concern was expressed that giving notice of oral communications to the party against whom the preliminary order was directed might not be easily discharged. In order to clarify that the arbitral tribunal was obliged to disclose not only the existence of the oral communications but also to indicate their contents, the words “including indicating the content of any oral communication” have been added after the words “all other communications” (A/CN.9/573, para. 37).

“A determination in respect of a preliminary order”

41. The revised draft takes account of the suggestion to add the words “in respect of an application for” after the words “a determination” for the sake of providing consistency with paragraph 7 (a), which referred to “an application for a preliminary order” (A/CN.9/573, para. 38).

“the party against whom the preliminary order is directed”

42. The Working Group agreed that it might be more appropriate to refer to “the party against whom the preliminary order is requested” or “is sought”, rather than to “the party against whom the preliminary order is directed”, as a determination might be for or against the granting of a preliminary order (A/CN.9/573, para. 39).

Notice

43. The revised draft makes it clear that, as decided by the Working Group, the arbitral tribunal, in receipt of the request for a preliminary order, was under an obligation to give notice of the documents and information to the other party (A/CN.9/573, para. 40).

[“unless the arbitral tribunal...whichever occurs earlier”]

44. The Working Group agreed to delete the bracketed text appearing at the end of subparagraph (d) to reflect its earlier decision (see above, paragraph 31) that no judicial enforcement regime should be provided for in the Model Law for preliminary orders.

Subparagraph (e)*Time limitation*

45. Subparagraph (e) reflects the decision of the Working Group not to include any time limitation expressed in hours or days. It was further agreed by the Working Group that a commentary or explanatory note that might be prepared at a later stage in respect of article 17 could refer to two days as an illustration to indicate the intention of the provision (A/CN.9/573, paras. 43-50) .

Notice

46. In order to clarify when the notice should be given, the Working Group agreed to add, as the opening words of subparagraph (e), the words “at the same time” (A/CN.9/573, para. 51).

Subparagraph (f)

47. With a view to preventing any confusion as to the purpose of subparagraph (f), a proposal was made to clarify that, as a matter of principle, a preliminary order should not have a life span beyond twenty days, but that certain relief granted under the preliminary order might be included in an inter partes interim measure of protection. The revised draft therefore reflects the decision of the Working Group to reverse the order of the two sentences of paragraph (f) (A/CN.9/573, para. 58). The Working Group also agreed to replace the words “confirming, extending” by the word “adopting”, on the basis that that term better expressed the fact that the preliminary order had to be converted into an inter partes interim measure (A/CN.9/573, paras. 57-58).

Subparagraph (g)

“appropriate security”

48. The revised draft reflects the decision of the Working Group to retain the text of subparagraph (g), with the deletion of the term “appropriate”.

Subparagraph (h)

Cross references to subparagraphs (c) and (e) and footnote

49. The cross-references to subparagraphs (c) and (e) have been deleted for the reason that these references were no longer necessary (A/CN.9/573, para. 65). As well, as agreed by the Working Group, the footnote has been deleted for the reason that it was unnecessary and that the reference to “less onerous conditions” was considered to provide an awkward standard to apply in respect of an obligation to disclose (A/CN.9/573, para. 68).

“is directed”

50. A proposal was made and agreed to replace the words “is directed” appearing after the words “the preliminary order is” by the words “has been requested” to clarify that the obligation of disclosure of the requesting party applied from the moment that the request for a preliminary order was lodged by the requesting party, and not from the moment the arbitral tribunal made a determination thereon (A/CN.9/573, para. 67).

Part II**Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)****A. Text of draft article 17 bis**

51. The following text sets out a newly revised version of article 17 bis of the Model Law (hereinafter referred to as “draft article 17 bis”) based on the discussions and decisions of the Working Group at its forty-second session (A/CN.9/573, paras. 70-89):

“(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal,

enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.*

“(2) The court may refuse to recognize or enforce an interim measure of protection, only:

“(a) at the request of the party against whom it is invoked, if the court is satisfied that:

“(i) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

“(ii) the arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

“(iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which, the arbitration takes place or under the law of which, that interim measure was granted; or

“(b) if the court finds that:

“(i) the interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

“(ii) any of the grounds set forth in article 36, paragraphs (1) (b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

“(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection. The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure.

“(4) The party who is seeking or has obtained recognition or enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or modification of that interim measure.

“(5) The court of the State where recognition or enforcement is sought may, if it considers it proper, request the requesting party to provide appropriate security, if the arbitral tribunal has not already made a determination with respect to security, or where such a decision is necessary to protect the rights of third parties.

“[(6) An interim measure issued by an arbitral tribunal under standards substantially equivalent to those set forth in paragraph (7) of article 17 shall not be enforceable.]”

* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

B. Notes on draft article 17 bis

Paragraph 1¹⁹

52. The Working Group adopted paragraph 1 without change (A/CN.9/573, para. 71).

Paragraph 2²⁰

Subparagraph (a)(i) (subparagraph (a)(i) and (ii) of the previous draft contained in A/CN.9/WG.II/WP.131)

53. The draft reflects the decision of the Working Group to retain the language “such refusal is warranted on the grounds” and to combine subparagraphs (a)(i) and (ii) of the previous draft (A/CN.9/573, para. 74).

Subparagraph (a)(ii) (subparagraph (a)(iii) of the previous draft contained in A/CN.9/WG.II/WP.131)

54. The words “the requirement to provide appropriate security” have been replaced by the words “the arbitral tribunal’s decision with respect to the provision of security” in order to better reflect that the arbitral tribunal has a discretion not to require any security or that the security might have been ordered and its provision deferred (A/CN.9/573, para. 76).

Subparagraph (a)(iii) (subparagraph (a)(iv) of the previous draft contained in A/CN.9/WG.II/WP.131)

[or under the law of which, that interim measure was granted] [the arbitration takes place]

55. To achieve consistency between draft article 17 bis (2) (a)(iii) and article 36 (1) (a)(v) of the Model Law, the two bracketed texts of the previous draft have been retained, but their order reversed (A/CN.9/573, para. 79).

Subparagraph (b)(i)

56. The words “by the law” are omitted from subparagraph (b)(i), since the Working Group agreed that they could be misinterpreted to mean that a court could operate on a law other than that from which it drew its powers (A/CN.9/573, para. 82).

Subparagraph (b)(ii)

57. The Working Group adopted the substance of subparagraph (b)(ii) without change (A/CN.9/573, para. 83).

Paragraph (3)²¹

58. It is recalled that the Working Group took note of various proposals relating to paragraph (3), which were to be further discussed in the context of draft article 17 ter. Due to lack of time, the Working Group did not reconsider them. The Working Group might wish to further discuss those proposals, which are reflected in A/CN.9/573, para. 84.

¹⁹ A/CN.9/545, paras. 95-102; A/CN.9/524, paras. 32-34, 64-66.

²⁰ A/CN.9/545, paras. 103-110; A/CN.9/524, paras. 35-39, 42-52, 57-63.

²¹ A/CN.9/524, paras. 40-41, 55-56.

Paragraph (4)²²

59. The Working Group adopted the substance of paragraph (4) without change (A/CN.9/573, para. 85).

Paragraph (5)²³

60. Paragraph 5, as revised, seeks to clarify the intention that the court might order a requesting party to provide security if the court is of the opinion that it is appropriate and the tribunal had not already made such an order or such an order was necessary to protect the rights of third parties (A/CN.9/573, para. 86). As agreed, the reference to “order”, which appeared twice in paragraph (5) of the previous draft, has been replaced by the verb “require” or by the substantive term “decision” to avoid limiting the effect of the provision to procedural decisions. (A/CN.9/573, para. 86)

Paragraph (6)²⁴*Preliminary orders and enforcement*

61. Consistent with its earlier decision that a preliminary order would not be judicially enforceable, the Working Group agreed to delete paragraph (6). (A/CN.9/573, para. 87).

62. The Working Group then proceeded to consider whether or not draft article 17 bis should include an express statement that it did not apply to preliminary orders. After discussion, the Working Group agreed that the Secretariat should prepare a draft paragraph for inclusion in article 17 bis, based upon the principle that preliminary orders were not enforceable by State courts, and ensuring that any proposed formulation would not undercut the binding nature of preliminary orders (A/CN.9/573, paras. 87-89).

Part III

Draft provision on court-ordered interim measures in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter²⁵

A. Text of draft article 17 ter

63. The following text sets out a newly revised version of article 17 ter of the Model Law (hereinafter referred to as “draft article 17 ter”) based on the discussions and decisions of the Working Group at its forty-second session (A/CN.9/573, paras. 90-95):

“The court shall have the same power of issuing interim measures of protection for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

²² A/CN.9/524, paras. 67-71.

²³ A/CN.9/524, paras. 72-75.

²⁴ A/CN.9/545, para. 111.

²⁵ A/CN.9/573, paras. 90-95; A/CN.9/524, paras. 76-78; A/CN.9/523, para. 77.

B. Notes on draft article 17 ter

64. It is recalled that, after discussion, the Working Group adopted Variant 1 of draft article 17 ter as it appeared in A/CN.9/WG.II/WP.125, paragraph 42 (A/CN.9/573, para. 95).

Part IV**Possible options on the issue of the form in which the current and revised provisions could be presented in the Model Law**

65. At its forty-second session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/573, para. 99).

66. The Working Group might wish to consider two different issues in relation to the form in which the current and the revised provisions could be presented. The first one relates to the structuring of the provisions, the second one to the placement of those provisions in the Model Law.

A. Structuring of the revised provisions*(1) Placement of definition*

67. Article 17, paragraph (2), contains a definition of interim measures of protection. One approach could be to include that definition under article 2 of the Model Law, which relates to the definitions and rules of interpretation of the Model Law. That approach would simplify the drafting of article 17. However, the Working Group might wish to further consider whether the definition of “interim measures” currently contained in article 17, paragraph (2), which applies in respect of interim measures granted by arbitral tribunals, should be redrafted so as to apply also to interim measures granted by State courts under article 9 and article 17 ter of the Model Law.

(2) Preliminary orders

68. At its thirty-eighth session, the Commission heard a proposal that the issue of preliminary orders should be dealt with in a separate article to facilitate the adoption of draft article 17 by States that would not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176). If that proposal were to be accepted by the Working Group, then the following options for the presentation of that new article might be considered by the Working Group:

- The article on preliminary orders might be included following article 17, and articles 17 bis and 17 ter would then be renumbered accordingly; or
- Due to the wide divergence of views expressed in the discussions on that matter, the Working Group might wish to consider whether the article should appear as a footnote along the lines adopted, for example, in article X as appended to article 4 of the UNCITRAL Model Law on International Commercial Conciliation.

B. Placement of the revised provisions in the Model Law

69. Concerning the placement of the revised provisions in the text of the Model Law, various options might be considered, as follows.

(1) *Placement of the revised provisions under chapter IV or IV bis of the Model Law*

70. A first option would be to replace the current article 17 by the revised provisions on interim measures of protection and include articles 17, 17 bis and 17 ter in the current chapter IV of the Model Law. That option presents the advantage of simplicity. However, it should be noted that, whilst chapter IV deals with the jurisdiction of arbitral tribunal, articles 17 bis and 17 ter relate to State court intervention and, for that reason, might be better placed in a new chapter.

71. If a new chapter entitled “Interim Measures of Protection” (possibly numbered chapter IV bis) and containing articles 17 to 17 ter were created, that chapter could include an indication of the date at which that chapter was adopted by the Commission. A similar approach was taken in respect of article 5 bis of the Model Law on Electronic Commerce. Inclusion of the date at which the chapter was adopted by the Commission would give an indication to enacting States of the reason why the drafting style of the revised provisions differs from the remaining provisions of the Model Law. If the Working Group agreed to include a new chapter, the current chapter IV would only contain article 16 and the question of whether or not to renumber both the chapters and the articles of the Model Law might need to be considered.

(2) *Placement of the revised provisions as ancillary text to the Model Law*

72. Another option would be to include the revised provisions on interim measures as a footnote to the current article 17 or in an annex to the Model Law. Explanatory material should then clarify that the revised provisions should be read as replacing the current provision on interim measures. One advantage of that option would be to avoid any restructuring of the Model Law. That annex might also be used to insert additional revisions that might be made to the Model Law. However, the Working Group may wish to consider whether such a presentation would not create the false impression that there are two classes of provisions, namely those contained in the annex being of secondary importance compared to those contained in the text of the Model Law itself.

(3) *Presentation of the revised provisions as a separate set of model legislative provisions on interim measures of protection in international commercial arbitration*

73. Another option would be to present the revised provisions on interim measures of protection as a discrete set of provisions, formally distinct from the Model Law, and dealing with a specific procedural aspect of arbitration. Indication could be made that those provisions are intended to build upon the current article 17 of the Model Law. Such an approach would offer an advantage to enacting States that deal with interim measures of protection in legislation separate from that dealing with international arbitration.

C. Explanatory material

74. The Working Group expressed the wish that explanatory material be prepared in relation to the revised provisions. The Working Group might wish to consider various options for the presentation of the explanatory material. The explanatory material could be drafted along the lines of the current explanatory note, which accompanies the Model Law,

and replace paragraph 26 of the current explanatory note. Another option would be to provide more detailed information on interim measures of protection to enacting States and to prepare a legislative guide on the revised provisions. The Working Group might wish to further consider whether it would be appropriate to also prepare a legislative guide for the remaining provisions of the Model Law.

**E. Report of the Working Group on Arbitration on the work
of its forty-fourth session (New York, 23-27 January 2006)**

(A/CN.9/592) [Original: English]

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I.	Revised legislative provisions on interim measures and preliminary orders.
II.	Revised legislative provisions on the form of arbitration agreement
III.	Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, *inter alia*, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures and the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of UNCITRAL Model Law on International Commercial Arbitration (“the Arbitration Model Law”) and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”).

2. The most recent summary of the discussions of the Working Group on interim measures, preliminary orders and the form of arbitration agreement is contained in document A/CN.9/WG.II/WP.140, paragraphs 5 to 26. The Secretariat was asked to prepare proposals on the form in which the revised versions of draft article 17 of the Arbitration Model Law relating to the power of an arbitral tribunal to order interim measures, of a new article to the Arbitration Model Law relating to the recognition and enforcement of interim measures (tentatively numbered article 17 bis), of a new article to the Arbitration Model Law relating to court-ordered interim measures (tentatively numbered article 17 ter) could be presented, for consideration by the Working Group at its forty-fourth session. The Secretariat was also asked to prepare a revised version of draft article 7 of the Arbitration Model Law relating to the definition and form of arbitration agreement as well as a note considering how State courts have interpreted the form requirement in article II, paragraph (2), of the New York Convention and exploring the extent to which article VII, paragraph (1), of the New York Convention might assist in modernizing the form requirement for arbitration agreement, for consideration by the Working Group at its forty-fourth session.

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fourth session in New York, from 23 to 27 January 2006. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Italy, Japan, Lebanon, Madagascar, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

4. The session was attended by observers from the following States: Azerbaijan, Bangladesh, Dominican Republic, Finland, Guinea, Indonesia, Iraq, Ireland, Kyrgyzstan, Malaysia, Netherlands, New Zealand, Philippines and Ukraine.

5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: African Union, European Community, NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration, Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Center for International Legal Studies, Association Suisse de l'Arbitrage (ASA), Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), International Chamber of Commerce (ICC), International Cotton Advisory Committee (ICAC), International Law Institute (ILI), Kuala Lumpur Regional Centre for Arbitration (KLRC), School of International Arbitration (Queen Mary University of London), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the London Court of International Arbitration (LCIA) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico);

Rapporteur: Mr. Mostafa Dolatyar (Islamic Republic of Iran).

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.140 and A/CN.9/WG.II/WP.140/Add.1); (b) a note by the Secretariat containing a newly revised draft of article 7 of the Arbitration Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-sixth session (A/CN.9/WG.II/WP.136); (c) a note by the Secretariat containing a proposal made by a delegation for a revision of article 7 of the Arbitration Model Law (A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1); (d) a note by the Secretariat regarding the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention (A/CN.9/WG.II/WP.139); (e) a note by the Secretariat on newly revised drafts of articles 17, 17 bis and 17 ter, for insertion in the Arbitration Model Law, prepared by the Secretariat pursuant to the decisions made by the Working Group at its forty-third session (A/CN.9/WG.II/WP.141); and (f) the report of the Working Group on the work of its forty-third session (A/CN.9/589).

9. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Preparation of uniform provisions on interim measures and on the requirement that an arbitration agreement be in writing.
 5. Possible future work in the field of settlement of commercial disputes.
 6. Other business.
 7. Adoption of the report.

III. Deliberations and decisions

10. The Working Group resumed its deliberations on agenda item 4 on the basis of the texts contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.136, A/CN.9/WG.II/WP.137, A/CN.9/WG.II/WP.137/Add.1, A/CN.9/WG.II/WP.139 and A/CN.9/WG.II/WP.141). The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters IV to VII. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda items 5 and 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters VIII and IX, respectively.

11. The Working Group adopted the revised version of draft legislative provisions on interim measures, preliminary orders and the form of arbitration agreement as well as a text of a draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention. The Secretariat was requested to circulate the revised version of those draft provisions and the text of the draft interpretative declaration to Governments for their comments, with a view to consideration and adoption of the draft provisions and draft interpretative declaration by the Commission at its thirty-ninth session, scheduled to be held in New York, from 19 June to 7 July 2006.

IV. Draft legislative provisions on interim measures and preliminary orders

12. The Working Group recalled that, at its forty-third session (Vienna, 3-7 October 2005), it had undertaken a detailed review of the text of the revised version of article 17 regarding the power of an arbitral tribunal to grant interim measures and preliminary orders, article 17 bis regarding the recognition and enforcement of interim measures issued by an arbitral tribunal and article 17 ter on court-ordered interim measures. At that session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions on interim measures and preliminary orders could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/589, paras. 104-106). The Secretariat was also requested to take account of the suggestions that those provisions be placed in a new chapter, numbered

chapter IV bis of the Arbitration Model Law, and be restructured by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106).

13. The Working Group resumed discussions on the draft legislative provisions on interim measures and preliminary orders on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group, as set out in A/CN.9/WG.II/WP.141.

Location and structure of chapter IV bis

14. The Working Group agreed that the draft legislative provisions on interim measures and preliminary orders should be located in a new chapter of the Arbitration Model Law and agreed that the articles could be grouped into sections as suggested in A/CN.9/WG.II/WP.141.

Numbering of provisions

15. A comment was made that the Latin numbering of articles could be problematic for users unfamiliar with such numbering. In response, it was noted that the Latin numbering was consistent with the approach taken in other UNCITRAL instruments, such as, for example, article 5 bis of the UNCITRAL Model Law on Electronic Commerce.

16. After discussion, the Working Group agreed to retain the numbering of the draft legislative provisions, as set out in A/CN.9/WG.II/WP.141.

Article 17

Paragraph (1)

17. The substance of paragraph (1) was adopted by the Working Group without modification.

Paragraph (2)

18. Reservations were expressed about paragraph (2) (b) directly or indirectly allowing the use of anti-suit injunctions given that such injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well, it was said that anti-suit injunctions did not always have the provisional nature of interim measures. It was suggested that there were already a number of rules that protected the arbitral process and that a reference to anti-suit injunctions under paragraph (2) (b) was therefore unnecessary.

19. The Working Group recalled that it had already considered that matter at its forty-third session and agreed to adopt the text of paragraph (2) (b) (A/CN.9/589, paras. 20-26). It was observed that the provisions as contained in A/CN.9/WG.II/WP.141 represented a package and the Working Group should not reopen discussions on substantive issues that might affect that package.

20. The substance of paragraph (2) was adopted without modification.

Article 17 bis

Paragraphs (1) and (2)

21. The substance of paragraphs (1) and (2) was adopted without modification by the Working Group.

Article 17 ter*Title*

22. A proposal was made to amend the title of article 17 ter so that it would read: “applications for preliminary orders and conditions for granting preliminary orders” in order to better reflect the content of the provision. That proposal was adopted by the Working Group.

Paragraphs (1) and (2)

23. The substance of paragraphs (1) and (2) was adopted without modification.

Paragraph (3)

24. For linguistic reasons, the Working Group agreed to reformulate paragraph (3) along the following lines:

“(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1) (a), is the harm likely to result from the order being granted or not.”

Article 17 quater*Paragraphs (1), (2), (3) and (4)*

25. The substance of paragraphs (1), (2), (3) and (4) was adopted without modification.

Paragraph (5)

26. It was suggested that the reference to “preliminary order binding on the parties” was ambiguous in that it appeared to require all parties to comply with the preliminary order rather than only the party against whom the order was requested. It was further observed that, if the intention was to bind all parties, that formulation did not sufficiently clarify the nature of the obligations of the parties. In response, it was said that the plural reference to “the parties” should be retained to reflect the fact that an order would be binding not only on the party against whom the measure was directed but also on the party applying for the measure (for example, in relation to providing information or security).

27. Another proposal was made to add the following text to paragraph (5), “a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal.” It was suggested that that proposal would be better dealt with in article 17 undecies, which related to court-ordered interim measures. As well, it was suggested that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. In response, it was observed that article 9 dealt with interim measures and not preliminary orders. It was suggested that this proposal merely clarified the operation of provisions and did not seek to reopen substantive questions relating thereto. The Working Group took note of that proposal.

28. After discussions, the Working Group retained the text of paragraph (5), without modification.

Article 17 quinquies

29. The substance of article 17 quinquies was adopted without modification.

Article 17 sexies*Title*

30. A proposal was made to delete the words “by the arbitral tribunal” from the title of article 17 sexies. That proposal was adopted.

Paragraphs (1) and (2)

31. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 septies*Paragraphs (1) and (2)*

32. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 octies

33. It was decided to replace the words, “the party against whom it is directed” with the words, “any party” for the reason that the measure could impact upon any party.

Article 17 novies*Title*

34. A proposal was made to delete the words “of interim measures” in order to avoid repetition of the Section title. That proposal was adopted.

Paragraph 1

35. The Working Group agreed that paragraph (1) should refer to article 17 decies instead of article 17 novies.

Paragraphs (2) and (3)

36. The substance of paragraphs (2) and (3) was adopted without modification.

Article 17 decies*Title*

37. Consistent with the modification to the title of article 17 novies, the Working Group agreed to delete the words “of interim measures” from the title of article 17 decies.

Paragraphs (1) and (2)

38. The substance of paragraphs (1) and (2) was adopted without modification

Footnote

39. The Working Group agreed that the footnote to article 17 decies should refer to article 17 decies instead of article 17 novies.

Article 17 undecies

Placement of article 17 undecies

40. The Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law for the reason that it dealt with court-ordered interim measures which might not easily fit in a chapter intended to deal mostly with interim measures granted by arbitral tribunals.

41. One suggestion was to place article 17 undecies following provisions enacting article 9 of the Arbitration Model Law, which dealt with interim measures granted by courts. However, given that article 9 was located within chapter II of the Arbitration Model Law, which related to arbitration agreement, that option was not considered appropriate.

42. The Working Group agreed that wording along the lines of the text suggested in the note by the Secretariat (A/CN.9/WG.II/WP.141, para. 13) for a footnote to article 17 undecies could be included in explanatory material accompanying that provision. Such a text could draw the attention of States to the issue of placing article 17 undecies in the most appropriate part of their enacting legislation.

43. The substance of article 17 undecies was adopted without modification.

Reference to articles 17 novies, 17 decies and 17 undecies in article 1, paragraph 2 of the Arbitration Model Law

44. At its forty-third session, the Working Group noted that, given the intention that the provision on court-ordered interim measure should apply irrespective of the country where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provided that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, would apply even if the place of the arbitration was not in the territory of that State (A/CN.9/589, paras. 101-103). It was also suggested that a reference to articles 17 novies and 17 decies (which dealt with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2) of the Arbitration Model Law would read as follows:

“The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.”

45. That proposal was adopted in substance by the Working Group.

V. Draft legislative provisions on the form of arbitration agreement

46. The Working Group recalled that, at its forty-third session, it had resumed discussions on a draft model legislative provision revising article 7 of the Arbitration Model Law on the basis of a text prepared by the Secretariat (“the revised draft article 7”) following discussions in the Working Group held at its thirty-sixth session (New York, 4-8 March 2002) (A/CN.9/508, paras. 18-39) and had also considered a proposal by the Mexican delegation regarding that issue reproduced in A/CN.9/WG.II/WP.137, as modified by A/CN.9/WG.II/WP.137/Add.1 (“the alternative proposal”) (A/CN.9/589, paras. 108-112). It was further recalled that the Working Group had considered that both

texts provided useful options to address concerns relating to the form of arbitration agreement. The Working Group agreed to further consider both options.

The alternative proposal

47. It was noted that the alternative proposal omitted entirely the writing requirement. It was said that, if that text were adopted, the question of the conclusion of the arbitration agreement and its content would be solely a matter of proof rather than of validity. It was said that the revised draft article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements to recognize, for example, oral arbitration agreements. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. While the alternative proposal was met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries. It was also stated that the purpose of the revision of paragraph (2) of article 7 of the Arbitration Model Law was to harmonise existing domestic laws in that respect and it was suggested that that purpose would be better achieved by the revised draft article 7 than the alternative proposal (for discussion on the alternative proposal, see also below, paragraphs 74 and 75).

48. The Working Group continued its discussion based on the revised draft article 7, as contained in A/CN.9/WG.II/WP.136. The Working Group was reminded that, whatever formulation was accepted in relation to paragraph (2) of article 7 of the Arbitration Model Law, it would be necessary to consider the impact of that provision upon article 35, given that that article included a cross-reference to article 7 in its requirement in paragraph (2), which provided that the party relying on an award or applying for its enforcement “supply the original arbitration agreement referred to in article 7 or a duly certified copy thereof” (for discussion on that matter, see below, paragraphs 76 to 80).

Revised draft article 7

Paragraph (1) of the revised draft article 7

49. The substance of paragraph (1) was adopted without modification.

Paragraphs (2) and (3) of the revised draft article 7

50. Support was expressed for retaining the substance of paragraph (2) as it gave a clear indication, consistent with article II, paragraph (2), of the New York Convention, that arbitration agreements had to be in writing and provided examples regarding the meaning of the writing requirement. However, it was noted that paragraph (2) of the revised draft article 7 sought by way of a definition to clarify that the term “writing” covered modern means of communications that might not be considered, in some countries, as meeting the writing requirement. A concern was expressed that this approach would be inconsistent with the approach taken in UNCITRAL texts on electronic commerce, which relied not on a definition but on a functional equivalence approach to “writing”.

Compliance of paragraph (2) of the revised draft article 7 with the UN Convention on the Use of Electronic Communications in International Contracts (“the Convention on Electronic Contracts”)

51. It was observed that the revised draft article 7 had been prepared before the UNCITRAL Working Group on Electronic Commerce finalized its work on the Convention on Electronic Contracts and that it should be revised to ensure consistency with that Convention. In addition, it was observed that article 20 of that Convention included the New York Convention in the list of international instruments to which it applied and that, to the extent the Arbitration Model Law might be used to assist with the interpretation of the New York Convention, it would be important to ensure compatibility between the three instruments.

52. It was suggested that the formulation in paragraph (2) of article 9 of the Convention on Electronic Contracts, which provided that an electronic communication met a requirement under law that it be in writing “if the information contained therein is accessible so as to be useable for subsequent reference” could be used in the revised draft article 7 as follows: “A data message satisfies the requirement for writing if the information contained therein is accessible so as to be useable for subsequent reference.” That proposal received some support.

“concluded or documented”

53. With a view to achieving the required level of flexibility, it was said that the form requirement for arbitration agreements should mirror similar provisions that existed in respect of litigation in national courts, for example, article 3 (c) of the Convention on Exclusive Choice of Court Agreements prepared by the Hague Conference on Private International Law and adopted on 30 June 2005, which provided that “an exclusive choice of court agreement is required to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be useable for subsequent reference”. It was also said that a similar reference to “concluded or documented in writing” was reflected in article 76 of the draft convention on the carriage of goods [wholly or partly] [by sea] currently being developed by the UNCITRAL Working Group on Transport Law (see, A/CN.9/WG.II/WP.140/Add.1, annex).

54. It was suggested that the words “concluded or documented” be considered for insertion under paragraph (2) of the revised draft article 7, as these words would clarify that the form requirement applied not necessarily at the stage of the formation of the arbitration agreement, but could also apply at the subsequent stage of evidencing the existence of the arbitration agreement. In support of that proposal, it was said that these words would be useful to encourage a liberal interpretation of the form requirement under article II, paragraph (2), of the New York Convention. A proposal was made that paragraph (2) of the revised draft article 7 should read: “The arbitration agreement shall be in writing. ‘An agreement in writing’ means an agreement concluded or documented in any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference.” That proposal received some support. A proposal was made to simplify that text, as follows: “The arbitration agreement shall be in writing. An agreement is ‘in writing’ if it is concluded or documented in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message.” In support of that proposal, it was stated that it would cover both situations where writing was required for validity or for evidentiary purposes.

55. Questions were raised as to whether the terms “concluded” and “documented” were both needed as it was widely felt that the term “documented” encompassed the term “concluded”. In response, it was said that if only the term “documented” were used, that provision might be interpreted in a very restrictive way as only applying where an agreement was concluded in writing. For that reason, it was suggested that both terms were needed.

56. Objections were raised on the ground that inclusion of those terms introduced issues related to proving the existence of an arbitration agreement that fell outside the intended purpose of paragraph (2) of the revised draft article 7, which related to the requirement that an arbitration agreement be in writing. A proposal was made to delete any reference to those words so that the revised paragraph would read: “The arbitration agreement shall be in writing. An agreement is “in writing” if it is in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message”. The Working Group took note of that proposal.

Proposals for restructuring paragraphs (2) and (3) the revised draft article 7

57. It was observed that paragraph (2) of the revised draft article 7 sought to deal with different issues, namely:

- To state the principle that an arbitration agreement shall be in writing;
- To determine whether the purpose of the writing requirement was to provide certainty as to the consent of the parties to arbitrate or as to the contents of the arbitration agreement; and
- To clarify how the writing requirement could be fulfilled.

58. A proposal was made to address each of these issues by including text along the following lines: “The arbitration agreement shall be in writing. An arbitration agreement is in writing if it can be evidenced in writing. A data message meets the requirement of a writing if the information contained therein is accessible so as to be useable for subsequent reference. ‘Data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.” That proposal received some support.

59. A related proposal was made to replace paragraphs (2) and (3) of the revised draft article 7 by the following restructured provision: “(2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its terms are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.” It was explained that the latter proposal had the following advantages:

- The language used in paragraph (2) of that proposal was consistent with article II, paragraph (2), of the New York Convention and therefore, that sentence maintained “the friendly bridge” between the texts;
- Paragraph (3) of that proposal by referring to “its terms are recorded” made it clear that only the terms of the arbitration agreement were required to be recorded and not the actual will of the parties to enter into the arbitration agreement. In that context, it was pointed out that the question whether the parties actually reached an agreement

to arbitrate should be left to national legislation;

- The language used in paragraph (4) of the proposal was consistent with that used in paragraph (2) of article 9 of the Convention on Electronic Contracts.

60. That proposal was widely supported. However, clarification was sought on a number of aspects thereof.

61. Questions were raised as to whether the words “its terms” in paragraph (3) of the above proposal (see above, paragraph 59) were necessary given that the existence of an agreement to arbitrate assumed the existence of terms relating thereto. After discussion, the Working Group was generally of the view that some reference to the contents of the arbitration agreement should be retained to make it clear that what was to be recorded was the content or terms of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement. In response to questions regarding the scope of the words “its terms”, divergent views were expressed. One view was that the reference to the “terms” of the contract could be interpreted as covering all of the contractual stipulations applying between the parties. Another view was that the “terms” of the agreement could be read more broadly to encompass, for example, the arbitration rules agreed upon by the parties or the law governing the arbitral procedure to the extent the parties did not agree on any procedural rules. It was also explained that “its terms” was not restricted to terms agreed by the parties expressly but could also cover agreements concluded by conduct, for example where one party sent an offer to conclude a contract to the other party which contained an arbitration agreement and the other party, without expressly accepting the offer, performed its part of the bargain (for example, it shipped the goods and paid the price).

62. To avoid a possible unclear or overly broad interpretation that could flow from the use of the word “terms”, a proposal was made to replace that word with a more generic one such as “content”. That proposal received some support. However, it was suggested that the phrase “its content is” might be improved upon. In order to provide a better formulation, it was proposed to redraft paragraph (3) of the above proposal (see above, paragraph 59) to read as follows: “an arbitration agreement is in writing if there is a record of the agreement in any form whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by any other means”. It was suggested that that text should be accompanied by explanatory material in a guide to enactment and use. Another proposal was made that paragraph (3) be redrafted as follows: “an arbitration agreement is in writing if the rules applicable thereto are embodied in a recorded text”. The Working Group did not agree that either of these formulations should be adopted but agreed that further clarification might be needed to be included in a guide to enactment and use in respect to the factual situations that were intended to be covered by paragraph (3), such as those listed in A/CN.9/WG.II/WP.110, paras. 16 to 26. The Working Group requested the Secretariat to revise the text taking account of those suggestions, with appropriate explanations being provided in a guide to enactment and use of article 7.

63. In response to a question, it was explained that the words “or contract” in paragraph (3) of the above proposal (see above, paragraph 59) were intended to address the issue of incorporation by reference in a contract of an arbitration agreement. It was noted that the question of incorporation by reference was a matter to be further considered when discussing paragraph (5) of the revised draft article 7 (see below, paragraphs 69 to 73).

64. A suggestion was made that the words “electronic communication” contained in paragraph (4) of the above proposal (see above, paragraph 59) should be replaced by the

words “electronic means” for the reason that the latter formulation was broader and covered a wider range of factual situations. After discussion, the Working Group agreed to retain the words “electronic communication” and to include under paragraph (4) of the above proposal the definition of “electronic communication” and “data message” as contained in paragraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.

Paragraph (4) of the revised draft article 7

65. A proposal was made that, in order to meet the variety of submissions that were used in modern arbitration practice in addition to the statement of claim and defence, paragraph (4) of the revised draft article 7 should be redrafted as follows: “Furthermore, an arbitration agreement is in writing if it is contained in an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement is alleged by one party and not denied by the other party in such submissions”. In response, it was stated that the term “submission” might be too vague and a source of ambiguity. As well, it was said that the terms “statement of claim” and “statement of defence” had well established and broad meaning in arbitral and litigation practice. Doubts were also expressed as to whether the reference to “written” submissions was appropriate and whether the words “arbitral or legal” sufficiently differentiated arbitral practice from court litigation.

66. Questions were raised whether paragraph (4) should be maintained, given that paragraph (3) of the above proposal (see above, paragraph 59), already included arbitration agreements concluded by conduct. In support of its retention, it was said that paragraph (4) provided an illustration of a specific situation, namely where the arbitration agreement was alleged by one party and not denied by the other. The view was expressed that at least the situation where an exchange of statements would evidence an arbitration agreement concluded elsewhere was not covered by paragraph (3) of the above proposal (see above, paragraph 59).

67. A suggestion was made that paragraph (4) should include more generic language to cover situations where parties communicated on the merits of the dispute. It was suggested that paragraph (4) should be redrafted in order to cover cases where no arbitration agreement existed but a party nevertheless submitted a claim to arbitrate which was not opposed by the other party.

68. After discussion, the Working Group agreed to retain paragraph (4) of the revised draft article 7 without modification notwithstanding some reservations that it might cover some of the situations dealt with under articles 4 and 16, paragraph (2) of the Arbitration Model Law as well as paragraph (3) of the above proposal (see above, paragraph 59). It was said that paragraph (4) was useful, since the narrow scope of article 4 of the Arbitration Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence merely by virtue of the exchange of statements of claim and defence and since paragraph (4) was more specific than article 16, paragraph (2) of the Arbitration Model Law.

Paragraph (5) of the revised draft article 7

69. The Working Group recalled that one of the main purposes of paragraph (5) was to address factual situations such as the case where a maritime salvage contract was concluded orally by radio with reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd’s Open Form or a contract concluded orally but subsequently confirmed in writing or otherwise linked to a written document

containing an arbitration clause, such as the general sale or purchase conditions or reference to existing rules of arbitration proposed unilaterally by a party and communicated to the other. The Working Group agreed to maintain the provision on the basis that it corresponded to modern practices.

70. Taking account of the decision of the Working Group to amend paragraph (2) of the revised draft article 7 (see above, paragraphs 50 to 64), which addressed a number of situations already covered by paragraph (5) of the revised draft article 7, a proposal was made to simplify the drafting of paragraph (5) to deal only with the issue of incorporation by reference as follows: “The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, if the reference incorporates that clause into the contract.” That proposal received some support.

71. A comment was made that the words “if the reference incorporates that clause into the contract” might be understood as requiring stricter conditions for a valid conclusion of an arbitration agreement than the 1985 text of the Arbitration Model Law and that therefore the existing language on that point should be maintained. To that end, the following text was proposed: “provided that the reference is such as to make that clause part of the contract”. It was said that it was preferable to avoid departure from the wording of the Arbitration Model Law, which was widely understood as deferring to applicable law to determine what linkage between the reference and the clause was needed to incorporate the clause into the contract. After discussion, the Working Group agreed to maintain the original wording of the 1985 text of the Arbitration Model Law.

72. It was said that the scope of application of paragraph (5) should be limited. To that end, a proposal was made to add at the end of paragraph (5) the words “and if arbitration agreements are customary for such contracts”. That proposal was objected to on the basis that it was too restrictive and created different categories of contracts, which might be unfamiliar in certain jurisdictions. The use of the word “customary” was considered to be vague and open to potentially diverging interpretations. It was recalled that the Arbitration Model Law did not provide a substantive rule as to the application of incorporation by reference but rather left its determination to national laws.

73. After discussion, the Working Group agreed that paragraph (5) would read as follows: “The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

Reconciling the conflicting approaches on the form of arbitration agreement

74. It was recalled that the Working Group’s intention in revising article 7 of the Arbitration Model Law had been to update domestic laws on the question of the writing requirement for the arbitration agreement, while ensuring access to enforcement under the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal, see above, paragraph 47). A suggestion was made and adopted that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.

75. The Working Group agreed to further consider the drafting of the alternative proposal, based on the text contained in A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1. It was said that the main purpose of the alternative

proposal was to delete paragraph (2) and only retain paragraph (1) of article 7 of the Model Law. The Working Group agreed that the last sentence of paragraph (1) which read: “[An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.]” should be deleted and the alternative proposal would read as follows: “‘An arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

Article 35, paragraph (2) of the Arbitration Model Law

76. The Working Group considered whether revision of article 7 impacted on paragraph (2) of article 35 of the Arbitration Model Law (see above, paragraph 48). It was proposed that paragraph (2) of article 35 of the Arbitration Model Law be amended to omit the requirement to submit the original arbitration agreement, a duly certified copy or any translation thereof such that the provision would read: “The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a certified copy thereof. If the award is not made in an official language of this State, the party shall supply a translation thereof into such language.” It was stated that, irrespective of the option chosen by an enacting State in respect of revisions to article 7, the amendment to article 35 should be effected.

77. Some concerns were expressed with the proposed deletion of the requirement to provide the arbitration agreement in paragraph (2) of article 35. It was said that that modification could introduce inconsistency between the Arbitration Model Law and article IV of New York Convention, which required that the arbitration agreement or a certified copy thereof be presented. On the other hand, it was noted that article VII, paragraph (1), of the New York Convention recognized the right of a party to enforce an arbitral award in the manner allowed by applicable national law. It was also stated that deleting the requirement to provide the arbitration agreement would impact negatively on article 36 of the Arbitration Model Law where the grounds upon which enforcement of an award might be refused rested on the terms of the arbitration agreement. It was noted that the 1985 text of the Arbitration Model Law already included a footnote to paragraph (2) of article 35, which explained that the conditions set forth in that paragraph were intended to set maximum standards and thus left it open to a State to impose less onerous conditions to be met by a party seeking enforcement. The view was expressed that it was therefore unnecessary to delete the reference to the arbitration agreement from the text of paragraph (2) of article 35.

78. Nevertheless, after discussion, the Working Group agreed that the requirement to provide the arbitration agreement could be dispensed with under paragraph (2) of article 35 and that if the award was not made in an official language of the State, then the court might, but was not obliged to, require the requesting party to provide a duly certified translation thereof.

79. It was further proposed to delete from the revised draft paragraph (2) of article 35 the words “duly authenticated” used in relation to the award as these words had given rise to problems in practice and were open to different interpretations. That proposal was adopted by the Working Group.

80. It was agreed that paragraph (2) of article 35 be redrafted as follows: “The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the

court may request the party to supply a certified translation thereof into such language.” It was agreed that the existing footnote to paragraph (2) of article 35 should be maintained without modification. It was noted that flexibility with respect to the submission of the translation into the language of the court existed in a number of legal systems and that it was desirable to recommend that national legislators consider adopting such a flexible approach.

VI. Explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement

81. The Working Group agreed that explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19, 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures, preliminary orders and the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.

VII. Draft interpretative instruments regarding article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

82. The Working Group recalled that, at its thirty-sixth session, it discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention and to achieve a higher degree of uniformity. At its thirty fourth session (Vienna, 25 June-13 July 2001) (A/56/17, para. 313), the Commission agreed that member and observer States participating in the Working Group’s deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision set out in article VII, paragraph (1), of the New York Convention. For that purpose, the Working Group had agreed to postpone its discussions regarding the writing requirement and the New York Convention.

83. In view of the progress that had been made at the current session in connection with the writing requirement under the Arbitration Model Law, the Working Group considered the draft interpretative instrument on article II, paragraph (2), of the New York Convention, reproduced in A/CN.9/508, para. 41 as well as the draft interpretative instrument on article VII, paragraph (1), of the New York Convention contained in A/CN.9/WG.II/WP.139, para. 37.

84. Questions were raised as to the legal status in international law of an interpretative instrument. It was questioned whether a non-binding interpretative instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention. In that respect, it was suggested that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the

application of article II, paragraph (2), of the New York Convention and that the Working Group should focus instead on the preparation of an amending protocol to the New York Convention. On the other hand, the view was expressed that, in order to increase the persuasive value of the instrument, the interpretative declaration should be endorsed by the General Assembly of the United Nations. The view was also expressed that UNCITRAL, as the core legal body in the United Nations system in the field of international trade law, would be the best body to adopt such a declaration.

85. Concerns were expressed that declarations interpreting either article II, paragraph (2), or article VII, paragraph (1), of the New York Convention would give an indication that article II, paragraph (2), did not already provide for a liberal, flexible and broad approach to the form requirement and that adopting such a declaration ran the risk of upsetting such interpretation that article II, paragraph (2), of the New York Convention already enjoyed in some jurisdictions. However, taking account of the diverging and sometimes conflicting interpretations that existed in relation to the application of article II, paragraph (2), the Working Group agreed that guidance on that matter would be helpful.

86. The Working Group proceeded to consider the text of the draft interpretative declaration on article VII, paragraph (1), of the New York Convention. In support of adopting that declaration, it was said that that approach would encourage the development of rules favouring the validity of arbitration agreements in a wider variety of situations. It was explained that the declaration on article VII, paragraph (1), of the New York Convention would encourage States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcements laws and it was observed that the recommendation contained in paragraph 13 of the draft declaration was not limited to the question of the arbitration agreement, but was broad enough to encompass any aspect of the enforcement procedure.

87. A suggestion was made that it would be preferable to include, in the draft declaration on article VII, paragraph (1), of the New York Convention, provisions clarifying the meaning of article II, paragraph (2), of the New York Convention. It was recalled that article II, paragraph (2), had been the subject of different interpretations in State courts, resulting from the differences of expression between the five equally authentic texts of the Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of “agreement in writing” (by using the word “includes”) appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.

88. In order to address those concerns, it was said that the draft interpretative declaration on article VII, paragraph (1), of the New York Convention should include a statement on the interpretation of article II, paragraph (2), of the New York Convention. It was decided that the draft interpretative declaration regarding article VII, paragraph (1), of the Convention, as it was reproduced in A/CN.9/WG.II/WP.139, should be retained subject to two amendments. First, paragraph 10 of the declaration should be amended by adding the words “particularly with respect to article 7” after the words “as subsequently revised”. Paragraph 10 of the draft declaration would therefore read: “Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,” Secondly, a new paragraph, numbered paragraph 13, could be inserted, as follows: “Recommends that article II, paragraph (2), of

the Convention be applied recognizing that the circumstances described therein are not exhaustive.” It was noted that that amendment would require that paragraph 13 be renumbered as paragraph 14 and the title of the declaration should be revised to refer to the interpretation of articles II, paragraph (2) and VII, paragraph (1). Those amendments were agreed to by the Working Group.

VIII. Possible future work in the field of settlement of commercial disputes

89. The Working Group undertook preliminary discussions regarding the desirability and feasibility of undertaking work on various issues, outlined in previous documents (A/CN.9/468, paras. 107-109; A/55/17, para. 396; A/60/17, para. 178) and the priority consideration that might be given to those issues.

90. The possible new topics upon which the Working Group was invited to focus its attention, included: possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); online dispute resolution (ODR); and State immunity in light of the recently adopted International Law Commission Convention on Jurisdictional Immunities of States and their Property (hereafter “the Jurisdictional Immunities Convention”).

91. It was stated that all the listed topics were worthy of consideration and that topics such as sovereign immunity and arbitrability might require the development of a binding instrument to be effectively addressed. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.

92. On the question of State immunity, the Working Group noted that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation.

93. On the topic of revision of the UNCITRAL Arbitration Rules, it was noted that these Rules would have their thirtieth anniversary in 2006 and that conferences were to be convened by the Secretariat to discuss ideas and areas for possible revision of those Rules. Although reservation was expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any needed revision would be of positive benefit to practitioners in international arbitration. In that respect, it was noted that a number of arbitration institutions had undertaken a revision of their arbitration rules based on the UNCITRAL Arbitration Rules. The work of those arbitration institutions could be made available to assist the Working Group in any review of the UNCITRAL Arbitration Rules. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary.

94. Another possible topic suggested for consideration to the Working Group was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request “within its competence and according to its rules on taking evidence”. It was suggested that article 27 could be revised to oblige a court to render such assistance. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations.

95. The Working Group took note of the above suggestions.

IX. Other business

96. The Working Group took note of the discussions in Working Group III (Transport Law) at its sixteenth session (Vienna, 28 November-9 December 2005) as to the compatibility of the New York Convention and the Arbitration Model Law with the draft article 83 (Arbitration Agreements) of its draft convention on the carriage of goods [wholly or partly] [by sea] and a suggestion that the opinion of the Working Group on Arbitration should be sought (see paras. 101-103 of A/CN.9/591).

97. As a result, the Working Group requested the Secretariat to convene an informal joint group of experts drawn from both Working Groups to assist the Secretariat to report on these matters as a matter of urgency at the next sessions of the two Working Groups.

Annex I

Revised legislative provisions on interim measures and preliminary orders

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party

against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 - Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement*

- (1) Recognition or enforcement of an interim measure may be refused only:
 - (a) at the request of the party against whom it is invoked if the court is satisfied that:
 - (i) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or
 - (ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

* The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(b) if the court finds that:

(i) the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

Other provision of the Arbitration Model Law to be amended

Article 1, paragraph (2) of the Model Law

(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Annex II

Revised legislative provisions on the form of arbitration agreement

(1) Revised draft article 7

Article 7. Definition and form of arbitration agreement

(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its [terms are] [content is] recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “Electronic communication” means any communication that the parties make by means of data messages; “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy .

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract

(2) Alternative proposal

Article 7. Definition of arbitration agreement

‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Other provision of the Arbitration Model Law to be amended

Article 35, paragraph (2) of the Model Law

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

Annex III

Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

“Declaration regarding interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

“The United Nations Commission on International Trade Law,

“[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

“[2] *Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

“[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

“[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

“[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

“[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes’,

“[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

“[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

“[9] *Considering* the wide use of electronic commerce,

“[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

“[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

“[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

“[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

“[14] *Recommends* that article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”

**F. Note by the Secretariat on settlement of commercial disputes:
preparation of uniform provisions on written form
for arbitration agreements, submitted to the Working
Group on Arbitration at its forty-fourth session
(A/CN.9/WG.II/WP.139) [Original: English]**

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460; this document is available, along with all other documents of UNCITRAL listed hereafter, on the UNCITRAL website at www.uncitral.org). One of the topics raised for consideration was the extent to which modernization of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as “the New York Convention”) was needed in respect of the formation of the arbitration agreement.¹ The Commission decided that future work on article II(2)² (hereafter referred to as “article II(2)”) of the New York Convention which required that the arbitration agreement be in written form “in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams” needed to be modernized.³ The Commission felt that work might be needed on two general issues addressed in the note by the Secretariat (A/CN.9/460, paras. 22-31), namely the issue of the written form requirement and its implications with respect to modern means of communication and electronic commerce, and the issue of consent by the parties to an arbitration agreement where the arbitration agreement was not embodied in an exchange of letters or telegrams.⁴ As well, the Commission pointed out that special attention might need to be given to specific fact situations that posed serious problems under the New York Convention, including tacit or oral acceptance of a written purchase order or a written sales confirmation, an orally concluded contract referring to written general conditions or certain brokers’ notes and other instruments or contracts transferring rights or obligations to non-signing third parties.⁵

2. Various views were expressed as to the means through which modernization of the New York Convention could be sought,⁶ including: by way of additional protocol;⁷ indirectly revising article II(2) by adopting model legislation to supersede that article in

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17, A/54/17*, para. 344.

² Article II of the New York Convention reads as follows:

“1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

“2. The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

“3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

³ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17, A/54/17*, para. 344.

⁴ *Ibid.*, para. 345.

⁵ *Ibid.*, para. 346.

⁶ *Ibid.*, paras. 347-349.

⁷ *Ibid.*, para. 347; some concern was expressed as to the status of such a protocol and the possibility that any attempt to revise the New York Convention might jeopardize the results achieved to date by the New York Convention. In response to that concern, it was pointed out that the very success of the New York Convention (...) should make it possible for UNCITRAL to undertake a limited overhaul of the text if such work was needed to adapt its provisions to changing business realities.

reliance of the more favourable law provision of article VII(1)⁸ (hereafter referred to as “article VII(1)”) of the New York Convention;⁹ additionally to such model legislation, by preparing guidelines or other non-binding materials to guide State courts in the application of the New York Convention;¹⁰ or by drafting a new convention separate from the New York Convention to deal with those situations which arose outside the sphere of application of the New York Convention, including (but not necessarily limited to) situations where the arbitration agreement failed to meet the form requirement established in article II(2).¹¹

3. The Commission referred the issues to the Working Group on Arbitration,¹² which studied the issues at its thirty-second session (Vienna, 20-31 March 2000).

4. At its thirty-second session, the Working Group discussed possible alternative ways of achieving a broader interpretation of article II(2), as had been outlined by the Commission, by either: (a) adopting a declaration, resolution or statement addressing the interpretation of the New York Convention and providing that, for the avoidance of doubt, article II(2) was intended to cover certain situations or to have a certain effect; or (b) encouraging a broader interpretation of the New York Convention by following the approach of some State courts of interpreting article II(2) in the light of the UNCITRAL Model Law on International Commercial Arbitration¹³ (hereafter “the UNCITRAL Arbitration Model Law”); or (c) preparing practice guidelines or notes which could set out the use of article 7 of the UNCITRAL Arbitration Model Law as an interpretation tool to

⁸ Article VII of the New York Convention reads as follows:

“1. *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*

“2. *The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.*”

⁹ Ibid., para. 348; it was noted that such a solution could be pursued only if article II(2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing, but would instead be understood as establishing the maximum requirement of form. It was also suggested that any model legislation that might be prepared with respect to the formation of the arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) to facilitate interpretation by reference to internationally accepted principles (see as well paras. 26 to 30 and footnote 59 of this document).

¹⁰ Ibid.

¹¹ Ibid., para. 349; whilst some support was expressed in favour of this suggestion, another view was that experience indicated that the process of adopting and securing widespread ratification of a new convention could take many years and that, meanwhile, there would be an undesirable lack of uniformity. It was stated that the suggested approach might be particularly suited to deal with a number of specific fact situations that posed serious problems under the New York Convention (see para. 1 of this document). However, with respect to a number of these situations (for example, transfer of rights or obligations to non-signing third parties), it was widely felt that the issues at stake went to general questions regarding the substance and validity of the underlying transaction. Accordingly, doubts were expressed as to whether it would be desirable and feasible to attempt to deal with those issues in the context of a set of provisions geared primarily to the formation of the arbitration agreement.

¹² Ibid., paras. 344-350 and para. 380.

¹³ A/CN.9/WG.II/WP.108/Add.1, para. 36, and its footnote 9.

clarify the application of article II(2), along the lines discussed in paragraphs 33 and 34 of document A/CN.9/WG.II/WP.108/Add.1.

5. The view that prevailed at the thirty-second session of the Working Group was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II(2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement should be further studied to determine the optimal approach.¹⁴

6. At its thirty-third (Vienna, 20 November-1 December 2000) and thirty-fourth (New York, 21 May-1 June 2001) sessions, the Working Group discussed preliminary drafts of an interpretative declaration relating to article II(2).¹⁵

7. At its thirty-sixth session (New York, 4-8 March 2002), the Working Group had before it the text of the draft declaration as adopted at its thirty-fourth session¹⁶ and reassessed the various options available to deal with difficulties that had arisen in the practical application of article II(2), before considering the revised draft interpretative declaration.

8. The Working Group considered at length the various arguments that were put forward in support of proposals to amend the New York Convention and the adoption of the interpretative declaration.¹⁷ The Working Group acknowledged that it could not, at that stage, reach a consensus on whether to prepare an amending protocol or an interpretative declaration to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group agreed that it would be useful to offer guidance on interpretation and application of the form requirement in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft text revising article 7 of the UNCITRAL Arbitration Model Law, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a “friendly bridge” between the new provisions of the UNCITRAL Arbitration Model Law and the New York Convention, pending a final decision by the Working Group on how to best deal with the application of article II(2).¹⁸

9. While no objections were raised to that course of action, the view was expressed that the mere fact of attempting to address the matter in a guide to enactment of the new draft article 7 of the UNCITRAL Arbitration Model Law could prejudice the consideration of a possible amending protocol to the New York Convention. Raising issues related to the New York Convention in a guide to enactment, i.e., an ancillary text of questionable legal value, appended to a new provision of the UNCITRAL Arbitration Model Law, which

¹⁴ A/CN.9/468, paras. 88-99.

¹⁵ A/CN.9/485, paras. 60-77 and A/CN.9/487, paras. 42-63, respectively; the latest draft declaration considered by the Working Group may be found at: A/CN.9/508, para. 41.

¹⁶ A/CN.9/508, para. 41.

¹⁷ Ibid., paras. 42-48.

¹⁸ Ibid., para. 49.

itself was not a mandatory instrument, was said to be a counterproductive exercise. It was stated that it would be preferable not to attempt to address in any way the issues raised by the interpretation of the form requirement under the New York Convention. The Working Group took note of those comments.¹⁹

10. Exploring how courts have defined what constitutes an agreement in writing in the New York Convention may assist in identifying divergent court interpretations regarding the form of an arbitration agreement. This note considers how State courts have interpreted the form requirements in article II(2) and explores the extent to which article VII(1) of the New York Convention might assist in modernising the form requirement for arbitration agreements.

I. Interpretation of article II(2) of the New York Convention by State courts

A. Interpretation of the terms “signature”, “exchange of documents”

General remark

11. Article II(2) provides a definition of a term included in article II(1) of the New York Convention, which requires that Contracting States recognize “an agreement in writing”. Article II(2) provides for two possible ways of satisfying the requirement of “writing”, also known as the “form requirement”. The first is where an arbitration clause in a contract or an arbitration agreement is signed by the parties. The second is where an arbitration clause in a contract or an arbitration agreement is contained in an exchange of letters or telegrams. By requiring either a signature or an exchange of documents, the form requirement ensures that the parties’ assent to arbitration is expressly recorded.

Signature or exchange of documents strictly required

12. In a number of cases, State courts strictly applied the requirements defined under article II(2) and granted enforcement of arbitral awards only when either the contract containing the arbitration clause or the arbitration agreement was signed by the parties²⁰ or was contained in an exchange of letters or telegrams.²¹ In a series of cases, State courts strictly required express acceptance, either by signature or exchange of documents by both parties.²² However, the principle did not appear to require that the arbitration clause be separately approved in writing²³ or be specifically discussed by the parties.²⁴ At least one court concluded that the form requirement must not be derogated from, even in situations where a finding that an arbitration agreement did not satisfy the form requirement of article II(2) would be contrary to principles of good faith.²⁵ These requirements prevailed over more or less demanding requirements of national laws (see below, paragraph 32).²⁶

¹⁹ Ibid., para. 50.

²⁰ Norway, Halogaland Court of Appeal, 16 August 1999, (Stockholm Arbitration Report, (1999), Vol 2, at 121): *the court considered that a contract concluded by an exchange of e-mails by reference to the GENCON charter party did not constitute an arbitration agreement in writing in accordance to article II(2) of the New York Convention. The court concluded that the e-mails exchanged together with the copy of the GENCON charter, which was not signed, failed to meet the “basic requirements of legal protection set up by the Convention”*; The Netherlands, Court of First Instance of Dordrecht, North American Soccer League Marketing, Inc. (USA) v. Admiral International Marketing and Trading BV (Netherlands) and Frisol Eurosport BV

- (Netherlands), 18 August 1982, (Yearbook Commercial Arbitration X (1985), p. 490); Germany, Brandenburg Court of Appeal, 13 June 2002, (No. 8, Sch 2/01); Spain, Supreme Court, Delta Cereales España SL (Spain) v. Barredo Hermanos SA, 6 October 1998, (Yearbook Commercial Arbitration XXVI (2001), p. 854): *the enforcement of the arbitral award was not granted as the document supplied by the parties, containing the arbitration clause, was not signed.*
- ²¹ The Netherlands, Court of Appeal, Hertogenbosh, Sneek Hardhout Import BV (Netherlands) v. Karl Schlueter KG (GmbH & Co) (Germany), 14 July 1995, (Yearbook Commercial Arbitration XXI (1996), p. 643): *an arbitration agreement, contained in general terms of contract, signed by one party and faxed to the other party, who signed and faxed the document back, was held to be valid*; Austria, Supreme Court, 22 May 1991, (OGH 22.5.1991, 3 Ob 73/91, SZ 64/61): *in relation to article V(1), a court found that enforcement might (upon application of the party opposing enforcement) be denied if the form requirements "exclusively and exhaustively contained in article II(2)" were not met*; United States, District Court for the Southern District of New York, Sen Mar, Inc. v. Tiger Petroleum Corporation (1991) (774 F Supp. 879): *the court decided that an arbitration clause was enforceable under the New York Convention only if it was found in a signed written document or an exchange of letters; there was no enforceable agreement in that case because the arbitration agreement was contained only in a telex that was objected to in its entirety by the other party.*
- ²² United States, District Court for the Western District of Washington, Richard Bothell and Justin Bothell, d/b/a Atlas Technologies and Atlas Bimetals Labs Inc. v. Hitachi Zosen Corp et al, 19 May 2000 (97 F Supp 2d 1048): *the court considered that there was no indication on the face of the purchase orders or any other document exchanged between the parties of an agreement to arbitrate.*
- ²³ Italy, Supreme Court, Krauss Maffei Verfahrenstechnik GmbH (Germany) v. Bristol Myers Squibb (Italy), 10 March 2000, (Yearbook Commercial Arbitration XXVI (2001), p. 816): *the court declared that it was not necessary for the arbitration clause to be separately approved in writing but that such clause was valid when contained in a document signed by both contracting parties: "once it is clear that the parties must sign the arbitration clause and that their unequivocal intention to refer the dispute to arbitrators must appear unambiguously, it follows that an arbitration clause is not valid when it is contained (...) in the documents (...) signed by the foreign seller, and it does not appear in the document (...) by which the buyer accepted the seller's offer".*
- ²⁴ Korea, Supreme Court, Kukje Sangsa Co Ltd (Korea) v. GKN International Trading (London) Ltd (UK), 10 April 1990, (Yearbook Commercial Arbitration XVII (1992), p. 568): *the court held that the form requirement of article II(2) was fulfilled when a sales contract was concluded by accepting purchase orders in accordance with the terms as stated therein including an arbitration clause; the court denied the argument of the defendant that the arbitration clause was not accepted because it was printed in smaller letters than the other terms and conditions and was not discussed by the parties.*
- ²⁵ Italy, Supreme Court, Robobar Limited (UK) v. Finncold sas (Italy) 28 October 1993, (Yearbook Commercial Arbitration XX (1995), p. 739): *the argument that it would be contrary to good faith to contest the validity of the arbitration clause was rebutted on the basis that formal requirements could not be derogated from.*
- ²⁶ Austria, Supreme Court, 22 May 1991, (OGH 22.5.1991, 3 Ob 73/91, SZ 64/61): *in relation to article V(1), a court found that enforcement might (upon application of the party opposing enforcement) be denied if the writing requirements which were "exclusively and exhaustively contained in article II(2)" were not met*; Germany, OLG Schleswig, 30 March 2000, (16 SchH 05/99): *the court stated that article II(2) superseded any national law with respect to formal requirements and the principle of autonomous interpretation meant that national law could not be applied to the interpretation and scope of the arbitration agreement*; Switzerland, Supreme Court, Insurance Company (Sweden) v. Reinsurance Company (Switzerland), 21 March 1995 (Yearbook Commercial Arbitration XXII (1997), p. 800): *the court stated that formal requirements were to be exclusively determined by article II(2), which should be interpreted independently, without assistance of national law*; Germany, OLG Koeln, 22 June 1999, (9 Sch 08/99): *the court held that the form requirement of article II(2) was fulfilled when*

Combination of alternative form requirements

13. Besides situations where both parties had signed the same document,²⁷ State courts have also concluded there to be a signature where there was a combination of alternative form requirements, recognizing the validity of an arbitration agreement when both parties had fulfilled either the signature or the exchange requirement but not to be met where only one party complied with the writing requirement.²⁸ Based on the notion that there must be a mutual agreement to arbitrate, either by signature or by exchange of documents, courts generally ruled out oral arbitration agreements,²⁹ even if confirmed by the other party in writing, or even if there was subsequent appearance by both parties before the arbitrator,³⁰ tacit acceptance³¹ or performance of the contract.³² As well, it did not allow for recognition of an arbitration agreement by regular prior use of general conditions of trade.³³

Diverging interpretations of the signature requirement

14. The requirement of signatures under article II(2) has not been interpreted consistently by State courts. Diverging interpretations in that respect may be found in decisions of State courts in the United States, which considered, in certain cases, that the requirement for signature or exchange, contained in article II(2), applied only to an arbitration agreement as distinct from the contract and not to an arbitration clause in a

parties signed a contract containing an arbitration clause.

²⁷ Austria, Supreme Court (OGH), 21 February 1978, 3 Ob 120/77, SZ 51/18 (Yearbook Commercial Arbitration X (1985), p. 418).

²⁸ Austria, Supreme Court, 7 November 1979, (OGH 7.11.1979, 3 Ob 144/79, SZ 52/160); Italy, Supreme Court, Universal Peace Shipping Enterprises SA (Panama) v. Montedipe SpA (Italy), 28 March 1991 (Yearbook Commercial Arbitration XVII (1992) p. 562): *the court held that an oral contract for sale and a bill of lading which included an arbitration clause sent by one party but not signed did not satisfy the form requirement of article II(2) of the New York Convention.*

²⁹ Italy, Supreme Court, Marc Rich & Co AG v. Societa Italiana Impianti SpA, 25 January 1991, (Yearbook Commercial Arbitration XVII (1992), p. 554 and decision of the Court of Justice of the European Community, dated 25 July 1991, p. 233): *the contract was concluded by an exchange of telexes; since a later telex by Marc Rich stating further terms of the contract including an arbitration clause was not replied to, and accepted by, Impianti, the court found that there was no proof of a mutual written agreement to arbitrate and thus the Italian courts had jurisdiction to hear the case; the Court held that "as far as arbitration clauses for foreign arbitration are concerned, the written form is always required under the New York Convention."*

³⁰ Germany, OLG Duesseldorf (1971) (Yearbook Commercial Arbitration II (1977), p. 237).

³¹ Germany, OLG Rostock, 22 November 2001, (1 Sch 03/2000); Italy, Supreme Court, Marc Rich & Co AG v. Societa Italiana Impianti SpA, 25 January 1991, (Yearbook Commercial Arbitration XVII (1992), p. 554).

³² Italy, Supreme Court, Robobar Limited (UK) v. Finncold sas (Italy) 28 October 1993, (Yearbook Commercial Arbitration XX (1995), p. 739).

³³ The Netherlands, Court of Appeal at The Hague, James Allen (Ireland) Ltd v. Marea Producten B.V. (Netherlands), 17 February 1984, (Yearbook Commercial Arbitration X (1985), p. 485): *the parties had conducted at least 25 prior transactions in accordance with standard conditions which included an arbitration clause; the last transaction, subject to the dispute, did not refer to those standard conditions and the court decided that regular prior use of general conditions of trade (containing an arbitration clause) could not constitute an enforceable arbitration agreement in a case where those general conditions had not specifically been referred to; the court stated that the requirement of the "agreement in writing" referred to in the New York Convention foreclosed the possibility of invoking such continuous use.*

contract.³⁴ According to that interpretation, article II(2) would consist of two separate regimes, one being “an arbitration clause in a contract” and the other “an arbitration agreement (a) signed by the parties or (b) contained in an exchange of letters or telegrams”. That reasoning had been subsequently followed in a first instance judgement, where the court considered that unsigned purchase orders represented an “arbitral clause in a contract” and as such, were not caught by the requirements of signature or exchange.³⁵ However, it should be noted that that interpretation was reversed on appeal,³⁶ and had not been widely followed in the United States, or by courts of other States. In other cases, State courts affirmed that the definition of “agreement in writing” required that such an agreement, whether it was an arbitration clause or agreement contained in a contract, be signed by the parties or contained in a series of letters or telegrams exchanged by the parties.³⁷

³⁴ United States, Court of Appeals for the fifth Circuit, *Sphere Drake Insurance plc v. Marine Towing, Inc.*, 23 March 1994, (16 F 3d 666, Yearbook Commercial Arbitration XX (1995), p. 937): *that case involved an insurance contract that was not signed by the insured party. The insured contended that because it did not sign the contract, there was no “agreement in writing” within the meaning of the New York Convention; to be enforceable under the New York Convention, either the contract containing the arbitration clause had to be signed by the parties, or the parties had to demonstrate their assent thereto by an exchange of correspondence. The court rejected that interpretation and ruled that the New York Convention’s definition of “agreement in writing” included either (1) an arbitration clause in a contract or (2) an arbitration agreement (a) signed by the parties or (b) contained in an exchange of letters or telegrams. In reaching its decision, the court cited, but declined to follow the decision from the US District Court for the Southern District of New York, Sen Mar, Inc v. Tiger Petroleum Corporation (1991)(774 F Supp. 879), which had taken a contrary view of the interpretation of article II(2).*

The Sphere Drake (1994) interpretation was followed in Stony Brook Marine Transportation Corporation v. Leslie Wilton, Compagnie d’Assurances Maritimes Aeriennes et Terrestres and Lev A. Osman (1996) 94 CV 5880 (JS) involving an arbitration clause contained in an insurance certificate issued after the loss occurred and unsigned by the insured, but referred to in a written order slip prepared by the insured’s agent and signed by the underwriter. The Sphere Drake (1994) interpretation apparently also influenced the US District Court of Minnesota in Polytek Engineering v. Jacobson Companies and Jacobson Inc. (1997) 984 F Supp 1238 (although it did not explicitly mention the case, it came to the conclusion that an unsigned purchase order that twice referred to an attached contract containing an arbitration clause, which was partially performed by the party trying to avoid arbitration, fulfilled the writing requirement).

³⁵ United States, District Court, *Kahn Lucas Lancaster, Inc. v. Lark International Ltd* (11 August 1997) (No. 95 CIV 10506): *the court followed Sphere Drake Insurance plc v. Marine Towing, Inc. and declined to follow Sen Mar Inc. v. Tiger Petroleum Corp. : the case involved purchase orders performed by the defendant but not signed by it; the court considered that “an arbitral clause in a contract is sufficient to implicate the New York Convention; an ‘agreement in writing’ does not necessarily have to be either signed by the parties or contained in an exchange of letters or telegrams, as long as the court is otherwise able to find an arbitral clause in a contract.” On appeal (see footnote 36 below), that interpretation of article II(2) was rejected.*

³⁶ United States, Court of Appeals for the second Circuit, *Kahn Lucas Lancaster, Inc. v. Lark International Ltd*, 29 July 1999 (186 F 3d 210): *the court stated that the definition of “agreement in writing” required that such an agreement, whether it was an arbitration agreement or an arbitration clause in a contract, be signed by the parties or contained in a series of letters or telegrams exchanged by the parties.*

³⁷ *The reasoning in the Kahn Lucas appeal case has been followed in subsequent cases by the US District Court of Connecticut, Coutinho Caro & Co USA Inc v. Marcus Trading Inc.,*

Diverging interpretations of the exchange of documents requirement

15. The requirement of exchange of documents between the parties has not been interpreted consistently by State courts. Certain State courts interpreted strictly the word “exchange” to mean that the document containing the arbitration clause or agreement should be returned by the party to which it was sent to the party, which sent it initially.³⁸ According to that trend of case law, the requirement that there be an “exchange”, and therefore a written offer of a contract containing an arbitration clause, or of an arbitration agreement and a written acceptance excluded a wide range of fact situations.³⁹ In other cases, a reference to the arbitration clause or agreement in subsequent correspondence emanating from the party to which the arbitration clause or agreement was sent was considered as sufficient to meet the form requirement of article II(2).⁴⁰

B. Application of other legal principles where the form requirements are otherwise not satisfied

Reliance on the conduct of the parties (“estoppel”)

16. The question arose whether, in the case where a party acted specifically in respect of an arbitration agreement, without objection, that party was subsequently barred, for reasons of good faith, from invoking non-compliance of the arbitration agreement with the written form, as required by article II(2). No leading approach is evident from the case law.

17. In a number of decisions, State courts have recognised an arbitration agreement in the absence of writing, based on the conduct of the parties, either by reference to domestic contract law principles,⁴¹ or by considering that the permissive language in article V(1) “may be refused” allowed the courts some flexibility in the determination of whether an arbitration agreement has been validly concluded.⁴² As well, a court found that the lack of

14 March 2000, *Judy Tien Lo v. Aetna International* (2000) WL 565465 and the US District Court for the Southern District of California, in *Chloe Z Fishing Co., Inc v. Odyssey Re (London) Ltd*, 29 April 2000, 109 F Supp 2d 1236, *where the court noted the different interpretations and expressed its preference for the Kahn Lucas (1999) interpretation (as opposed to Sphere Drake (1994)), noting however that the facts of Kahn Lucas could not be transposed to the current case. A number of other cases have expressly followed the Kahn Lucas interpretation*: US District Court for the Western District of Washington, *Bothell and Bothell v. Hitachi Rosen Corporation*, 19 May 2000, (97 F Supp 2d 1048), *where the court denied a motion to stay legal proceedings on the basis of a very restrictive interpretation of exchange; the reasoning in the Kahn Lucas appeal case has been mentioned as well in the case from United Kingdom, Queen’s Bench Division, Commercial Court, XL Insurance Ltd v. Owens Corning*, 28 July 2000, 2 Lloyd’s Rep 500, (Yearbook Commercial Arbitration XXVI (2001) p. 869).

³⁸ Italy, Court of Appeal of Naples (1974) (Yearbook Commercial Arbitration I, (1976) Case No. 11, p. 193).

³⁹ A/CN.9/WG.II/WP.108/Add.1, para. 12.

⁴⁰ Italy, Court of Appeal of Florence (1977), (Yearbook Commercial Arbitration IV (1979), Case No. 29, p. 289).

⁴¹ United States, Court of Appeals, Seventh Circuit, *Mary D. Slaney (US) v. International Amateur Athletic Federation (Monaco)*, 27 March 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 1091): *the court stated that non-signatories to an arbitration agreement might nevertheless be bound according to ordinary principles of contract and agency, including estoppel*.

⁴² Hong Kong, High Court, *China Nanhai Oil Joint Service Corporation Shenzhen Branch*

written form was cured by participation in arbitration without objection.⁴³ The limits of the application of this principle were however less clear with some court decisions suggesting that the acts of performance must refer directly to the arbitration agreement or allow a court to deduce that a party wished to accept the arbitration agreement.⁴⁴

Incorporation of arbitration clause or agreement by mere reference or usual commercial relations

18. The New York Convention did not address the issue of recognition of an arbitration clause or agreement that, whilst not satisfying the form requirement, was found to be incorporated into a contract or exchange of letters or telegrams by mere reference.

19. In respect of incorporation by reference, State courts found that article II(2) required that the arbitration agreement must be referred to in the main contract,⁴⁵ unless the parties had an ongoing business relation.⁴⁶ In the case of an ongoing relation, an arbitration clause was considered to be incorporated by reference even if the other party did not receive the actual term on the basis that the party was presumed to have knowledge of the arbitration clause.⁴⁷

(PR China) v. Gee Tai Holdings Co Ltd, 13 July 1994, (Yearbook Commercial Arbitration XX (1995), p. 671): *the Supreme Court analysed the doctrine of estoppel and held that the doctrine was inherent to the New York Convention.*

⁴³ Greece, Court of Appeal of Athens, Greek Company v. FR German Company, Decision No. 4458, (1984) (Yearbook Commercial Arbitration XIV (1989), p. 638): *the lack of written form was cured by participation in arbitration without objection; to reach that conclusion, the court applied the domestic law governing the arbitration proceedings (without referring to article VII(1) of the New York Convention).*

⁴⁴ Spain, Supreme Court, Delta Cereales Espana SL (Spain) v. Barredo Hermanos SA (Spain), 6 October 1998, (Yearbook Commercial Arbitration XXVI (2001), p. 854): *“the court’s interpretation aims at ascertaining, from the communications and acts of the parties, whether they wished to include the arbitral clause in their contract or, in general, to submit their dispute to arbitration”; however, in that case, neither the documents supplied by Delta nor by Barredo contained an arbitration clause satisfying the requirements of article II(2) since they were not signed by the other party; Switzerland, Court of Appeal, Geneva, C Import and Export Company (PR China) v. G SA (Switzerland), 11 December 1997, (Yearbook Commercial Arbitration XXIII (1998), p. 764): *the court stated that the New York Convention allowed, apart from written and signed acts, those acts which had a less strict form but were accepted by the trade usages of the parties.**

⁴⁵ Italy, Supreme Court, Molini Lo Presti SpA (Italy) v. Continentale Italiana SpA (Italy), 2 March 1996, (Yearbook Commercial Arbitration XXII (1997), p. 734): *the reference in a contract to an arbitration clause contained in a standard agreement was considered sufficient to incorporate the arbitration clause per relationem.*

⁴⁶ France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d’Activités Pétrolières ETAP (Tunisia), 9 November 1993 (Yearbook Commercial Arbitration XX (1995), p. 660): *exchange of telexes, which referred to “Standard Industry Practice”, “the standard contract” and “the practice in International Trade” established proof of consent to arbitration; Germany, The BayObLG, 17 September 1998 (4 Z Sch 01/98): *a contract of sale signed by the parties, which expressly incorporated “the terms and conditions printed on the other side”, including an arbitration clause, satisfied the form requirement of article II(2) since it did not refer to a separate document.**

⁴⁷ Germany, Schleswig, 30 March 2000, 16 SchH 05/99: *a contract, which referred to terms and conditions on reverse side of standard contract form, used by the parties for several years, was found to satisfy the written form notwithstanding that the reverse page of the contract never reached the other party; Switzerland, Federal Supreme Court, Tradax Export S.A. (Panama) v*

20. A number of cases have taken an even broader approach finding that incorporation by reference might be found even if the arbitration clause was not in the main contract, provided there was some written reference to the document containing that clause and that the party against whom it was invoked was aware of the contents of the document when concluding the contract and accepted the incorporation of the document in the contract.⁴⁸

In another case, noting that the New York Convention reinforced a strong policy in favour of arbitration over litigation and that this policy applied with special force in the field of international commerce, the court stated that, despite the fact that the parties did not sign

Amoco Iran Oil Company (US), 7 February 1984, (Yearbook Commercial Arbitration XI (1986), p. 532): *the Court stated that article II(2) was silent on the question of incorporation by reference and that there was no harmonised solutions to that question; a charter party contained a valid arbitration clause and the question was whether the arbitration clause was also incorporated by the reference to the charter party in the bill of lading; in the case at hand, well-established commercial companies were involved, which were familiar with the use of standard terms of charter parties; thus, the court came to the conclusion that, since the bill of lading referred to the totality of the clauses and conditions contained in the charter party to which also the arbitration clause belonged and due to the experience of the parties involved, it could be assumed that the defendant (belonging to the Amoco group) knew or should have known the respective aspects of the carriage contract; the court held that the arbitration clause was therefore valid.*

- ⁴⁸ France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d'Activités Pétrolières ETAP (Tunisia), 11 October 1989, (Yearbook Commercial Arbitration XV (1990), p. 447): *the court stated that although the New York Convention did not exclude the recognition of an arbitration agreement incorporated by reference, article II(2) required "that the existence of the clause be mentioned in the main contract, unless there exists between the parties a longstanding business relationship which insures that they are properly aware of the written conditions normally governing their commercial relationships."* France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d'Activités Pétrolières ETAP (Tunisia), 9 November 1993, (Yearbook Commercial Arbitration XX (1995), p. 660): *the court, without referring to the New York Convention, stated that: "in the field of international arbitration, an arbitration clause, if not mentioned in the main contract, may be validly stipulated by written reference to a document which contains it, for instance, general conditions or a standard contract, when the party against which the clause is invoked was aware of the contents of this document at the moment of concluding the contract and when it has, albeit tacitly, accepted the incorporation of the document in the contract";* Australia, Supreme Court of Queensland, Court of Appeal Division, 27 June 2000, Austin John Montague v. Commonwealth Development Corporation (UK), Appeal No. 8159, (Yearbook Commercial Arbitration XXVI (2001), p. 744): *the Supreme Court of Queensland found that signature of terms of reference as part of ICC arbitration proceedings amounted to an agreement in writing;* United States, District Court for the Eastern District of New York, USA, Stony Brook Marine Transportation Corp v. Leslie Wilton et al (1996): *the order slip drawn up by one party's agent and signed by other party's agent, which referred to an arbitration clause was considered, in the context of custom and practice of marine insurers, as incorporating by reference the arbitration clause;* Spain, Supreme Court, Consmaemma (Italy) v. Hermanos Madrid SA (Spain), 20 February 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 858): *a sales confirmation document containing an ICC arbitration clause and a reference to a form, which also contained an ICC arbitration clause, was only signed by one party. The Supreme Court found that the New York Convention was applicable and that the requirements of article II(2) were met because the original contract containing an arbitration clause, together with a subsequent contract was said to show that the parties intended to submit to arbitration disputes arising under their contract.* Switzerland, Supreme Court, G S.A. (Switzerland) v. T Ltd (UK), 12 January 1989, (Yearbook Commercial Arbitration XV (1990), p. 509): *an agreement resulting from an exchange of written documents did not need to mention the arbitration clause and a general reference to a contract containing an arbitral clause was considered sufficient to meet the form requirement of article II(2).*

an arbitration agreement, the incorporation of the arbitration clause by reference in letters exchanged between the parties was sufficient.⁴⁹

21. In other cases, State courts held that the reference need not to relate specifically to the arbitration clause but rather to the contract as a whole provided that the parties had the possibility to examine the general terms, i.e. when they were printed on the back side or were known due to the regular business contact between the parties or where the parties should have known about the document due to trade usages.⁵⁰ In some cases, incorporation by reference had not been accepted because the reference was not explicit or was ambiguous according to usual practice of trade. According to other cases, if an arbitration agreement was incorporated in a document and if it was proven that the parties were bound by a contract, which included the terms of that document, no further proof of the arbitration agreement was required.⁵¹

C. New means of communication

22. The express reference to “letter or telegram” in article II(2) raised the issue of whether new means of generating and recording communications would (in addition to letters and telegrams) be considered as meeting the form requirements of article II(2). This question was answered in the affirmative by most of the State courts in respect of telexes⁵²

⁴⁹ United States Court of Appeals, Third Circuit, 20 June 2003, NO. 02-2169, (Yearbook Commercial Arbitration XXIX (2004), p. 978).

⁵⁰ Switzerland, Court of Appeal, Basel-Land, DIETF Ltd v. RF AG, 5 July 1994, (Yearbook Commercial Arbitration XXI (1996) p. 685): *a seller had sent a confirmation order to a buyer containing reference to the overleaf general business regulations which included an arbitration clause; the buyer replied by fax referring to the confirmation order and made certain requests as to the packaging of the goods etc.; the Court found that the form requirements of article II(2) were met by stating that the written acceptance did not need to refer especially to the arbitration clause but may concern the contract as a whole.*

⁵¹ United Kingdom, Court of Appeal, Zambia Steel & Building Supplies Ltd. V. James Clark & Eaton Ltd, May 16, 1986 ((1986) 2 Lloyd’s Rep. 225): *the court, referring to the 1975 English Arbitration Act stated that “once it is clear that the assent to the written terms is not required to be contained in the written agreement, but that assent to the written terms may be proven by other evidence, then (...) any evidence which proves that the party has agreed to be bound by an [arbitration] agreement (...) contained in a document or documents is sufficient to make the document or documents an [arbitration] agreement in writing (...)” The reasoning of Zambia Steel (1986) was followed in a decision by the Queen’s Bench Division of the Commercial Court, Abdullah M Fahem and Co (Yemen) v. Mareb Yemen Insurance Co and Tomen (UK) Ltd (1997) (Yearbook Commercial Arbitration XXIII (1998) p. 789) where a stay of court proceedings was sought invoking an arbitration agreement; the court cited the English Arbitration Act and held that the Act provided for a very wide meaning of the words “in writing”, which was even wider than article 7(2) of the UNCITRAL Arbitration Model Law but was said to be still consonant with article II(2); the court held that if an arbitration agreement was incorporated in a document and if it was proven that the parties were bound by a contract which included the terms of that document, no further proof of the arbitration agreement was required.*

⁵² United States, District Court for the Southern District of New York, Oriental Commercial and Shipping Co Ltd (Saudi Arabia) and Oriental Commercial and Shipping Co (UK) Ltd (UK) v. Rosseel N.V. (Belgium), 4 March 1985, (609 F Supp 75); France, Court of Appeal, Paris, Bomar Oil NV v. ETAP, 20 January 1987, (1987, rev. arb. 482); Switzerland, Federal Tribunal, G.S.A. v. T. Ltd, 12 January 1989, (Yearbook Commercial Arbitration XV (1990)); Italy, Court of Savona, Dimitros Varverakis v. Companis de Navigacion Artico SA, 26 March 1981 (Yearbook

and telefaxes.⁵³ One court stated that article II(2) could not have intended to exclude all other forms of written communications regularly utilized to conduct commerce.⁵⁴ In some cases, State courts found that, even though the form requirement meant that the arbitration agreement must exist in written form, it sufficed that the agreement was contained in a document allowing for a written proof and confirmation of the common intent of the parties.⁵⁵

23. In another case, a State court found that article II(2) should be interpreted and applied in the light of the less restrictive requirements of article 7(2) of the UNCITRAL Arbitration Model Law and article 178 of the Swiss Private International Law Act.⁵⁶ That court stated that, in the light of modern means of communication, unsigned writings play an increasingly important role and signature requirements are becoming less important and, in particular cases, specific conduct might, by virtue of the rules of good faith, substitute the form requirement. However, that interpretation was not universally accepted, and at least one court considered that an exchange of e-mail messages did not satisfy the form requirement of article II(2).⁵⁷

II. Interplay between article II(2) and article VII(1) of the New York Convention

24. The New York Convention has been described as having a “pro-enforcement” bias in that it seeks to encourage enforcement of awards in the greatest number of cases as possible. That purpose was achieved through article VII(1) by removing conditions for recognition and enforcement in national laws that were more stringent than the conditions in the New York Convention, while allowing the continued application of any national

Commercial Arbitration, X (1985)); Austria, Supreme Court, 2 May 1972, (Yearbook Commercial Arbitration X (1985)); Switzerland, Federal Supreme Court, Tracom SA v. Sudan Oil Seeds Co, 1987, (Yearbook Commercial Arbitration XII (1987)).

⁵³ United States, Court of Appeals for the Second Circuit, Titan Inc v. Guangzhou Zhen Hua Shipping Co Ltd, 15 February 2001 (241 F 3d 135); Germany, OLG Hamburg, 30 July 1998 (Yearbook Commercial Arbitration XXV (2000), p. 714): *the court found that in the light of technological developments, telexes and faxes like telegrams were to be treated as letters within the meaning of article II(2)*; Switzerland, Federal Supreme Court, Tracom S.A. (Switzerland) v. Sudan Oil Seeds Co Ltd (UK), 5 November 1985 (Yearbook Commercial Arbitration XII (1987), p. 511): *the Supreme Court found that telexes and letters to settle disputes by arbitration and appointment of an arbitrator in a telex satisfied the form requirement of article II(2)*.

⁵⁴ United States, District Court for the Southern District of California, Chloe Z Fishing Co Inc et al v. Odyssey Re (London) Ltd (2000) (109 F Supp 2d 1236).

⁵⁵ Switzerland, Court of Appeal in Basel, DIETF Ltd v RF AG (1994).

⁵⁶ Switzerland, Federal Tribunal, Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA (1995) BGE 121 III 38, ASA Bulletin 3/1995 503: *article 178 of the Federal Act of Private International Law provides as follows: “As regards form, the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopy or any other means of communication which permits it to be evidenced by a text. (...)”*.

⁵⁷ Norway, Halogaland Court of Appeal, 16 August 1999, (Stockholm Arbitration Report, (1999), Vol 2, at 121): *the court considered that a contract concluded by an exchange of e-mails by reference to the GENCON charter party did not constitute an arbitration agreement in writing in accordance to article II(2) of the New York Convention. The court concluded that the e-mails exchanged together with the copy of the GENCON charter, which was not signed, failed to meet the “basic requirements of legal protection set up by the Convention”*.

provisions that gave special or more favourable rights to a party seeking to enforce an award (A/CN.9/WG.II/WP.108/Add.1, para. 21).

25. To the extent that many national laws also regulate the formal validity of the agreement to arbitrate, State courts have had to determine how such national rules relate to the form requirements of article II(2). The question whether State courts might apply their own more liberal laws under article VII(1) rather than the stricter requirements of the New York Convention raises several questions.

A. Uniform or maximum form requirement

26. The first question is whether the New York Convention should be interpreted as providing a unified form requirement with which arbitration agreements must comply under the New York Convention⁵⁸ or whether article II(2) of the New York Convention establishes a maximum requirement of form (thus leaving States free to adopt less stringent requirements)⁵⁹ (A/CN.9/WG.II/WP.108/Add.1, paras. 21-22).

27. Many domestic laws have taken a broader approach in respect of the requirements in article II(2). Also, there are indeed instances in which State courts have applied domestic law in preference to the New York Convention in order to uphold an arbitration clause,⁶⁰

⁵⁸ Switzerland, Federal Supreme Court, Tradax Export S.A. (Panama) v. Amoco Iran Oil Company (US), 7 February 1984 (Yearbook Commercial Arbitration XI (1986), p. 532) and Switzerland, Federal Supreme Court, Tracom S.A. (Switzerland) v. Sudan Oil Seeds Co. Ltd. (UK), 5 November 1985, (Yearbook Commercial Arbitration, XII (1987), p. 511): *in those cases, the court emphasized the uniform rule character of article II, stating that "article II contains rules of uniform applicability which, in cases where the Convention is applicable, replaces national law"*; OLG Schleswig, 30 March 2000, 16 SchH 05/99: *article II(2) superseded any national law with respect to formal requirements and the principle of autonomous interpretation meant that national law could not be applied for the interpretation and scope of the arbitration agreement, whether more or less strict than article II(2) concerning formal requirements*.

⁵⁹ Germany, Court of Appeal of Cologne, Danish buyer vs. German seller, 16 December 1992, (Yearbook Commercial Arbitration XXI (1996), p. 535): *the court stated that "article II(2) of the Convention does not provide for a uniform rule, as it can be deduced from article VII(1) of the Convention (...)" (See as well footnote 8 of this document.)*

⁶⁰ The Netherlands, Court of First Instance, Rotterdam, 28 September 1995, Petrasol BV (Netherlands), v. Stolt Spur Inc. (Liberia) (Yearbook Commercial Arbitration, XXII, pp. 762-765): *the Court affirmed that "the provisions of the New York Convention (particularly article II) do not preclude the application of article 1074 CCP, because of the more-favourable-law provision in article VII of the Convention, to be applied by analogy"*; India, Delhi High Court, 15 October 1993 (Suit No. 1440 of 1990 and I.A No. 5206 of 1990, D – 15-10-1993), Gas Authority of India, Ltd v. SPIE-CAPAG, SA (France), Nippon Kokan Corporation (Japan), Toyo Engineering Corporation (Japan), International Chamber of Commerce (Yearbook Commercial Arbitration XXIII, pp. 688 – 712): *the court affirmed that "the parties to an international commercial arbitration agreement can seek enforcement of an arbitral award on the basis of the domestic law instead of the Convention, notwithstanding the fact that they may have agreed to enforce the arbitration agreement under article II of the Convention. When the arbitration agreement does not result in an arbitral award capable of enforcement under the Convention, it can still be enforced under parallel domestic law of India, the Indian Arbitration Act"*; France, Supreme Court, Bomar Oil NV (Neth. Antilles) v. Entreprises Tunisiennes d'Activité Pétrolière, 9 November 1993 (Yearbook Commercial Arbitration XX (1995) p. 660); France, Court of Appeal Versailles, Bomar Oil NV (Neth. Antilles) v. Entreprises Tunisiennes d'Activité Pétrolière, 23 January 1991 (Yearbook

and a number of court decisions have, by relying on article VII(1), upheld the validity of an arbitration agreement under domestic law, which would not have been considered as valid under the New York Convention.⁶¹ In one case, the court found that “ordinary contract principles dictate when the parties are bound by a written arbitration provision absent their signatures.”⁶² In another case, the court enforced an arbitral award based on article VII(1) of the New York Convention because the form requirements of article II(2) were not met.⁶³

28. In a number of cases involving international arbitration, State courts have cited the New York Convention but then applied domestic legal principles to the question whether the arbitration agreement was valid and enforceable.⁶⁴

Commercial Arbitration XVII (1992), pp. 488-490): *the issue was addressed in the 1987 decision of the Paris Court of Appeal in Bomar Oil, in which it was held that article II(2) of the New York Convention expressed a “substantive rule which must be applied in all cases”.* That decision was then reversed by the Cour de Cassation, but this issue was not directly addressed.

⁶¹ Supreme Court (Germany), 25 May 1970, (Yearbook Commercial Arbitration 1977, p. 237); The Netherlands, Court of Appeal, The Hague, Owerri commercial Inc. (Panama) v. Dielle Srl. (Italy), 4 August 1993, (Yearbook Commercial Arbitration XIX, p. 703).

⁶² United States, District Court for the Southern District of New York, Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” di Dr. Domenico e Dr. Antonio dal Ferro, 3 April 1979, (41 F Supp 1163).

⁶³ Germany, OLG Koeln (1992) (Yearbook Commercial Arbitration XXI (1996), p. 535).

⁶⁴ United States, District Court for the Southern District of New York, Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” di Dr. Domenico e Dr. Antonio dal Ferro, 3 April 1979, (41 F Supp 1163); United States, Court of Appeals for the Second Circuit, Genesco Inc v. Kakiuchi & Co, 1 April 1987, (815 F 2d 840): *similar approaches of applying domestic law were adopted by courts:* in Jamaica Commodity Trading Company Limited v. Connell Rice & Sugar Co, Inc., United States District Court for the Southern District of New York, 24 May 1985, (85 Civ 1210) *where the court decided that, while the arbitration agreement must be in writing to be enforced, there was no requirement for a signature;* in Astor Chocolate Corporation v. Mikroverk Ltd, 20 January 1989, (704 F Supp 30 (EDNY)), *the US District Court for the Eastern District of New York held that while federal law governed the issue of the scope of an arbitration clause, state law governed the issue of whether or not the clause was part of the contract.* In Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela (1993) (991 F Supp 2d 42): *the Court of Appeals for the second Circuit ignored the New York Convention and, by citing only domestic cases, found that, under New York law, the arbitration agreement was binding because it was incorporated by reference;* in Overseas Cosmos Inc v. NR Vessel Corp (1997) (97 Civ 5898), *the US District Court for the Southern District of California cited Genesco (1987) and held that it was well established that a party may be bound by an arbitration agreement even without having signed such agreement. In the absence of signatures, ordinary contract principles dictate whether the parties are bound by the agreement;* United Kingdom, Queen’s Bench Division XL Insurance Ltd v. Owens Corning, 28 July 2000 (2 Lloyd’s Rep 500, Yearbook Commercial Arbitration, XXVI (2001) p. 869); United Kingdom, Court of Appeal, Zambia Steel & Building supplies Ltd. V. James Clark & Eaton Ltd, May 16, 1986 ((1986) 2 Lloyd’s Rep. 225): *the court, referring to the 1975 English Arbitration Act, stated that “once it is clear that the assent to the written terms is not required to be contained in the written agreement, but that assent to the written terms may be proven by other evidence, then (...) any evidence which proves that the party has agreed to be bound by an [arbitration] agreement (...) contained in a document or documents is sufficient to make the document or documents an [arbitration] agreement in writing (...).”* The reasoning of Zambia Steel (1986) was followed in a decision by the Queen’s Bench Division of the Commercial Court, Abdullah M Fahem and Co (Yemen) v. Mareb Yemen Insurance Co and Tomen (UK) Ltd (1997) (Yearbook Commercial Arbitration XXIII (1998) p. 789) *where a stay of court proceedings was sought invoking an arbitration agreement; the court cited the English*

29. State courts have not always looked at the New York Convention as superseding domestic law, and certain courts applied domestic law without referring to article VII(1) of the New York Convention,⁶⁵ finding that, while an arbitration agreement must be in writing, there was no requirement for a signature and, in the absence of signature, ordinary contract principles would govern whether or not parties were bound by the arbitration agreement.⁶⁶ On that basis, a number of State courts have held that specific incorporation by reference to an arbitration clause would satisfy the form requirement by relying on principles established by the Convention on Contracts for the International Sale of Goods (Vienna, 1980)⁶⁷ or domestic legal principles⁶⁸ or the UNCITRAL Arbitration Model Law.⁶⁹ At least one court considered that an arbitration agreement existed despite the fact that none of the parties signed a written contract, “which is common practice in the trade in question”.⁷⁰

30. Where State courts have applied domestic laws instead of the New York Convention in determining the validity of an arbitration agreement, another area of uncertainty relates to the determination of the law applicable to that question. On that issue, the solutions provided by courts have varied. The formal validity of the agreement to arbitrate would be judged by applying the uniform rule of article II(2), whereas the substantive validity of the

Arbitration Act and held that the Act provided for a very wide meaning of the words “in writing” which was even wider than article 7(2) of the UNCITRAL Arbitration Model Law but was said to be still consonant with article II(2); the court held that, if an arbitration clause was incorporated in a document and if it was proven that the party was bound by an agreement which included the terms of that document, no further proof of the arbitration agreement was required.

⁶⁵ France, Supreme Court, *Societe Britannia v. Societe Jezequel et Maury*, 15 July 1987, (Rev arb. 1990, p. 627); France, Court of Appeal, Paris, France, *Societe Abilio Rodriguez v. Societe Vigelor* (1990) (Rev. arb. 1990, p. 691): *the court applied domestic law to consider valid an arbitration clause incorporated by reference in a sales confirmation letter issued by a broker.*

⁶⁶ United States, District Court for the Eastern District of New York, *Astor Chocolate Corporation v. Mikroverk Ltd* (1989) (704 F Supp 30 (EDNY)); United States, District Court for the Southern District of California, *Overseas Cosmos Inc. v. NR Vessel Corp* (1997) 97 Civ 5898 *cited Genesco* (1987); France, Supreme Court, *Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d'Activités Pétrolières ETAP* (Tunisia), 9 November 1993, (Yearbook Commercial Arbitration XX (1995) p. 660).

⁶⁷ United States, District Court for the Southern District of New York, *Filanto SpA v. Chilewich International Corp.*, 14 April 1992, (789 F Supp 1229, Yearbook Commercial Arbitration XVIII (1993), p. 530): *the court stated that any dispute falling within the New York Convention, whether brought in state or federal court, must be resolved with reference to that instrument; however, it then stated that courts in interpreting the writing requirement had generally started with the plain language of the New York Convention and had then applied the language in light of federal law, which consisted of generally accepted principles of contract law; it refused however to apply the Uniform Commercial Code but applied the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).*

⁶⁸ United States, Court of Appeals, Seventh circuit, *Mary D. Slaney (US) v. International Amateur Athletic Federation (Monaco)*, 27 March 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 1091); United States, Court of Appeals for the Second Circuit, *Square v. Bombay*, 23 August 1999.

⁶⁹ Hong Kong, High Court, *Jiangxi Provincial Metal and Minerals Import and Export Corp v. Sulanser Company Ltd*, 6 April 1995, (Yearbook Commercial Arbitration XXI (1996), p. 546): *the court held that the definition of writing in article II(2) was not exclusive and did not bar the application of article 7(2) of the UNCITRAL Arbitration Model Law.*

⁷⁰ France, Court of Appeal, Paris SARL *Centro Stoccaggio Grani v. SA Granit*, 8 June 1995, (Rev. Arb. 89).

agreement to arbitrate might, under article V(1)(a) of the New York Convention, be determined in accordance with national laws. In certain cases, State courts have not differentiated between the formal requirement (written form) for the validity of the arbitration agreement governed by the New York Convention and the substantive requirements governed by national law, and have applied the latter to both requirements.⁷¹ Other State courts have taken the view that the validity of arbitration agreements should be determined under the law of the country where the award was made in the absence of an agreement by the parties.⁷²

B. Self-contained regime

31. The question whether the New York Convention's provisions might be combined with provisions of domestic laws had been raised mainly in relation to the application of article II(2) of the New York Convention.

32. Certain State courts have adopted the view that the New York Convention is a self-contained regime and ruled that it would be contrary to the intentions of the authors of the New York Convention if awards made on the basis of an agreement that did not comply with the New York Convention's requirements would nevertheless benefit from its regime. Applying this view, article VII(1) would not allow a party to combine the provisions of the New York Convention with those of domestic law on the enforcement of foreign award. It was said that a choice must be made to rely either on the New York Convention or on domestic law.⁷³

⁷¹ Switzerland, Swiss Federal Tribunal, *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (1995) BGE 121 III 38, (ASA Bulletin 3/1995 503): *the court found that article II(2) should be interpreted and applied in the light of the less restrictive requirements of article 7(2) of the UNCITRAL Arbitration Model Law and article 178 of the Swiss Private International Law Act. It stated that, in light of modern means of communication, unsigned writings play an important role and signature requirements were becoming less important. In particular cases, specific conduct may, by virtue of the rules of good faith, substitute the writing requirement*; Italy, Supreme Court, *Lanificio Walter Banci SaS (Italy) v. Bobbie Brooks Inc (US)* (1980) (Yearbook Commercial Arbitration VI (1981) p. 233): *the court discussed the relation between article II and article V in enforcement proceedings and came to the conclusion that, in case of enforcement, article V and not article II was applicable; as a consequence, it held that the written form of the arbitral clause was in conformity with applicable domestic law, stating that under article V(1)(a), the validity of the arbitration agreement had to be determined under the law of the country where the award was made in the absence of an agreement by the parties; the court did not ascertain whether the arbitration agreement was in conformity with article II; this view was somehow affirmed in a decision of the Supreme Court, Italy, in *Conceria G De Maio & F snc (Italy) v. EMAG AG (Switzerland)* (1995) (Yearbook Commercial Arbitration XXI (1996) p. 602): *the court held that, in enforcement proceedings, article V and not article II applied, and that the validity of the arbitration clause was to be ascertained under the applicable law.**

⁷² Italy, Supreme Court, *Lanificio Walter Banci SaS (Italy) v. Bobbie Brooks Inc. (US)*, 15 April 1980, (Yearbook Commercial Arbitration VI (1981), p. 233); Italy, Supreme Court, *Conceria G De Maio & F snc (Italy) v. EMAG AG (Switzerland)*, 20 January 1995, (Yearbook Commercial Arbitration XXI (1996), p. 602); *Universal Peace Shipping Enterprises SA (Panama) v. Montipe SpA (Italy)* (1991), (Yearbook Commercial Arbitration XVII (1992) p. 562).

⁷³ Germany, Court of Appeal of Cologne, *Danish buyer v. German seller*, 16 December 1992, (Yearbook Commercial Arbitration XXI (1996), p. 535).

33. However, certain State courts have found that the New York Convention contained nothing to prevent the use of some of its provisions in conjunction with other more liberal provisions in national law.⁷⁴

C. Article VII(1) and the reference to arbitration agreements

34. Another question is whether article VII(1), which applies to the enforcement of arbitral awards, might also be applied in relation to arbitration agreements. Certain State courts applied domestic law in determining the question of enforceability of an arbitration agreement, therefore considering that article VII(1), which referred in its text to the enforcement of arbitral awards, should be interpreted as also applying in relation to arbitration agreements.⁷⁵

III. Concluding remarks

A. General remarks

35. There remains a wide divergence of interpretation by State courts on the form requirement defined under article II(2). In particular, what is meant by the term “signature”, whether the signature requirement applies to both the arbitration clause in a contract as well as the arbitration agreement and what is required by an “exchange of letters or telegrams” are all matters on which there have been different and sometimes conflicting interpretations. Different judicial interpretations of the form requirement and a trend to avoid the form requirement by reference to other legal doctrines may undermine the principles of the New York Convention and the harmonisation of the law regarding recognition and enforcement of arbitration agreements.

36. Courts, in many States, have established a clear position as to the circumstances in which article VII(1) may be applied to uphold arbitration agreements where the form requirement set out in article II(2) would otherwise not be met, but those positions diverge from one State to another. The advantage of applying article VII(1) would be to avoid the application of article II(2) and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations. Encouraging the wide adoption by States of article 7(2) of the UNCITRAL Arbitration Model Law, currently being revised by the Working Group, could provide a useful means of achieving greater uniformity as to the form requirement, which was more responsive to the needs of modern arbitration.

⁷⁴ Germany, Oberlandesgericht of Hamm, 2 November 1983, (Yearbook Commercial Arbitration XIV (1989), p. 629) : *the court simultaneously applied the provisions of both the German New Code of Civil Procedure and the New York Convention to the enforcement of a foreign award*; The Netherlands, Court of First Instance, Rotterdam, Isaac Glecer (Israel) v. Moses Asrael Glecer and Estera Glecer-Nottman (Belgium), 24 November 1994 (Yearbook Commercial Arbitration XXI (1996), p. 635): *the court granted enforcement, finding, inter alia, that Article 1076 of the Dutch CCP applied to the enforcement under article VII(1) the New York Convention*.

⁷⁵ United States, Court of Appeals for the Second Circuit, Genesco, Inc v. Kakiuchi & Co., 1 April 1987, (815 F 2d 840); United Kingdom, Queen’s Bench Division, Commercial Court, XL Insurance Ltd v. Owens Corning, 28 July 2000, 2 Lloyd’s Rep 500, (Yearbook Commercial Arbitration XXVI (2001) p. 869).

B. Draft declaration regarding the interpretation of article VII(1) of the Convention

37. As indicated above (paragraphs 24 to 34), there are areas of uncertainty in the application of article VII(1). Given the current work of the Working Group on article II(2), and the draft model provision revising article 7(2) of the UNCITRAL Arbitration Model Law, the Working Group might wish to consider whether the preparation of guiding principles on article VII(1) of the New York Convention would also be useful in achieving greater uniform application. The text of a declaration interpreting article VII(1) of the Model Law could read as follows:

“Declaration regarding interpretation of article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

“The United Nations Commission on International Trade Law,

“[1] Recalling resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

“[2] Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

“[3] Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

“[4] Conscious of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

“[5] Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

“[6] Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes’,

“[7] Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

“[8] Taking into account article VII(1) of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

“[9] Considering the wide use of electronic commerce,

“[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

“[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

“[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

“[13] *Recommends* that article VII(1) of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”

**G. Note by the Secretariat on settlement of commercial disputes:
interim measures of protection, submitted to the Working
Group on Arbitration at its forty-fourth session
(A/CN.9/WG.II/WP.141) [Original: English]**

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Introduction

1. At its forty-second session (New York, 10-14 January 2005), the Working Group requested the Secretariat to consider the issue of the form in which the legislative provisions on interim measures and preliminary orders could be presented in the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) and present possible variants for consideration by the Working Group at a future session (A/CN.9/573, para. 99).

2. At its forty-third session (Vienna, 3-7 October 2005), the Working Group agreed that the legislative provisions on interim measures and preliminary orders be placed in a new chapter, numbered chapter IV bis of the Model Law, and requested the Secretariat to prepare a new draft of the provisions, taking account of the suggestion to restructure the provisions by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106).

3. To facilitate the resumption of discussions, this note contains a proposal on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law.

I. Proposal on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law

4. The following text sets out a proposal as to the presentation of the draft legislative provisions on interim measures and preliminary orders, recognition and enforcement of interim measures and court-ordered interim measures. Modifications to the earlier draft contained in the annex to the report of the Working Group on the work of its forty-third session (annex to A/CN.9/589) have been underlined in the text below. As well, a

comparative table outlining the concordance of the numbering between articles of the earlier draft and articles of the text below has been annexed to this note.

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 bis—Conditions for granting interim measures

- (1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders

- (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.[]

(3) The conditions defined under article 17 bis apply to any preliminary order [], provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order's being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order [] shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order [] shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security by the arbitral tribunal

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the [] measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the [] order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the [] order, and such obligation shall continue until the party against whom the [] order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to the party against whom it is directed if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 - Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement of interim measures

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 novies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement of interim measures*

- (1) Recognition or enforcement of an interim measure may be refused only:
 - (a) at the request of the party against whom it is invoked if the court is satisfied that:
 - (i) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or
 - (ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the

* The conditions set forth in article **novies** are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

arbitration takes place or under the law of which that interim measure was granted; or

(b) if the court finds that:

(i) the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.[]

II. Notes on the form in which the legislative provisions on interim measures and preliminary orders could be presented in the Model Law

Structure of the provisions

5. As agreed by the Working Group, the provisions on interim measures, preliminary orders, recognition and enforcement of interim measures and court-ordered interim measures are placed in a new chapter, numbered chapter IV bis (A/CN.9/589, para. 105). As suggested by the Working Group, those provisions have been restructured by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106). In order to better clarify the proposed structure of the revised text, section headings have been included. This structure has the advantage of providing a logical presentation of the provisions, and avoids creating an article on interim measures that is of inordinate length as compared to other articles in the Model Law.

Article 17 bis, paragraph (1)(b)

6. The Working Group might wish to note that the words “of the claim” have been added after the word “merits” in order to clarify that the merits to be considered might relate to the main claim and not to the interim measure requested. Clarifying that what is being considered is the main claim of the dispute may limit unnecessary arguments as to whether there exists a reasonable possibility of success in respect of the granting of the interim measure (or the preliminary order under article 17 ter (3)). However, the reasonable possibility of success on the merits of the claim will be assessed differently in

view of the different information available to the arbitral tribunal at different stages of the arbitral proceedings, ranging from the early stage where the preliminary order is being applied for until the time when the issuance of the interim measure is discussed *inter partes*.

Article 17 ter, paragraph (1)

7. The word “file” has been deleted from article 17 ter, paragraph 1, and replaced by the word “make”. The Working Group might wish to consider whether this word provides a more neutral requirement in relation to application for preliminary orders.

Article 17 ter, paragraph (2)—Article 17 quater, paragraph (5)

8. The words “such preliminary order does not constitute an award” have been removed from article 17 ter, paragraph (2) and relocated under article 17 quater, paragraph (5). The Working Group might wish to consider whether these words are more appropriately located within article 17 quater, paragraph (5) given that paragraph (5) deals with the nature and effect of a preliminary order.

Article 17 ter, paragraph (3)

9. Article 17 ter, paragraph (3) provides that the provisions of article 17 bis (relating to interim measures) also apply to preliminary orders. The Working Group might wish to consider whether the proposed revised draft of that paragraph clarifies how article 17 bis is to be applied in the context of preliminary orders, namely that the harm to be assessed by the arbitral tribunal in that context is the harm resulting if the preliminary order is not granted, and not the harm resulting if the interim measure is not granted.

Article 17 septies, paragraph (2)

10. The word “any” appearing before “party” has been replaced by the word “the” for the sake of consistency with paragraph (1) of the same article.

Article 17 decies

11. A footnote has been added to the title of article 17 decies (formerly that footnote appeared under article 17 bis (1) as contained in the annex to the report of the Working Group on the work of its forty-third session (annex to A/CN.9/589)). The content of the footnote applies to the grounds for refusing recognition and enforcement and therefore relates to the content of article 17 decies.

Article 17 undecies

Placement

12. In enacting article 17 undecies, States might wish to consider the placement of that provision since article 17 undecies, which deals with court-ordered interim measures might not easily fit in a chapter that is intended to deal mostly with interim measures granted by arbitral tribunals.

13. Among the options to be considered, one possibility would be to place article 17 undecies following provisions enacting article 9 of the Model Law, which deals with interim measures granted by courts. However, given that article 9 is contained within chapter 2 of the Model Law, which relates to the definition and form of arbitration agreement, that option might not be considered appropriate. The Working Group might

wish to consider whether a footnote to article 17 undecies should draw the attention of States to the issue of placing article 17 undecies in the most appropriate part of their enacting legislation. Such footnote could read as follows:

“In enacting article 17 undecies, States might wish to consider grouping this provision with other provisions in the enacting legislation relating to certain functions of arbitration assistance and supervision performed by courts or other authority.”

Reference to article 1, paragraph 2 of the Model Law

14. At its forty-third session, the Working Group noted that, given the intention that the provision on court-ordered interim measure should apply irrespective of the country where the arbitration takes place, that provision should be added to the list of articles contained under article 1, paragraph (2). That article provides that, in respect of the listed articles, the Model Law, as enacted in a given State, would apply even if the place of the arbitration were not in the territory of that State (A/CN.9/589, paras. 101-103). It is also suggested that a reference to articles 17 novies and 17 decies (which deal with recognition and enforcement of interim measures and the grounds for refusal thereof) be included within the list of excepted articles so that article 1, paragraph (2) of the Model Law would read as follows:

“The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.”

15. Including all excepted articles within article 1, paragraph (2), which establishes the territorial scope of application of the Model Law, appears to provide a simpler and more user-friendly approach than including such an exception within each of the revised articles. Taking that approach into account, the words “This article shall apply notwithstanding the provisions of article 1, paragraph 2”, which appeared at the end of article 17 ter of the earlier draft (contained in the annex to A/CN.9/589) have been deleted.

Annex

Table of concordance

<i>Provisions on interim measures and preliminary orders as contained in the annex to the report of the Working Group on the work of its forty-third session (A/CN.9/589)</i>	<i>Newly revised provision on interim measures and preliminary orders as contained in this note</i>
Article 17 (1)	Article 17 (1)
Article 17 (2)	Article 17 (2)
Article 17 (3)	Article 17 bis (1)
Article 17 (4)	Article 17 bis (2)
Article 17 (5)	Article 17 sexies (1)
Article 17 (6)	Article 17 septies (1)
Article 17(7)	Article 17 quinquies
Article 17 (8)	Article 17 octies
Article 17 (9) (a)	Article 17 ter (1)
Article 17 (9) (b)	Article 17 ter (3)
Article 17 (9) (c)	Article 17 ter (2)
Last sentence of subparagraph (c)	Article 17 quater (5)
Article 17 (9) (d)	Article 17 quater (1)
Article 17 (9) (e)	Article 17 quater (2)
Article 17 (9) (f)	Article 17 quater (3)
Article 17 (9) (g)	Article 17 quater (4)
Article 17 (9) (h)	Article 17 sexies (2)
Article 17 (9) (i)	Article 17 septies (2)
Article 17 (9) (j)	Article 17 quater (5)
Article 17 bis (1)	Article 17 novies (1)
Footnote to article 17 bis (1)	Footnote to title of article 17 decies
Article 17 bis (2)	Article 17 decies (1)
Article 17 bis (3)	Article 17 decies (2)
Article 17 bis (4)	Article 17 novies (2)
Article 17 bis (5)	Article 17 novies (3)
Article 17 ter	Article 17 undecies
Last sentence of article 17 ter	Article 1 (2)

H. Note by the Secretariat on settlement of commercial disputes: interim measures

(A/CN.9/605) [Original: English]

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be enforceability of interim measures of protection.¹

2. The Working Group considered the possible preparation of harmonized texts on interim measures at its thirty-second (Vienna, 20-31 March 2000),² thirty-third (Vienna, 20 November-1 December 2000),³ thirty-fourth (New York, 21 May-1 June 2001),⁴ thirty-sixth (New York, 4-8 March 2002),⁵ thirty-seventh (Vienna, 7-11 October 2002),⁶ thirty-eighth (New York, 12-16 May 2003),⁷ thirty-ninth (Vienna, 10-14 November 2003),⁸ fortieth (New York, 23-27 February 2004),⁹ forty-first (Vienna, 13-17 September

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 371-373 and para. 380.

² A/CN.9/468, paras. 60-87.

³ A/CN.9/485, paras. 78-106.

⁴ A/CN.9/487, paras. 64-87.

⁵ A/CN.9/508, paras. 51-94.

⁶ A/CN.9/523, paras. 15-80.

⁷ A/CN.9/524, paras. 15-78.

⁸ A/CN.9/545, paras. 19-112.

⁹ A/CN.9/547, paras. 12-116.

2004),¹⁰ forty-second (New York, 10-14 January 2005),¹¹ forty-third (Vienna, 3-7 October 2005)¹² and forty-fourth (New York, 23-27 January 2006)¹³ sessions.

3. At its forty-fourth session, the Working Group agreed that the legislative provisions on interim measures and preliminary orders be placed in a new chapter, numbered chapter IV bis of the UNCITRAL Model Law on International Commercial Arbitration (“the Arbitration Model Law”).¹⁴

I. Draft legislative provisions on interim measures and preliminary orders

4. The text of chapter IV bis on interim measures and preliminary orders, as adopted by the Working Group at its forty-fourth session,¹⁵ reads as follows:

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

¹⁰ A/CN.9/569, paras. 12-68.

¹¹ A/CN.9/573, paras. 11-95.

¹² A/CN.9/589, paras. 11-107.

¹³ A/CN.9/592, paras. 12-45 and annex I.

¹⁴ Ibid., para. 14.

¹⁵ Ibid., paras. 12-45 and annex I.

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional

circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security

- (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

- (1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- (2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4—Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

- (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement*

- (1) Recognition or enforcement of an interim measure may be refused only:
- (a) At the request of the party against whom it is invoked if the court is satisfied that:
 - (i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or
 - (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
 - (b) If the court finds that:
 - (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
 - (ii) Any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures**Article 17 undecies—Court-ordered interim measures**

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

* The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

II. Remarks on the draft legislative provisions on interim measures and preliminary orders

Remarks on section 1—Interim measures

Article 17, paragraph (2)

Form of issuance of an interim measure

5. At its thirty-sixth (New York, 4-8 March 2002),¹⁶ thirty-seventh (Vienna, 7-11 October 2002)¹⁷ and fortieth (New York, 23-27 February 2004)¹⁸ sessions, the Working Group considered at length the form in which an interim measure should be issued by an arbitral tribunal. The Working Group agreed that the phrase “whether in the form of an award or in another form”, which was inspired from the UNCITRAL Arbitration Rules, was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued. It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure should take. The Commission might wish to note the suggestion that any explanatory material to be prepared, possibly in the form of a guide to enactment and use of the new legislative provisions, make it clear that the wording adopted should not be misinterpreted as taking a stand in respect of the issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (see below, para. 17).¹⁹

Exhaustive nature of the list of functions characteristic of interim measures

6. At its thirty-sixth (New York, 4-8 March 2002)²⁰ and thirty-ninth (Vienna, 10-14 November 2003)²¹ sessions, the Working Group considered whether all possible grounds for which an interim measure might need to be granted were covered by the current formulation under article 17, paragraph (2). After discussion, the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), the list could be expressed as an exhaustive one.²² The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

Article 17 bis

7. At its forty-third session (Vienna, 3-7 October 2003), the Working Group agreed to retain the word “adequately” in subparagraph (a) of article 17 bis (1) and to clarify, in any explanatory material, that the subparagraph should be interpreted in a flexible manner by balancing the degree of harm suffered by the applicant if the interim measure was not

¹⁶ A/CN.9/508, paras. 65-68.

¹⁷ A/CN.9/523, para. 36.

¹⁸ A/CN.9/547, paras. 70-72.

¹⁹ Ibid.

²⁰ A/CN.9/508, para. 71.

²¹ A/CN.9/545, para. 21.

²² Ibid.

granted against the degree of harm suffered by the party opposing the measure if that measure was granted.²³

8. It was suggested as well that explanatory material accompanying article 17 bis could indicate that the fact that the requirements in paragraphs (1)(a) and (b) of article 17 bis only applied to the type of measure contained in paragraph (2)(d) of article 17 to the extent the arbitral tribunal considered appropriate did not mean that an arbitral tribunal would not examine and weigh the circumstances in determining the appropriateness of ordering the measure.²⁴

“Urgent need for the measure”

9. The Working Group considered, after discussion, that the need for urgency should not be a general feature of interim measures.²⁵ The Commission might wish to decide whether guidance should be provided in explanatory material indicating how urgency impacts upon the operation of the provisions in Section 1.

Remarks on section 2—Preliminary orders

General remarks

10. At its forty-first (Vienna, 13-17 September 2004),²⁶ and forty-second (New York, 10-14 January 2005)²⁷ sessions, the Working Group undertook a detailed review of the provisions regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis. In the legislative provisions, the term “preliminary order” is used, instead of “interim measure”, to describe a measure issued on an ex parte basis. This term emphasizes the temporary and extraordinary nature of the order, as well as its distinct scope and purpose.

11. At its forty-second session (New York, 10-14 January 2005), after extended discussion, the Working Group agreed to include a compromise text of the provisions on preliminary orders, on the basis of the principles that: those provisions would apply unless otherwise agreed by the parties; it be made clear that preliminary orders had the nature of procedural orders and not of awards; and no enforcement procedure would be provided for such orders in section 4.²⁸

Article 17 ter

Purpose, function and legal regime of preliminary orders

12. At the forty-first session of the Working Group (Vienna, 13-17 September 2004), doubts were expressed as to whether or not the notion of “preliminary order” should be regarded as a subset of the broader notion of “interim measure”. It was suggested that, if a preliminary order was understood to be a subset of an interim measure, then the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice.²⁹ The Working Group noted that, although a preliminary

²³ A/CN.9/589, para. 37.

²⁴ Ibid., para. 33.

²⁵ A/CN.9/523, para. 41.

²⁶ A/CN.9/569.

²⁷ A/CN.9/573.

²⁸ Ibid., para. 27.

²⁹ A/CN.9/569, para. 24.

order might be regarded as a subset of an interim measure, it should be distinguished from an interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinctive feature of a preliminary order was that it was subject to strict time limits as set out in article 17 quater. It was stated that a preliminary order was effectively to provide a “bridging device” until an inter partes hearing could take place in respect of the requested interim measure.³⁰ The Commission might wish to decide whether explanatory material accompanying article 17 ter should include an explanation of the distinction between an interim measure and a preliminary order.

13. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was said that article 17 ter could be misunderstood as providing that the arbitral tribunal could only direct the parties in general terms not to frustrate the purpose of the interim measure. Notwithstanding that view, it was understood that the arbitral tribunal had a more general discretion to issue a preliminary order that was appropriate and was in keeping with the circumstances of the case and that such an understanding should be made clear in any explanatory material.³¹

Article 17 quater

Obligation of arbitral tribunal to give notice (article 17 quater, paragraph (1))

14. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was noted that the arbitral tribunal had an obligation to communicate documents and information to the party against whom the preliminary order was sought and it was suggested that it be clarified that that obligation applied whether the arbitral tribunal issued or refused to issue the order. The Commission might wish to note that the Working Group agreed that clarification of that obligation might be included in any explanatory material accompanying article 17 quater.³²

Non-enforceability of preliminary orders (article 17 quater, paragraph (5))

15. The Working Group considered at length whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order³³ and the fact that it could raise practical difficulties, such as whether notification to the other party of the preliminary order should be deferred until after the order had been enforced by a court.³⁴ The Commission might wish to note that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group (see above, paragraph 11).

Recourse to courts

16. The Commission might wish to consider a proposal made at the forty-fourth session of the Working Group (New York, 23-27 January 2006) to add the following text to paragraph (5) of article 17 quater: “a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal”. The

³⁰ Ibid., para. 26.

³¹ A/CN.9/573, para. 30.

³² Ibid., para. 41.

³³ A/CN.9/547, para. 66.

³⁴ A/CN.9/569, paras. 46-51.

Working Group took note of that proposal. It was suggested that this proposal merely clarified the operation of the provision and did not seek to reopen substantive questions relating thereto.³⁵

Remarks on section 4—Recognition and enforcement of interim measures

Interplay between section 4 and articles 35 and 36

17. Article 17 decies, which deals with the grounds for refusing recognition and enforcement of interim measures, refers to article 36, paragraph (1), of the Arbitration Model Law which is expressed to apply to awards. It is recalled that the Working Group decided not to define the form in which an interim measure should be issued (see above, para. 5), and the purpose of article 17 decies is to define the grounds for non-enforcement of interim measures, whether issued in the form of an award or in another form. The Commission might wish to consider whether it is necessary to clarify that the reference in article 17 decies to article 36, paragraph (1) should be understood as a reference to the grounds for non-enforcement, regardless of the form of issuance of the interim measure.³⁶

Article 17 decies, paragraph 1

Burden of proof

18. In contrast to article 36, paragraph (1)(a), of the Arbitration Model Law which places the burden of proof on the party against whom the award is invoked, article 17 decies, paragraph (1)(a) reflects the decision of the Working Group that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable law.³⁷ The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

“modified, terminated or suspended”

19. The Commission might wish to note that the Working Group agreed that any explanatory material accompanying article 17 decies should clarify that the enforcement regime set out in section 4 applied in respect of any interim measure, whether or not it was modified by the arbitral tribunal.³⁸

Interplay between article 17 decies, paragraph (1)(a)(iii) and article 34

20. The Commission might wish to decide whether clarification is needed on the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Arbitration Model Law. It is recalled that that question was raised at the fortieth session of the Working Group (New York, 23-27 February 2004) in the context of a discussion on whether the effect of article 17 decies, paragraph (1)(a)(iii) would be to allow a State court to set aside an interim measure issued by an arbitral tribunal. The Working Group agreed that article 17 decies, paragraph (1)(a)(iii) should not be

³⁵ A/CN.9/592, para. 27.

³⁶ A/CN.9/547, para. 43.

³⁷ Ibid., paras. 35-36, 42, 58 and 60; A/CN.9/573, para. 73.

³⁸ A/CN.9/589, para. 85.

misinterpreted as creating a ground for State courts to set aside an interim measure issued by an arbitral tribunal.³⁹

Article 17 decies, paragraph 2

21. The Commission might wish to recall that concerns were expressed in the Working Group that, when a court was called upon to enforce an interim measure, under article 17 decies, paragraph (1)(a)(i) (which refers to the grounds set forth in article 36, paragraphs (1)(a)(i), (ii), (iii) or (iv)), its decision could have an effect beyond the limited sphere of recognition and enforcement of the interim measure and, for example, impact on the recognition and enforcement of the arbitral award that determines the merits of the case. The purpose of article 17 decies, paragraph (2) is to confine the power of a court to the determination of recognition and enforcement of the interim measure only.⁴⁰

Remarks on section 5—Court-ordered interim measures

Article 17 undecies

Placement of article 17 undecies

22. The Commission might wish to note that the Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law given that it deals with court-ordered interim measures which might not easily fit into a chapter intended to deal mostly with interim measures granted by arbitral tribunals. The Working Group agreed that a text suggesting that States place article 17 undecies in the most appropriate part of their enacting legislation⁴¹ could be included in explanatory material accompanying that provision along the lines of the text suggested in the note by the Secretariat.⁴²

III. Amendment to article 1, paragraph (2), of the Arbitration Model Law

23. At its forty-third session (Vienna, 3-7 October 2005), the Working Group noted that, given the intention that the provision on court-ordered interim measures should apply irrespective of the State where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provides that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, applies even if the place of the arbitration is not in the territory of that State.⁴³ It was also suggested that a reference to articles 17 novies and 17 decies (which deal with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2), of the Arbitration Model Law would read as follows:

³⁹ A/CN.9/547, para. 26.

⁴⁰ Ibid., para. 24.

⁴¹ A/CN.9/592, paras. 40-42.

⁴² A/CN.9/WG.II/WP.141, para. 13. The footnote reads as follows: "In enacting article 17 undecies, States might wish to consider grouping this provision with other provisions in the enacting legislation relating to certain functions of arbitration assistance and supervision performed by courts or other authority."

⁴³ A/CN.9/589, paras. 101-103.

“(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.”

IV. Explanatory material

24. The Commission might wish to discuss the decision of the Working Group that explanatory material in relation to the legislative provisions on interim measures and preliminary orders could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraph 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures and preliminary orders to enacting States in a guide to enactment and use of the revised provisions.⁴⁴

⁴⁴ A/CN.9/592, para. 81.

I. Note by the Secretariat on settlement of commercial disputes: form of arbitration agreement

(A/CN.9/606) [Original: English]

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").¹ The Working Group considered the possible preparation of a harmonized text on the writing requirement at its thirty-second (Vienna, 20-31 March 2000),² thirty-third (Vienna, 20 November-1 December 2000),³ thirty-fourth (New York, 21 May-1 June 2001),⁴ thirty-sixth (New York, 4-8 March 2002),⁵ forty-third (Vienna, 3-7 October 2005),⁶ and forty-fourth (New York, 23-27 January 2006)⁷ sessions.

2. When the Working Group considered the issue of the requirement of written form for the arbitration agreement at its thirty-second session, it was generally observed that there was a need for provisions which conformed to current practice in international trade.

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 344-350 and para. 380.

² A/CN.9/468, paras. 88-106.

³ A/CN.9/485, paras. 21-59.

⁴ A/CN.9/487, paras. 22-41.

⁵ A/CN.9/508, paras. 18-39.

⁶ A/CN.9/589, paras. 108-112.

⁷ A/CN.9/592, paras. 46-81.

It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade.⁸

3. It is recalled as well that the Working Group's intention in revising article 7 of the Arbitration Model Law has been to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal). Views were expressed that both the alternative proposal and the revised draft article 7 provided useful options to address concerns relating to the writing requirement.⁹ A suggestion was made and adopted by the Working Group at its forty-fourth session that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.¹⁰

I. Draft legislative provisions on the form of arbitration agreement

4. The texts of the revised draft article 7 and the alternative proposal, as adopted by the Working Group at its forty-fourth session, read as follows.¹¹

1. Revised draft article 7 of the Arbitration Model Law

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

⁸ A/CN.9/468, para. 88.

⁹ A/CN.9/589, paras. 110-112.

¹⁰ A/CN.9/592, para. 74.

¹¹ Ibid., paras. 46-75 and annex II.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

2. Alternative proposal

Article 7. Definition of arbitration agreement

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

II. Notes on the draft legislative provisions on the form of arbitration agreement

1. Notes on the revised draft article 7 of the Arbitration Model Law

Paragraph (1)

5. Paragraph (1) reproduces article 7, paragraph (1), of the Arbitration Model Law.¹²

Paragraph (2)

6. Paragraph (2) reproduces the first sentence of article 7, paragraph (2), of the Arbitration Model Law, and is consistent with the language of article II, paragraph (2), of the New York Convention.¹³

Paragraph (3)

7. Paragraph (3) defines the writing requirement.¹⁴

General remarks

8. Paragraph (3) of the revised draft article 7 sought by way of a definition to clarify how the writing requirement could be fulfilled. At its forty-fourth session (New York, 23-27 January 2006), the Working Group discussed whether the purpose of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement.¹⁵ After discussion, the Working Group was generally of the view that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement, and therefore, reference to the content of the arbitration agreement would be appropriate in the text of paragraph (3).¹⁶ In that context, it was pointed out that paragraph (3) dealt with the definition of the form of the arbitration

¹² Ibid., para. 49.

¹³ Ibid., paras. 50-59.

¹⁴ Ibid., para. 59.

¹⁵ Ibid., para. 57.

¹⁶ Ibid., paras. 61 and 62.

agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national legislation.

9. It might be recalled that the intention of the Working Group was to ensure that the revised provision on the definition of the form of the arbitration agreement would encompass a variety of situations, including the case where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form; contracts concluded by performance or by conduct (for example, a sale of goods under article 18 of the United Nations Convention on Contracts for the International Sale of Goods), with reference to a standard form containing an arbitration clause, such as documents established by the Grain and Food Trade Association (GAFTA); and contracts concluded orally but subsequently confirmed in writing. A mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure to the extent the parties did not agree on any procedural rules are cases which are not intended to be addressed by that paragraph.

10. The Working Group agreed that further clarification in any explanatory material accompanying that provision, such as a guide to enactment and use, might be needed as to the factual situations that were intended to be covered by paragraph (3).¹⁷ The Commission might wish to discuss the revised draft article 7 in the light of the factual situations listed below with a view to determining whether the draft adequately covers them, to the extent the Commission intends them to be covered.

Factual situations

11. At its thirty-second session¹⁸ (Vienna, 20-31 March 2000), the Working Group considered several typical examples of situations where the parties agreed on the content of a contract containing an arbitration agreement and where there was written evidence of the contract, but where, nevertheless, current law, if interpreted narrowly, might be construed as invalidating or calling into question the validity of the arbitration agreement.¹⁹

12. The situations in (a) to (h) below are those where the parties have entered into a contract containing an arbitration clause but the form of that clause might be considered as not meeting the statutory requirement:

(a) A contract containing an arbitration clause is formed by one party sending written terms to another party, and that latter party fulfils its obligations under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of a text proposed by one party, which is not explicitly accepted in writing by the other party, but

¹⁷ Ibid., para. 62.

¹⁸ A/CN.9/468, para. 95; A/CN.9/WG.II/WP. 108/Add.1, para. 12 and A/CN.9/WG.II/WP.110, paras. 16-26.

¹⁹ These fact situations were listed in para. 12 of document A/CN.9/WG.II/WP.108/Add.1 and paras. 16-26 of document A/CN.9/WG.II/WP.110. Among them was also the case where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the "group of companies" theory. However, the Working Group considered that that situation raised difficult issues and the idea of a harmonised rule did not gain wide acceptance. (A/CN.9/468, para. 95).

that latter party refers in writing to a contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) A reference is made in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading incorporate the terms of the underlying charter party by reference;

(f) A series of contracts are concluded between the same parties in a course of dealing, where previous contracts have included arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains an arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a “further” contract may have been concluded orally or in writing);

(h) A bill of lading contains an arbitration clause that is not signed by the shipper or the subsequent holder.

13. The situations in (a) to (d) below refer to cases where it may be assumed that the arbitration agreement has been validly entered into by one set of parties and the question relates to the substantive issue of whether that arbitration agreement has become binding on a third party who later becomes party to the contract or assumes certain rights and obligations arising out of the contract:

(a) Third party rights and obligations under arbitration agreements contained in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);

(b) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(c) Third party rights and obligations contained in arbitration agreements where the third party exercises subrogated rights;

(d) Rights and obligations contained in arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same.

14. It might be noted that the Working Group considered that the fact that the oral conclusion of certain types of contracts may be a customary practice in certain fields of trade or that arbitration agreements in certain types of contracts may be customary had more to do with substantive conditions for finding that an agreement to arbitrate had been reached than with its form. Since it was desirable that the model provision limits itself to issues of form and not deal with substantive conditions for the validity of arbitration agreements, the question of what was customary and how agreement between the parties was reached was considered as falling outside the model provision.²⁰

²⁰ A/CN.9/485, paras. 39-41 and A/CN.9/592, para. 72.

Paragraph (4)

15. The language used in paragraph (4) was consistent with that used in paragraph (2) of article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts (“the Convention on Electronic Contracts”) and the definitions of “electronic communication” and “data message” reproduced the definitions contained under subparagraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.²¹

Paragraph (5)

16. The provisions of paragraph (5) were included under article 7, paragraph (2), of the Arbitration Model Law, and the Working Group agreed to retain that paragraph.²²

Paragraph (6)

17. The Working Group recalled that a principal purpose of paragraph (6) was to confirm the formal validity of arbitration agreements incorporated by reference. For example, parties might conclude by performance a contract whose terms were established in a standard form but that form might, in turn, not contain within it an arbitration clause but might, instead, incorporate an arbitration clause by reference to another document that contained its terms.²³ The Working Group agreed that, as a matter of general policy, the reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement, and that domestic or other applicable law should determine whether the reference was such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement had been concluded orally, by conduct or by other means not in writing.²⁴

2. Notes on the alternative proposal

18. The alternative proposal omitted entirely the writing requirement. Under that provision, oral arbitration agreements would be recognised as valid. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. It was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, oral arbitration agreements were rarely used and had not given rise to significant disputes as to their validity.²⁵

19. That alternative proposal was seen as establishing a more favourable regime for recognition and enforcement of arbitral awards than was provided for under the New York Convention, and therefore, by virtue of the “more favourable law provision” contained in article VII, paragraph (1), of the New York Convention, the Arbitration Model Law would apply instead of article II, paragraph (2), of the New York Convention.

²¹ A/CN.9/592, para. 64.

²² Ibid., paras. 65-68.

²³ Ibid., para. 69.

²⁴ Ibid., and A/CN.9/508, paras. 27-31.

²⁵ A/CN.9/592, para. 47.

20. While the proposed new text was considered useful to highlight the problems raised by the written form requirements, it was said that removal of the form requirement and of every reference to “writing” could create uncertainty.²⁶

21. The Commission might wish to consider whether the alternative proposal should be retained and, in the affirmative, the form in which the revised draft article 7 and the alternative proposal might be presented in the Arbitration Model Law.

III. Amendment to article 35, paragraph (2), of the Arbitration Model Law

22. Article 35, paragraph (2), of the Arbitration Model Law, modelled on article IV of the New York Convention, provides that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In considering the drafts regarding the writing requirement for an arbitration agreement, the Working Group considered it necessary to ensure that a modified understanding of the writing requirement (article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention) be reflected in article 35, paragraph (2), of the Arbitration Model Law, by amending that article as follows:²⁷

Article 35, paragraph (2), of the Arbitration Model Law

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

IV. Explanatory material

23. At its forty-fourth session (New York, 23-27 January 2006), the Working Group agreed that explanatory material in relation to the legislative provisions on the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.²⁸ The Commission might wish to provide further guidance on that matter.

24. When the Commission considered the possibility of preparing model legislation, it was suggested that any model legislation that might be prepared with respect to the form of arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods, which is designed to facilitate interpretation by reference to internationally accepted principles. Similar

²⁶ A/CN.9/589, para. 110.

²⁷ A/CN.9/592, paras. 76-80 and annex II.

²⁸ Ibid., para. 81.

provisions were included in the UNCITRAL Model Law on Electronic Commerce²⁹ and the UNCITRAL Model Law on Cross-Border Insolvency.³⁰ It was said that such a non-binding commentary formulated by the Commission along with the model legislative provision could speed up the process of harmonization of law and its interpretation. The Commission might wish to decide whether such provision needs to be included.³¹

²⁹ Article 3:“(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

³⁰ Article 8: “In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

³¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 348 and A/CN.9/WG.II/WP.108/Add.1, para. 23.

**J. Note by the Secretariat on settlement of commercial disputes:
Draft declaration regarding the interpretation of article II,
paragraph (2), and article VII, paragraph (1),
of the New York Convention
(A/CN.9/607) [Original: English]**

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration (“the Arbitration Model Law”) and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”).¹ At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission noted that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.²

2. At its thirty-fifth session (New York, 17-28 June 2002), the Commission noted that the Working Group had discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention. The Commission noted that the Working Group could not, at that stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention. The Commission was of the view that member and observer States participating in the Working Group’s deliberations should have time to consult on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention, as noted by the

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 344-350 and para. 380.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 313.

Commission at its thirty-fourth session.³

3. The Working Group considered the topic of the written form requirement contained in article II, paragraph (2), of the New York Convention and the preparation of an interpretative instrument at its thirty-second (Vienna, 20-31 March 2000),⁴ thirty-third (Vienna, 20 November-1 December 2000),⁵ thirty-fourth (New York, 21 May-1 June 2001),⁶ thirty-sixth (New York, 4-8 March 2002),⁷ and forty-fourth (New York, 23-27 January 2006)⁸ sessions.

I. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

4. The text of the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention, as agreed by the Working Group at its forty-fourth session,⁹ reads as follows:

“Declaration regarding interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

“The United Nations Commission on International Trade Law,

“[1] Recalling resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

“[2] Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

“[3] Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

“[4] Conscious of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

“[5] Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

“[6] Recalling that the Conference of Plenipotentiaries which prepared and opened

³ Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 183.

⁴ A/CN.9/468, paras. 88-106.

⁵ A/CN.9/485, paras. 60-77.

⁶ A/CN.9/487, paras. 42-63.

⁷ A/CN.9/508, paras. 40-50.

⁸ A/CN.9/592, paras. 82-88.

⁹ Ibid., and annex III to A/CN.9/592.

the Convention for signature adopted a resolution, which states, *inter alia*, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes’,

“[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

“[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

“[9] *Considering* the wide use of electronic commerce,

“[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

“[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

“[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

“[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

“[14] *Recommends* that article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”

II. Notes on the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

5. The discussions in the Working Group initially focussed on article II, paragraph (2), of the New York Convention and on the various options available to deal with difficulties that had arisen in its interpretation. The Working Group was generally of the view that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form, and that the practice in some respects was no longer reflected by the position set forth in article II, paragraph (2) (and other international legislative texts modelled on that article), if interpreted narrowly.¹⁰ The Working Group discussed possible alternative ways of achieving a broader interpretation of article II,

¹⁰ A/CN.9/468, para. 88.

paragraph (2).¹¹ These included a protocol amending the terms of article II, paragraph (2); adoption of a declaration, resolution or statement addressing the interpretation of the New York Convention and providing that, for the avoidance of doubt, article II, paragraph (2) was intended to cover certain situations or to have a certain effect; encouraging a liberal interpretation of the New York Convention by following the approach of some courts of interpreting article II, paragraph (2) in the light of the Arbitration Model Law;¹² and preparing practice guidelines or notes proposing that article 7 of the Arbitration Model Law could be used as an interpretation tool to clarify the application of article II, paragraph (2).¹³

6. The prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II, paragraph (2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach.¹⁴

7. At its thirty-sixth session (New York, 4-8 March 2002), the Working Group discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and application of the writing requirement contained in that article and to achieve a higher degree of uniformity. Article II, paragraph (2) has been the subject of different interpretations in State courts. In particular, what is meant by the term “signature”, whether the signature requirement applies to both the arbitration clause in a contract as well as the arbitration agreement and what is required by an “exchange of letters or telegrams” are all matters on which there have been different and sometimes conflicting interpretations.¹⁵ A/CN.9/WG.II/WP.139. The differing interpretations in State courts originated as well from the differences of expression between the five equally authentic texts of the New York Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of “agreement in writing” (by using the word “includes”) appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.¹⁶

8. The draft declaration considered by the Working Group at its thirty-sixth session (New York, 4-8 March 2002) contained the recommendation or declaration that the definition of ‘agreement in writing’ in article II, paragraph (2), of the New York Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration].¹⁷ Views were expressed in the Working Group that the draft legislative provisions revising article 7 of the Arbitration Model Law being considered by the Working Group differed

¹¹ A/CN.9/468, paras. 88-99.

¹² A/CN.9/WG.II/WP.108/Add.1, para. 36 and footnote 9.

¹³ A/CN.9/WG.II/WP.108/Add.1, paras. 33 and 34.

¹⁴ A/CN.9/468, paras. 88-99.

¹⁵ A/CN.9/WG.II/WP.139.

¹⁶ A/CN.9/592, para. 87.

¹⁷ A/CN.9/508, paras. 40-50.

significantly from article II, paragraph (2), of the New York Convention in that, for example, under the draft legislative provision, an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II, paragraph (2), of the New York Convention, as interpreted in many legal systems, it would not be so regarded.¹⁸ Views were therefore expressed that it might not be appropriate to use an interpretative instrument to declare that article II, paragraph (2), of the New York Convention should be interpreted as having the meaning of the revised draft article 7 of the Arbitration Model Law. In considering the possibility of amending the Arbitration Model Law as a tool for interpreting article II, paragraph (2), of the New York Convention (without amending the New York Convention), the Working Group noted as well that national legislation might operate in the context of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.

9. At its forty-fourth session (New York, 23-27 January 2006), the Working Group proceeded to consider the text of a draft interpretative declaration on the interpretation of article VII, paragraph (1), of the New York Convention. That approach was considered as encouraging the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encouraging States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcement laws.¹⁹ At that session, the Working Group agreed to include in the draft declaration provisions clarifying the meaning of article II, paragraph (2), of the New York Convention.²⁰

10. It should be noted that the acceptability of allowing less restrictive form requirements to operate through article VII, paragraph (1), of the New York Convention would depend on whether article II, paragraph (2), of the New York Convention was regarded as establishing a requirement of form from which States may depart when their national law on the form requirement is more favourable (thus leaving States free to adopt less stringent requirements) or whether the New York Convention was interpreted as providing a unified form requirement which arbitration agreements must comply with under the New York Convention. Courts, in many States, have established a clear position as to the circumstances in which article VII, paragraph (1) might be applied to uphold arbitration agreements where the form requirement set out in article II, paragraph (2) would otherwise not be met. The advantage of applying article VII, paragraph (1) would be to avoid the application of article II, paragraph (2) and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations. Encouraging the wide adoption by States of article 7, paragraph (2), of the Arbitration Model Law, as proposed to be revised, could provide a useful means of achieving greater uniformity as to the form requirement. A declaration encouraging the application of more favourable legislation would have the added advantage of overcoming the requirement in article IV of the New York Convention regarding the presentation of an original of the arbitration agreement or a certified true copy. The Working Group had already proposed the deletion of that requirement from article 35, paragraph (2), of the Arbitration Model Law.²¹

11. The Commission might also wish to discuss the extent to which these considerations relating to article VII, paragraph (1), of the New York Convention might have an impact on future work regarding the Arbitration Model Law. Certain provisions of the Arbitration

¹⁸ A/CN.9/508, para. 45.

¹⁹ A/CN.9/592, paras. 85-86.

²⁰ *Ibid.*, para. 88.

²¹ A/CN.9/592, paras. 76-80.

Model Law, which mirror the text of the New York Convention, such as for example, articles 7 and 35, paragraph (2), are proposed to be amended, so as to create more liberal rules, consistent with modern practice. The Commission might wish to discuss the extent to which the Arbitration Model Law might become the instrument through which the enforcement regime would be modernised. An alternative would be to further the modernization efforts by preparing an international binding instrument on international commercial arbitration, which would consist in developing the principles of the Arbitration Model Law into a convention, still allowing the existing instruments to operate in harmony.

12. When the Commission considered the possibility of preparing model legislation with a view to superseding article II, paragraph (2), of the New York Convention by relying on article VII, paragraph (1), of the New York Convention, it was suggested to establish (in addition to model legislation) guidelines or other non-binding material to be used by courts as guidance from the international community in the application of the New York Convention. It was said that such a non-binding commentary formulated by the Commission could speed up the process of harmonization of law and its interpretation.²² The Commission might wish to provide further guidance on that matter.

²² *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 348, and A/CN.9/WG.II/WP.108/Add.1, para. 34.

**K. Note by the Secretariat on the draft legislative provisions
on interim measures and the form of arbitration agreement:
comments received from Member States
and international organizations**

(A/CN.9/609 and Add.1-6) [Original: English]

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I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that priority items for the Working Group should be: the requirement of written form for the arbitration agreement contained in article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration (“the Arbitration Model Law”) and article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”),¹ as well as enforceability of interim measures of protection.²

2. The Working Group finalised its work on the draft legislative provisions regarding interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of article II (2), and article VII (1), of the New York Convention at its forty-fourth session (New York, 23-27 January 2006). By a note verbale dated 21 March 2006, the Secretary-General transmitted the texts of the draft legislative provisions on interim measures and the form of arbitration agreement as well as the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention, as annexed to the report of the Working Group on that session (A/CN.9/592) to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. Short notes on each text were issued separately (A/CN.9/605 on the draft legislative provisions on interim measures, A/CN.9/606 on the draft legislative provisions on the form of arbitration agreement, A/CN.9/607 on the draft declaration regarding the interpretation of articles II (2), and VII (1), of the 1958 New York Convention).

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 344-350 and 380.

² *Ibid.*, paras. 371-373 and 380.

3. The present document reproduces the first comments received by the Secretariat on draft legislative provisions on interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Member States and international organizations

A. Member States

Guatemala

[Original: Spanish]
[28 April 2006]

Comments from Guatemala on the amendments to the UNCITRAL Model Law on Arbitration

I have the honour to transmit below comments on the draft provisions to be included in the amendments to the UNCITRAL Model Law on Arbitration (the Model Law). It was my understanding that the comments should be as concrete as possible, and they are that. However, if the Permanent Mission considers that some comments should be more detailed, I stand ready to assist.

In the first place, it should be recognized that interim measures and preliminary orders have attracted particular interest and gained special significance as an area where progress could be made with arbitration regulations that offer greater possibilities to arbitrators and arbitral tribunals as regards the power to decree or prescribe such measures or orders. That is one of the main reasons why for the past two years or so work has been under way in Guatemala on a draft law, submitted by the Supreme Court, whose purpose it is to assign greater coercive powers to arbitrators as regards the capacity to decree or prescribe such measures.

It should be mentioned that this exercise has been criticized by the person who is preparing this report, on the grounds that it aims to give direct coercive powers to arbitrators, enabling them to decree such measures without any judicial support or help; in other words, it aims to confer "*jus imperium*" on arbitrators with regard to interim measures or anticipatory measures or preliminary orders. It would seem that the proposal prepared by the relevant working group during the forty-fourth session (held in New York from 3 to 27 January 2006) is not only more reasonable in that respect but also more in line with the overall contents of the Model Law.

That having been said, there follow detailed comments on the analysed text.

Article 17 (1)

The following wording is suggested: (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, grant interim measures (it is suggested that the word A be replaced by ANY).

This semantic change creates a broader or more balanced impression of the situation for all parties to the arbitral process.

Article 17 (2)

No actual change in wording is suggested, but it is suggested that thought be given to the use of the word “laudo” [award] to denote the means by which an interim measure might be granted. Although the reason for using that word is clear, being linked principally to the executive force of the word when used in a State’s jurisdictional tribunals, in some jurisdictions it may give rise to confusion insofar as it refers to the final conclusion of legal proceedings (“laudo” is equivalent to “sentencia” [judgement], and in ordinary or jurisdictional proceedings interim measures are granted through preliminary orders or decisions). Perhaps the expression “laudo interino” [interim award] could be used, as, I believe, it is in other jurisdictions, and, if it were used, perhaps a definition of this type of “laudo” [award] could be added to the article of the Model Law containing the definitions.

If the use of the expression “laudo interino” [interim award] were accepted, where reference is made in Article 17 (2) to “a subsequent award” the expression “laudo definitivo” [final award] would have to be used in the subparagraph in question.

Article 17 bis**Subparagraph (1) (a)**

It is suggested that, instead of the words “no resarcible” [not reparable], use be made of “no reversible” [irreversible] or “irreparable”.

Subparagraph (1) (b)

It is suggested that this subparagraph be deleted. In the Guatemala jurisdiction it could be used as a means of impugning or discrediting the arbitrators on the grounds that they had advanced in some way or other an opinion about the claims of one of the parties. Perhaps it would be better simply to indicate, in this or some other provision of the Model Law amendment proposal, that the arbitrators shall decide on the measures in respect of which they are competent, or to establish a higher standard of care for the arbitrators as regards their decision whether or not to grant such measures.

Section 2

It is suggested that in the first line “a toda demanda” [to a request] be replaced by “a todo requerimiento” [the English version would probably not be affected]. If this change were acceptable, it would have to be made in other provisions as well—for example, in Article 17 ter. Similarly, it is suggested that in various articles of the proposal the word “demandante” in the phrase “demandante de una medida cautelar” [party requesting an interim measure] or “demandante de una orden preliminar” [party requesting a preliminary order]* be replaced by “solicitante” or “requirente”.

* *Translator’s note:* The phrase “demandante de una orden preliminar” does not appear to occur in A/CN.9/592.

Article 17 ter

As the term “Órdenes preliminares” [Preliminary orders] is not used in all jurisdictions in their laws relating to legal procedure,³ perhaps, as with “medidas cautelares”, a definition of that term should be included.

It would be useful to know more about the relationship, in the case in question, between preliminary orders and interim measures, in order to decide whether it is necessary to make further comments regarding this and other articles.

Further to the previous comment, the regulation relating to the recognition and enforcement of interim measures should be examined more thoroughly, as it would appear that these are thought of principally in the context of international arbitrations, whereas in some jurisdictions, such as that of Guatemala, the Model Law has been adopted as domestic legislation covering both international and national arbitrations. It will be necessary to determine whether the proposed regulation applies equally to national arbitrations. Finally, as regards the revised legal provisions relating to the form of the arbitral agreement there is only one comment, as follows.

Article 7 (3)

The following wording is suggested:

“An arbitration agreement shall be in writing if there exists any record or documentary evidence of its contents, regardless of whether the agreement or the contract of which it is a part was concluded orally, through the execution of certain legal documents or by some other means.”

Italy

[Original: English]
[3 May 2006]

Comments on Draft legislative provisions on interim measures and preliminary orders (Annex I)

Under the present status of Italian law on arbitration, arbitrators are not granted the power to issue interim measures or preliminary orders. The Italian view of the matter is that such power ought to be reserved to the exclusive benefit of the Court of competent jurisdiction. This fundamental choice of the Italian legal system is not expected to change in the near or foreseeable future. Thus, the proposed new UNCITRAL rules on interim measures and preliminary orders are unlikely to be adopted, in whole or in part, by the Republic of Italy. This would be even more stringent for interim measures recognized *inaudita altera parte*. The Italian Delegation had already submitted in the past comments and proposals on the above, that are reiterated and recalled here.

Assuming however that, notwithstanding the above, the Commission may still find it useful to receive comments from an Italian perspective on such proposed new rules, the following comments are offered.

³ In Guatemala at least, the term is not used in laws relating to civil and trade law procedure. Instead, the terms “medidas cautelares”, “medida’s preventivas” or “medidas de garantia” are used.

1. The entire Chapter IV bis (from Article 17 to Article 17 undecies) is drafted in a very detailed and analytical form and in a legal style that, it is submitted, is likely to be accepted without difficulties only by countries which belong to the common law tradition.

Adoption by countries, such as Italy, belonging to the civil law tradition would encounter less difficulties, if a more concise style were adopted and more reliance were placed on the traditional gap-filling function of national procedural rules governing in each country the exercise of summary jurisdiction on grounds of urgency.

2. It would be appropriate to make it clear (whether in the text of the Draft provisions or in an official Commentary or in the Guide to Enactment) that in Chapter IV bis the word “party” may only mean a “party to the arbitration agreement”, not a third party whose position may be affected by the interim measure or the preliminary order, but whose consent to being subjected to the jurisdiction of the arbitral tribunal is lacking.

Article 17 quater (2) provides a good illustration of a provision whose legal certainty would benefit, it is submitted, from the insertion of the above suggested clarification.

3. In the light of the strong opposition that was voiced by a number of delegations within the Working Group against the opt-out formula which was ultimately selected in Article 17 (1) and Article 17 ter (1), the Commission may wish to reconsider the advisability of offering a final text, in which an opt-in formula may be added as an alternative solution.

Thus, as an alternative to “Unless otherwise agreed by the parties”, the final text could also offer the possibility of choosing, as an opening statement of Article 17 (1) and Article 17 ter (1), the words “If so agreed by the parties” or any other equivalent wording.

Comments on Draft legislative provisions on the form of arbitration agreement (Annex II)

Annex II offers a new revised “long” text of Article 7 (“Definition and form of arbitration agreement”) and an alternative “short” text (“Definition of arbitration agreement”).

A preference is expressed for the “long” main proposal, whose underlying intent is to introduce an important distinction, deserving approval.

Concisely stated, the distinction is between the certainty of the parties’ will to arbitrate and the certainty of the rules designed to govern the conduct of the arbitration proceedings.

Whilst in many national legal systems the written form of the arbitration agreement is still required for the purposes of achieving the first type of certainty (i.e., the certainty of the will to arbitrate), the proposed revision of Article 7 (long text) intends to achieve a radical change of perspective, by shifting the focus on the second type of certainty (i.e., by aiming at securing the certainty of the rules designed to govern the conduct of the arbitration proceedings).

In substance, the proposed revision of Article 7 (long text) liberalizes the manner in which the parties may express their will or consent to arbitrate (this may be done even “orally, by conduct or by other means”), whilst the form requirement is still imposed for the different purpose of making sure that there is a “recorded” certainty of the rules, by which the arbitration will be conducted.

The key provision is Article 7 (3), in respect of which the Commission is called to assess whether the underlying intent of achieving certainty of the arbitration rules would be

better served by defining the form requirement by reference to a record of the “terms” (first option in square brackets) or by reference to a record of the “content” (second option in square brackets) of the arbitration agreement.

A strong preference is expressed herein for the use of the word “content” as opposed to “terms”, since “content” appears to better describe the prescriptive internal substance of an agreement for which the law requires the use of an external form.

However, this is merely the indication of the preferable choice between “terms” and “content”. The Commission may well wish to consider the advisability of adopting a different and more satisfactory wording of the entire Article 7 (3), provided always that the fundamental choice of prescribing the form requirement for the sole purpose of the certainty of the arbitration rules is preserved in its substance.

Comments on Draft declaration regarding the interpretation of article II, paragraph (2) and article IV, paragraph (1), of the New York Convention (Annex III)

A favourable opinion is expressed in support of this Draft declaration.

Although it may be difficult to assess in precise legal terms how effective, if adopted, the declaration may be in reducing the present lack of uniformity in the interpretation of the New York Convention, it would be unrealistic to assume that a different and more ambitious solution would have greater chances to succeed.

A/CN.9/609/Add.1**Draft legislative provisions on interim measures and the form
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**II. Comments received from Member States and international
organizations****A. Member States****2. China**

[Original: Chinese]

[26 April 2006]

MC/DTL Administrative letter No.26[2006]

**Comments in response to the relevant draft documents of Working Group II of the
United Nations Commission on International Trade Law**

The three draft documents prepared by Working Group II (Arbitration and Conciliation) and as forwarded by UNCITRAL have been duly received. After consideration, we hereby submit the following comments:

**I. Revised Legislative Provisions on Interim Measures and
Preliminary Orders****(I) General comments on the text as a whole**

The present draft represents an extensive expansion of the provisions in Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration regarding the power of the arbitral tribunal to order interim measures. The terms “interim measures” and “preliminary orders” are similar in meaning to “preservative measures” known in China’s legal system, which include preservative measures towards property and preservative measures with regard to evidence. The Arbitration Law of China states in its Article 28 that “... If one of the parties applies for property preservation, the arbitration commission

shall submit to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law"; and in its Article 46 that "... If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located." In other words, the Chinese law has not accorded the arbitral tribunal the power to order preservative measures, nor the power to order interim measures or issue preliminary orders. In this connection, therefore, the present draft is in conflict with the relevant provisions of the Chinese civil procedure law and the arbitration law. There is no legal basis for courts in China to recognize and enforce interim measures and preliminary orders from foreign arbitral tribunals.

(II) Comments on specific provisions

Within the extent of our general views as above, we make the following suggestions for amendment of specific provisions:

1. For paragraph (1)(b), Article 17 bis—Conditions for granting interim measures in Annex I, Revised legislative provisions on interim measures and preliminary orders, it is suggested that subparagraph (b) "There is a reasonable possibility that the requesting party will succeed on the merits of the claim, ..." be deleted in its entirety, as it is no easy task to make an accurate prejudgement on the likelihood of success of the claim at the time of application for interim measures. Besides, who is going to determine such likelihood and how should it be determined remains a tough issue. It takes time to make such determinations. And interim measures are of such an urgent nature that does not allow for longer periods of time to decide on the possible existence of the likelihood of success. Delay in time will defeat the purpose of the provisions on interim measures.
2. For paragraph (5), Article 17 quater—Specific regime for preliminary orders, it is suggested that the clause "but shall not be subject to enforcement by a court" be deleted from the paragraph "A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court ..." for a preliminary order that is not subject to enforcement by a court will bring about no real effect.
3. For the second line in Article 17 quinquies—Modification, suspension, termination, it is suggested to insert the words "if it is justified" after "upon application of any party", since it is unacceptable for an application not to be justified.
4. For paragraph (1), Article 17 novies—Recognition and enforcement, it is suggested to delete the phrase "unless otherwise provided by the arbitral tribunal", since there should be no provision otherwise by the arbitral tribunal once it has issued an order for "interim measures". The phrase lends little room for reasonable understanding.

II. Revised legislative provisions on the form of arbitration agreement

(I) General comments on the text as a whole

The text is an attempt, in the light of technological developments, for revision by way of expanded understanding of the requirement for “writing” in Article 7 of the Model Law regarding the definition and form of an arbitration agreement. The Arbitration Law in effect in China contains similar requirements for arbitration agreements to be “in writing”. With technological advancement, inter-personal communications and the conclusion of contracts are being done increasingly by verified means, which undoubtedly calls for a corresponding expansion in the interpretation of the requirement for “writing”, hence the necessity to revise Article 7 of the Model Law. For this purpose, we prefer the first alternative text which describes in specific terms the forms of “writing” and lends itself to easier operation, while being consistent with the understanding of written forms of contracts in China’s current practice.

(II) Comments on specific provisions

1. For paragraph (3), Article 7—Definition and form of arbitration agreement under (1) Revised draft article 7 in Annex II, Revised legislative provisions on the form of arbitration agreement, it is suggested to substitute in the second line the word “established” for the word “recorded”, the reason being that “recorded” is narrower in its meaning than the word “established”.
2. For Article 7— Definition of arbitration agreement under (2) Alternative proposal, the text is less than satisfactory and therefore is to be discarded.

III. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

The draft declaration is intended to express the desire that States would give at an earlier date their valid interpretation of the form requirements for arbitration agreements so as to keep pace with the development in the forms of writing in the modern society. The ultimate goal is to lead to recognition and enforcement of international commercial arbitration awards in various States to the greatest possible extent. The declaration is in correspondence with the revision and improvement of Article 7 of the Model Law. We find the current text of the declaration to be appropriate and, therefore, fully acceptable.

IV. Expressions in the Chinese and English texts

With regard to individual cases of inconsistency in the expressions between the Chinese and the English texts, we propose to delay our examination and finalization until after the meetings later this year or next year when the English texts are finalized.

A/CN.9/609/Add.2

**Draft legislative provisions on interim measures and the form
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II. Comments received from Member States and international organizations

A. Member States

3. Germany

[Original: English]

[8 May 2006]

The German Government would like to express its thanks for the excellent Draft. Our comments are as follows:

1. Interim measures, article 17 et seq.

The German Government welcomes the Draft of article 17 et seq. now put forward. We therefore do not intend to make any suggestions regarding changes.

2. Written form requirement, article 7

The German Government favours the alternative proposal, which does not contain any provisions concerning the form of the communication. It is above all actual circumstances in practice which speak for this solution, since such agreements are often not set out in writing.

Further, the “warning function” of the written form will probably have become obsolete by now since arbitration is viewed as equal to national jurisdiction. As, in addition, the first solution also provides for the possibility of setting the agreement out in writing in retrospect, the written form can no longer be seen as having a warning function; both models thus produce the same result. The fact that the written form can be used as evidence merely has practical implications for the presentation of evidence and, as a result, also justifies omitting any form requirements. It was, not least, statements by those delegations who already have freedom of form and who unanimously reported only positive experience which were convincing.

3. Relationship to article II (2) of the New York Convention

The declaration on article II (2) of the New York Convention is to be welcomed as an interim solution. However, a revision of the New York Convention should be seriously considered for the future. This may involve a great deal of work, but the result should be favoured on account of its higher degree of legal certainty. If the New York Convention itself is not amended, this will merely lead to the mitigation of resulting problems caused by legal instruments such as the proposed declaration. The problem itself will remain, nonetheless. Against this background, an attempt should be made to tackle this problem, too.

A/CN.9/609/Add.3

**Draft legislative provisions on interim measures and the form
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II. Comments received from Member States and international organizations

A. Member States

4. Belgium

[Original: French]
[12 May 2006]

These comments are limited to the draft legislative provisions on the written form of the arbitration agreement and to the draft declaration regarding the interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

1. As regards the draft legislative provisions on the written form of the arbitration agreement, three comments may be made.

1.1. The first relates to the fact that these draft legislative provisions set out two different proposals for revising Article 7 of the Model Law on International Commercial Arbitration and that it seems to be envisaged that these two proposals could be approved simultaneously by the Commission.

However, these two proposals would appear to be irreconcilable as the first one aims to soften the requirement in Article 7 that the arbitration agreement be in writing, whereas the second one aims to suppress it.

Belgium therefore considers that a choice should be made and that the first proposal, which aims to soften the requirement, is preferable.

The requirement that the arbitration agreement be in writing is a legitimate requirement given the impact of the agreement on the basic right of access to the courts. While it is reasonable to soften this requirement and thereby adapt it to the needs of international trade, Belgium considers that simply suppressing it would be excessive.

1.2. The second comment relates to the content of the first aforementioned proposal for revising Article 7 of the Model Law, and particularly to the formulation of its paragraph 3.

Belgium believes that this provision should not be interpreted in the sense that a written document which has nothing at all to do with the parties, such as a copy of the rules of an arbitration body, could be considered to constitute an arbitration agreement in written form.

On the contrary, paragraph 3 of Article 7 should be interpreted in the sense that, on the one hand, in all cases there must be a written document emanating from at least one of the parties, such as a written proposal, even in a simplified form, to conclude an arbitration agreement, but that, on the other hand, there is no need for the finalization of the contractual process to be documented as such by a contract “in due form”, since it will be possible to prove its finalization on the basis of the existing written document.

An explanatory comment should make this point clearer.

1.3. Further to the preceding comment, Belgium wishes to make it clear that it is not in favour of the modification to Article 35.2 of the Model Law proposed with a view to suppressing the requirement that the party calling for the enforcement of an arbitral award must supply the original of the arbitration agreement.

Such a modification would create an undesirable disparity between the Model Law and the New York Convention.

2. As regards the draft declaration relating to the interpretation of the New York Convention, it would seem reasonable to consider that the purpose of this interpretative declaration is to establish a link between the proposed modifications to Article 7 of the Model Law and the New York Convention.

Belgium therefore considers that, if the revision of Article 7 of the Model Law aims to soften the requirement in this article that the arbitration agreement be in writing (see point 1.1 above), the purpose of the interpretative declaration should be to recommend that account be taken of such softening in interpretations of the same writing requirement formulated in Article II of the New York Convention.

Belgium therefore questions the appropriateness of including in the declaration a reference to Article VII of the New York Convention, since recourse to this article in the present context presupposes the disregarding of Article II of the Convention.

A/CN.9/609/Add.4

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II. Comments received from Member States and international organizations

A. Member States

5. United Kingdom

[Original: English]
[18 May 2006]

United Kingdom comments on Article 17 of the Model Law and the future work of UNCITRAL

Following the last meeting of the Working Group in New York, we agreed to send comments on the work of UNCITRAL, in light of its recent project on interim measures and in particular “preliminary orders”.

As we noted at the meeting, the United Kingdom has mixed feelings about the completion of this project.

On the one hand, we are of course happy that the Working Group has finally arrived at an agreed draft, which can go forward to the Commission next month, leaving the way clear, at last, for new projects. We would particularly like to congratulate the Chairman and the Secretariat for the tireless work and drafting skills in arriving at a final solution after many difficult sessions.

On the other hand, however, it is the nature of this process itself that gives rise to serious concerns—quite apart from the United Kingdom’s reservations on the substance of the new provision (which are now a matter of record, and need not be restated).

On any view, the Working Group’s draft on “preliminary orders” has been the subject of extraordinary controversy inside and (more troublingly) outside UNCITRAL. Even ahead of the Commission’s consideration, it is already apparent that the new provision will be met with a substantial body of criticism in the international field. This is not to say that it does not also have a body of support, but the key question for us is whether this is really a position in which UNCITRAL should ever find itself. We cannot

think of any previous project (short of the Model Law itself) that has had such a difficult gestation, and required so many resources for what, so far as “preliminary orders” are concerned, may be considered a somewhat modest result.

Early on in this particular project, it became manifest that there was no international consensus on “*ex parte*” measures. On the contrary there was—and remains—profound disagreement amongst specialists. The result was inevitable: lengthy debates; difficult Working Group sessions; and a final draft that has the weaknesses of any hard fought compromise.

Our fear, which we have expressed previously, is that the end result may damage UNCITRAL’s international standing and future influence. UNCITRAL has a unique reputation worldwide in the development of commercial law. In our view, a key element in its success has been its acceptance as a neutral and expert body, able to express an international consensus, and therefore of significant influence across diverse cultures and legal traditions. It has been and should be a source of innovation, but within careful bounds. As soon as its work is perceived as controversial, or a vehicle for the interests of a few dominant delegations, it may lose this standing. Equally, as soon as its processes are seen as inefficient in terms of cost and time, it may be that much harder to attract and maintain international participation.

This is all the more regrettable in this case, given that the relatively minor “*ex parte*” element of our work has been allowed to overshadow the rest of the project, and what is certainly a commendable draft on “*inter partes*” measures.

Our suggestion is that this experience be borne in mind in structuring UNCITRAL’s future work. In particular, it is our hope that UNCITRAL will continue to innovate, and to push the international consensus as far as it will go. At the same time, however, it is vital that UNCITRAL avoids “trouble spots”, internal division, and the expenditure of disproportionate resources where this is avoidable.

The United Kingdom strongly supports the work of UNCITRAL, and will continue to do so. We hope that these few observations will be understood, as they are intended, as constructive comments, and we look forward to working closely with UNCITRAL in its future work in this area.

A/CN.9/609/Add.5

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II. Comments received from Member States and international organizations

A. Member States

6. France

[Original: French]
[29 May 2006]

General remarks

1. The French delegation notes with regret that the Working Group's method of functioning did not fully meet its expectations. It felt that, on numerous occasions, every effort had not been made to reach truly consensus solutions. For example, the Working Group unfortunately did not take into account the reservations expressed—by a majority at the last plenary session—regarding “preliminary orders” and preferred to make no amendments whatsoever to the provisions drafted on this issue. Also, it adopted a provision on “anti-suit injunctions” despite the reservations expressed by many delegations. The reports of the Working Group are sometimes elliptical on these matters and do not sufficiently make the point that a compromise could be achieved only under particularly difficult conditions.

2. As to substance, the French delegation gives a mixed appraisal of the work of the Working Group, in which it nonetheless participated positively and constructively. While the definitions of interim measures that can be ordered by an international arbitrator are generally welcome, many provisions are overly cumbersome—as a comparison with the original provisions of the Model Law reveals—if not questionable from the perspective of arbitration practice.

3. From the viewpoint of France, all of this compromises the quality and desired universal scope of the new model legislative provisions. A symposium held last February at the Senate in Paris on the UNCITRAL project showed that for a good many French legal writers and arbitration practitioners the model provisions gave rise to numerous,

strong reservations, which are largely in line with those formulated by the French delegation during the course of the work.

Interim measures of protection

Draft article 17 (2) (b): anti-suit injunctions

4. The French delegation is opposed to the inclusion of “anti-suit” measures among ordinary interim measures. Measures of this type do not fall into the category of interim measures. Also, they are alien to the continental law tradition. Anti-suit injunctions are questionable since they deny a party the legal remedies to which it is normally entitled. Hence such a course of action is challengeable within the European Union.¹

5. The French delegation wishes to request the deletion of this provision, which was inserted in the revised provisions without any extensive discussion of the potential consequences on the structure of the provisions as a whole (cf. point 1 above).

Draft article 17 ter: preliminary orders

6. A large group of countries shared the French delegation’s major objections to such measures, believing that they ran counter to party autonomy, the foundation of international commercial arbitration. These measures might also infringe the principle of equal treatment of parties. The French delegation thus proposes once again—this suggestion having received the support of many delegations at the previous session—that such measures be permitted only if they have previously been accepted by the parties in their arbitration agreement. This positive option would not in any way preclude the possibility of the effective use of these measures since it could be inserted in a model arbitration agreement to which the parties may refer for the settlement of their disputes. It therefore constitutes a genuine compromise arrangement which could make acceptable the introduction in arbitration law of ex parte measures which have been accepted in the form of preliminary orders.

Draft article 17 quater, paragraph (4): unenforceable nature of preliminary orders

7. Somewhat illogically, given the Working Group’s interest in this innovative extension of the arbitrator’s powers, it has been stipulated that “[a] preliminary order shall be binding on the parties but shall not be subject to enforcement by a court”. This would rob these measures of much of their effectiveness since juridical persons, in particular banking establishments, which the arbitrator will approach to obtain the execution of such orders, would be unable to comply without a writ of enforcement. It would therefore be desirable to delete that sentence while retaining the following one, which states that a preliminary order does not constitute an award.

Draft article 17 decies: grounds for refusing recognition/enforcement

8. The French delegation can only reiterate its position on this matter. The proposed text, which combines provisions based on the New York Convention and relating to arbitral awards with provisions stemming more specifically from requirements concerning

¹ See, on this point, the judgement of the European Court of Justice of 27 April 2004 in Case C-159/02 (Turner), which ruled that the Brussels Convention precludes “*the grant of an injunction whereby a court of a contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting State*”.

interim measures, constitutes a set of clauses incorporating excessive and disproportionate double conditions.²

Written form of arbitration agreement

9. The French delegation agrees with the substance of the draft provisions prepared by the Working Group. However, it proposes that their wording be more succinct. In particular, the revised draft article 7 contains a paragraph (4) on electronic communication, which could be deleted or abridged since it constitutes a definition and not a prescriptive rule. Reference might simply be made to UNICTRAL documents dealing with electronic commerce.

10. Surprisingly, the omission of the writing requirement has also been proposed as an alternative. The French delegation does not wish this other arrangement to appear in the revised provisions. It would greatly weaken the provisions adopted by the Working Group with a view to embracing as closely as possible the current situation regarding arbitration law on this matter. In general, it is desirable to make as limited use as possible of variants, the aim being to guide States towards solutions that appear the most appropriate. Most importantly, the proposal to totally remove the requirement of written form had not received the Working Group's agreement.

² It is recalled that the French delegation had proposed a more concise wording:

- (1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding on the parties and [unless otherwise provided by the arbitral tribunal] enforced upon application by the party which obtained it [or by the arbitral tribunal] to the competent court, irrespective of the country in which it was issued.
- (2) The court may refuse to recognize [and] [or] enforce an interim measure of protection only if:
 - (a) Upon the request of a party the court is satisfied that:
 - That party was not given notice of the appointment of an arbitrator or of the arbitral proceedings;
 - The party against whom the measure is directed was unable to present its case under the conditions of article 17;
 - The arbitral tribunal did not have [was deprived of] the powers to order any such interim measure of protection;
 - (b) The court finds that:
 - The requested measure is incompatible with the powers conferred upon the court by its laws unless the interim measure can be reformulated to adapt it to those laws;
 - The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.

A/CN.9/609/Add.6**Draft legislative provisions on interim measures and the form
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**II. Comments received from Member States and international
organizations****A. Member States****Austria**

[Original: English]
[6 April 2006]

**Comments on draft legislative provisions on interim measures and on the form
requirement for arbitration agreements**

The Austrian Ministry of Justice thanks UNCITRAL for giving it the opportunity to comment on the draft text which was so meritoriously developed by the Secretariat taking into consideration the discussion of Working Group II at its forty-fourth session in New York. As requested by the Secretary-General our comment will be straight to the point and very concise.

In general Austria can go along with the draft text as it currently stands and avails itself of this opportunity to congratulate the secretariat for its excellent work in the course of and in between the Working Group meetings related to this topic.

There are, however, two elements in the draft text Austria is not really content with:

First, Austria would like to reiterate its position that it is neither desirable nor appropriate to confer on arbitral tribunals the power to grant preliminary orders on an ex parte basis. The party against which an interim measure is invoked should always be given the possibility to present its position prior to the issuance of such a measure.

Therefore, Austria remains critical of draft article 17 ter of the Model Law even taking into account the specific precautions set out by article 17 quater, in particular paragraph 5 of this article. The opt-out solution in article 17 ter (1) seems to be not sufficient to protect the rights of the parties. As a rule parties to an arbitration agreement might not be aware of

the danger of being later faced by a preliminary order directed against them and might therefore not be prepared to opt-out via a respective clause in their arbitration agreement.

Secondly, as Austria already pointed out during the meetings of the Working Group, this delegation is highly sceptical as to the exposure of the form requirement laid down in article 7 of the Model Law and therefore strongly opposed to the idea that an arbitration agreement could validly be concluded orally or even by mere conduct of the persons involved. Austria proposes to stick to the current wording of article 7 of the Model Law as neither of the two variants for a revised article 7 is able to meet our concerns and there is, in our view, no urgent need for abandoning the current requirements laid down in article 7 as it currently stands.

**L. Note by the Secretariat on settlement of commercial disputes:
possible future work in the field of
settlement of commercial disputes**

(A/CN.9/610 and Add.1) [Original: English]

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Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.¹

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) (“the Arbitration Model Law”), as well as the

¹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.²

3. After concluding the discussion on its future work in the area of international commercial arbitration, the Commission entrusted the work to one of its working groups, which it established as Working Group II (Arbitration and Conciliation), and decided that the priority items for the Working Group should be conciliation,³ requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention (“the writing requirement”),⁴ enforceability of interim measures of protection⁵ and possible enforceability of an award that had been set aside in the State of origin.⁶

4. Work on the UNCITRAL Model Law on International Commercial Conciliation was completed by the Working Group at its thirty-fifth session in 2001, and work in relation to both the question of interim measures and the form requirement for arbitration agreements was completed at the forty-fourth session of the Working Group in 2006.

5. To facilitate discussions of the Commission on topics to be considered in priority by the Working Group, this note contains a list of topics, which were discussed at previous sessions of the Commission and suggestions made in the Working Group.

I. List of topics initially mentioned as possible future work

1. List of topics considered by the Commission

6. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered possible topics for future work.⁷ The list of those topics, excluding conciliation and the requirement that an arbitration agreement be in writing was as follows:

(a) Arbitrability:⁸ it was observed that uncertainties as to whether the subject matters of certain disputes are capable of settlement by arbitration caused problems in international commercial arbitration. To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to stimulate transparency of solutions on that question. Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list any other issues that are regarded as non-arbitrable by the State. At the same time, concerns were expressed that any national listing of non-arbitrable issues might be inflexible and therefore counter-productive. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development (see below, para. 13).

² Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

³ Ibid., paras. 340-343 and para. 380.

⁴ Ibid., paras. 344-350 and para. 380.

⁵ Ibid., paras. 371-373 and para. 380.

⁶ Ibid., paras. 374-376 and para. 380.

⁷ Ibid., paras 340-380; A/CN.9/WG.II/WP.108, para. 6; A/CN.9/468, para. 107.

⁸ A/CN.9/460, paras. 32-34 and *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 351-353.

(b) Sovereign immunity:⁹ support was expressed in favour of preparatory work by the Secretariat of that item on the basis that it was of significant practical importance. That matter was noted as causing uncertainty and, potentially, delay in a number of States (see below, para. 15).

(c) Consolidation of cases before arbitral tribunals:¹⁰ it was pointed out that consolidation of arbitration cases into a single proceeding was not a novel issue and that it had practical significance in international arbitration, in particular where a number of interrelated contracts or a chain of contracts were entered into. It was also suggested that it might be useful for the Commission to prepare guidelines to assist parties in drafting arbitration agreements that envisaged consolidation of proceedings.

(d) Confidentiality of information in arbitral proceedings:¹¹ it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rule in respect of confidentiality.

(e) Raising claims for the purpose of set-off:¹² views were expressed that it was generally well accepted that an arbitral tribunal could only take-up a claim if that claim was covered by the arbitration agreement. It was decided that the consideration of the matter was therefore unlikely to be productive.

(f) Decisions by “truncated” arbitral tribunals:¹³ it was felt that it would be inadvisable to attempt to legislate on this matter because it raised sensitive issues, had implications in the context of recognition and enforcement of an award made by a truncated tribunal, and acceptable solutions would be difficult to achieve.

(g) Liability of arbitrators:¹⁴ it was said that there were many countries that did not have legislation on this matter, and it would be valuable if the Commission would provide model solutions. Another view was that, in light of different approaches in legal systems, the matter should not be considered by the Commission because it was unlikely that a consensus could be achieved on a workable solution.

(h) Power of the arbitral tribunal to award interest:¹⁵ it was noted that the power of an arbitral tribunal to award interest was a matter of great practical importance that arose often and potentially involved large amounts of money. It was suggested that providing guidance and model solutions would facilitate arbitration.

(i) Costs of arbitral proceedings:¹⁶ it was widely considered that the question of various matters relating to the costs of arbitration was not urgent.

(j) Possible enforceability of an award that has been set aside in the State of origin:¹⁷ the view was expressed that this issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.¹⁸ It was

⁹ Ibid., paras. 35-50 and *ibid.*, paras. 354-355.

¹⁰ Ibid., paras. 51-61 and *ibid.*, paras. 356-357.

¹¹ Ibid., paras. 62-71 and *ibid.*, paras. 358-359.

¹² Ibid., paras. 72-79 and *ibid.*, paras. 360-361.

¹³ Ibid., paras. 80-91 and *ibid.*, paras. 362-363.

¹⁴ Ibid., paras. 92-100 and *ibid.*, paras. 364-366.

¹⁵ Ibid., paras. 101-106 and *ibid.*, paras. 367-369.

¹⁶ Ibid., paras. 107-114 and *ibid.*, para. 370.

¹⁷ Ibid., paras. 128-144 and *ibid.*, paras. 374-376.

¹⁸ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.

suggested, however, that that item involved a broader spectrum of issues, such as, the question of the discretionary power to enforce an award even where a ground for refusal existed (such as a minor procedural defect or a defect that did not influence the outcome of the arbitration).

2. Other topics mentioned

7. At its thirty-second session (Vienna, 17 May-4 June 1999), the following topics were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time:¹⁹

(a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties.

(b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances.

(c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association.

(d) Questions relating to the interpretation of legislative provisions such as those in article II (3) of the New York Convention (or article 8 (1) of the Arbitration Model Law), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued.

(e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. Those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

¹⁹ Ibid., *Fifty-fourth session, Supplement No. 17* (A/54/17), para. 339; A/CN.9/468, para. 108.

3. Topics proposed by arbitration experts

8. A number of other topics concerning the New York Convention, proposed by arbitration experts at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the New York Convention, were raised for possible consideration by the Working Group at its thirty-second session (Vienna, 20-31 March 2000).²⁰ These included:

(a) The meaning and effect of a non-domestic award, that is an award not considered as a domestic award in the State where its recognition and enforcement was sought (article I (1), second sentence).

(b) Clarification of what constituted an arbitral award under the Convention. Did it cover, for example, awards on agreed terms; “Treaty awards”; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*.

(c) Determination of the law applicable to arbitrability under article II (1).

(d) Field of application of article II (3) concerning the enforcement of the arbitration agreement.

(e) Law applicable to agreements that might be “null and void, inoperative, or incapable of being performed” under article II (3).

(f) Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention.

(g) Enforcement conditions and procedure referred to in article III, as implementing legislation showed diverging solutions.

(h) Period of limitation for enforcement of a Convention award where again implementing legislation showed a range of different periods.

(i) Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V.

(j) Meaning and effect of the suspension of an arbitral award in the country of origin (article V (i)(e)).

(k) Meaning and effect of the more-favourable-law provision of article VII (1).

9. Recalling the discussion of increased use of electronic commerce and the question whether electronic messages complied with formal requirements for arbitration agreements, the Commission took note of suggestions that it would be useful to review the implications of “on-line” arbitrations, i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communications. It was also agreed that the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce on that matter (see below, paragraph 14).²¹

4. Conclusion by the Commission

10. When the Commission discussed its future work at its thirty-second session (Vienna, 17 May-4 June 1999), it left open the question of what form that future work might take. It was agreed that decisions on that matter should be taken later as the substance of proposed

²⁰ A/CN.9/468, para. 109.

²¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396; A/CN.9/468, para 113.

solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).²² At its thirty-third session (New York, 12 June-7 July 2000), the Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-law provision of article VII (1) of the 1958 New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention; and the power by the arbitral tribunal to award interest.²³

II. Topics most recently mentioned as possible future work

11. The following topics were mentioned, either by the Commission or the Working Group, as possible future topics to be considered by the Working Group in priority.

1. UNCITRAL Arbitration Rules

12. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) could be considered for inclusion in future work.²⁴ Although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any necessary revision would be of positive benefit to practitioners in international arbitration. The view was expressed that particular caution should be exercised in determining the scope of such a revision, which should be precisely defined in order to avoid undermining the stability of the reference offered by the UNCITRAL Arbitration Rules over 30 years of existence of that instrument. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary. The view was also expressed that preliminary consideration of a possible revision of the Rules should not prevent the Working Group from envisaging other possible topics for future work, such as the use of arbitration in corporate governance or the use of on-line dispute resolution mechanisms.

²² *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 338.

²³ *Ibid.*, *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.

²⁴ *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

2. Arbitrability

13. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions, the Commission noted that priority consideration might be given to the issue of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition (see above, para. 6).²⁵

3. On-line dispute resolution (ODR)

14. The Commission took note of a proposal that priority consideration might be given to the issues of on-line dispute resolution (see above, para. 9).²⁶

4. Sovereign immunity

15. On the question of sovereign immunity, the Working Group noted at its forty-fourth session (New York, 23-27 January 2006) that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation (see above, para. 6).²⁷

5. Other topics

16. Another possible topic suggested for consideration to the Working Group at its forty-fourth session (New York, 23-27 January 2006) was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request “within its competence and according to its rules on taking evidence”. It was suggested that article 27 could be revised to oblige a court to render such assistance.²⁸

17. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof.

²⁵ *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178; A/CN.9/573, para. 100, A/CN.9/592, paras. 90.

²⁶ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178; A/CN.9/573, para. 100; A/CN.9/592, para. 90.

²⁷ A/CN.9/592, paras. 90 and 92.

²⁸ A/CN.9/592, para. 94.

18. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations. Whilst the Working Group agreed that an arbitral tribunal had no jurisdiction to bind parties that were not party to the arbitration agreement, it noted that that matter was of particular importance in the context of granting of preliminary orders. It was highlighted that there had been developments, for example, in a case involving investment arbitration where standing had been given to third parties that might be affected by a decision of the arbitral tribunal. The Working Group agreed that these matters could be considered as items for future work by the Working Group.²⁹

19. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.³⁰

²⁹ A/CN.9/592, para. 94.

³⁰ A/CN.9/592, para. 91.

A/CN.9/610/Add.1

**Settlement of commercial disputes: possible future work
in the field of settlement of commercial disputes:
revision of the UNCITRAL Arbitration Rules**

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Introduction

1. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) (“the UNCITRAL Notes”) could be considered for inclusion in future work.¹ At the forty-fourth session of the Working Group (New York, 23-27 January 2006), although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority.² It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary.³

¹ *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

² A/CN.9/592, para. 93.

³ *Ibid.*

2. At its thirty-eighth session (Vienna, 4-15 July 2005), the Commission was informed that 2006 would mark the thirtieth anniversary of the UNCITRAL Arbitration Rules and that conferences to celebrate that anniversary were expected to be organized in different regions to exchange information on the application and possible areas of revision of the UNCITRAL Arbitration Rules.⁴ A conference was held in Vienna on 6 and 7 April 2006 in cooperation with the International Arbitral Centre of the Austrian Federal Economic Chamber. Suggestions were made to amend a number of articles of the UNCITRAL Arbitration Rules in order to better align the Rules with current international arbitration practice and the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). To facilitate discussions of the Commission on that topic, this note contains a brief overview of some suggestions made by practitioners during that conference. Such an overview shall not be regarded as an exhaustive list of topics to be considered by the Commission. Should the Commission decide that a revision of the UNCITRAL Arbitration Rules should be considered by Working Group II (Arbitration), a more detailed annotated list of possible areas of revision could be presented by the Secretariat to the Working Group at its next session to assist it in considering the areas of possible revision and the policies to be adopted in revising the Rules.

Suggestions for a revision of the UNCITRAL Arbitration Rules

Multiparty arbitration

3. When a single arbitration involves more than two parties (multi-party arbitration), proceedings can be more complicated to manage and rules of various arbitration institutions have been amended so as to accommodate multi-party arbitration.⁵ Amendments to the UNCITRAL Arbitration Rules could be considered to address that situation. The areas of possibly increased complexity in multi-party arbitration are listed in the UNCITRAL Notes.⁶

Consolidation of cases before arbitral tribunals

4. In situations where several distinct disputes arise between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing separate arbitration clauses, one of the parties might refuse that all such disputes be resolved in the same proceedings. A party might also initiate a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide a more efficient resolution of the disputes between the parties and also reduce the possibility of inconsistent awards in parallel arbitrations. Under the UNCITRAL Arbitration Rules, consolidation is possible only where the parties specifically so agree.⁷

Truncated arbitral tribunals and obstructing arbitrators

5. A review of the UNCITRAL Arbitration Rules might address the situation where the arbitral tribunal decides to proceed with the arbitration notwithstanding the absence in bad

⁴ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 179.

⁵ For instance, the ICC Rules (article 10), the LCIA Rules (article 8.1), and the WIPO Rules (article 18).

⁶ UNCITRAL Notes on Organizing Arbitral Proceedings, paras. 86-88.

⁷ Article 19 (3) of the UNCITRAL Arbitration Rules states that the respondent can bring a counter claim arising out of the same contract.

faith of one of its members or where the arbitral tribunal considers that one of its members is obstructing the progress of the case, including the arbitral tribunal's deliberations.⁸ The Commission might wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, consider the extent to which the parties should be able, by agreement, to put beyond doubt the validity of an award issued by a truncated arbitral tribunal.⁹

Confidentiality of information in arbitral proceedings

6. Articles 25, paragraph (4), and 32, paragraph (5), of the UNCITRAL Arbitration Rules deal with the confidentiality of hearings and awards respectively, but there are no rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before the arbitral tribunal. A suggestion was made that an explicit provision to that effect be included in a revised version of the UNCITRAL Arbitration Rules.

Interim measures

7. Article 26 of the UNCITRAL Arbitration Rules, which deals with interim measures is not consistent with the revised model legislative provisions on interim measures proposed to be inserted under a new chapter IV bis of the Model Law and scheduled for adoption by the Commission at its thirty-ninth session.¹⁰ The question to be considered is whether, and if so, to what extent, article 26 should mirror the revised legislative provisions on interim measures of the Model Law.

Liability of arbitrators

8. The Commission might wish to consider whether the question of liability of arbitrators needs to be further examined in the context of the UNCITRAL Arbitration Rules. At present, neither the UNCITRAL Arbitration Rules or the Model Law address that question.¹¹

Raising claims for the purpose of set-off

9. The UNCITRAL Arbitration Rules provide that the respondent may rely on a claim for the purpose of a set-off if the claim arises out of the same contract (article 19). Views have been expressed that the arbitral tribunal's competence to consider claims by way of a set-off should, under certain conditions, extend beyond the contract from which the principal claim arises. The reasons cited are procedural efficiency and the desirability of eliminating disputes between the parties.¹²

Third-party intervention in arbitral proceedings

10. Third parties, for example non-governmental organizations, often ask for an opportunity to explain their positions, particularly in investment treaty arbitrations. Article 15, paragraph (1), of the UNCITRAL Arbitration Rules, providing that "the arbitral

⁸ In that respect, article 13 of the UNCITRAL Arbitration Rules deals with substitute arbitrators; and article 32, paragraph (4), of the UNCITRAL Arbitration Rules requires the majority of the tribunal to state the reasons for the absence of one arbitrator's signature from an award.

⁹ A/CN.9/460, paras. 80-91.

¹⁰ A/CN.9/592, annex 1.

¹¹ A/CN.9/460, paras 92-100.

¹² A/CN.9/460, paras. 72-79.

tribunal may conduct the arbitration in such manner as it considers appropriate”, could be interpreted as conferring power on the arbitral tribunal to accept *amicus curiae* briefs in written form. The Commission might wish to consider whether an express provision on third-party intervention should be included in any revised version of the UNCITRAL Arbitration Rules.

Other suggestions

11. Article 3 of the UNCITRAL Arbitration Rules requires the claimant’s notice of arbitration to indicate the “general nature” of its claim as well as the “remedy or relief sought”. Thereafter, the arbitral tribunal is constituted without the respondent having an opportunity (or being required) to state its position with respect to (i) jurisdiction, (ii) the claim, or (iii) any counterclaim. In order to promote a more streamlined efficient arbitral procedure, article 3 might be modified to include provision permitting the respondent to submit a response to the claimant’s notice of arbitration.

12. Article 35 of the UNCITRAL Arbitration Rules currently provides that either party might request the arbitral tribunal to give an interpretation of the award. The question raised was whether that provision should only apply where there is a dispute as to what the award orders the parties to do.

13. Article 39, paragraph (1), of the UNCITRAL Arbitration Rules provides that fees be “reasonable in amount”. The Commission might wish to consider whether more guidance on that question should be included in any revision of the UNCITRAL Arbitration Rules.

III. PROCUREMENT

A. Report of the Working Group on Procurement on the work of its eighth session (Vienna, 7-11 November 2005) (A/CN.9/590) [Original: English]

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh session (New York, 4-8 April 2005) (A/CN.9/575), the Working Group started in-depth consideration of the use of electronic communications and technologies in the procurement process, being: (a) electronic publication and communication of procurement-related information; (b) the use of and controls over electronic means of communication in the procurement process and the electronic submission of tenders; (c) electronic reverse auctions; and (d) abnormally low tenders (A/CN.9/WG.I/WP.34 and Add.1-2, A/CN.9/WG.I/WP.35 and Add.1 and A/CN.9/WG.I/WP.36). The Working Group decided to accommodate the use of electronic communications and technologies (including electronic reverse auctions) as well as the investigation of abnormally low tenders in the Model Law and to continue at its eighth session the in-depth consideration of those topics and consequential revisions to the Model Law, on the basis of drafting materials that the Secretariat would prepare (A/CN.9/575, para. 9).

3. At its thirty-eighth session, in 2005, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its eighth session in Vienna from 7 to 11 November 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Brazil, Cameroon, Canada, China, Colombia, Czech Republic, France, Germany, Iran (Islamic Republic of), Italy, Jordan, Lithuania, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

5. The session was attended by observers from the following States: Democratic Republic of the Congo, Greece, Haiti, Indonesia, Iraq, Ireland, Oman, Peru, Philippines and Romania. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Secretariat and World Bank;

(b) *Intergovernmental organizations*: African Development Bank, European Commission and European Space Agency (ESA);

(c) *International non-governmental organizations invited by the Commission*: International Bar Association (IBA), International Development Law Organization (IDLO) and the European Law Students' Association (ELSA).

6. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Acting Chairman: Mr. Olawale MAIYEGUN (Nigeria)
(Friday afternoon session, 11 November 2005)

Rapporteur: Mr. Gonzalo SUÁREZ BELTRÁN (Colombia)

7. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.37 and Corr.1);

(b) A note concerning the use of electronic communications in the procurement process, including drafting materials (A/CN.9/WG.I/WP.38 and Add.1);

(c) A note concerning electronic publication of procurement-related information, including a comparative study and drafting materials (A/CN.9/WG.I/WP.39 and Add.1); and

(d) A note concerning electronic reverse auctions and abnormally low tenders, including drafting materials (A/CN.9/WG.I/WP.40 and Add.1).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

9. At its eighth session, the Working Group continued its work on proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 7 above (A/CN.9/WG.I/WP.38, 39 and 40 and their addenda) as a basis for its deliberations.

10. The Working Group agreed that the consideration at its ninth session would focus on the following aspects: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use, such as “accessibility standards”, and the related principle of “functional equivalence” of all means of communication; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; (c) electronic reverse auctions, including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered and their procedural aspects; and (d) abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders. The Secretariat was requested to present revised drafting materials on these topics for consideration by the Working Group at its next session and to undertake a study on the following practical aspects of the functioning of electronic reverse auctions: (i) pre-qualification, qualification and ranking of bidders in the context of Model 2 electronic reverse auctions (see para. 85 below) and (ii) the use of tender securities in the context of electronic reverse auctions (see para. 100 below). The Working Group decided to take up the topics of framework agreements and suppliers’ lists at its next session, time permitting.

11. On Friday morning, the Secretariat summarized its understanding of the changes required to be made to the drafting materials that were before the Working Group at its current session. The Working Group also heard presentations by the Secretariat on the progress made in the preparation of studies on the topics of framework agreements and suppliers’ lists, to be submitted for the consideration by the Working Group at its next session. Some delegates shared information on the experience in their respective jurisdictions with framework agreements and suppliers’ lists.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Scope and extent of revisions of the Model Law and the Guide to Enactment (A/CN.9/WG.I/WP.38, paras. 4-23)

12. The Working Group considered the scope and extent of its revisions to the Model Law and the Guide to Enactment.

13. The Working Group acknowledged the importance of appropriate procurement planning and contract administration for overall effective functioning of procurement and fulfilling the objectives of the Model Law. Some delegations considered that the current scope of the Model Law, which covered the phase of the selection of a successful supplier or contractor only, should be broadened to address the procurement planning and contract administration phases (A/CN.9/WG.I/WP.38, paras. 12 and 13). The general view in the Working Group, however, was that the scope of the Model Law in that respect should remain unchanged and that it would be more appropriate for paragraph 10 of the Guide to be expanded as regards good practice in procurement planning and contract administration. On the other hand, some support was expressed for formulating at least minimum general principles applicable to those additional phases in the Model Law itself. The Working Group, recognizing the broader context in which that issue should be considered, decided to address the issue further at a later stage, in conjunction with revisions to relevant articles of the Model Law.

14. As regards the scope and nature of the revised Guide to Enactment (A/CN.9/WG.I/WP.38, paras. 9-11 and 19-23), the Working Group agreed to defer the consideration of those issues until after reviewing the Model Law in its entirety. Such an approach, it was said, was necessary taking into consideration the interplay between various provisions of the Model Law and the Guide, to ensure the appropriate content and level of detail, and to avoid unnecessary repetition in the Guide.

15. Some support was expressed for the suggestion that the Guide should provide greater detail of matters to be addressed in regulations or even draft regulations themselves, especially in the light of the value that such regulations could have for harmonization of procurement law (A/CN.9/WG.I/WP.38, para. 9). On the other hand, the view was expressed that the harmonization of procurement regulations should be facilitative and should not remove all flexibility from enacting States, and the regulations themselves should not be overly prescriptive.

16. The view was reiterated that revisions to the Model Law and the Guide addressing the use of electronic means of communication and publication in public procurement should be drafted with the objective of enabling and, where appropriate, promoting such use without, however, discriminating against the use of other means, such as paper-based ones, in the procurement process.

B. Drafting suggestions

1. General introductory remarks in the Guide to Enactment on the use of electronic communications in procurement (A/CN.9/WG.I/WP.38, Chapter II, section B, subsection 2 (b))

17. The Working Group agreed to introduce the following amendments to the text: (i) delete the words “other socio-economic” in paragraph 3; (ii) replace the words “where possible” with the words “where appropriate” in paragraph 4; and (iii) redraft paragraphs 6 and 13 in a positive tone, stressing the need for States that would choose to enact the revised Model Law to adopt general electronic commerce legislation that provided for the legal recognition, validity and enforceability of electronic communications generated in the procurement process.

18. Views varied as regards the need for the text of articles 5, 6 and 8 of the UNCITRAL Model Law on Electronic Commerce (A/51/17, annex I) to be quoted in paragraph 9. Some delegations were of the view that the full quotation of the text of the relevant articles was justified to ensure that the revised Model Law with its Guide to Enactment could be used as a self-contained and stand-alone document, addressing all relevant aspects of the use of electronic communications in public procurement. Other delegations were of the view that the current level of detail in paragraph 9 was unnecessary in that part of the Guide (which contained general introductory remarks on the use of electronic communications), but that the points raised could be made elsewhere in the Guide. It was therefore suggested that paragraph 9 be deleted, and that cross-references to the UNCITRAL Model Law on Electronic Commerce were sufficient, though some additional explanation of the provisions of that Model Law might be required. The Working Group requested the Secretariat in redrafting paragraph 9 and referring to provisions from other texts in other parts of the Guide, as appropriate, to try to reconcile considerations of economy, clarity and efficiency.

2. Functional equivalence (A/CN.9/WG.I/WP.38, paras. 24-29)

19. The Working Group recalled its earlier decision that it would provide for a general principle of “functional equivalence” regarding the use of communications in the procurement process, and that it would approach the drafting from a technologically neutral perspective (A/CN.9/575, para. 12).

20. The Working Group proceeded to consider drafting suggestions for a new article 4 bis of the Model Law (proposed to be entitled “Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents”), considering Variants A, B and C (A/CN.9/WG.I/WP.38, paras. 24-29).

21. It was noted that each of the three variants contained three main elements. The first was a description of the methods of communicating, publishing, exchanging or storing information or documents, and holding meetings, the second, a statement that electronic means of so doing would be sufficient, and the third, controls over the use of means of communications (A/CN.9/WG.I/WP.38, para. 26).

22. As to the first element, it was observed that the difference between the variants was that Variants A and C contained a list of the types of communications to which the article applied, and Variant B contained a generic description of the types of communication referred to, without a list. The Working Group decided that Variant B would be the better formulation, as it was the clearest and easiest to apply, and avoided the risk that procuring entities might seek to avoid the application of the provision through rigid construction of the items on the list. However, it was pointed out that the generic description might not be sufficiently wide to encompass all the items present in the list, including the opening of tenders electronically, the publication of procurement-related information, and a requirement for a document to be in a sealed envelope.

23. As to the second element, it was observed that the aim of the provision was to address all forms of communication, and to ensure their functional equivalence. While the relative novelty of electronic forms of communication might require greater explanation than traditional forms of communication, the Working Group stressed that the text should be drafted in a manner that encompassed any form of communication.

24. As to the third element, it was recalled that the controls concerned were the “accessibility standards” that the Working Group decided at its seventh session should

apply to the means of communication chosen (A/CN.9/575, para. 14). It was noted that one aspect of the controls stated that any means of communication could be used “provided that the enacting State or procuring entity is satisfied that such use complies with the [accessibility standards]”. It was observed that the provision as drafted conferred a wide discretion on the procuring entity, and that at the same time the procuring entity was not required to reduce to writing the justification for its decision as to the means of communication chosen, nor to include that decision in the record of the procurement under article 11 of the Model Law. Accordingly, it was proposed that the text should state “provided that such use complies with the [accessibility standards]”, a purely objective standard, and that the issue of requiring the procuring entity to record its selection of the means of communication should be revisited when the Working Group considered the formulation of the “accessibility standards”.

25. It was proposed, in the alternative, that the “accessibility standards” might be set out elsewhere in the Model Law, and therefore that the text of the proposed article 4 bis could address the first two elements alone.

26. The Working Group decided that it would continue its deliberations on the basis of Variant B for draft article 4 bis, and requested the Secretariat to reformulate Variant B to take account of these proposals, in particular to revise the text expressly to accommodate all forms of communication, and without a statement of the accessibility standards within that article.

27. As regards the description of the communications, the Working Group noted that the draft text before it referred to both the “methods” and the “means” of communication (A/CN.9/WG.I/WP.38, para. 28). The Working Group considered the advantages and disadvantages of both terms, and agreed to continue its deliberations on this question at a future date.

3. Accessibility standards (A/CN.9/WG.I/WP.38, paras. 30-32)

28. The general view was that the provisions on the “accessibility standards” currently contained in article 4 bis should be dealt with as a separate consideration, and that they should clearly address all forms of communication, and not just electronic ones.

29. With respect to the draft provisions on the “accessibility standards” (A/CN.9/WG.I/WP.38, para. 30), it was noted that the aim of subparagraph (a) was to ensure, inter alia, that procuring entities duly consider cost implications in the choice of means of communication, and therefore the phrase “generally available” should be changed to “reasonably available”. Another suggestion was to use the phrase “compatible (or interoperable) with those in common or general use”. Reference was also made to paragraph 5 of A/CN.9/WG.I/WP.38/Add.1, in which the latter phrase was used, and it was also noted that similar wording appeared in the European Union procurement directives 2004/17/EC and 2004/18/EC.¹ Concern was expressed, however, that in practice it was difficult to comply with the requirement for “interoperability”, as it was often impossible to achieve, and therefore excessive reviews of procurement decisions could result. Another suggestion was to replace the word “generally” with “commonly”. As regards

¹ Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 1 and 114, respectively). Both available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

subparagraph (b), it was considered that the subparagraph should be deleted, as its content was not relevant to “accessibility standards.”

30. Some delegations concurred with the observation of the Secretariat (A/CN.9/WG.I/WP.38, para. 31) that there was a degree of inconsistency between subparagraphs (a) and (c) in that a procuring entity could choose a method of communication that may be generally available but the choice could still be discriminatory. It was suggested that the entire provision could be replaced with the following text: “The procuring entity shall ensure that its method of communicating, publishing, exchanging or storing information or documents shall not unreasonably discriminate among or against potential suppliers or contractors or otherwise substantially limit competition.”

31. It was noted that (i) the proposed alternative text did not address the use of electronic means of communication in public procurement per se, (ii) the addition of a reference to “holding meetings” might be warranted, (iii) the phrase “shall not unreasonably discriminate” was susceptible to different interpretations across jurisdictions, and an alternative to the notion of “reasonableness” would be preferable, and (iv) all discrimination on the part of the procuring entity should be prohibited, and that therefore the word “substantially” should be deleted.

32. The Working Group noted that there was a difference between the notion of “general availability” in subparagraph (a) and “non-discrimination” in subparagraph (c) (A/CN.9/WG.I/WP.38, para. 31), and considered whether both concepts should be expressly provided for, or whether a requirement that the means of communication be generally available could be regarded as encompassed within the requirement for non-discrimination. The Working Group decided that it would revisit that issue at a later date.

33. Noting that no final determination on the question had been made, the Working Group requested the Secretariat to prepare a revised draft for the “accessibility standards”, based on the text set out in paragraph 30 above, incorporating the comments made at the current session, and to revise the proposed Guide to Enactment text accordingly. The Working Group deferred the decision on the location of these provisions in the text of the Model Law, and requested the Secretariat to make proposals on the question for its consideration at its next session.

4. Form of communication—proposed revisions to article 9 of the Model Law (A/CN.9/WG.I/WP.38/Add.1, paras. 1-5).

34. Noting the close interaction between the topics of “functional equivalence” of all means of communication, and “accessibility standards” considered earlier in the session (see paras. 19-33 above), and the provisions on the form of communication in revised article 9 (A/CN.9/WG.I/WP.38/Add.1, para. 3), some views were expressed that the relevant provisions should be located together. Other delegations considered that article 9 of the Model Law was restricted in scope to the form of communications between the procuring entity and suppliers and that provisions addressing matters beyond that specific topic should be located elsewhere in the text.

35. As regards paragraph (1) bis of the revised article 9, it was noted that the proposed text might be superfluous in the light of provisions in article 4 bis (addressing “functional equivalence”), which gave the procuring entity the discretion to select the means of communication.

36. As regards paragraph (1) ter, it was noted that “accessibility standards” as they apply to the submission of tenders could be accommodated in article 30 of the Model Law. However, the Working Group noted that the “accessibility standards” should apply to all procurement phases, and that one article should address all phases.

37. The Working Group agreed provisionally to delete paragraphs (1) bis and ter pending finalization of its deliberations on “functional equivalence” and the electronic submission of tenders, respectively. However, if the formulation of article 9, paragraph (1) bis, were retained in the ultimate provision on “functional equivalence”, it was observed that the text should address all communications in the procurement process, and so the reference to “communications with” suppliers or contractors should be to “communications between the procuring entity and suppliers or contractors”.

38. As regards paragraph (1) quater, it was suggested that the provisions could alternatively be included in the article addressing “accessibility standards”. The alternative text for “accessibility standards” (see para. 30 above), as redrafted, could either replace paragraph (1) quater, or could be located elsewhere in the text.

39. It was further observed that the formulation of the “accessibility standards” and proposed article 9, paragraph (1) quater, should be considered in the context of proposed article 9, paragraph (1) quinquies. The latter paragraph provided that enacting States might wish to issue regulations addressing technical issues raised by the use of electronic communications and the accessibility of those communications. The Working Group considered whether the issue of such regulations should be mandatory or non-mandatory. Certain delegations noted that an obligation to regulate such matters might be onerous.

40. After deliberations, the Working Group considered that regulations proposed in article 9, paragraph (1) quinquies, addressing the technical issues should not be mandatory, but that those on the question of accessibility should be mandatory, subject to resolution of the drafting issues outstanding on the “accessibility standards” themselves. The Working Group also agreed that the text of the Guide should explain the aims of the regulations, and underscore the objective of functional equivalence of all forms of communication so that higher standards of authenticity, integrity, interoperability and confidentiality should not be imposed more on electronic than paper-based communications. It was also suggested that the text of the Guide could usefully alert enacting States on the need for accessibility and interoperability requirements as necessary safeguards, especially in the context of international procurement, to ensure non-domestic suppliers’ access to procurement markets.

41. The Working Group also considered the question of whether the provision of software by the procuring entity to potential suppliers should be made without charge (A/CN.9/WG.I/WP.38/Add.1, para. 5). The Working Group noted that procuring entities would be required to obtain a licence to use software, and to specify the numbers of users for that purpose (a requirement that might be impossible to satisfy), and also that there were circumstances in which it would be appropriate to charge for software provided. Consequently, the Working Group concluded that it would not be appropriate to require procuring entities to provide all software without charge, but that the Guide should provide that procuring entities should not use a charging facility to levy disproportionate charges or to restrict access to the procurement.

42. The Working Group requested the Secretariat to prepare a revised draft of article 9, and accompanying text for the Guide accordingly.

5. Notion of “electronic” and related terms (A/CN.9/WG.I/WP.38/Add.1, paras. 6-12)

43. The Working Group considered whether a definition of the term “electronic” or “electronic means of communication” should be provided for in the text of the Model Law, noting that although some procurement regimes and electronic commerce legislation included equivalent definitions, other systems had no such definition (A/CN.9/WG.I/WP.38/Add.1, para. 9 and endnote 5). Included in the latter category was the Model Law on Electronic Commerce, which defined the terms “data message” and “electronic data interchange” from a functional perspective. As electronic communications was an evolving area, it was also observed that as broad an interpretation as possible would be required, and that any definition might become obsolete, the Working Group concluded that the text of the Model Law should not include a definition of these terms. Nonetheless, the Working Group considered that the Guide to Enactment should describe the concepts, referring to “functional equivalence” provisions in the Model Law as necessary.

6. Legal value of procurement contracts concluded electronically (A/CN.9/WG.I/WP.38/Add.1, paras. 13-15)

44. The Working Group agreed to the proposed text (A/CN.9/WG.I/WP.38/Add.1, the section following para. 14), with a note that citations from the Model Law on Electronic Commerce were to be replaced by appropriate cross-references.

7. Requirement to maintain a record of the procurement proceedings (A/CN.9/WG.I/WP.38/Add.1, paras. 16-18)

45. The Working Group recalled its previous decision that the form of the record should not be prescribed, but made subject to the “accessibility standards” described above (A/CN.9/575, paras. 43-46). The Working Group considered that the proposed requirement for the procuring entity to keep electronically stored information in the record accessible even as technologies changed would be technically difficult. It was agreed that this requirement should continue only until the time for review under article 52 of the Model Law had elapsed. The Secretariat was requested to amend the proposed text of paragraph (1) bis of the Guide to Enactment addressing article 11 of the Model Law accordingly.

8. Electronic submission of tenders, proposals and quotations (A/CN.9/WG.I/WP.38/Add.1, paras. 19-27)

46. The Working Group based its deliberations on proposed revisions to article 30 of the Model Law (A/CN.9/WG.I/WP.38/Add.1, para. 24). The aim of the revisions, it was noted, was to remove the previous right of a supplier under article 30 (5)(b) to submit a tender in writing, in a sealed envelope. The Working Group deferred consideration of the extent to which the provisions should be addressed in the Model Law, Guide to Enactment in the form of narrative text, or in draft regulations.

47. As regards the revisions to article 30 (5)(a), it was decided that the text should remove any possibility that the supplier could insist on the submission of a paper-based tender. Accordingly, it was proposed that the Secretariat revise the provision to provide that a tender must be submitted in the form as required in the solicitation documents. It was also agreed that controls equivalent to those set out in the current article 30 (5)(b), requiring that the form of the tender provided a record of its content and at least a similar

degree of authenticity, security and confidentiality, should be included (to the extent that they were not set out elsewhere in the Model Law, in particular in the “accessibility standards” set out above). The Working Group also noted that the provisions of article 27 (Contents of solicitation documents) should include an obligation on the part of the procuring entity to set out in those documents the form in which tenders should be submitted, with appropriate cross-references to the “functional equivalence” provisions, so as to encompass all forms in which tenders might be submitted.

48. The Working Group deferred its consideration of the accompanying Guide to Enactment text (A/CN.9/WG.I/WP.38/Add.1, paras. 26-27), and the issue of whether further provision addressing the modification of tenders would be required, pending its finalization of the revisions to article 30 (5)(a) of the Model Law.

49. It was also observed that the question of tender securities might need specific provision, in the light of the experience of certain delegations and observers that tender securities remained paper-based documents, and simultaneous submission with electronic tenders might not be possible. It was noted that tenders had been rejected for failure to furnish tender securities when required in these circumstances. The Secretariat was requested to provide the Working Group with further information and proposals on this question at its next session, for example considering whether there was any practice allowing for a short period for post-tender submission of securities (see also para. 100 below).

9. Electronic opening of tenders (A/CN.9/WG.I/WP.38/Add.1, paras. 28-32)

50. The Working Group considered the technical issues raised by the electronic opening of tenders, and the level of detail regarding those issues that should be set out in the revised Model Law and Guide to Enactment. The Working Group recalled its earlier conclusions that an electronic equivalent to the physical presence of suppliers and contractors contemplated by the current article 33 (2) of the Model Law (A/CN.9/575, paras. 37-42) should be provided for. It was suggested that proposed paragraphs (4) and (5) of article 33 could be combined by inserting the words “in accordance with the requirements of article 33 (2)” before the words “to be present at the opening of the tenders” in paragraph (4), and deleting paragraph (5).

51. The Working Group deferred its consideration of the accompanying Guide to Enactment text (A/CN.9/WG.I/WP.38/Add.1, para. 32) pending its finalization of the revisions to article 33 (2) of the Model Law.

10. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.39 and Add.1)

(a) General remarks

52. It was recalled that, when article 5 of the Model Law was drafted, the then Working Group did not have sufficient exposure to national practices regarding the public availability of procurement-related information to provide a scope of article 5 beyond the legal texts referred to in the current text of that article. An expanded scope of article 5 might be evidenced by a reference to a broader range of “laws and regulations directly pertinent to the procurement proceedings” found in article 27 (t) of the Model Law. It was suggested that it might be proper for the Working Group to reconsider the scope of article 5.

53. The Working Group noted that caution should be exercised in transposing such concepts as “publication” and “systematic maintenance” from the paper-based to the electronic environment, where those concepts may have different connotations. For example, did the requirement for “systematic maintenance” pre-suppose ongoing maintenance of information for future reference? Did the term “publication” mean continuous or one time posting on the Internet? The terms to be used in the revised article 5 required careful consideration, it was said, in order for the article to achieve its intended purposes. In addition, it was noted that, in trying to achieve transparency in the procurement process, the Working Group should not overlook the legitimate interests of States to keep some information (such as that regarding national security and defence) out of the public domain.

54. With reference to publication of regulatory texts under some domestic procurement regimes (A/CN.9/WG.I/WP.39, paras. 20-28), it was suggested that the Guide should draw a distinction between information intended to bind procuring entities vis-à-vis suppliers or contractors, and other information that by its nature was intended for the internal use of procuring entities only. It was observed that different publicity requirements would apply to each category of information. In response, it was noted that the intended recipients of information and the form that the information took were of less importance than its substance so that information would cover all important aspects of national procurement practices and procedures relevant to suppliers. Reference in that regard was made to the consideration of a similar issue in the World Trade Organization (A/CN.9/WG.I/WP.39, para. 19).

(b) Public accessibility of procurement-related information—proposed revisions to article 5 of the Model Law (A/CN.9/WG.I/WP.39 and A/CN.9/WG.I/WP.39/Add.1, paras. 34-39)

55. The Working Group had before it the text of the revised article 5 (A/CN.9/WG.I/WP.39/Add.1, para. 35) and recalled its deliberations on the article at its seventh session (A/CN.9/575, paras. 24-28).

56. It was noted that the revised draft dealt with several types of information: (i) regulatory texts, (ii) procurement-specific information required to be published under the Model Law, such as solicitation of tenders and award notices; and (iii) other information not required to be published under the Model Law, such as information on forthcoming opportunities, and internal controls or guidance (optional types of information). Divergent views were expressed on whether all three types of information should be dealt with in the same article. It was noted that the publicity requirement might differ for various types of information. For example, a requirement that the publication of information should be centralized and standardized might be justified for information required to be published under the Model Law, while for other types of information the same requirement might be onerous.

57. It was suggested that paragraph 1 of article 5 should be restricted to legal texts as per the current article 5 of the Model Law, with an addition of a reference to judicial decisions of general application to align the text with the respective text in the Agreement on Government Procurement of the World Trade Organization (GPA).²

² See annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf, article XIX (1).

58. Caution was expressed as regards expanding the scope of the article to cover other types of information, such as to type (ii) information set out in paragraph 56 above. A suggestion was made that regulations might be a more appropriate place to discuss the publicity requirements for that type of information. Otherwise, it was noted, the Model Law would become less flexible and could give rise to possibly frivolous protests on the basis of non-compliance with publicity requirements.

59. On the other hand, it was suggested that article 5, paragraph 2, might also deal with the publication of information on forthcoming opportunities, and be merged with the provisions on that subject contained in paragraph 40 of A/CN.9/WG.I/WP.39/Add.1 (see also paragraph 62 below).

**(c) Publication of information on forthcoming opportunities
(A/CN.9/WG.I/WP.39/Add.1, paras. 1-17, 38 and 40-41)**

60. The Working Group had before it the revised article on publication of information on forthcoming opportunities (A/CN.9/WG.I/WP.39/Add.1, para. 40) and recalled its deliberations on the subject at its seventh session (A/CN.9/575, paras. 29-31).

61. The Working Group noted the advantages of publishing information on forthcoming procurement opportunities, such as transparency in the procurement process through reducing cases of “ad hoc” and “emergency” procurements, and, consequently, less frequent recourse to less competitive methods of procurement. The Working Group also considered the opportunities for cost saving and an increase in competition by enabling more suppliers to be informed about procurement opportunities, to assess their interest in participating and accordingly to plan in advance (A/CN.9/WG.I/WP.39/Add.1, paras. 5 and 41). The Working Group noted that, under some procurement regimes, the publication of such information enabled procuring entities to shorten the minimum time limit for the receipt of tenders (A/CN.9/WG.I/WP.39/Add.1, para. 14).

62. The general preference was for optional publication of information on forthcoming procurement opportunities (A/CN.9/WG.I/WP.39/Add.1, para. 17). Views varied as to whether the Model Law or regulations would be the appropriate place to deal with the issue. The Working Group agreed on a preliminary basis to include provisions relating to forthcoming procurement opportunities in the Model Law, and to define a clear timeline for publication of that type of information using words to the effect of “as promptly as possible”.

(d) Other issues (A/CN.9/WG.I/WP.39/Add.1, paras. 18-33)

63. The Working Group noted that electronic publication, besides bringing potential benefits for interested suppliers or contractors and the public in general, such as by providing easier access of broader audience to more procurement-related information, had enabled practices that raised a number of concerns not found in paper-based environment, and that might necessitate specific regulation. The attention of the Working Group was brought to the concerns arising from unsystematic, non-standardized and non-centralized ways of posting procurement-related information on the Internet, the absence of systematic maintenance of information posted and charging fees for the provision of information. These issues indicated that the retrieval of procurement-related information that was necessary, useful and accurate might be impeded. The Working Group noted that regulations did not often adequately deal with those and other issues arising from the

publication of procurement-related information by electronic means. It decided to defer the consideration of these issues to a future session.

11. Electronic reverse auctions (A/CN.9/WG.I/WP.40 and Add.1, paras. 1-20)

(a) General remarks (A/CN.9/WG.I/WP.40, paras. 4-8)

64. Recalling its request to the Secretariat made at its seventh session to draft enabling provisions on electronic reverse auctions (A/CN.9/575, para. 67), the Working Group took note of the parameters for the draft, which were as follows: (i) the provisions should allow for electronic reverse auctions as a procurement method rather than as a phase in other procurement methods, (ii) they should address the general conditions for use of electronic reverse auctions (of which the most important was that the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified), and (iii) they should not exclude any category of procurement per se. Finally, the provisions should take account of other international procurement regimes on the topic (A/CN.9/575, paras. 51-67).

65. Some delegations noted that the decision of the Working Group at its seventh session leading to the first parameter should be revisited. Other delegations noted that the decision had been taken on the basis that allowing electronic reverse auctions as a phase in other procurement methods would undermine the principle of tendering that was the preferred procurement method under the Model Law. However, noting that the extent of current use of auctions under other procurement regimes required the Model Law to address them, the Working Group agreed to consider the text of the draft provisions before it, pending resolution of the first parameter.

66. The Working Group agreed that the Guide to Enactment should address the benefits of ensuring as wide a participation as possible, although noted that it might not be desirable for suppliers to participate in the electronic reverse auction through a proxy and over the telephone, as such participation might give rise to a risk of abuse. It was observed that the use of the Internet would ensure the traceability of the proceedings, which telephone systems might not.

**(b) Conditions for use of electronic reverse auctions (article 19 bis)
(A/CN.9/WG.I/WP.40, paras. 9-17)**

67. The Working Group observed that as a general matter the draft should allow for the evolution of electronic reverse auctions, and should not exclude any type of auction pending decisions on the first parameter set out above.

68. As regards paragraph (1) of article 19 bis, which provided for an organ of the enacting State other than the procuring entity to approve the use of electronic reverse auctions, some delegations noted that the decision as to whether an electronic reverse auction was an appropriate procurement tool in each case was complicated, and the involvement of a party other than the procuring entity would be beneficial. However, it was noted that such third-party authorization might not be possible under the constitutions of all enacting States. Other delegations expressed the view that such decisions should not be taken other than by the procuring entity itself.

69. As regards subparagraph (1) (a), it was observed that the main issue for consideration was whether it would be appropriate to procure construction and services through an electronic reverse auction, given that such procurement tended to be complex in nature,

involve qualitative evaluation criteria, and experience had indicated that electronic reverse auctions where permitted for such procurements might have been inappropriately used and overused.

70. As to construction, it was noted that not all construction procurement was complex (such as paving roads) and that developments over time might mean that what was viewed today as complex would not be so viewed in the future. On the other hand, it was observed that for the electronic reverse auction to function correctly and ensure that bidders priced their bids realistically and provided their best offers, bidders would be required to know the cost structure of their bids in detail. Prime contractors in complex construction contracts would not have such knowledge as regards the subcontracted elements of their bid. As a result, artificial prices could result. It was also observed that over the medium term, small- and medium-sized enterprises would tend to be excluded in favour of larger suppliers.

71. As regards services, it was observed that although some services might be capable of precise specification and purely objective evaluation, the class of services known as intellectual services would not be appropriately procured through this mechanism.

72. It was observed that in some jurisdictions, electronic reverse auctions were conducted on the basis of lists or catalogues that set out items that could be procured through the mechanism.

73. Accordingly, the Working Group decided that neither construction nor services procurement in their entirety should be excluded from the provisions governing electronic reverse auctions, pending further deliberations as to which type of procurement would be suitable for electronic reverse auction.

74. As regards the text of subparagraph (1) (a), it was agreed that the words “and accurate” and “such that homogeneity in the procurement can be achieved” should be deleted.

75. As regards paragraph (1) (b), it was observed that the aim of the provision was to ensure that electronic reverse auctions should be contemplated in competitive markets, but that it would not be appropriate to specify the number of potential suppliers or contractors that would constitute a competitive market. Accordingly, the Working Group decided to delete the words “at least [ten]” from the proposed text, and to reformulate the provision to provide that the number of suppliers should be such that effective competition would be ensured.

76. As regards paragraph (1) (c), it was agreed that the main issue for consideration was whether the price alone, or price and other evaluation criteria should be subject to the electronic reverse auction. Some delegations considered that only the price should be subject to auction, so as to ensure transparency in the process. Other delegations expressed the view that allowing non-price criteria to be auctioned would confer a benefit, for example, should technical issues (such as energy consumption, and others that may not be quantifiable) be included in the evaluation criteria, noting that the weighting accorded to each such criterion should be disclosed in the solicitation documents.

77. Yet other delegations considered that any non-price criteria should in any event be capable of quantification and objective evaluation, in order to preserve transparency in the process and the benefits of the auction. Certain delegations cautioned that the requirement that criteria be capable of quantification meant that they should be readily and objectively quantifiable.

78. The Working Group considered the functional approach of the text, and noted that providing that auctions should include only items that could be precisely specified, and for which the evaluation criteria in addition to price could be objectively quantified, would exclude by itself some categories of construction and services not suitable for the electronic reverse auction. However, it was also observed that this formulation would not address the question of costs structures noted in paragraph 70 above. On the other hand, the attention of the Working Group was drawn to the fact that drafting the text so as to exclude “construction” and “services” would raise complex issues of definition, and therefore that one solution might be to leave the text with those terms included, with appropriate guidance in the Guide to Enactment. It was agreed that the criteria issue would also determine the complexity of the electronic reverse auction, and the Working Group decided that its deliberations on the question should continue at its next session.

79. As regards the text of paragraph (1) (c), it was agreed that the words “standard products” and “commodities” should be deleted, but the remainder of the text would remain pending finalization of the Working Group’s deliberations on the above issues.

80. The Working Group requested the Secretariat to revise the text for the Model Law and to make consequential changes to the proposed text of the Guide to Enactment, taking into account the above matters.

(c) Pre-auction period (article 47 bis) (A/CN.9/WG.I/WP.40, paras. 18-25)

81. The Working Group noted that it would not be possible to finalize its deliberations on the proposed text of article 47 bis (A/CN.9/WG.I/WP.40, the section following para. 20) pending resolution of the issues regarding the conditions of use of electronic reverse auctions set out in paragraphs 65 to 80 above. The desirability of keeping the provisions as concise as possible was also stressed.

82. It was noted that the aim of the provisions was that competition would be unrestricted, so the provisions governing tender proceedings would be followed, save that the bids submitted, and their evaluation, would be “initial”. It was noted that “initial” in this context meant that all criteria would be presented and evaluated against the stipulated selection criteria in the normal manner, but the price (and any other criteria to be determined through the auction) would be submitted to the electronic reverse auction, so as to determine the successful supplier.

83. It was noted that the draft text enabled the number of participants invited to participate in the auction to be restricted, and that the Guide to Enactment should note that the conditions of use for restricted tendering would normally not apply to procurement suitable for an electronic reverse auction. Accordingly, it was considered that the number of participants should not, in normal circumstances, be restricted other than as a result of the initial evaluation as set out above.

84. It was observed that paragraph (4) of the draft article in particular required the Working Group to consider the models of electronic reverse auctions that should be provided for. It was recalled that the Working Group, at its seventh session, had considered two models that could be provided for in the text. In Model 1, all aspects of tenders that were to be compared in selecting the winning supplier, and which could be the price alone, would be submitted through the auction itself. In Model 2, there would be a prior assessment of all elements of the initial bid or of those not to be submitted to the auction, and suppliers would be provided with information on their ranking based on the initial evaluation. All evaluation criteria would be factored in a mathematical formula, which

would then re-rank the bidders on the submission of each bid during the auction itself. In both models, the auction would determine the successful supplier (unlike other possible models, which the Working Group had provisionally decided not to address in the Model Law).

85. As regards Model 2, certain delegations noted that it was difficult to understand how non-quantifiable criteria could be included in the procedure, since such criteria might be considered to undermine the logic of the procedure itself. It was also observed that the higher-ranking suppliers, whose products might be produced on a higher cost basis than those of lower-ranking suppliers, might submit unrealistically low prices during the auction itself, and therefore a performance risk might arise. It was observed that a way of avoiding this possibility would be to permit only the price to be subject to the auction, and not other criteria, that is a restricted version of Model 1.

86. The Working Group requested the Secretariat to produce two alternative provisions addressing the pre-auction period, one on the basis of Model 1, and one on the basis of Model 2, noting that the main issue for consideration was whether the electronic reverse auction should include non-price criteria that were qualitative and not quantifiable. The Working Group decided that it would be appropriate to consider the text of the Guide to Enactment and any draft regulations once the draft text of the Model Law, as revised, had been considered.

(d) Auction phase (article 47 ter) (A/CN.9/WG.I/WP.40, paras. 26-35)

87. It was noted that the Working Group would not be able to finalize its deliberations on the proposed text of article 47 ter (A/CN.9/WG.I/WP.40, the section following para. 27) until the issues set out above had been resolved. However, the Working Group provided preliminary commentary on the text as follows.

88. As regards subparagraph (1) (b), it was noted that the word “provide” and the alternative phrases “whether it has the top ranking in the auction” and “to establish the changes needed to any bid to give it the top ranking in the auction” should be deleted.

89. As regards paragraph (2), it was proposed that the text following the words “participate in the auction” in subparagraphs (a) and (b) considered procedural matters that could be addressed in regulations or the Guide to Enactment, and should be deleted from the draft text.

90. As regards subparagraph (2) (c), it was suggested that the text should form a separate paragraph.

91. As regards paragraph (3), it was suggested that the procuring entity might also need to terminate the electronic reverse auction under the circumstances referred to in the paragraph and it was proposed therefore that the words “or terminate” should be added to the paragraph after the word “suspend” (and that this matter should receive detailed treatment in the Guide).

92. As regards paragraph (6), it was noted that the second part of the paragraph addressed options available should the successful bidder fail to enter into a procurement contract. They included that a further electronic reverse auction should be held, that the second-best bidder should receive the contract (noting that identifying the second best bidder would not necessarily be possible), and that negotiations with other bidders might be permitted. It was also observed that, where the rules would award the contract to the second best bidder, there had been instances observed in practice of a bidder placing an artificially low but

winning bid, in the knowledge that the second-best bidder would receive the contract. The Working Group agreed to consider this issue further at a future session.

93. The Working Group decided that it would be appropriate to consider the text of the Guide and any draft regulations once the draft text of the Model Law had been revised in accordance with the above points, but noted in the interim that the text of the Guide and any draft regulations should be drafted so as to prevent obsolescence as much as possible.

**(e) Revisions to the Model Law to enable the use of electronic reverse auctions
(A/CN.9/WG.I/WP.40/Add.1, paras. 1-20)**

94. With respect to the proposed revisions to article 11 of the Model Law (Record of procurement proceedings) (A/CN.9/WG.I/WP.40/Add.1, para. 3) it was suggested that the proposed wording in paragraph 1, subparagraph (i) bis, of the article should be replaced with the following wording: “[i]n procurement proceedings involving the use of electronic reverse auctions pursuant to article 19 bis, a statement to that effect”, to ensure consistency with the wording in other parts of the same article.

95. No comments were made with respect to the proposed revisions to article 18 of the Model Law (Methods of procurement) (A/CN.9/WG.I/WP.40/Add.1, para. 4).

96. With respect to the proposed revisions to article 25 (Contents of invitation to tender and invitation to prequalify) and article 27 (Contents of solicitation documents) (A/CN.9/WG.I/WP.40/Add.1, paras. 6 and 7, respectively), the point was made that reference to “tendering proceedings” might be inappropriate as “tendering proceedings” had a specific meaning and scope under chapter III of the Model Law, which was considerably more comprehensive than electronic reverse auctions. It was also suggested that the term “opening” should be replaced with the term “start” as the former had particular connotations in procurement proceedings.

97. It was considered that the level of detail in the proposed revisions to article 27 should be reviewed: those provisions that did not require regulation by the Model Law should be removed to regulations or the Guide. The need for subparagraph (n) bis (i) was questioned as its content could be encompassed in subparagraph (q) of the same article. It was suggested that the term “lowest evaluated tender” in subparagraph n (bis) (v) should be replaced with the term “most economically advantageous tender” (as used in EU public procurement directive 2004/18/EC, article 53), as the former term might imply the “offer with the lowest price”. The understanding of the Working Group with respect to the latter suggestion, however, was that the term “lowest evaluated tender” used in the Model Law (see, in particular, article 34 (4) (b) (ii)) corresponded in meaning to the term “most economically advantageous tender”. In response to an inquiry, it was confirmed that subparagraphs (a) to (n) of article 27, including the provisions on the treatment of alternatives contained in subparagraph (g), would apply in the context of electronic reverse auctions, and the Guide would explain, where necessary, how those provisions operated in that context.

98. No comments were made with respect to the proposed revisions to article 28 of the Model Law (Clarification and modifications of solicitation documents) (A/CN.9/WG.I/WP.40/Add.1, para. 11).

99. The Working Group acknowledged the connection between the proposed revisions to article 31 (Period of effectiveness of tenders; modification and withdrawal of tenders) (A/CN.9/WG.I/WP.40/Add.1, para. 12), the provisions regulating cancellation and

suspension of electronic reverse auctions addressed in proposed article 47 ter (see para. 91 above), and the provisions on tender securities addressed in the proposed revisions to article 32 (see next paragraph). It was also observed that if suppliers could withdraw their bids before the electronic reverse auction itself, the impact on the level of competition that would be required for an effective auction should be considered. The Secretariat was requested to address this issue when revising the draft provisions.

100. With respect to the proposed revisions to article 32 of the Model Law (Tender securities) (A/CN.9/WG.I/WP.40/Add.1, para. 13), the Working Group noted that allowing for tender securities in the context of electronic reverse auctions might be problematic, as banks generally required a fixed price for the security documents. It was observed that little experience on the use of tender securities in electronic reverse auctions had been accumulated so far around the world and that existing practices were highly diverse (A/CN.9/WG.I/WP.40/Add.1, para. 13, discussing article 32 of the Model Law (Tender securities)). It was also noted that at least in one jurisdiction no tender securities were used at all in electronic reverse auctions. The view was expressed that it would be difficult therefore for the Working Group to formulate any strict rules on that issue. It was suggested that the Guide should note that practices might continue to evolve, as more relevant experience was accumulated. The Working Group deferred the consideration of the proposed revisions and asked the Secretariat to present to the Working Group at its next session a study on practical experiences with the use of tender securities in the context of electronic reverse auctions.

101. With respect to the proposed revisions to article 34 of the Model Law (Examination, evaluation and comparison of tenders) (A/CN.9/WG.I/WP.40/Add.1, paras. 14-17), it was suggested that the proposed addition to the end of subparagraph 1 (a) might enable a non-responsive tender to be amended so as to become responsive, and the addition should therefore be rephrased so as to ensure that it enabled the items that were to be presented in the auction alone to be amended after the submission of the initial tender.

102. The Secretariat was requested, in redrafting the articles, not to distort the way other procurement methods were handled in the Model Law, carefully to choose terminology to prevent confusion and to try to avoid repetition, especially in the light of the “functional equivalence” principle. At the same time, it was acknowledged that the ultimate drafting of those provisions would depend on resolution of the unsettled issue as to whether electronic reverse auctions should be treated in the Model Law as a separate procurement method or a phase in tendering proceedings.

(f) Location of provisions on electronic reverse auctions

103. It was suggested that all provisions related to electronic reverse auctions could be dealt with in a separate part, either within chapter V or as a chapter V bis, rather than piecemeal in revisions to relevant articles of the Model Law. This would assist, it was said, in determining which provisions should remain in the Model Law and which should be subject to regulations or addressed in the Guide, and in making the relevant provisions in the Model Law more workable and user-friendly. A further suggestion was made that a separate part of the Model Law would contain only those provisions relevant to electronic reverse auctions that derogate from the provisions in other parts of the Model Law and, to avoid repetition, where necessary, cross-references could be used.

104. Concerns were expressed about this suggestion, in that it presupposed that the issue of whether electronic reverse auctions were treated as a separate method or a phase in other

procurement methods had already been resolved in favour of the former resolution. In response, it was noted that provisions could be drafted in such a way as to encompass both options.

105. Another concern expressed was that additional amendments might be required to address the fact that the principle of “functional equivalence” made electronic procurement of all kinds possible and not only electronic reverse auctions. Some suggested that the Secretariat should follow the approach of amending each relevant article of the Model Law and refine what was proposed in A/CN.9/WG.I/WP.40/Add.1. The Working Group’s attention was also drawn to the fact that, with constantly evolving technological solutions and their introduction to procurement processes, it would be difficult to place electronic reverse auctions in a fixed structure and therefore sufficient flexibility in that regard should be retained. It was noted that caution should be exercised in taking a final decision on the issue of structure, and to focus on the resolution of substantive issues in the first instance.

12. Abnormally low tenders (A/CN.9/WG.I/WP.40/Add.1, paras. 21-29)

106. Views varied as to whether the provisions on abnormally low tenders should be included in the Model Law. On the one hand, strong support was expressed for inclusion of provisions in the Model Law. When reviewing tenders, procuring entities, it was said, should be allowed to seek justification of prices if they suspected abnormally low tenders. It was observed that the consequences of not doing so would be extremely disruptive for procurement process. Not only was there a performance risk, but also experience, particularly in the construction sector, indicated that businesses submitting abnormally low tenders subsequently tended to use all possible means to contest procurement proceedings and to improve the terms of the contract, with attendant upward pressure on the contract price. Addressing the issue in the Guide only would not be sufficient. It was also noted that the Working Group should look at the problem with abnormally low tenders in a broader context of public policy since the submission of abnormally low tenders often involved criminal acts (e.g., money-laundering) or illegal practices (e.g., non-compliance with minimum wage or social security obligations). It was also observed that where there were such obligations, an abnormally low tender whose price would not allow the minimum wage or social security obligations to be paid could be seen as clearly and objectively low.

107. On the other hand, some delegates were of the view that express provision should not be included in the Model Law because: (i) in practice, the right given to procuring entities to reject tenders on the basis that their tender price was abnormally low would be open to abuse (the tenders could be rejected as abnormally low without justification); (ii) what constituted an abnormally low tender could be a very subjective criterion, especially in international procurement; and (iii) there were other ways of dealing with the abnormally low tenders. Further, it was observed that although the subjectivity might be most apparent in international procurement, as what is an abnormally low price in one country may be perfectly normal in another, in the domestic procurement context such techniques as selling old stock below cost or below cost pricing to keep the workforce occupied were legitimate. Therefore, prices could be low but not abnormally low. Accordingly, and instead of addressing the subject in the Model Law, it was suggested that the Guide should provide guidance to the following effect: “if an enacting State chooses to introduce the right of a procuring entity to reject tenders on the basis that their tender price was abnormally low, the State has to ensure that proper procedures are in place to prevent arbitrary decisions and abusive practices.” The point was made that this approach would be

preferable in the light of the fact that the multilateral development banks did not accept the rejection of tenders on the basis that their tender price was abnormally low.

108. In response to some of those concerns, it was noted that risks of contract non-performance would be mitigated through the proper implementation of articles 6 (Qualifications of suppliers and contractors) and 32 (Tender securities) of the Model Law, which would enable the qualifications of the supplier and the resources available to undertake the contract to be assessed. A particular emphasis was placed on the qualification criteria that the suppliers had to meet to participate in procurement proceedings listed in article 6 (1) (b), such as professional and technical qualifications and financial resources. It was also noted that the concerns regarding possible abuse of procedures designed to address abnormally low tenders could be met if safeguards ensuring transparency and clarity were put in place: for example, if it were noted in the solicitation documents that a price realism analysis could be conducted should it be suspected that the tender price was abnormally low. Objectivity in the process could also be improved if procuring entities were to compare prices received with pre-tender estimates based on market prices. Finally, it was observed, many possible abnormally low tenders when closely examined would turn out to be non-responsive tenders that would be rejected as such.

109. The Working Group decided to proceed on the basis that some minimum provisions would be included in the Model Law, supplemented by detailed discussion in the Guide, in particular as regards the necessary safeguards to prevent arbitrary decisions and abusive practices. The Secretariat, in preparing the revised provisions, was asked to apply the following considerations: (i) the procuring entity should be allowed but not required to reject abnormally low tenders; (ii) introducing in the Model Law a possibility of assessing bid prices on the basis of cost rather than price (noting that the draft texts before the Working Group were based on a price assessment) was undesirable since cost assessment was cumbersome and complicated; (iii) only the procuring entity, and not a third party, should be able to take measures where an abnormally low tender was suspected, and the assessment of the tender concerned must be carried out on a purely objective basis; and (iv) it was important to address possible abnormally low tenders before the relevant contract had been concluded, as measures thereafter might lead to even higher prices and disruption to the procurement concerned.

110. As regards the proposed changes to article 34 (A/CN.9/WG.I/WP.40/Add.1, paras. 23 and 26), the general view was that: (i) the proposed addition to article 34 (4) (b) (A/CN.9/WG.I/WP.40/Add.1, para. 23) should be deleted so that the question of qualification was not confused with the evaluation of tenders. However, the Working Group considered that the principle set out in the draft addition could be included in the proposed text for article 34 (3) (d) bis (A/CN.9/WG.I/WP.40/Add.1, para. 26); (ii) the language of the proposed text for article 34 (4) (b) should be amended so as to provide that before a procuring entity could reject a tender on the basis that its price was abnormally low, the procuring entity had to follow certain procedures such as those that were set out in the proposed article 34 (3) (d) bis; and (iii) in the proposed article 34 (3) (d) (bis), the phrase in the chapeau “and raises concerns as to the ability of the tenderer to perform the contract” should be deleted.

111. The Secretariat was requested to reflect the above issues when proposing revised text for the Guide to Enactment.

**B. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services,
submitted to the Working Group on Procurement
at its eighth session**

(A/CN.9/WG.I/WP.38 and Add.1) [Original: English]

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Procurement Law” or the “Model Law”)¹ is set out in paragraphs 5 to 33 of document A/CN.9/WG.I/WP.37, submitted to the Working Group for its consideration at this session. The main task of the Working Group is to update and revise the Model Law as necessary, so as to take account of recent developments in public procurement, including the use of electronic communications and technologies in procurement.

2. At its seventh session (New York, 4-8 April 2005) the Working Group addressed the following topics: electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process (such as controls over their use), electronic reverse auctions, and abnormally low tenders (see, further, document A/CN.9/575). The Working Group requested the Secretariat to prepare drafting materials for consideration on these topics at its eighth session, and also to present a comparative study on the use of framework agreements (A/CN.9/568, para. 78 and A/CN.9/575, para. 9).

3. This working paper will present for the Working Group’s consideration drafting materials for provisions to govern the use of electronic means of communication in the procurement process, including controls over such use. Further working papers will present drafting materials on the topics of electronic publication of procurement-related information, and electronic reverse auctions and abnormally low tenders respectively (A/CN.9/WG.I/WP.39 and A/CN.9/WG.I/WP.40). As also requested by the Working Group at its seventh session, the Secretariat will address the question of framework agreements in two further working papers (A/CN.9/WG.I/WP.41 and A/CN.9/WG.I/WP.42 respectively).

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procure/ml-procure.htm>).

II. Guidance given by the Working Group for drafting revisions to the text of the Model Law and in the Guide to Enactment to provide for the use of electronic communications and technologies in the procurement process

A. Scope and extent of revisions to the Model Law and Guide to Enactment

1. General remarks

4. The Working Group has reaffirmed that principles governing public procurement should be located in the text of the revised Model Law, and appropriate guidance on their application should be set out in its accompanying Guide to Enactment (A/CN.9/568, para. 24, A/CN.9/575, para. 11).

5. This approach is a continuation of that adopted when the Model Law and its accompanying Guide to Enactment were promulgated in 1994. Paragraph 12 of the Guide, under the heading “A ‘framework’ law to be supplemented by procurement regulations”, notes that:

“The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a ‘framework’ law that does not itself set forth all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of ‘procurement regulations’ to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State—without compromising the objectives of the Model Law.”

6. In considering the scope of revisions to be made to the text of the Model Law, the Working Group has taken into account its twin goals of updating and simplifying the text, and rendering it more precise, and the impact that those revisions would have on those countries that have based their procurement legislation on the current Model Law (A/CN.9/575, para. 10). Accordingly, the Working Group has expressed the wish not to revise the text of the current Model Law beyond the extent reasonably necessary to achieve its goals.

7. Paragraph 7 of the Guide to Enactment, under the heading “Purpose of this Guide”, notes that:

“The information presented in the Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a modern procurement law designed to achieve the objectives set forth in the Preamble to the Model Law. Such information might assist States also in exercising the options provided for in the Model Law and in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances... taking into account that the Model Law is a ‘framework’ law providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.”

8. As to the nature and level of detail in the guidance to be provided, and in the context of its consideration of electronic procurement, the Working Group has noted the importance of guidelines from UNCITRAL to ensure consistency in regulations governing procurement in various jurisdictions. The Working Group has also expressed concern that practices could otherwise be developed that would be divergent and inconsistent with the principles of the Model Law (A/CN.9/575, para. 61).

9. The Working Group may therefore wish to consider whether to broaden the scope of the Guide to Enactment, so as not only to continue to fulfil its functions as set out in paragraph 7 above, but also to address the concern set out in the preceding paragraph. The Working Group may consider that the Guide may usefully provide greater detail of the regulations that enacting States may wish to promulgate in the form of a narrative or even draft regulations themselves, for example when introducing or enabling electronic communications in public procurement (A/CN.9/568, para. 38). A Guide of such type may also require more prescriptive language than is found in the current text (see, further, para. 23 below). The Guide would then be addressing practical procedures in some detail, and may need to allow for the possibility of changes to procedures, as new technologies and modes of operation arise.

10. The Working Group may consider, for the assistance of procurement officials in enacting States, that the practical procedures included in the Guide to Enactment should address issues that arise for procuring entities as contracting parties in procurement. In this regard, the International Chamber of Commerce (ICC) has issued a Guide to Electronic Contracting and the ICC e-Terms 2004,² the aim of which is to enhance the legal certainty of contracts made by electronic means. Although strictly beyond the scope of the Model Law, therefore, the Working Group may wish to consider whether reference could be made to other publications that discuss such issues, such as the ICC Guide.

11. Given the possible substantial additions to the text of the Guide, the Working Group may wish to consider whether to produce a new Guide to Enactment (perhaps entitled “Guide to Enactment and Use”), or to make additions to the current text by way of addenda. In order to assist the Working Group in considering the form that the revised Guide to Enactment should take, the Secretariat has set out below drafting suggestions as regards the text that might appear in the Guide on the topic of the use of electronic communications in the procurement process (the text following para. 20 below). The Working Group may wish to consider this text as an example of how the revised Guide may be presented.

2. Contract administration and implementation phase in procurement

12. The Model Law addresses the procedures to be followed when awarding a procurement contract. As the text of the current Guide to Enactment notes, at paragraph 10:

“The Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation phase. Accordingly, one will not find in the Model Law provisions on issues arising in the contract implementation phase, issues such as contract administration, resolution of performance disputes or contract termination. The

² Available at <http://www.iccwbo.org/law/econtracting/>.

enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.”

13. In the light of the general comments made regarding the scope of the Model Law and Guide to Enactment above, the Working Group may wish to consider whether to address the contract administration and implementation phase in the texts (see, further, para. 78 of A/CN.9/WG.I/WP.36), also so as to address the concern expressed in paragraph 8 above. This Note does not suggest any changes to the text of the Model Law and Guide to Enactment that may be necessary if this aspect of procurement is to be addressed, a matter that may be necessary.

B. General legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process – interaction with electronic commerce and other law

1. General remarks

14. At its seventh session, the Working Group decided to base its future deliberations on the form of communications in the procurement process to provide for a general principle of functional equivalence in the use of communications in procurement (A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 11).³ These principles are those upon which the UNCITRAL Model Law on Electronic Commerce (1996)⁴ (the Model Law on Electronic Commerce) is based.

15. The Guide to Enactment accompanying the Model Law on Electronic Commerce sets out the functions of a document in paragraph 16, as follows: “[a document should] be legible by all; [should] remain unaltered over time; [should] allow for the reproduction of a document so that each party would hold a copy of the same data; [should] allow for the authentication of data by means of a signature; and [should] be in a form acceptable to public authorities and courts”.

16. The functional equivalent approach is based on the recognition that legal requirements for paper-based documentation, which have satisfied the above functions of a document, constitute the main obstacle to the use of electronic communications, in that the latter may not enjoy the same degree of contractual certainty and legal recognition as their paper counterparts. Examples include requirements for documents to be in “writing”, to be “original”, or to be “documentary evidence”. The functional equivalent approach aims to ensure that all documents have the same degree of contractual certainty and legal recognition.

³ The functional equivalent approach is entirely consistent with the provisions of the current text of the UNCITRAL Model Procurement Law as regards the use of communications in the procurement process. Article 9 (1) of the UNCITRAL Model Procurement Law provides that, subject to any requirement of form specified by the procuring entity when first soliciting participation, communications are to be in a form that “provides a record of the content of the communication” and there is no definition of the methods or means of communication.

⁴ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.

17. The Working Group has also expressed the wish that the Model Procurement Law's provisions should be technologically neutral, for the same reasons as are set out in paragraph 24 of the Guide to Enactment that accompanies the Model Law on Electronic Commerce:

"The approach used in the Model Law [on Electronic Commerce] is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law [on Electronic Commerce] that exclusion of any form or medium by way of a limitation in the scope of the Model Law [on Electronic Commerce] might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules [that purpose is set out in paragraph 6 of that Guide]."

18. However, the Working Group has also noted that in some enacting States, provision has already been made to address issues arising from the use of electronic communications and technologies in procurement in States' general body of law. Additionally, there may be specific rules for the use of electronic communications in government activities, including in the procurement process (A/CN.9/WG.I/WP.34, para. 12). Consequently, the Working Group has decided that such issues as are questions of the general law on electronic commerce and not of procurement law should not be addressed in the Model Law itself. Rather, an enacting State's general body of law should govern the issues raised by electronic commerce generally, and the Working Group will not recommend provisions regarding electronic communications in the Model Law unless the procurement context strictly requires such provision (A/CN.9/575, para. 50).

19. Nonetheless, the Working Group's recommendations as to the contents of the Guide to Enactment indicate that its text should provide guidance for enacting States on requirements for relevant legislation, such as discussing the rules that enacting States may wish to ensure are in place in order to ensure effective procurement contracting using electronic communications and technologies. These general rules may in some cases be supplemented by regulations, addressing such issues as those set out in Chapters II and III of the Model Law on Electronic Commerce, under the titles: "Application of legal requirements to data messages" (Chapter II) and "Communication of data messages" (Chapter III) (the term "data message" is equivalent to an electronic communication).⁵ The Working Group may therefore wish to consider the extent to which the guidance to be provided should address these issues and make reference to other documents, such as the Model Law on Electronic Commerce, where solutions are to be found.

⁵ Chapter II addresses the following issues: "Legal recognition of data messages", "Incorporation by reference", "Writing", "Signature", "Original", "Admissibility and evidential weight of data messages", "Retention of data messages", and Chapter III the following issues: "Formation and validity of contracts", "Recognition by parties of data messages", "Attribution of data messages", "Acknowledgement of receipt", and "Time and place of dispatch and receipt of data messages". The Working Group may be aware that UNCITRAL's Working Group on Electronic Commerce has made recommendations to the Commission as to draft provisions for a Convention on Electronic Contracting. The Commission approved the text at its thirty-eighth session, held in Vienna from 4 to 15 July 2005. The draft provisions do not differ materially from those in the Model Law on Electronic Commerce and it is anticipated that, if adopted by the Commission, the process of ratification of the Convention and its coming into force will take a considerable period of time. Thus the Working Group may wish to base its deliberations for the time being on the provisions of the Model Law on Electronic Commerce, but to update them if need be, before its work is completed.

2. Possible Guide to Enactment text on the use of electronic communications in the procurement process

(a) General remarks

20. The Working Group may find it useful to address the substance of the anticipated revisions to the text of the Model Law in a new section in the introduction to the Guide to Enactment, though the appropriate location of the text will depend to some extent on the solutions chosen by the Working Group for the principles governing the use of electronic communications to be included in the revised Model Law. In addition, and as it is from those principles that the proposed revisions to the text of the Model Law are drawn, proposed text that could form the basis of the guidance on this issue to be provided in the Guide to Enactment is found in the following paragraphs, with the proposed revisions to the text of the Model Law itself and article-specific commentary thereafter.

21. The Working Group may care to note the following points as regards the drafting of the proposed text. First, where reference is made to the Model Law, and to avoid any confusion during the course of the Working Group's deliberations, the Model Law is referred to as the "1994 Model Law". Secondly, the text includes the full text of quotations from the Model Law on Electronic Commerce, but the Working Group may wish to consider whether and how to make reference to its provisions when the Guide is produced. Thirdly, stylistic and other minor changes may be required (including new terminology to distinguish between the 1994 Model Law and revised Model Law) so as to ensure internal consistency in the Guide when finalized. Fourthly, references to working papers and reports of the Working Group would be deleted, but are included in the suggestions below for ease of reference during the Working Group's deliberations. For the same reason, the draft appears with sub-headings footnotes, which could also be deleted in the final text. Finally, and according to whether the Working Group decides to revise the Guide using addenda or by producing a new Guide, the paragraph numbering will need to be revised.

22. The text does not seek to address more than the main issues raised by the use of electronic communications in the procurement process. The Working Group may wish to consider, therefore, the appropriate level for such a discussion (see, for example, draft paragraph 11, on the question of electronic signatures).

23. If the Guide to Enactment is to operate as a guide to both enactment and use of the Model Law, the Working Group may wish to consider whether some of its guidance should have a fairly prescriptive character. Accordingly, the Working Group will find alternative text for its consideration, addressing the question of sufficiency of general electronic commerce law in enacting States, for example, presented as "Enacting States [will also] [may] wish to consider [whether the law is adequate]" in the proposed text for the Guide to Enactment below.

(b) Proposed text

(i) Introduction to provisions introducing the use of electronic communications in the procurement process

(1) The UNCITRAL Model Procurement Law (1994 version) was adopted at a time at which the use of information technology and electronic communications was anticipated, but not yet widespread. Although some of its provisions may allow for the use of electronic communications and technologies in the procurement process, the Model Law was not primarily concerned with legal issues related to the use of

these technologies, and a number of its provisions reflect a background of communications, record-keeping and evidentiary systems that were largely based on information recorded on paper. Examples include references to “documentary evidence” and similar concepts set out in articles 6 (2), 7 (3)(a)(iii), 10, 27 (c), 36, 38 (f) of the current 1994 Model Law, the rules on preparation, modification, withdrawal, submission and opening of tenders, and the conclusion of a procurement contract.

(2) Since the adoption of the Model Law in 1994, the use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet, to which this Guide will refer generally as “electronic procurement”, has increased rapidly. Electronic procurement has been observed to offer many potential benefits, including improved value for money from more rigorous competition in a broader procurement market, better information for suppliers and contractors and more competitive techniques, savings in time and costs, improved administration of contracts awarded, and, in some cases, improved compliance with rules and policies and fewer opportunities for corruption and abuse. Further, electronic procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process. UNCITRAL therefore considers that the Model Law should make provision so as to enable the use of electronic procurement.

(3) However, concerns have also been expressed that controls on the use of electronic procurement may be needed to address the relative novelty of electronic communications, possible discrimination where access to the necessary infrastructure may be lacking, issues of security, confidentiality and authenticity in electronic communications, and the impact of modern procurement methods on other socio-economic policy goals. The revisions to the original Model Law seek to address these concerns, and this Guide sets out the objectives of the revisions themselves.

(4) Although some of the issues raised by electronic procurement can be accommodated within the Model Law’s existing provisions (or through the interpretation of existing laws and rules, including as set out in the Guide to Enactment), UNCITRAL has revised the text of the Model Law so as to make appropriate provision or provide clarification where necessary and, where possible, to promote the use of electronic procurement as a means of enhancing the achievement of the objectives of the Model Law itself.

(ii) Interaction between legislation concerning electronic procurement and electronic commerce legislation

- (5) Electronic procurement has a natural dependence on the existing level of use and regulation of electronic commerce in general. This Guide will also, therefore, make reference to the interaction between the legislation governing electronic commerce and that governing procurement where appropriate. It will not be appropriate for a procurement law to govern electronic commerce generally in an enacting State, and for this reason, the Model Law will not address issues that fall to be treated as a matter of general electronic commerce law. However, provision is made where the procurement context requires additional measures (such as the submission of tenders). In the light of the above, enacting States may wish to ensure that their existing legislation governing the use of electronic commerce indeed provides adequate recognition of electronic communications, and that it addresses the issues set out in the following paragraphs. For ease of reference of enacting States, the

solutions to the issues that UNCITRAL has provided in its main electronic commerce text (the UNCITRAL Model Law on Electronic Commerce (1996)) are also set out.⁶

(6) One of the main fetters on the use of electronic communications is a legal obstacle: that is, uncertainty as to the legal recognition, validity or enforceability of electronic communications generated in the contractual process. These obstacles may arise in requirements for “written” or “original” communications and documents, the formalities of contract formation and the admissibility of evidence in court (A/CN.9/568, para. 30 and A/CN.9/WG.I/WP.34/Add.1, para. 44). The UNCITRAL Model Law on Electronic Commerce seeks to enable commercial transactions to be conducted electronically, by removing these legal obstacles and so providing certainty in the use of electronic communications.

(7) The approach of the UNCITRAL Model Law on Electronic Commerce is to provide a general principle of functional equivalence in communications, such that electronic communications are afforded the same degree of recognition as traditional paper-based documents. The functions of documents, including communications, are more fully described in paragraph 16 of the Guide to Enactment accompanying that Model Law, which notes that they should, inter alia, fulfil the following functions: “to ... be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.”

(8) Articles 5, 6 and 8 of the UNCITRAL Model Law on Electronic Commerce in material part provide for the functional equivalence of paper-based and electronic communications, addressing the “legal recognition of data messages [electronic communications]”, and the notions of “writing”, and “original”. The combined effect of these provisions, which should be read together, is that electronic communications have the same degree of legal recognition and validity as paper-based ones—that is, the two types of communications are functionally equivalent.

(9) The UNCITRAL Model Law on Electronic Commerce addresses these issues as follows:

(a) Article 5: “[I]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”. The commentary to that article in the Guide to Enactment of the Model Law on Electronic Commerce notes that “article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein”;

(b) Article 6: “[w]here the law requires information to be in writing, that requirement is met by a data message if the information contained therein is

⁶ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.

accessible so as to be usable for subsequent reference.” The commentary notes that “article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement ... that information be retained or presented “in writing” (or that the information be contained in a “document” or other paper-based instrument)”; and

(c) Article 8: “[w]here the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.” The commentary explains that although the adjective “original” normally refers to documents of title and negotiable instruments, the provision may be needed in some jurisdictions in certain additional transactions.

(10) [The specific considerations arising when documents are signed electronically, and those arising in the conclusion of contracts by electronic means are addressed in the commentary to article 36 (“Acceptance of tender and entry into force of procurement contract”) below.] [As regards the electronic signature of documents, article 7 of the UNCITRAL Model Law on Electronic Commerce, provides as follows: “[w]here the law requires a signature of a person, that requirement is met by a data message if (a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement ...”.]

(11) Enacting States may also wish to issue regulations covering such matters as technical disruptions, disclaimers of liability and practical issues such as time zones, issue of receipts, etc.

(iii) Approach to enabling the use of electronic communications in the revised Model Law

(12) This revised Model Procurement Law addresses the use of electronic communications in the procurement process adopting the functional equivalent approach from the UNCITRAL Model Law on Electronic Commerce, but, as noted above, will not make provision for matters addressed in the general law of electronic commerce unless the procurement context requires additional provisions. Consequently, the Model Procurement Law does not address the following topics: the general legal recognition of electronic communications, what is meant by “writing”, what is an “original” document, electronic or digital signatures, the general admissibility and evidential weight of electronic communications, the formation, validity and operation of contracts, the attribution of electronic communications, and acknowledgements of receipt of electronic communications other than tenders.

(13) The provisions presented in this revised Model Procurement Law set out that any requirement for writing, for a record or to a meeting in the Model Law itself can be met by using electronic communications. (In the context of a meeting, using electronic communications means that the participants can follow and participate in the proceedings by electronic means of communication.) It does not provide that such communications are of themselves legally valid, a matter that will be provided

for in an enacting State's general electronic commerce legislation. However, the procurement context requires specific provision in areas such as regarding the submission of tenders under the provisions of articles 27 (h), (q), (r), and (z), 30, 31 (2) and 33 of the current Model Law. In such cases, the reasons for the need and objectives of the provisions are set out in the relevant section of this Guide (A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 11).

(14) The revised Model Law also, where possible, encourages (but does not require) the use of electronic communications and technologies in public procurement (A/CN.9/575, para. 10, A/CN.9/568, para. 33), save in the case of [cross reference to electronic procurement, such as ERA and dynamic purchasing systems].

(15) The use of electronic communications raises issues of authenticity, confidentiality and integrity of communications, documents and data, as noted above. Enacting States [will also] [may] wish to consider the extent to which their domestic electronic commerce law provides adequate controls over communications that could be generated in the procurement context. This topic is further addressed in the sections of this Guide addressing the form of communications (under article 9 of the 1994 Model Law) and the submission of tenders by electronic means (under article 30 of the 1994 Model Law).

(16) The principle of flexibility in method of communicating, based on functional equivalence, applies not only to general communications in procurement, but equally to the publication of opportunities and procurement-related information, the exchanging of information concerning procurement, the submission and opening of tenders, holding pre-tender conferences, the maintenance, storage and dissemination of information and documents (including the record of the procurement proceedings required under article 11 of the Model Procurement Law), and the conclusion of contracts. Accordingly, proposed article 4 bis [or proposed article 5 bis] are drafted in broad fashion, so as to cover all aspects of the generation, transfer and storage of information in communications and documents, and the controls and accessibility standards described in the preceding paragraphs should apply equally to these broader notions.

III. Proposed draft text for the revised Model Procurement Law to accommodate the use of electronic communications during the procurement process

A. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

1. General remarks

24. The Working Group has addressed drafting the new provisions to provide for the use of electronic communications from two angles. First, the Working Group has decided to include a new provision setting out the principle of functional equivalence of methods of communication as described above (including the notions of certainty in the use of and legal recognition of electronic communications), and, secondly, it wishes to ensure that the Model Law's overall provisions regarding the form of communications are sufficient to

allow for the principle to operate (which may require additional changes to the current text).

2. Proposed new text for the Model Law: new article 4 bis to address functional equivalence

25. The Working Group decided at its seventh session to continue its deliberations taking into account the following alternative drafts of a new article 4 bis of the Model Law, to set out the principle of functional equivalence:

(a) Variant A

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any [provision] [requirement] under this Law for:

- (a) A document to be in writing;
- (b) A document to be signed;
- (c) A document to be in a sealed envelope;
- (d) A document to be published or provided or made accessible;
- (e) A record to be created or maintained;
- (f) Meeting of persons to take place; and
- (g) The opening of tenders

or any other requirement implying physical presence or a paper-based environment may be met by the use of electronic, optical or comparable means [, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the enacting State or procuring entity is satisfied that such use complies with the accessibility standards contained in [article 4 bis or 5 bis].]⁷

(b) Variant B

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any provision of this Law related to writing, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means, [including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or

⁷ As regards the proposed article 5 bis, see paragraph 30 below.

telecopy] [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the enacting State or procuring entity is satisfied that such use complies with the accessibility standards contained in article [article 4 bis or 5 bis].] [with the inclusion of the list found in Variant A in the Guide to Enactment.] (A/CN.9/568, para. 13).

3. Commentary

26. Each variant includes three notions:

- (a) Some description of the methods of communicating, publishing, exchanging or storing information or documents, and holding meetings referred to;
- (b) A statement that electronic “means” of so doing will be sufficient, though the word “means” is neither defined nor further refined;
- (c) The inclusion of a control over the use of electronic “means”, such that they serve the objectives of the Model Law and, particularly, do not operate as a barrier to access to procurement (these are the notions set out paragraphs (a), (b) and (c) of the proposed article 4 bis or 5 bis, the “accessibility standards” that the Working Group has decided should apply to any means of communication chosen (A/CN.9/575 (paras. 14, 25, 32, 33, 39, 45 and 50)).⁸

27. The difference between the variants arises in the location of the description “all methods of communicating, publishing, exchanging or storing information or documents”. Variant A provides a non-exhaustive list of methods and Variant B presents the description in a generic manner, with examples to be provided in the Guide to Enactment. The Working Group may wish to consider whether the enhanced understanding that may be provided by setting out examples in the text may be outweighed by the risk of confusion should other situations in which information or documents are communicated, published, exchanged or stored arise and as business modalities change.

28. The Working Group may also wish to consider whether the word “methods” in the heading should be changed to “means”, so as to conform to the use of “means” in the text. Secondly, the Working Group may consider that the words “physical presence” should be followed by the words “of a person”. Thirdly, as the word “means” is not itself defined in the text, the words “of communicating, publishing, exchanging or storing information or documents” could be inserted after the word “means” in either variant. Alternatively, a phrase such as “of so doing” (Variant A) or “of such notions” (Variant B) could be inserted after the word “means”, thus making clear that the word “means” refers to the manner of description of the items set out immediately preceding it. Finally, the Working Group may wish to place the obligation to address the accessibility standards on the procuring entity

⁸ The means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle that would allow a requirement for paper-based or electronic communications in appropriate circumstances).

rather than the enacting State in the alternative. In this regard, the Working Group may wish to consider the following further Variant C for the proposed article 4 bis, which is based on Variant A above but could equally be presented in the form of Variant B, *mutatis mutandis*:

Variant C

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any [provision] [requirement] under this Law for:

- (a) A document to be in writing;
- (b) A document to be signed;
- (c) A document to be in a sealed envelope;
- (d) A document to be published or provided or made accessible;
- (e) A record to be created or maintained;
- (f) Meeting of persons to take place; and
- (g) The opening of tenders

or any other requirement implying physical presence or a paper-based environment may be met by the use of electronic, optical or comparable means [of communicating, publishing, exchanging or storing information or documents]. [Such means may include, but are not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the procuring entity is satisfied that such use complies with the accessibility standards contained in [article 4 bis or 5 bis].]⁹

29. Proposed guidance on this issue to be provided in Guide to Enactment is addressed in the draft general guidance set out following paragraph 23 above.

B. Accessibility standards

1. Proposed new text for the Model Law: new article 5 bis, to address accessibility standards

30. As to the “accessibility standards” described in the proposed draft article 4 bis above,¹⁰ the Working Group decided at its seventh session that the standards were a critical part of the introduction of provisions enabling flexibility in the form of

⁹ As regards the proposed article 5 bis, see paragraph 30 below.

¹⁰ Which standards apply equally to the publication and storage of information, further discussed in A/CN.9/WG.I/WP.39.

communications to be chosen, and that the location of the description of those standards should be considered in the light of all the revisions addressing this issue (A/CN.9/575, para. 14). The Working Group may wish to consider, therefore, whether the standards should be located in the proposed article 4 bis, the revisions to article 9 (set out in the following section), or perhaps as a new article 5 bis, which could take the following form:

Article 5 bis. Accessibility standards

- (1) The procuring entity shall ensure that its use of any method of communication for publishing, exchanging or storing information or documents or holding a meeting during the procurement process:
 - (a) [Shall not represent an obstacle to the procurement process] [shall use means of communication generally available];
 - (b) Should promote economy and efficiency in the procurement process; and
 - (c) Shall not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition.

2. Commentary

31. The Working Group may wish to consider whether the formulation of the accessibility standards as currently drafted may contain some degree of internal inconsistency. A reference to a means of communication that is “generally available” in subparagraph (a) may be regarded as potentially in conflict with subparagraph (c), in that a means of communication may be generally available but nonetheless discriminatory as regards some suppliers or contractors.

3. Proposed new text for the Guide to Enactment regarding article 4 bis or 5 bis of the Model Law, to address accessibility standards

32. The Working Group may wish to consider whether the Guide to Enactment should address the concept of accessibility standards, for example in the following terms:

Article [4][5] bis. Accessibility standards

- (1) The new provisions attach conditions to the use of electronic means of communication to safeguard the objectives of the Model Law, so as to prevent the means of communication chosen from operating as a barrier to access (A/CN.9/568, para. 30). The criteria set out in subparagraphs (a), (b) and (c) of the proposed article 4 bis [or 5 bis] are referred to as “accessibility standards” that should apply to any means of communication chosen (A/CN.9/575 (paras. 14, 25, 32, 33, 39, 45 and 50)). Their aim is to ensure that a procuring entity does not discriminate among suppliers or contractors in the manner of communication, as currently provided in article 9 (3) of the 1994 Model Law.
- (2) Electronic means of communication typically rely upon a network able to handle and transmit digital signals, which must be open and generally available to any person, such as the Internet, which is (at the time of writing) widely if not universally available. However, given the rapid pace of technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible (whether for technical reasons, reasons of cost or otherwise). The “accessibility standards” therefore require procuring entities to be satisfied when commencing a procurement process that the means of communication chosen must not only be non-discriminatory and accessible to all

at that time, but should [fulfil the objectives of the Model Law as set out in its preamble]
[not obstruct the procurement process].

A/CN.9/WG.I/WP.38/Add.1

**Possible revisions to the UNCITRAL Model Law on Procurement
of Goods, Construction and Services – drafting materials addressing
the use of electronic communications in public procurement**

ADDENDUM

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III. Proposed draft text for the revised Model Procurement Law to accommodate the use of electronic communications during the procurement process

C. Form of communication—proposed revisions to article 9 of the Model Law¹

1. General remarks

1. The form of communication is a sub-category of the general means of communication proposed to be addressed in a new article 4 bis of the Model Law, as discussed in paragraphs 24-29 of document A/CN.9/WG.I/WP.38. The Working Group has agreed to provide for a general principle as to the form of communication in article 9

¹ See, further, A/CN.9/WG.I/WP.34/Add.1, paras. 18-43, and A/CN.9/WG.I/WP.34/Add.2. The form of communication applies to documents and communications generated in prequalification proceedings (article 7 of the Model Law), Form of communications (article 9), Rules concerning documentary evidence provided by suppliers or contractors (article 10), Contents of invitation to tender and invitation to prequalify (article 25), Provision of solicitation documents (article 26), Clarification and modification of solicitation documents (article 28), Submission of tenders (article 30), Notice of solicitation of proposals (article 37), and Clarification and modification of requests for proposals (article 40).

of the Model Law (A/CN.9/575, paras. 32 and 33), which would apply to all types of communications dealt with in the Model Law. The principle would enable the procuring entity to choose any form of communication with suppliers and others, without being required to justify its choice, provided that the chosen form meets the “accessibility standards” set out in draft article 5 bis. The choice is also subject to the current provisions or article 9 that communications must contain a record of their content.

2. The Working Group may wish to consider whether, in the light of the interaction between the current article 9 and the proposed article 4 bis and accessibility standards, all three provisions should appear sequentially in the Model Law. For example, the Working Group may consider that the notion of access to communications as reflected in the draft accessibility standards is an issue that is closely linked to the current article 5 (“Public accessibility of legal texts”) and therefore that the articles governing the use of communications should immediately precede or follow it.

2. Proposed additional text for the Model Law: revisions to article 9 of the Model Law, to address the form of communication

3. The Working Group may wish to consider the following proposed revisions to article 9, the aim of which is to enable the procuring entity to choose the communication method. The text of paragraph (1) in the 1994 Model Law is restated below (in normal font), so as to introduce the proposed additional text, which is underlined.

Article 9. Form of communications

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(1) bis. The procuring entity may stipulate in the solicitation documents the form that all communications with suppliers or contractors shall take, provided that the means of communication chosen by the procuring entity shall comply with the accessibility standards contained in [article 4 bis or 5 bis].

(1) ter. The procuring entity may stipulate in the solicitation documents that tenders submitted under article 30 must be submitted in electronic form [, provided that the means of submission chosen by the procuring entity shall comply with the accessibility standards contained in article [article 4 bis or 5 bis].

(1) quater. Without prejudice to the right of a procuring entity to stipulate the form of communications in the solicitation documents, the procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

(1) quinquies. The procurement regulations may establish measures to ensure the authenticity, integrity, accessibility and confidentiality of communications, and to ensure the interoperability of the systems used to transmit and receive them.

3. Proposed additional text for the Guide to Enactment regarding article 9 of the Model Law, to address the form of communication

4. The Working Group may wish to consider whether the following paragraphs could form the basis of the guidance on this issue, using the text in the 1994 version of the Guide to Enactment as a basis. The text of paragraph (1) in the 1994 Guide is restated below (in normal font), so as to introduce the proposed additional text (with text to be removed struck through, and proposed additional new text underlined):

Article 9. Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement, subject to other provisions of the Model Law, is that a communication must be in a form that provides a record of its content. ~~This approach is designed not to tie communication to the use of paper, taking into account that communications are increasingly carried out through means such as electronic data interchange ("EDI"). In view in particular of the as yet uneven availability and use of non-traditional means of communication such as EDI, paragraph (3) has been included as a safeguard against discrimination against or among suppliers and contractors on the basis of the form of communication that they use.~~

2. Obviously, article 9 does not purport to answer all the technical and legal questions that may be raised by the use of EDI or other non-traditional methods of communication in the context of procurement proceedings, and different areas of the law would apply to ancillary questions such as the electronic issuance of a tender security and other matters that are beyond the sphere of "communications" under the Model Law.

3. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the confirming communication.

3 bis. The revised article 9 of the Model Law provides that the procuring entity may choose the method by which it will communicate with suppliers or contractors in the procurement process. The objective of this provision is to afford the procuring entity the option of insisting on a particular means of communication, such as electronic means, without having to justify its choice. However, that option is subject to two elements of control: first, that the means of communication chosen must serve the objectives of the Model Law (that is, those objectives set out in the preamble to the Model Law) and, secondly, that the means of communication do not operate as a barrier to access to procurement (the "accessibility standards" described in paragraphs ** above, which will apply to any means of communication chosen). In this regard, the revised paragraphs (1) bis, (1) ter and (1) quarter have been included so as to strengthen the safeguards contained in the article against discriminatory or otherwise exclusionary practices by the procuring entities (A/CN.9/575, para. 33). The obligation on the procuring entity to be satisfied that the accessibility standards are met will be open to review under article 54, and the requirements of the record of the procurement proceedings to be maintained pursuant to article 11 will enable the procuring entity's decision and how it was arrived at to be reviewed.

3 ter. Paragraphs (1) bis and (1) ter are also designed to ensure that suppliers and contractors do not have the right to insist on any particular means of communication with a procuring entity, that no such right can be construed (A/CN.9/575, para. 33).

3 quater. The proposed text as regards paragraph 1 ter has been inserted in order to provide for the electronic submission of tenders, currently prohibited under article 30 of the Model Law (see, further, A/CN.9/568, para. 32 and A/CN.9/WG.I/WP.34/Add.1, paras. 22-37).²

3 quinquies. The proposed new paragraph (1) quinquies has been inserted so as to draw the attention of enacting States that:

(a) There should be appropriate procedures and systems to establish the authenticity of communications;

(b) The means used to send and receive electronic communications should be sufficient to ensure that the integrity of data is preserved;

(c) The confidentiality of information submitted by or relating to other suppliers is maintained;

(d) The tools or systems used to send and receive electronic communications are fully compatible (or interoperable);

(e) The means used to send and receive electronic communications should enable the time of receipt of documents to be established, if the time of receipt is significant in applying the rules of the procurement process (for example, the submission of requests to participate and tenders/proposals); and

(f) The means used to send and receive electronic communications should be secure, that is, they ensure that tenders and other significant documents cannot be accessed by the procuring entity or other persons prior to any deadline, to prevent procuring entities' passing information on other tenders to favoured suppliers and to prevent competitors from gaining access to that information themselves (security) (A/CN.9/568, para. 41).

3 sexiens. Items (a), (b) and (c) fall to be addressed in general electronic commerce law, and as noted in paragraph [cross refer to general guidance section] above, enacting States [will] [may]³ wish to consider the extent to which their existing laws provide adequate controls over the communications that may be generated in the procurement process, whether further regulation is needed, and whether to make reference to the need for such controls in their procurement regulations. One example in domestic legislation requires the heads of procuring entities before using electronic commerce to "ensure that the [entity's] systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information".⁴

² Consequential proposed revisions and commentary to article 30 are set out in the text following paragraphs 23 and 24.

³ See paragraph 23 of document A/CN.9/WG.I/WP.38.

⁴ The United States Federal Acquisition Regulations, sect. 4.502, available at <http://www.arnet.gov/far/loadmainre.html>.

3 septiens. Items (d), (e) and (f) require procurement-specific solutions, arising most notably in connection with the submission of tenders electronically, and are addressed in paragraphs [cross reference] below.

4. Commentary

5. The Working Group may be aware that electronic means of communication may involve the use of particular tools or software. If a procuring entity wishes to use specialised software, for example, the Working Group may wish to provide that the procuring entity should provide it openly and without charge, and that the procuring entity should ensure that any electronic systems it uses are fully compatible (or interoperable) with those in common or general use. (The term interoperability is used to denote systems that can communicate between themselves without technical or functional hindrance, and general electronic commerce law or practice may establish appropriate measures or systems in a particular enacting State.) The Working Group may also wish to consider whether a description of what is meant by “common or general use” would be warranted, perhaps with reference to the accessibility standards discussed earlier in this Note.

D. Notion of “electronic” and related terms⁵

1. General remarks

6. There is no definition of the notion “electronic optical or comparable means of communicating [, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy” set out in the alternative draft provisions for functional equivalence under consideration by the Working Group.

7. At its seventh session, the Working Group considered whether a definition of the term “electronic” or of “electronic means” should be included in article 2 of the Model Law, perhaps based on the definitions found in the European Union procurement directives of 31 March 2004 (Directive 2004/17/EC and Directive 2004/18/EC) (A/CN.9/575, para. 20). The definitions in these Directives provides as follows: “Electronic means” means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.”⁶

2. Proposed additional text for the Model Law: addition to article 2 of the Model Law, to provide definitions of the notion “electronic” and related terms

8. In the light of the references to the term “electronic means” and other related terms in the proposed articles 4 bis and 9, the Working Group agreed that further deliberations regarding proposed definitions of these items should be held at a future session (A/CN.9/575, para. 22), taking the following alternative proposals into account:

(a) Variant A

“‘Electronic means’ of communicating, publishing, exchanging or storing

⁵ See, further, A/CN.9/WG.I/WP.34, paras. 17-22, and A/CN.9/WG.I/WP.34/Add.2, article 2. Definitions.

⁶ See article 1, para. 13, of the EU Directive 2004/18/EC.

information or documents means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

‘Electronic means’ of assembly of persons for any purpose under this Law means any method of assembly whereby those assembled can follow and participate in the proceedings by electronic means of communication.”

(b) Variant B

“‘Electronic means’ of communicating, publishing, exchanging or storing information or documents, and of holding meetings, means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”

3. Commentary

9. The Working Group may wish to bear in mind that electronic commerce legislation in certain systems defines the term “electronic”, or “electronic means”, or provide equivalent definitions, with varying levels of specificity. Common elements include references to electrical, digital, magnetic, wireless, optical, electromagnetic, biometric and photonic technology, and references to the form in which information can be transmitted or stored (e.g. using telecommunications technology).⁷

⁷ Examples of provisions found include:

- a. “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (United States Electronic Signatures in Global and National Commerce Act of 2000; Sect. 106 (2));
- b. “‘Electronic’ includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and “electronically” has a corresponding meaning. (Canada: draft “Uniform Electronic Commerce Act” Part 1, 1 (a));
- c. “‘Electronic mail means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient (EU Directive 2002/58/EC).
- d. “‘Electronic communication means: (a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or (b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.” (Australia, The Electronic Transactions Act 1999, Sect 5, (1));
- e. “‘Electronic communication’ means a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa (a) by means of a telecommunication system (within the meaning of the Telecommunications Act 1984); (b) by other means but while in an electronic form (UK Electronic Communications Act 2000, Sect. 15);
- f. “‘Electronic’ includes electrical, digital, magnetic, optical, electromagnetic, biometric, photonic and any other form of related technology; “‘electronic communication’ means information communicated or intended to be communicated to a person or public body, other than its originator, that is generated, communicated, processed, sent, received, recorded, stored or displayed by electronic means or in electronic form, but does not include information communicated in the form of speech unless the speech is processed at its destination by an automatic voice recognition system (Republic of Ireland Electronic

10. However, the Model Law on Electronic Commerce does not define the adjective “electronic” itself, again approaching the question of electronic communications from a functional standpoint. It provides, in the definitions section, that:

“(a) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) ‘Electronic data interchange (EDI)’ means the electronic transfer from computer to computer of information using an agreed standard to structure the information;”

11. These definitions are similar to those of the proposed new article 4 bis and revised article 9, set out in the text following paragraph 25 of document A/CN.9/WG.I/WP.38 and paragraph 3 above.

12. It was also suggested that it would be possible not to include a definition of the term “electronic means” or related items, on the basis that one would be superfluous in the light of the proposed article 4 bis (see the text following para. 25 of document A/CN.9/WG.I/WP.38). Further, the Working Group may consider that not including a definition would be consistent with the general principle of addressing only procurement-specific electronic commerce issues in the Model Law. If the Working Group concludes that no definition is necessary, it may consider a description of what is meant by “electronic means” of communication in the introductory text for the Guide to Enactment proposed in the text following paragraph 23 of document A/CN.9/WG.I/WP.38, so as to address the concern that the Guide to Enactment should encourage consistency in the use of terminology by enacting States, in order to avoid conflict with other legislative acts (A/CN.9/575, para. 20).

E. Legal value of procurement contracts concluded electronically⁸

1. General remarks

13. Articles 36 (2)(a) and (b) of the Model Law provide that the solicitation documents may require the supplier or contractor whose tender has been accepted to “sign a written procurement contract” conforming to the tender. Consistent with its general stance on the inclusion of electronic commerce issues in the Model Law, the Working Group has decided that the ability to conclude a contract electronically, including to sign an electronic contract, is a matter that falls to be addressed in general laws governing electronic commerce and therefore that the Model Law should not make provision for the electronic

Commerce Act 2000, Sect. 2);

g. “Electronic record” means a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or for transmission from one information system to another (Singapore, Electronic Transactions Act (Chapter 88), Art. 2).

The Secretariat found that other jurisdictions, notably those in continental Europe and Latin America, typically did not define the term “electronic”.

⁸ See, further, A/CN.9/WG.I/WP.34, paras. 44-58, and A/CN.9/WG.I/WP.34/Add.2. The legal recognition of electronic communications arises in connection with the acceptance of tender and entry into force of procurement contract (article 36), and also raises issues of procurement contracts and electronic signatures.

conclusion of contracts (A/CN.9/575, para 50).⁹ However, the Working Group expressed the view that the Guide to Enactment might usefully address the issues raised by electronic contracting (see, further, A/CN.9/WG.I/WP.34/Add.1, para. 44). Suggestions for that text are set out below.

2. Proposed additional text for the Guide to Enactment regarding article 36 of the Model Law, addressing the acceptance of tender and entry into force of procurement contract

14. The Working Group may wish to consider whether the following proposed text may usefully be added following paragraph 1 of the Guide to Enactment addressing article 36 of the Model Law. As noted above, the text appears under headings and sub-headings, but these could be removed for consistency of style when the Guide is produced.

Formalities regarding the procurement contract

(1) bis. Articles 27 (y) and 38 (u) of the Model Law refer to a “written” procurement contract, and article 36 (2)(a) and (b) provide that the solicitation documents may require the supplier or contractor whose tender has been accepted to “sign a written procurement contract” [, which may be signed in the traditional manner, or electronically]. [Enacting States will wish to ensure that their existing legislation recognizes procurement contracts that are executed electronically.]

(a) Electronic contracting

(1) ter. The solution provided by the UNCITRAL electronic commerce texts, found in article 11 of the Model Law on Electronic Commerce, does not seek to interfere in the general rules of contract formation. Rather, its stated aim is to “promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, [the provision] ... might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means. Such uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainties is inherent in the mode of communication and results from the absence of a paper document.” Article 11 itself provides that “[w]here a data message [electronic communication] is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message [electronic communication] was used for that purpose.”

(b) Electronic signatures

(1) quater. In practical terms, enacting States may wish to prescribe the manner in

⁹ The UNCITRAL Model Law on Electronic Signatures (2001) addresses the issue, as its name suggests. For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).

which the parties will sign or otherwise authenticate a procurement contract concluded electronically, in accordance with their laws on electronic commerce. Some States may have requirements for digital or other authenticated forms of electronic signatures in electronic commerce, which may be applied to procurement provided that they do not operate so as to restrict access to the procurement.

(1) quinquies. The solution provided by the UNCITRAL electronic commerce texts is found in article 7 of the Model Law. The Guide to Enactment text discussing the latter article notes that its aim is to promote reliance on electronic signatures for producing legal effect where such electronic signatures are functionally equivalent to handwritten signatures. The provisions themselves address the issue of electronic signature of documents using the principle of functional equivalence, by providing that: “[w]here the law requires a signature of a person, that requirement is met in relation to a data message if: [the signature] is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.”

3. Commentary

15. The Working Group will note that proposed paragraph 1 bis contains alternative text addressing the issue of electronic signatures, addressing the question of the degree of prescription to be given in the Guide (see, further, paragraph 23 of document A/CN.9/WG.I/WP.38).

F. Requirement to maintain a record of the procurement proceedings

1. General remarks

16. Article 11 of the Model Procurement Law requires the procuring entity to maintain a record of the procurement proceedings containing certain minimum information, and provides for that information to be made accessible. However, recognizing that article 11 addresses the storage but not the dissemination of information, and that it does not prescribe the form in which it should be maintained, the Working Group has requested the Secretariat to include the concepts of both storage and dissemination in the “accessibility standards” set out in the text following paragraph 30 of document A/CN.9/WG.I/WP.38. The draft article 4 bis and alternative article 5 bis, and the draft text for the Guide to Enactment addressing accessibility standards, reflect these issues. Further, the Working Group has decided that article 11 should not address the form of the record, but that the Guide to Enactment should consider the issues raised (see, further, A/CN.9/575, paras. 43-46).

2. Proposed additional text for the Model Law: revisions to article 11 of the Model Law, to enable the maintenance of the record of the procurement proceedings in any form

17. The Working Group has also requested the Secretariat to re-draft proposed new paragraph 6 of article 11, so as to ensure that its provisions apply to all methods of storage of documents (A/CN.9/575, para. 47). The proposed revisions to the provision are set out below.

Article 11. Record of procurement proceedings

...

(6) Procurement regulations may establish procedures for maintaining and accessing the record of the procurement proceedings, including measures to ensure the integrity, authenticity, accessibility and, where appropriate, confidentiality of information, the traceability of steps in the procurement process, and the interoperability of record retention systems.

3. Proposed additional text for the Guide to Enactment regarding article 11 of the Model Law, to enable the maintenance of the record of the procurement proceedings in any form

18. The Working Group may wish to consider whether the following paragraphs could form the basis of the guidance on this issue, using the 1994 version of the Guide text as a basis:

Article 11. Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds...

[additional text proposed to be inserted in current paragraph (1), to be paragraph (1) bis, thus separating the original paragraph (1) into two new paragraphs¹⁰

(1) bis. Article 11, however, focuses on the accessibility and availability of information forming the record, and does not contain requirements as to the form of the record, nor the conditions to be in place for a record to be maintained electronically (A/CN.9/575, para. 45). The accessibility standards set out in [article 4 bis or 5 bis], however, require the procuring entity, when maintaining the record, to select a means of storage of information that will enable the information concerned to remain accessible even as technologies advance, and to be non-discriminatory. Further, enacting States may wish to pass regulations that ensure that record retention systems are fully compatible (interoperable), and that they allow each communication in the procurement process to be verified, such that the sender, recipient and time and duration of each communication can be established (and automatic data processing or calculations can be reconstituted) (traceability). Further, the regulations may address whether access to the record and contract documents should be recorded and any data protection issues that would arise, to ensure the integrity and security of data, and confidentiality of communications and information, as more fully set out in [cross reference to commentary to article 9 above].]

¹⁰ The remainder of paragraph (1) and of the commentary on the article addresses the issue of disclosure of information. The Working Group may consider that a new paragraph (1) bis could be inserted, before the disclosure discussion, to address the continued accessibility and interoperability of record retention systems, any required period of retention of records, confidentiality and integrity and security of electronic records (A/CN.9/WG.I/WP.34/Add.1, para. 57).

G. Electronic submission of tenders, proposals and quotations¹¹

1. General remarks

19. Under article 30 (5)(a) of the Model Law, tenders are to be submitted “in writing, signed and in a sealed envelope”, or under article 30 (5)(b) “in any other form specified in the solicitation documents”, subject to certain conditions. Article 30 (5)(b) also gives a supplier an overriding right to submit a tender in writing, signed and in a sealed envelope. According to the 1994 Guide to Enactment, this latter is an “important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as [Electronic Data Interchange (EDI)]”. (Those provisions are incorporated by cross-reference to chapter III of the Model Law in articles 46 (1) (two-stage tendering) and 47 (3) (restricted tendering), and similar provisions are implied in article 48 (6) (request for proposals).) However, and in the light of more widespread availability of the relevant technology, the Working Group has decided to amend these provisions in order to enable tenders and other offers to be submitted electronically (A/CN.9/586, para. 32).

20. Applying the principle of functional equivalence to the electronic submission of tenders, electronic tenders require the same legal value as tenders submitted in writing, signed and in a sealed envelope. Article 30 (5)(b) provides that the form of any tender should provide “a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality” as one submitted in writing, signed and in a sealed envelope. The Guide to Enactment refers to additional “rules and techniques” that might be needed, for instance “to guard the confidentiality of tenders and prevent ‘opening’ of the tenders prior to the deadline for submission of tenders”.¹²

21. In the electronic context, such rules and regulations may need to address the following matters. First, security: tenders must be protected from unauthorized access or interference (for example, via firewalls). Secondly, integrity: the system should prevent any reading or alteration of the contents of tenders submitted before the time stipulated for opening (for example, by using encryption technologies, locking all tenders, ensuring that tenders cannot be decrypted before the scheduled opening time, ensuring that only authorized persons can set or change the opening time, perhaps requiring two authorized persons). Thirdly, the authenticity of tenders must be established. Fourthly, the confidentiality of information must be protected, including intellectual property rights. Fifthly, interoperability—procuring entities should ensure that the systems used are fully compatible with those of potential suppliers or contractors. Finally, systems should be checked periodically to assist in protection of the system against outside interference (including viruses, worms and hackers).

22. For the purposes of the record of the procurement proceedings required under article 11 of the Model Law, the traceability of the communications concerned should also be verified (see, further, the text following paragraph 18 above). In practical terms, this may involve creating a record of all access to the system before tenders are opened and detecting any unauthorized access.

¹¹ See, further, A/CN.9/WG.I/WP.34/Add.1, para. 33, and A/CN.9/WG.I/WP.34/Add.2.

¹² Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, remarks to article 30, para. 3. For the text of the Guide to Enactment, see document A/CN.9/403, reproduced in the UNCITRAL Yearbook, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II.

23. The Working Group may wish to consider whether the Guide to Enactment should propose draft regulations or narrative text to address these matters, such as that set out in the preceding paragraphs.

2. Proposed additional text for the Model Law: revisions to article 30 of the Model Law, to enable the submission of tenders in electronic form

24. The text of paragraph (5) in the 1994 Model law is restated below (in normal font), so as to introduce the proposed additional text (with text to be removed struck through, and proposed additional new text underlined):

Article 30. Submission of tenders

(5) (a) ~~Subject to subparagraph (b),~~ A tender shall be submitted in writing, signed and in a sealed envelope ~~(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in or in any other form specified in the solicitation documents, provided that the means of submission chosen by the procuring entity shall comply with the accessibility standards contained in [article 4 bis or 5 bis];~~

(b) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

3. Commentary

25. The proposed revisions would enable the procuring entity to insist on the submission of tenders in electronic format, by removing the previous option for a supplier to submit its tender in a sealed envelope. The Working Group may note that there is no provision for an electronic equivalent of a sealed envelope in the proposed revisions (questions of confidentiality, security and integrity of data are examined further in paragraphs 26 to 27 below). The procuring entity is required, under the proposed article, to apply the accessibility standards discussed earlier in this Note to the selection of the submission method, consistent with the choice to be made in any form of communication in the procurement.

4. Proposed additional text for the Guide to Enactment regarding article 30 of the Model Law, to enable the submission of tenders in electronic form

26. In the light of the above, paragraph 3 of the current text of the Guide to Enactment addressing article 30 of the Model Law could therefore be amended to provide as follows, with a new paragraph 3 bis (with text to be removed struck through, and proposed additional new text underlined):

Article 30. Submission of tenders

(3) ~~The requirement in Paragraph (5) (a) that tenders provides that tenders are to be submitted in writing is subject to the exception in subparagraph (b) permitting the use of a form of communication other than writing, such as electronic data interchange (EDI), including submission by electronic means as [defined in article 2] [described in the commentary to article 9], provided that the form used is one that provides a record of the content of the communication. Additional safeguards are included to protect the integrity of the procurement proceedings, as well as the particular interests of the procuring entity and of suppliers and contractors: that the use of a form other than writing must be permitted by the solicitation documents;~~

~~that suppliers and contractors must always be given the right to submit tenders in writing, an important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as EDI; and that the alternative form must be one that provides at least a similar degree of authenticity, security and confidentiality. It may be further noted that the implementation of paragraph (5) to accommodate the submission of tenders in non-traditional forms that the form must be set out in the solicitation documents; and that the form must be one that provides at least a similar degree of authenticity, security and confidentiality as submission in paper-based format. Enacting States or procuring entities may consider that the submission of tenders in non-paper forms would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent “opening” of the tenders prior to the deadline for submission of tenders, and to deal with other issues that might arise when a tender is submitted other than in paper (e.g., the form that the tender security would take).~~

(3) bis. Enacting States or procuring entities may therefore wish to enact regulations that address the origin and authenticity of communications, documents and tenders (and proposals or quotations) received from suppliers or contractors; the integrity of communications, documents and tenders received from suppliers or contractors, the date and time of receipt of communications, documents and tenders; that prevent communications, documents and tenders from being accessed by the procuring entity or other persons prior to any deadline, that provide that any unauthorized access or attempt to access communications, documents and tenders prior to the deadline referred to in paragraph (1) above is detectable; that ensure the ongoing confidentiality of communications, documents and tenders received from or relating to other suppliers or contractors; and that ensure that communications are traceable and systems interoperable.

27. The Working Group may, as noted above, wish to provide further detail or draft regulations addressing these issues, for example along the following lines, in proposed paragraph (3) ter:

(3) ter. Systems for the electronic receipt of tenders must ensure at a minimum that:

- (a) [The authenticity of] electronic signatures relating to tenders [can be established][comply with relevant electronic signature legislation, e.g. that based on the Model Law on Electronic Signatures];
- (b) The system is interoperable with those in [general]¹³ use in [the enacting State];
- (c) The exact time and date of the receipt of tenders can be established;
- (d) No person can have access to a tender prior to the time and date specified in the solicitation documents, or any extension thereto as the deadline for submission of tenders, and at which tenders are to be opened;
- (e) If that access prohibition is infringed, the infringement is clearly detectable;
- (f) Only [two] authorized persons may set or change the time and date specified in the solicitation documents or any extension thereto as the deadline for submission of tenders, and at which tenders are to be opened;
- (g) Authorized persons may have access to the tender only after the deadline;

¹³ As regards the notion of “general use”, see paragraph 5 above.

(h) Data received and opened in accordance with these requirements must remain accessible only to such authorized persons.¹⁴

H. Electronic opening of tenders

1. General remarks

28. Article 33 (1) of the UNCITRAL Model Procurement Law provides that tenders “shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders [...], at the place and in accordance with the procedures specified in the solicitation documents.” Article 33 (2) provides further that “all suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.”

29. The Working Group has noted that while article 33 (1) may be sufficiently broad to accommodate any system for opening tenders, article 33 (2) suggests the physical presence of suppliers and contractors at a given place and time (A/CN.9/575, para. 36). The Working Group decided that the Model Law should include an enabling provision to permit the opening of electronic tenders. Such opening may be achieved through an electronic information system, which would automatically release and open the tenders at the date and time provided in the solicitation documents, and automatically transmit the information that would usually be publicly announced at the opening of tenders. Alternatively, authorized persons may open tenders on-line and publish the relevant information.

30. The electronic opening of tenders may require security-related controls additional to those for other electronic procurement. For example, even automatic release and opening of tenders will require human authorization at some point, and individuals will have to be designated for that purpose. If tenders are to be opened by individuals, they may need to be issued with decryption keys. The controls may also include only simultaneous action by at least two authorized persons (e.g. unlocking of data), logging each access to the system and step taken, and the prevention of virus-checking steps from compromising the integrity of data. Finally, the system must allow the sequential opening of both elements of a two stage tender submitted under article 46 of the Model Law, without the security of the second stage being compromised. The Working Group may wish to consider whether it is appropriate to address these detailed technical issues in the Guide to Enactment, or merely to make reference to the general controls set out in paragraphs 21 and 22 above.

2. Proposed additional text for the Model Law: revisions to article 33 of the Model Law, to address the opening of tenders submitted electronically

31. The Working Group has decided that article 33 of the Model Law should be revised to contain the following draft text, as new paragraphs 4 (A/CN.9/575, paras. 37-42):

Article 33. Opening of tenders

...

¹⁴ These regulations are based on those found in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Official Journal of the European Union, No. L 134, 30 April 2004, p. 1).

(4) Where the procurement proceedings were conducted electronically in accordance with [insert provisions dealing with electronic communications, reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are allowed to follow the opening of the tenders through electronic means of communication used by the procuring entity.

(5) Where suppliers or contractors are permitted to follow the opening of the tenders through electronic means of communication used by the procuring entity in accordance with article 33 (4), they shall be deemed to have been permitted to be present at the opening of tenders in accordance with the requirements of article 33 (2).

3. Proposed additional text for the Guide to Enactment regarding the opening of tenders submitted electronically

In the light of the above, the Working Group may wish to include guidance to the opening of tenders electronically, setting out the solutions adopted to the matters discussed in paragraphs 29 and 30 above.

**C. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services,
submitted to the Working Group on Procurement its eighth session
(A/CN.9/WG.I/WP.39 and Add.1) [Original: English]**

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or the “Model Law”)¹ is set out in paragraphs 5 to 34 of document A/CN.9/WG.I/WP.37.

2. As regards electronic publication of procurement-related information, at its sixth and seventh sessions (Vienna, 30 August-3 September 2004, and New York, 4-8 April 2005, respectively), the Working Group, inter alia, considered whether any additional information relevant to potential suppliers, which the Model Law did not currently require to be published, might be brought within the scope of any existing or new provisions of the Model Law or guidance given. It agreed to study the usefulness of publication, in

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum* (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as “*UNCITRAL Yearbook*”), vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procure/ml-procure.htm>).

particular of (i) regulatory acts pertinent to procurement not covered by current article 5 of the Model Law, such as internal guidelines or instructions of administrative bodies, and (ii) information on general forthcoming procurement opportunities. The Working Group requested the Secretariat to review the relevant practices under domestic procurement regimes and present the results of such a review for its consideration at a future session. (A/CN.9/568, paragraph 28 and A/CN.9/575, paragraphs 24 and 31).

3. This note and addendum thereto (A/CN.9/WG.I/WP.39/Add.1) are submitted, pursuant to that request, for consideration by the Working Group at its eighth session.

II. Publication of procurement-related information not covered by the Model Law: study of national, regional and international practices

A. General remarks

4. Some information not required to be published under the Model Law is required, encouraged or permitted to be published or is published in practice in some jurisdictions reviewed. Issues such as the content of the published information, whether the publication is mandatory or optional, and whether the means of publication is specified vary greatly from jurisdiction to jurisdiction. For the purpose of this study, a distinction should be drawn between information that has historically been required to be published, and further information, the publication of which has been enabled by electronic means of communication.

1. Information historically required to be published

5. Most of the information that has historically been required to be published was considered by the Working Group when the Model Law was prepared. Some such information, such as invitations to tender and notices on contract awards, was included in the Model Law's provisions on publication, while the inclusion of other information was ultimately rejected for various reasons, for instance because of concerns over confidentiality, collusion of suppliers or market manipulation.² The type of information that was ultimately included in the Model Law's provisions was not necessarily considered in depth by the Working Group.

6. For example, the then Working Group did not spend much time in the consideration of article 5 of the Model Law (public accessibility of legal texts), analysed in more detail in section B below. Nor did it substantially consider the publication of information on procurement contract awards (article 14 of the Model Law).³ As a result, practices with the

² See e.g., documents A/CN.9/331, para. 211, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 153-155, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; and A/CN.9/359, para. 71, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.

³ The requirement on the publication of a notice on contract awards was included in the 1993 Model Law on Procurement of Goods and Construction only upon its adoption. See *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 184-186. See further documents A/CN.9/376/Add.1, comments by Japan with respect to article 32 of the draft Model Law, and A/CN.9/377, proposed amendments as regards

publication of similar information under domestic, regional and international regimes were not considered by the then Working Group.⁴ Some information considered by the then Working Group to be useful for disclosure to the public in general was not ultimately subjected to mandatory publication under the Model Law, as is the case in legislation of some of the jurisdictions reviewed, but rather was dealt with in the provisions of the Model Law on the records of procurement proceedings⁵ or in the provisions that require making available certain types of information to any member of the public upon request.⁶ The then

article 32 (6) of the draft Model Law, both reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I. These documents, in the relevant parts, referred to the provisions of the draft Model Law on Procurement of Goods and Construction, under which the notice of contract awards was supposed to be given only to suppliers and contractors that participated in the tendering proceedings (draft article 32 (6)). The provisions, as adopted, extended the notice to the general public and to other procurement methods. See article 12 of the 1993 Model Law on Procurement of Goods and Construction (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part three, annex I). The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/pdf/english/texts/procurem/proc93/proc93.pdf>). This article was not changed when the Model Law on Procurement of Goods, Construction and Services was adopted in 1994 (it became article 14 of the Model Law).

⁴ For example, while the publication of a notice on contract awards is generally required under domestic, regional and international regimes, the content of the notice varies greatly. For the current practices, see, e.g., article 35 (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm) (hereinafter the “EU Public Procurement Directive”), and article XVIII (1) of the World Trade Organization’s (WTO) Agreement on Government Procurement (hereinafter the “GPA”) (see annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf). Some jurisdictions, in addition, require the publication of a summary of the awarded procurement contract as a pre-condition for its effectiveness.

⁵ The Model Law, for example, requires a procuring entity to include in the record of procurement proceedings a statement of the grounds and circumstances on which it relied to justify the use of non-tendering methods (article 18 (4)) and any decision taken by a procuring entities in connection with suspension of procurement proceedings and grounds and circumstances therefore (article 56 (5)). Similar information is required to be published in some jurisdictions reviewed. For example, the publication of a notice that a single-source procurement or procurement without a competitive method in case of emergency is utilized has to be published under the Virginia Public Procurement Act (VPPA), as amended, article 2, § 2.2-4303, paras. E and F (available at <http://www.eva.state.va.us/dps/Manuals/docs/VPPA.pdf>). The notice has to state that only one source was determined to be practicably available or that the contract is being awarded on an emergency basis, as applicable, and identify what is being procured, the contractor selected, and the date on which the contract was or will be awarded. The notice is to be published on the day the procuring entity awards or announces its decision to award the contract, whichever occurs first. As regards suspension of procurement proceedings, the publication of the notice to that effect is required for instance under article 6.3 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

⁶ See, for example, article 7 (6) of the Model Law regarding the names of all prequalified suppliers or contractors. For the consideration of the matter in the Working Group, see document A/CN.9/359, paras. 71 and 101, reproduced in the *UNCITRAL Yearbook*,

Working Group considered that some other information required to be published in some jurisdictions should be disclosed to interested suppliers or contractors only.⁷

7. On the other hand, some other information required to be published in some jurisdictions reviewed was not considered for publication by the then Working Group at all, for example, a notice on complaints filed with a supervisory body about procurement proceedings.⁸ Some information was not considered by the Working Group at that time probably because it was considered that such information fell outside the scope of the Model Law or was linked to procurement procedures that the then Working Group did not consider, for example, framework agreements, or decided from the outset not to include in the Model Law, for example, suppliers' lists.⁹

8. Overall, the drafting history and some provisions in the Guide to Enactment of the Model Law¹⁰ indicate that drafters of the Model Law were cautious of the costs and efforts of publishing procurement-related information, preserving its integrity and keeping it up to date. Those concerns were understandably present at that time, as the Model Law was drafted primarily for a paper-based environment and "the procedures in the Model Law reflected a practice that was rooted in paper-based documentation."¹¹ As a result, the Model Law requires the publication of the minimum information necessary to achieve transparency in the procurement process and at the same time to avoid what was thought at that time the disproportionately onerous burden on an enacting State generally and on a procuring entity in particular.

vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C. The requirement to publish the list of all prequalified suppliers or contractors is found in some jurisdictions.

⁷ See, e.g., article 12 (3) of the Model Law which provides that the notice of the rejection of all tenders, etc., shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations. The same type of information is required to be published, for example, under article 80 of the Public Procurement Law of the Republic of Serbia, published in the *Official Herald of the Republic of Serbia*, No. 39/2002, 43/2003 - the other Law, and 55/2004, available at <http://www.oecd.org/dataoecd/34/12/35016323.pdf>.

⁸ See, e.g., article 54 (1) of the Procurement Law of the Republic of Armenia, of 6 December 2004. Published in the *Official Bulletin* # 2004/72 (371), 28 December 2004.

⁹ For the publication requirements in connection with the maintenance of suppliers' lists, see, for example, article XI (9) of the GPA. For the consideration of the issue of suppliers' lists in the draft Model Law, see document A/CN.9/315, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A, and document A/CN.9/331, para. 62, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.

¹⁰ See, e.g., commentary to article 14 in the Guide to Enactment, para. 2, that inter alia reads: "in order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts no matter how low their value, the enacting State is given the option in paragraph (3) of setting a monetary-value threshold below which the publication requirement would not apply." For the text of the Guide to Enactment, see document A/CN.9/403, reproduced in the *UNCITRAL Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

¹¹ See document A/CN.9/359, para. 107, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.

2. Information, publication of which has been enabled by electronic means of communication

9. The above trend has been reversed in those jurisdictions where electronic means of communication are widely used for the publication of procurement-related information. Savings in costs, time and effort resulting from such use have led to a trend of making available as much information for the benefit of suppliers as possible.

10. Additional procurement-related information usually required, enabled or encouraged to be published by electronic means includes (i) solicitation documents, including specifications and modifications, encouraged to be published in their entirety on the Internet;¹² (ii) information on forthcoming procurement opportunities, analysed in more detail in document A/CN.9/WG.I/WP.39/Add.1, section I; (iii) various lists of standardized goods;¹³ (iv) various types of statistical reports inter alia on the results of procurement and contracts concluded;¹⁴ (v) information on the status of ongoing procurement proceedings, including notices on suspension; (vi) procedures cancelled; (vii) records of procurement proceedings; and (viii) any useful general information, such as information on a contact point for general inquiries. In practice, more information than required or authorized by law is usually made available to the public. Apart from various additional information, new features and services also appear.¹⁵

11. The publication of some additional information is encouraged, for example, in the EU public procurement directive (the “EU directive”).¹⁶ The EU directive provides that if

¹² See, e.g., the EU Public Procurement Directive, annex VIII.

¹³ See, e.g., article 51 of the Public Procurement Law of the Republic of Montenegro, published in the Official Gazette of the Republic of Montenegro, No. 40/2001, also available at <http://www.rszz.cg.yu/procurement.doc>.

¹⁴ See e.g., article 35 (4), subpara. 4, and article 77 (2), of the EU Public Procurement Directive that requires the publication of statistical reports on the results of award procedures in lieu of the publication of an award notice for certain types of contracts for which the publication of award notice is not mandatory. See also, in Australia, article 6 and appendix C of the Procurement Guidance on Procurement Publishing Obligations, January 2005, available at http://www.finance.gov.au/ctc/austender-annual_procurement_p.html (hereinafter the “Australian Procurement Publishing Guidance”), and article 70 of the Public Procurement Law of the Republic of Montenegro (see endnote 13 above), mandating the publication of information on public contracts with value equal to or over the established threshold (in Australia, the relevant information has to be posted at the government procurement website within six weeks of entering into the arrangement; in the Republic of Montenegro, the Public Procurement Commission is required to publish such information at least once a year. In both countries, reports are to contain procuring agency details, contract details (such as start and end dates, procurement method, value, description sufficient to identify the nature and the quantity of goods or services procured or the period of standing offer) and supplier details (such as name, address and registration numbers)). Also in Australia, under article 8.1 of the Australian Procurement Publishing Guidance, Financial Management Guidance No. 15, January 2005, available at http://www.finance.gov.au/ctc/docs/Procurement_Publishing_Obligations_-_January_2005.pdf (hereinafter the “Australian Procurement Publishing Guidance”), it is required to publish lists of public contracts with the value equal to or above the defined threshold which have not been fully performed or which have not been entered into in the previous 12 months. See also article 72 of the Public Procurement Law of the Republic of Montenegro requiring the publication of annual public procurement assessment reports.

¹⁵ For instance, in Chile, the official procurement website offers the Normative Orientation Service (Servicio Orientación Formativa) that provides legal advice on procurement rules. See http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html.

¹⁶ See above, endnote 4.

the specifications and additional documents related to procurement are published in their entirety on the Internet from the date of publication of the contract notice and the contract notice specifies the Internet address at which this documentation is accessible, procuring entities are allowed to shorten the time limits for receipt of tenders.¹⁷ Similar provisions are also found in some national legislation of EU countries.¹⁸

12. Publication of some additional information may be necessitated by new electronic procurement techniques and features, such as e-catalogues, dynamic purchasing systems or electronic reverse auctions (ERAs). Although in the jurisdictions reviewed, most of the needs for disclosure of information to the public arising from the use of those techniques and features have been accommodated by information traditionally made public, such as notices of contracts and notices of contract awards, as well as records of procurement proceedings, provision of further information to the public may be necessary. Some specific publication requirements are found, for example, with respect to the records of ERA proceedings in Brazil (see A/CN.9/WG.1/WP.35/Add.1, paragraph 37).

B. Publication of additional regulatory texts not covered by article 5 of the Model Law

1. Scope of article 5 of the Model Law

13. When the Model Law was prepared in the 1990s, the then Working Group worked on the basis that clear and readily accessible laws and regulations relating to procurement would promote transparency and create predictability and confidence in the procurement process.¹⁹ Several articles, primarily article 5 (public accessibility of legal texts), were intended to promote public accessibility of rules regulating public procurement.

14. The original text of article 5 was broadly based on article VI (1) of the 1981 GATT Agreement of Government Procurement,²⁰ except that the latter, apart from referring to laws, regulation and administrative ruling of general application, also referred to judicial decisions and any procedures (including standard contract clauses) regarding government procurement.²¹ The then Working Group did not spend much time in the consideration of the original text of article 5 and made only one substantive change in it by adding the requirement of “systematic maintenance” of the texts referred to in the article.²²

¹⁷ The EU Public Procurement Directive, article 38 (6).

¹⁸ See, e.g., article 22 (1)(3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

¹⁹ See document A/CN.9/315, para. 20, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.

²⁰ As stated in paragraph 1 of the original commentary to article 5 in document A/CN.9/WG.1/WP.25, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.

²¹ The text of the 1981 GATT Agreement on Government Procurement is available at http://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf.

²² For the drafting history of article 5 of the Model Law, see documents: A/CN.9/331, para. 35, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, para. 65, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; A/CN.9/359, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C; and A/CN.9/371, paras. 39-40, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16),

15. Under article 5, as its title “Public accessibility of legal texts” suggests, the requirement of public accessibility and systematic maintenance applies to legal texts regulating procurement. The commentary to the article in the Guide to Enactment also states that the article “is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts.” Legal texts listed in article 5 are “this Law, procurement regulations and administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof.”

16. “Procurement regulations” are defined in article 4 of the Model Law as those to be promulgated by an authorized organ to fulfil the objectives and to carry out the provisions of the Law. The need to ensure public availability of procurement regulations was specifically highlighted as such regulations may be used to exclude the application of the Model Law under its article 1 (2)(c).²³ In the context of article 4, an attempt was made to expand the scope of “procurement regulations” referred to in that article to include administrative directives, rulings and guidelines issued not only by organs authorized to promulgate procurement regulations but also by organs authorized to promulgate such directives, rulings and guidelines. The then Working Group, however, rejected that suggestion, proposing instead for the commentary to note that in addition to the law, various types of directives, rulings and guidelines might be applicable in particular procurement proceedings.²⁴ No such wording was included in the Guide to Enactment, and article 5, by referring to “administrative rulings and directives of general application” alongside “procurement regulations”, makes it clear that these two categories of documents are distinct.

17. The reference to “administrative rulings and directives of general application” appears only in article 5, and the term is not further defined. Except for the note in the original commentary that article 5 does not intend to cover administrative rulings and directives directed or concern individual contractors or suppliers,²⁵ no further guidance was given by the then Working Group as to the scope of the term. (On the other hand, references to “laws” and “procurement regulations” are also found in articles 27 (t) and 38 (s) of the Model Law that require the procuring entity to refer to the law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings in the solicitation documents/requests for proposals for services).²⁶

part two, I, A.

²³ See document A/CN.9/359, para. 20, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.

²⁴ See document A/CN.9/331, para. 34, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.

²⁵ See document A/CN.9/WG.V/WP.25, article 5, para. 3, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.

²⁶ For the drafting history of the relevant provisions in the Model Law, see A/CN.9/331, paras. 93-97, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 181-183, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; and A/CN.9/371, para. 110, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, A.

2. Practices under international systems

18. Most procurement-related international instruments require the publication of “any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement.” This wording is found in article XIX (1) of the current Agreement on Government Procurement (GPA)²⁷ of the World Trade Organization (WTO) and, in a slightly amended version, in particular with a reference to precedential judicial decisions, in article 1019 (1) of NAFTA (Chapter 10).²⁸ Similar wording has been considered for inclusion in article 10 of Chapter XVIII (Government Procurement) of the draft FTAA agreement.²⁹ The APEC non-binding Principles on Government Procurement refer in paragraph 5 to transparency of “the laws, regulations, judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set aside for certain categories of suppliers), procedures and practices (including the choice of procurement method) related to [government procurement],” and in paragraph 61 to establishing and making know clear “procurement laws/regulations/policies, practices and procedures.”³⁰

19. In the context of the negotiations of an agreement on transparency in government procurement in WTO, two approaches to the scope of information on procurement-related legislation and procedures to be required for publication under a future agreement were considered: (i) a formal approach that would require, for example, all laws, ministerial ordinances, administrative guides or internal rules and procedures to be published; and (ii) an approach that would consist of determining the substance of the information that should be made available, irrespective of the legal form. It was argued in WTO that preference should be given to the latter approach since what was of importance was the substance of the information to be made available; the objective of transparency would not be achieved if the publications that contained the relevant laws and regulations did not cover important aspects of national procurement practices and procedures.³¹

3. Practices under some domestic procurement regimes

20. The amount of information regulating public procurement that is made available to the public varies from jurisdiction to jurisdiction depending on legal systems and traditions, in particular the sources, form and nature of domestic rules and procedures regulating procurement, as well as the level of transparency in public procurement in a given jurisdiction. States parties to the relevant international instruments, like the GPA and NAFTA,³² are bound by requirements on transparency of procurement-related regulatory

²⁷ See above, endnote 4.

²⁸ Available at <http://www.dfait-maeci.gc.ca/nafta-alena/chap10-en.asp?#SectionD>.

²⁹ The draft of 21 November 2003 is available at http://www.ftaa-alca.org/FTAADraft03/ChapterXVIII_e.asp.

³⁰ Available at http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

³¹ See, e.g., reports of the WTO Working Group on Transparency in Government Procurement to the General Council (1998 and 1999), annex, para. 27 in the 1998 report, and para. 29 in the 1999 report. Both reports are available under “Annual reports” at http://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm.

³² The following States are currently parties to the GPA: Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong SAR of China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands

texts that may be broader than those applicable domestically to the public disclosure of other regulatory texts.³³

21. As regards the sources, form and nature of domestic rules and procedures regulating procurement, the attention of the Working Group is drawn to the report of the Secretary-General on procurement (A/CN.9/WG.V/WP.22)³⁴ submitted in 1989 to the then Working Group that drafted the Model Law, which in its paragraphs 7 and 30 to 38 addresses these issues. The relevant findings in the report remain pertinent and are reflected below.

22. In jurisdictions where procurement is regulated by binding and mandatory legal norms, comprising a majority of those reviewed for the present study, most rules regulating public procurement would be encompassed by article 5 of the Model Law as they would be considered “legal” or “normative” acts. As such, they are subject to the general principle of publicity of normative acts, usually enshrined in the Constitution and further elaborated in the administrative law, under which to be legally binding a normative act has to be published in the specified media. Procurement-related laws and regulations are usually published in the Official Gazette, while administrative rulings and directives may be published in the same or a different medium. In some jurisdictions, administrative rulings of only some bodies are subject to mandatory publication.³⁵

23. In some countries, public procurement is essentially regulated by internal rules and directives for financial and economic control of government administration adopted under a legislative act, for example a general finance administration act.³⁶ The disclosure of

with respect to Aruba, Norway, Singapore, Switzerland, and United States. The following States are negotiating accession: Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and Chinese Taipei. Information is available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. The NAFTA members are Canada, Mexico and the United States.

³³ In the context of WTO, government procurement is subject to transparency obligations not only under the GPA but also article X.1 of GATT and article III.1 of GATS, with the result that the number of States obliging to publish measures relating to government procurement is not limited to the States parties to the GPA.

³⁴ Reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, B.

³⁵ See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.

³⁶ For example, in Australia, public procurement is largely governed by government procurement policies, consisting of Commonwealth Procurement Guidelines, Finance Circulars and Procurement Guidance, the latter including a range of web-based and printed guidance documents developed by the Department of Finance and Administration to assist agencies and officials to implement the Government’s procurement policy. See article 2.7 of the Commonwealth Procurement Guidelines (CPG), January 2005 (hereinafter the “CPG”), available at http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html. In the United States, federal government procurement is regulated by a detailed code of common procurement policies and rules (the Federal Acquisition Regulations (FAR)), available at http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/01.htm#P52_10741, issued jointly by the General Services Administration, Department of Defense and the National Aeronautics and Space Administration. It prescribes different procedures, offers procuring entities alternative techniques and sets recommended and mandatory contract clauses and attached forms. See also the World Bank’s OECS countries procurement assessment report, as revised in April 2003, available at <http://unpan1.un.org/intradoc/groups/public/documents/CARICAD/UNPAN010037.pdf>.

those rules is usually required by specific acts.³⁷ Under those rules, substantial discretion as regards the conduct of procurement process is often given to the heads of procuring entities. Such a broad delegation of authority enables heads of a procuring entity to formulate procurement rules on an ad hoc basis.³⁸ No specific requirement on their publication may exist,³⁹ although a general requirement of transparency in public administration may apply. Whether such rules are “legal texts” within the meaning of article 5 of the Model Law is open to question.

24. The conduct of procurement in some countries may also be regulated by internal memoranda, circulars, letters of information from ministers and instructions issued within ministries or procuring entities. Some of them could be addressed to state officials rather than to the public in general; however, they may still have bearing on the procurement process as a whole. In addition, generic and topic-specific procurement handbooks and manuals are often prepared by central or local authorities, but could also be issued by procuring entities or agencies responsible for maintaining government procurement websites.⁴⁰ The use of some manuals or handbooks by all procuring entities could be

³⁷ See, for example, the Freedom of Information Act of Australia, 1982, available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/\\$file/FreedmInfo1982_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/$file/FreedmInfo1982_WD02.pdf). In the United States, under FAR 1.105-1, FAR is to be issued as Chapter 1 of Title 48 of the United States Code of Federal Regulations (CFR). Subsequent chapters are reserved for agency acquisition regulations that implement or supplement FAR. In addition, under FAR 1.301 (b), agency acquisition regulations are required to be published for comment in the Federal Register when “they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors.”

³⁸ See, e.g., in Australia, under article 3 of the CPG, the agency chief may issue executive instructions, internal procedures and operational guidelines providing the detailed operational guidance to an agency’s officials on financial management, including procurement. In the United States, under FAR, procuring entities’ competent persons assume substantial regulatory functions: heads of procuring agencies “may issue or authorize the issuance of agency acquisition regulations that implement or supplement FAR and incorporate, together with FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its sub-organizations, and contractors or prospective contractors.” FAR 1.301 (a) (1); and also “may issue or authorize the issuance of internal agency guidance at any organizational level (e.g. designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements).” (FAR 1.301 (a) (2)).

³⁹ For example, under FAR 1.301 (b), internal agency guidance is not subject to the same public disclosure requirements as agency acquisition regulations (see above, endnote 37).

⁴⁰ See, e.g., the “Handbook on IT-Procurement” at the website of the Federal Chancellor of Austria (IT-Beschaffungshandbuch); a number of reference materials on procurement at the website of the Bundeskartellamt of Germany, a federal government body supervising activities of monopolies (<http://www.bundeskartellamt.de/wDeutsch/merkblaetter/Vergaberecht/MerkblVergabe.shtml>), and the “handbook on procurement” providing assistance for the completing of electronic forms issued by the Ministry of Traffic and Construction of Germany (<http://www.bmvbw.de/Bauwesen/Bauauftragsvergabe-1535/Vergabehandbuch.htm>); and a series of manuals that clarify the procurement process, such as “Manual on Projects”, “Manual on Public Construction”, “Manual on Maintenance”, “Electronic Reverse Auction: Supplier’s Manual”, available at the official procurement website of the Brazilian Government (www.comprasnet.gov.br).

mandatory,⁴¹ most however are issued only for reference and guidance. Those documents are generally not considered to be “legal texts” and are therefore not covered by article 5 of the Model Law. They are usually not subject to the same rules of publicity that are applicable to “legal texts” in their domestic jurisdictions. In practice, it has been usually difficult to locate them. Some of them may be commercially published although in some jurisdictions ministerial circulars could be published in the same medium where laws and regulations are.⁴² Some of these texts have been made available to the public through the Internet usually free of charge but in some instances a fee is charged.

25. In another group of countries, where a binding and mandatory legal procurement framework does not exist,⁴³ public procuring entities have the flexibility to contract with other parties through procedures and upon terms they deem appropriate guided by such general principles as equal treatment of suppliers,⁴⁴ promotion of public interests and good governance. There may sometimes exist rules and regulations regulating public procurement issued by various agencies handling public procurement. In at least one jurisdiction, it has been found that such rules could be easily overridden or amended by ministers or officials in those agencies, the rules do not create legal rights and obligations, and it is unlikely that they will be enforceable in the courts.⁴⁵ As such, they are not “legal texts” and thus not covered by article 5 of the Model Law. They may be required to be made available to the public under the general principle of transparency of governance or under a specific act.⁴⁶

⁴¹ See, e.g., in the Philippines, the Act providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Republic Act No. 9184 (the “Government Procurement Reform Act”), section 6, which states that the Government Procurement Policy Board shall pursue the development of generic procurement manuals, the use of which once issued shall be mandatory upon all procuring entities. The Act is available at http://www.tag.org.ph/phillaw/Gov_Pro_Ref_%20Act.pdf.

⁴² See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.

⁴³ In New Zealand, for example, heads of procuring entities are free to manage their departments’ procurement operations. They do it within general principles of good governance and probity requirements found in acts regulating public finance and state sector in general as well as within a broad policy framework for procurement with such general procurement principles as life-cycle best value for money, open and effective competition, and full and fair opportunity for domestic suppliers. See the report of New Zealand to APEC in 2002, available at http://www.apec.org/apec/documents_reports/government_procurement_experts_group/2002.html.

⁴⁴ See, e.g., article 298 of the Constitution of India, 1950, available at <http://indiacode.nic.in/coiweb/coifiles/p12.htm>.

⁴⁵ See, e.g., the findings in the Country Procurement Assessment Report of India by the World Bank, 2003, available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20040402111746.

⁴⁶ In India, no explicit requirement under law for the publication of internal rules of public authorities existed until recently. On 11 May 2005, the Parliament of India (Lok Sabha) adopted the Right to Information Act, 2005, that requires the public authorities to disseminate regularly and widely in a form and manner easily accessible to the public materials related to discharge of their functions, including “rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions.” See article 4 of the Right to Information Bill, 2005, as passed by Lok Sabha of India on 11 May 2005, available at http://www.freedominfo.org/news/india/20050516/THE_RIGHT_TO_INFORMATION_ACT_2005-Final.pdf

26. In the legal systems where laws in part are developed on the basis of case law, precedents set out in judicial decisions and opinions could play a central role in defining national legislation and procedures, including in the field of public procurement. In some other legal systems, judicial decisions and opinions of higher courts may have value for interpretation and application of legislative rules and procedures. Under domestic regimes, such information may or may not be required to be published. The criteria for publishing judicial decisions and opinions are usually established by a court.⁴⁷ Those required to be published are published in a specifically designated official publication, although in some jurisdictions no official publication for judicial decisions may exist.⁴⁸ Some decisions and opinions of courts not published officially could be commercially published and made available online. In at least one jurisdiction reviewed, a specific requirement is found to publish in the electronic system court orders issued in relation to the litigation arising from public acquisitions.⁴⁹

27. An obligation may explicitly be imposed by law on an entity posting texts regulating public procurement to keep them up to date.⁵⁰ In most jurisdictions reviewed, such an obligation is implicit, as amendments to normative acts are not effective until published.

28. In some jurisdictions reviewed, provisions are found on the publication of decisions or conclusions made by an administrative body with supervisory functions over public procurement proceedings. Procurement legislation in some jurisdictions explicitly requires the publication of final rulings of such bodies taken in the course of procurement review

⁴⁷ The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit, for instance, sets out the following criteria that the Court employs in determining whether to publish an opinion: “(1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that gave it general public interest.” See *USCS Ct App D.C. Cir, Appx § XII (2005)*. Most of these criteria are also found, for instance, in the Rules of the United States Court of Appeals for the Fifth Circuit where they are preceded by a general statement that “the publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinion that may in any way interest persons other than parties to a case should be published.” See *USCS Ct App 5th Cir, Loc R 47 (2005)*.

⁴⁸ See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.

⁴⁹ Article 63 of Ordinance No. 20 of Romania of 24 January 2002 concerning public acquisitions by means of electronic bids. Published in the Official Journal of Romania, No. 86, of 1 February 2002. Available at <http://www.riti-internews.ro/og20.htm>.

⁵⁰ See, for example, section 8 (1)(b) of the Freedom of Information Act of Australia, 1982, available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/\\$file/FreedmInfo1982_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/$file/FreedmInfo1982_WD02.pdf); and article 4 of the Right to Information Bill of India, of 11 May 2005, available at http://www.freedominfo.org/news/india/20050516/THE_RIGHT_TO_INFORMATION_ACT_2005-Final.pdf.

proceedings.⁵¹ In some other jurisdictions, it is left to a supervisory body to decide on the publication of its decisions and conclusions.⁵² In some other jurisdictions, the obligation to disclose such information to the public may exist or be implied under general rules on public access to documents and information in the public administration.⁵³

4. Conclusion

29. Some texts regulating public procurement, notably judicial decisions that the Model Law, unlike the GPA and NAFTA, does not require to be published, are not covered by article 5 of the Model Law. The Working Group may wish to subject some of them to the mandatory publication requirement under revised article 5 of the Model Law, for example, along the lines of article XIX of the GPA (see paragraph 18 above). The publication of other additional texts, such as procurement manuals, handbooks and guidance that are usually of a reference character, could be enabled in the revised Model Law, and a note in the Guide to Enactment may elaborate on the value of publication of such texts as well as all other texts that cover important aspects of domestic procurement practices and procedures. For drafting suggestions, see document A/CN.9/WG.I/WP.39/Add.1, section III.

⁵¹ See, e.g., § 108 of the Act of the Czech Republic on Public Contracts providing that “the supervisory body shall make known its final rulings awarded in the past calendar year in the Collection of Rulings of the Supervisory Body in the field of the award of public contracts and on Internet site of the supervisory body.” The Act is available at <http://www.oecd.org/dataoecd/54/21/35013316.pdf>.

⁵² See, e.g., article 7 (2) of the Act on the State Commission for Supervision over Public Procurement Procedure of the Republic of Croatia, 2003, providing that “major decisions or conclusions may be published in an anonymous form in the Official Gazette, should the State Commission so decide.” The Act is available at <http://www.oecd.org/dataoecd/54/63/35013282.pdf>.

⁵³ See, e.g., § 7a of the Public Procurement Act of Norway, available at <http://odin.dep.no/nhd/norsk/p10002767/p10002770/024081-990048/index-dok000-b-n-a.html>.

A/CN.9/WG.I/WP.39/Add.1**Possible revisions to the UNCITRAL Model Law on Procurement
of Goods, Construction and Services – issues arising from
the use of electronic communications in public procurement****ADDENDUM****CONTENTS**

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I. Publication of information on forthcoming procurement opportunities

A. Scope of the study

1. The present study deals with the publication of information on forthcoming procurement opportunities presented as a list of procurements that a procuring agency intends to engage in within a certain forthcoming period of time, usually a budgetary year.¹ The study does not cover advance notices about a specific procurement or summaries of an invitation to tender required to be published in some jurisdictions reviewed before an invitation to tender.² Nor does it analyse provisions of international instruments, like the Agreement on Government Procurement (GPA)³ of the World Trade Organization (WTO), that do not specifically address the subject but contain provisions that may be construed as implying the publication of such information.⁴

2. Unlike invitations to tender or various notices about a specific procurement that are binding on a procuring entity posting them and that inform potential suppliers or contractors about a specifically identified procurement, information on forthcoming procurement opportunities is neither binding nor specific.⁵ The former forms the basis for the conduct of procurement proceedings and gives rise to enforceable rights and obligations, both to procuring entities and suppliers. The latter serves only an informative purpose and contains only general information about forthcoming opportunities available at the time the relevant information is published. In practice, the information on forthcoming procurement opportunities is often accompanied by a disclaimer where some or all of the following are usually stated: (i) all planned procurements are subject to revision or cancellation; (ii) that data is for planning purposes only; (iii) the indicative notice does not represent a pre-solicitation or constitute an invitation to tender or request

¹ See, e.g., in Chile, article 2.19 of the Regulation of Law 19.886 of 29 August 2003 (known as “Ley de Compras”, available at http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html), that defines the “annual procurement and contracting plan” as a list of “goods and/or services of reference character that a certain entity plan to procure or contract in a given calendar year”. The Regulation is available in Spanish at <https://www.chilecompra.cl/Portal/InicioPortal.aspx>.

² For example, in Brazil, provisions are found requiring a procuring entity to publish in advance at least once before the invitation to a specific procurement an advertisement containing a summary of the upcoming invitation to tender. The advertisements are to indicate only the object of procurement and place, date and time where and when prospective participants can read and obtain the full text of the invitation to tender and all other information about the specific procurement. They are to be published in the Official Gazette and in other widely circulated newspapers and in addition can be disseminated by other means “in order to broaden the area of competition.” See article 21 of federal Law No. 8.666 of 21 June 1993 as amended. The text in Portuguese is available at <https://www.planalto.gov.br/> and <http://www.COMPRASNET.gov.br/legislacao/leis/lei8666.pdf>.

³ Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.

⁴ See, e.g., the reference to “options for further procurement” in article IX, 6 (a), of the GPA.

⁵ This is specifically stated, for example, in article 10 of the Public Procurement Law of the Republic of Bulgaria of 25 June 1999, published in the State Gazette, No. 56 of 22 June 1999, available also at http://www.wto.org/english/tratop_e/gproc_e/49.doc, as well as in article 15 (4) of Ordinance No. 20 of Romania of 24 January 2002 concerning public acquisitions by means of electronic bids.

for proposals, nor is it a commitment by the procuring entity to purchase the described suppliers, services or works; and (iv) the notice is not a fully exhaustive list.

B. Extent and purpose of publication of information on forthcoming procurement opportunities

3. References to forthcoming procurement opportunities are found in those jurisdictions where systematic procurement planning exists. Such procurement planning has long existed in many countries while in some countries it is just being introduced. The publication of forthcoming opportunities in turn is a recent phenomenon enabled in some countries by the use of electronic means of communication for publication of procurement-related information.

4. Provisions requiring or encouraging the publication of information on forthcoming procurement opportunities are found, in particular, in Australia, Chile and EU countries.⁶ The EU public procurement directive (the “EU directive”)⁷ and legislation in a number of EU countries reviewed refer in that context to the publication of a “prior information or indicative notice (PIN)”.⁸ In Australia and Chile, reference is made to the publication of

⁶ See, in Australia, sub-clauses 7.16-7.17 of the Commonwealth Procurement Guidelines, January 2005 (hereinafter the “CPG”), available at http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html, and article 12 of the Procurement Guidance on Procurement Publishing Obligations, January 2005, available at http://www.finance.gov.au/ctc/austender-annual_procurement_p.html (hereinafter the “Australian Procurement Publishing Guidance”); in Chile, article 12 of Ley de Compras; and in the EU, article 35 (1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm), and in EU countries, e.g. in Austria, para. 38 of the Federal Act on the Award of Purchase Contracts (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>; in Germany, para. 18(a) of Ordinance on the procurement of supplies by the Minister of Economy (Verdingungsordnung für Leistungen (VOL)) of 17 September 2002, available in German at http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/Homepage_2Fdownload_2Fwirtschaftspolitik_2FVOL.pdf,property=pdf.pdf, para. 9 (a) of Ordinance on the procurement of services by the Minister of Economy (Verdingungsordnung für freiberufliche Leistungen (VOF)), available in German at <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/V/verdingungsordnung-fuer-freiberufliche-leistungen,property=pdf.pdf>, and Part A, Section 2, para. 17 (a) of Ordinance on the procurement of construction contracts by the Minister of Traffic and Construction (Vergabe- und Vertragsordnung für Bauleistungen (VOB)), available in German at http://www.bmvbw.de/Anlage/original_13076/VOB-2002-Teile-A-und-B.pdf; and in Lithuania, article 18.2 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm) (hereinafter the “EU Public Procurement Directive”).

⁸ See, e.g., article 35 (1) of the EU Public Procurement Directive, and article 13 of the Public Procurement Law of Poland of 29 January 2004.

annual procurement plans (APPs).⁹ Other terms, such as “order books”, “preliminary notices,” “informative notices”, or “announcement of intent” are also used.

5. Whereas procurement planning is aimed at disciplining procuring entities, the publication of information on forthcoming procurement opportunities is primarily effected to increase competition and save costs during the procurement by drawing suppliers’ early attention to potential procurement opportunities, which enables them to plan their bids in advance. Both procurement planning and publication of information on forthcoming procurement opportunities are strongly promoted by multilateral development banks (the “MDBs”), in particular through their e-GP initiatives, as being conducive, *inter alia*, to the elimination of “ad hoc” and “emergency” procurements and thus of recourses to less competitive methods of procurement.¹⁰

C. Terms of publication

1. Mandatory or optional

6. Most EU jurisdictions make the publication of PINs mandatory if the estimated total value of the covered procurements is equal to or exceeds a certain threshold.¹¹ It is also the case under the EU directive, but only when a procuring entity takes the option of shortening the time limits for the receipt of tenders.¹² The publication of PINs with respect to other procurements is optional.¹³ Some types of procurements are excluded from the application of the provisions on PINs.¹⁴

7. In contrast, in Australia, a threshold for mandatory publication of APPs is established only for some private entities that are subject to the Commonwealth

⁹ See sub-clause 7.16 of the Australian CPG, and article 12 of the Chilean Ley de Compras.

¹⁰ See, in particular, the Electronic Government Procurement Portal launched by the Asian Development Bank, the Inter-American Development Bank and the World Bank in November 2004 (available at <http://www.mdb-egp.org/data/default.asp>). It contains a number of documents prepared by the MDBs and used by many countries in designing their e-government procurement portals. One of the sections of the portal provides an e-GP Roadmap, in which the posting of procurement plans is addressed (p. 32).

¹¹ See, e.g., para. 38 of the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>; § 29 of the Act of the Czech Republic on Public Contracts, available at <http://www.oecd.org/dataoecd/54/21/35013316.pdf>; para. 9(a) of the Ordinance on the procurement of services by the Minister of Economy of Germany (Verdingungsordnung für freiberufliche Leistungen (VOF)), available in German at <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/V/verdingungsordnung-fuer-freiberufliche-leistungen,property=pdf.pdf>; section 22 (1) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003, available at <http://www.oecd.org/dataoecd/53/19/35014924.pdf>; article 18.2 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>; article 13 of the Public Procurement Law of Poland of 29 January 2004, available at <http://www.oecd.org/dataoecd/52/53/35015461.pdf>; and article 67 of the Public Procurement Act of the Republic of Slovenia of 5 May 2000.

¹² Article 35 (1) of the EU Public Procurement Directive.

¹³ See, e.g., section 22 (2) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003.

¹⁴ See, e.g., article 35 (1) of the EU Public Procurement Directive, for instance, exempting negotiated procedures without the prior publication of a contract notice from the application of the provisions on the publication of PINs.

Government procurement policy framework.¹⁵ For public procuring entities, except for those excluded from the application of the relevant provisions, publication of APPs is mandatory regardless of the estimated total value of expected procurements. Procuring agencies with no significant procurements planned in the forthcoming year should publish either APPs with no detail of planned procurement or a notice in the government procurement website (AusTender)¹⁶ that they expect to have no significant procurement over the coming year.¹⁷ For all entities, the publication of APPs on any procurement that would benefit from the early notice is explicitly encouraged “as a matter of better practice.”¹⁸

2. Deadline for publication

8. It is common to establish the time frame for the publication of PINs and APPs usually linked to the beginning of the budgetary year. For instance, in Austria, the publication is to be made at the beginning of each fiscal or budgetary year.¹⁹ In Australia, procuring agencies are to publish APPs annually by the beginning of the financial year, that is by 1 July, but not earlier than 1 June, but this is without prejudice to procuring entities’ obligation to make their APPs available on request.²⁰ Under the EU directive, where supplies and services are concerned, the publication is to be made as soon as possible after the beginning of the budgetary year; it is different as regards works, the publication in this case is to be made after the decision approving the planning of the works contracts or the framework agreement that the contracting authority intends to award is taken.²¹ In Romania, the announcement of intent to procure is to be published not later than 30 days from the date of the approval of the contracting authority’s budget.²² In some jurisdictions, except for the indication that PINs are to be published at least once a year, no specific deadline for the publication of PINs is found.²³

3. Procurements covered

9. Flexibility is given to procuring entities to exercise their judgment as to which anticipated procurements to include in the PINs and APPs. The Australian procurement guidelines draw the attention of procuring entities in this context to the objectives of APPs’

¹⁵ Those are bodies legally and financially separate from the State who nevertheless could be subject to the CPG. See article 1.3 of the CPG. For them, the requirement to publish APPs only applies to covered procurements which are non-construction procurements above \$400,000 and construction services procurements above \$6 million (in Australian dollars). See article 4.1 of the Australian Procurement Publishing Guidance and articles 3-4 of the Finance Minister’s (CAC Act Procurement) Directions 2004, available at http://www.finance.gov.au/ctc/finance_minister_s__cac_act_pr.html.

¹⁶ See <https://www.tenders.gov.au/federal/index.shtml>.

¹⁷ Article 4.1 of the Australian Procurement Publishing Guidance.

¹⁸ Ibid.

¹⁹ See § 38 (1) of the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>.

²⁰ Article 4.1 of the Australian Procurement Publishing Guidance.

²¹ Similar provisions are found, for example, in article 18.4 of the Law on Public Procurement of the Republic of Lithuania.

²² Article 15 (2) of Ordinance No. 20 of 24 January 2002 concerning public acquisitions by means of electronic bids.

²³ See, e.g., article 71 of the Public Procurement Law of the Republic of Serbia (available at <http://www.oecd.org/dataoecd/34/12/35016323.pdf>), and article 67 (1) of the Public Procurement Act of the Republic of Slovenia of 5 May 2000.

publication, such as to facilitate procurement planning, increase competitiveness, and save costs during the procurement proceedings, and provide a set of factors that a procuring entity may wish to consider when deciding which procurement to publish in APPs. Although no value threshold is specified, the importance of drawing suppliers' early attention to major projects is particularly highlighted. Among other suggested factors bearing on publication are (i) expiration of existing contractual arrangements in the forthcoming financial year, (ii) the likelihood of the procurement actually occurring, (iii) the method of procurement, and (iv) additional value of the APP publication to the agency's relationship with industry, suppliers and contractors.²⁴

4. Period covered

10. In most jurisdictions, a specific reference is made to a certain period of time that PINs or APPs have to cover, usually a calendar or budgetary year.²⁵ In Australia, the APP must cover agencies' planned procurement for the forthcoming financial year, but may also have an outlook for more than the mandatory 12 months. The Australian procurement guidance explicitly provides that in the latter case APPs must still be published annually. In some jurisdictions, regulations imply that PINs may cover shorter periods.²⁶ In practice, PINs found on the websites of procuring entities may stretch beyond the term of one year.

5. Information published

11. Apart from a few required fields, flexibility is given to procuring entities to decide what information and level of detail they should include to meet disclosure and transparency requirements and encourage competition while maintaining the integrity of information.²⁷ Information commonly required to be provided in the publication is: (i) the subject matter of any planned procurement with basic specifications, such as the nature and quantity or value of expected purchases and the place of execution; (ii) the estimated date of the publication of the invitation to tender; and (iii) information about where additional information could be obtained.²⁸ In addition, under the EU directive, it is necessary to indicate whether a framework agreement is involved.²⁹ In Chile, it is also required to indicate any procuring method that will be adopted.³⁰ In Australia, an APP has also to contain a strategic procurement outlook statement for the forthcoming financial year, which "should broadly discuss any key, major or strategic initiatives from which the agency expects procurement to arise."³¹

²⁴ Article 4.2 of the Australian Procurement Publishing Guidance.

²⁵ See, e.g., article 2.19 of the Regulation of Ley de Compras (see above, endnote 1).

²⁶ For example, under article 71 of Public Procurement Law of the Republic of Serbia and article 67 (1) of the Public Procurement Act of the Republic of Slovenia of 5 May 2000, PINs are to be published at least once a year.

²⁷ See, e.g., in Australia, article 7.17 of the CPG and article 4.2 of the Procurement Publishing Guidance.

²⁸ See, e.g., annex 1 of Directive 2001/78/EC of the European Parliament and of the Council of 13 September 2001 on the use of standard forms in the publication of public contract notices (Official Journal of the European Union, No. L 285, 29 October 2001, p. 1) (hereinafter the "EU Public Contract Notices Directive"), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/L_285/L_28520011029en00010162.pdf; and article 22 (3) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003.

²⁹ The EU Public Procurement Directive, annex VII A, under "Prior information notice".

³⁰ See article 98 of Regulation of Ley de Compras (see above, endnote 1).

³¹ See article 4.2 of the Australian Procurement Publishing Guidance.

6. Updating information published

12. Provisions on updating information published with respect to forthcoming procurement opportunities are found in Australia where procuring entities are explicitly encouraged to amend APPs by inserting details of new planned procurements and amending or deleting inaccurate information to keep the indicative notices current and potential suppliers up to date.³² In other jurisdictions reviewed, although no explicit provisions addressing the matter have been found, the objectives of the publication of PINs and APPs and taking advantage of the benefits of such publication (see paragraphs 14 and 15 below) may necessitate keeping information up to date. In some jurisdictions, an obligation to keep information on forthcoming opportunities up to date and accurate may be implied as the PIN is a constituent part of the solicitation documents and a reference thereto, i.e. where it was published, is to be included in the solicitation documents.³³

7. Form and manner of publication

13. Standard forms for the publication of PINs are prescribed by the EU directive.³⁴ In Australia, the form is attached to procurement guidance for reference only. As regards the means and place of the publication of PINs and APPs, in all jurisdictions reviewed, they are to be published by electronic means in the same media where other procurement-related information is published.

D. Value of publication

14. It is common to find provisions allowing procuring entities to shorten time frames for submission of tenders if their PINs or APPs meet requirements as to their minimum content and time of publication.³⁵ To satisfy the minimum content requirement in Australia, APPs must include a description of the procurement, estimated date of the invitation to tender and the procedure to obtain documents, while under the EU directive PINs must contain all the information required for the contract notice insofar as that information is available at the time the PIN is published. To satisfy the requirement as regards the time of publication, APPs, including any amendments thereof, are to be published in Australia between 30 days and 12 months, and under the EU directive, PINs are to be published between 52 days and 12 months before the invitation to tender.³⁶

³² Ibid., article 4.4.

³³ See, e.g., articles 20 (2) (21) and 20 (3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

³⁴ See the EU Public Procurement Directive, annex VIII, 1 (a). A standard form is annexed to the EU Public Contract Notices Directive (see above, endnote 28).

³⁵ In Australia, the time frame may be shortened to not less than ten days in lieu of the standard 25-day minimum time limit, provided reasonable time is still available for potential suppliers to prepare their tenders (see article 4.3 of the Australian Procurement Publishing Guidance). Under article 38 (4) of the EU Public Procurement Directive, the time frame could be shortened to 36 days up to 22 days from usual 52-day time limit applicable in open procedures, and 37- and 40-day time limits applicable in other methods of procurement. See also section 25 (9) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003; articles 38, 39 and 48 of the Law on Public Procurement of the Republic of Lithuania; and articles 60 (3) and 63 of the Public Procurement Act of Slovenia of 5 May 2000.

³⁶ See article 4.3 of the Australian Procurement Publishing Guidance and article 38(4) of the EU

15. In some jurisdictions, procurement law allows procuring entities not to repeat in the invitations to tender or solicitation documents information provided in the PIN unless requested by the suppliers.³⁷

E. Conclusion

16. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or the “Model Law”)³⁸ does not address the publication of forthcoming opportunities. Nor does it address procurement planning in general. The subjects were not discussed when the Model Law was prepared. As the Guide to Enactment states, the Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract and does not purport to address other procurement phases.³⁹ The publication of forthcoming procurement opportunities could be considered as a step in the procurement phase preceding those dealt with in the Model Law and therefore falling outside its current scope.

17. If the Working Group decides that the Model Law should promote the publication of information on forthcoming procurement opportunities, it shall consider (i) whether the Model Law should require the publication of such information or treat it as optional; (ii) whether there should be a threshold for the publication of such information; (iii) other terms of publication, such as the content of information published, the period covered and time frame for publication; and (iv) any other special conditions imposed on publication of such information. For the drafting suggestions, see section III below.

II. Other issues suggested for consideration by the Working Group in connection with electronic publication of procurement-related information

18. Legislative provisions regulating publication of procurement-related information in jurisdictions reviewed do not often adequately deal with the publication of procurement-related information by electronic means. Electronic publication, besides bringing potential benefits for interested suppliers or contractors and the public in general, such as by providing easier access of broader audience to more procurement-related information, has enabled practices that raise a number of concerns, not found in paper-based environment, that may necessitate specific regulation. Some of them are described in subsections A to C below. Subsection D below intends to bring to the attention of the Working Group the issue of fees charged for access to procurement-related information posted online, deferred

Public Procurement Directive.

³⁷ See, e.g., article 20 (3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

³⁸ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as “*UNCITRAL Yearbook*”), vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

³⁹ Part I, paragraph 10, of the Guide to Enactment.

by the Working Group for consideration at a future session.

A. Content of information and its presentation and systematic maintenance

19. As was noted in paragraphs 9 and 10 of document A/CN.9/WG.I/WP.39, in practice, more information than required to be published by legislation is made available to the public through electronic means of communication, usually by posting on the Internet. Some of such information may be authorized to be published by law while some is published at the discretion of various public bodies, including procuring entities and entities in charge of maintaining government procurement electronic systems. While the content and manner of publication of information required to be published by law are usually regulated, no similar regulation may exist with respect to information enabled or encouraged to be published or published in practice.

20. Unless some guidance is given as regards the scope and manner of publication, publication of abundant information may impede retrieval of procurement-related information that is necessary and useful. Systematic maintenance of such information and therefore its accuracy, consistency and relevance may also be jeopardized. As a result, although more procurement-related information may be made available in practice, easy public access to information of practical use and importance may be impeded considerably. The content of disclosure may also raise other concerns, including over legitimate commercial interests of the parties, law enforcement and fair competition.

21. These potential problems may be mitigated if the requirement for centralized, systematized and standardized posting of procurement-related information found in some jurisdictions reviewed were to apply to all procurement-related information published. However, in most jurisdictions reviewed, such a requirement extends only to procurement-related information required to be published by law (see sections B and C below).

22. The Working Group, in drafting the relevant provisions of the Model Law on publication of procurement-related information, may wish to consider formulating general rules with respect to the content and manner of publication of procurement-related information. In particular, guidance could be given that no information could be made available to the general public if such a disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition (see, for instance, a similar wording in article 55 (3) of the Model Law). Furthermore, the advantages of systematic and standardized presentation of information may be highlighted, in particular for ease of access, retrieval and systematic maintenance of procurement-related information.

23. With the increasing volume of information made available to the public through online publication, the need for systematic maintenance of information posted becomes more apparent to ensure its accuracy, relevance and consistency. Under the Model Law, the obligation of systematic maintenance extends only to legal texts published under its article 5. The obligation was incorporated in the article without in-depth consideration upon the adoption of the Model Law by the Working Group in 1993. The Working Group may wish to consider extending the obligation of systematic maintenance to all information published, and this could be reflected in the revised article 5 (see section III below), with the Guide to Enactment noting that in a non-paper-based environment, achieving systematic maintenance has become significantly less time- and cost-consuming. Alternatively, the Working Group may wish to decide to limit the obligation of systematic

maintenance only to information required to be published under the Model Law.

24. The obligation of systematic maintenance of information published is closely linked to the issue of liability of procuring entities for the failure to provide accurate and up-to-date information to potential suppliers or contractors. The latter issue was discussed when the Model Law was prepared in the context of including references to laws and regulations directly pertinent to the procurement proceedings in solicitation documents (see article 27 (t) of the Model Law).⁴⁰ The conclusion reached at that time, as reflected in article 27 (t), was that the omission of reference to laws and regulations pertinent to the procurement proceedings should not constitute grounds for review or give rise to liability on the part of the procuring entity. The Working Group may wish to consider the issue of liability for inaccurate or outdated information in the context of revised article 5 or defer the consideration of that issue until its consideration of the subject of “review of procurement proceedings”.

B. Involvement of intermediaries in electronic publication

25. Procuring entities may be authorized to post information directly without intermediaries or to send it to a designated advertising agent. The first method is practiced in Australia,⁴¹ the second exists, for example, in the EU.⁴² The latter, while ensuring standardization and consistency in posting the information, may result in delays and mistakes. The MDBs in the context of their e-government procurement (e-GP) initiatives⁴³ recommend that “from the very beginning, the procuring entities themselves must publish their information—directly, without third-party intervention—on the single website, abiding by its rules.”⁴⁴

26. The Working Group may wish to consider elaborating on advantages and disadvantages of those options in the Guide to Enactment.

⁴⁰ For the consideration of the issue, see documents: A/CN.9/315, paras. 46-47, reproduced in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as the “*UNCITRAL Yearbook*”), vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A; A/CN.9/331, paras. 93-97, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; and A/CN.9/343, paras. 181-183, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A.

⁴¹ See AusTender User Guide, December 2004, available at http://www.contracts.gov.au/docs/GaPSUserGuide_20040401.pdf.

⁴² The European Union operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Union, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard-copy form and in additional electronic media).

⁴³ See, in particular, the Electronic Government Procurement Roadmap, pp. 32-40, available in the MDBs’ Electronic Government Procurement Portal (<http://www.mdb-egp.org/data/default.asp>).

⁴⁴ *Ibid.*, p. 32.

C. Multi-posting of procurement-related information

27. Procurement-related information is frequently posted on a centralized government procurement website as well as on the websites of procuring entities. Even where a centralized system for publication of procurement-related information exists, procuring entities may still be allowed to use other media for publication.⁴⁵

28. Multi-posting of procurement-related information on the Internet may have a negative impact on reliability and integrity of procurement-related information and the procurement process as a whole. In particular, it may cause the fragmentation of procurement-related information and confusion as regards authenticity and authoritativeness of procurement-related information. In addition, it may unintentionally put some potential suppliers getting access to the “correct” website to a more beneficial position than the others, as not the same information posted through the Internet is made available instantaneously to all interested suppliers.

29. These concerns are being addressed in legislation of some jurisdictions. Most of them prohibit the publication of various procurement-related information in different media before it is published in the specifically designated central medium.⁴⁶ Some of them specifically state that the same notices published in different media must contain the same information.⁴⁷

30. The MDBs as well address those concerns and recommend that information be published on a single website, according to the rules applicable to the maintenance of the website. MDGs’ e-GP guidelines state that “a single website implies that all the information on procurement must disappear from the websites of the procuring entities. There is no reason why suppliers should visit many different physical or electronic sites in order to reach public sector procurement opportunities, or to establish an interoperability mechanism to substitute for the lack of basic standards. The disappearance of procurement information from individual sites may be gradual, inversely proportional to the development of the single website, but respecting the primacy of the single website, which must contain the original, legally binding information, as well as define the standards and general rules.”⁴⁸

31. The Working Group may consider it useful to address these issues, either in the context of its consideration of the “accessibility standards” in draft article 4 bis (see A/CN.9/WG.I/WP.38 and addendum) or in revised article 5 (see section III below).

⁴⁵ See e.g., articles 3-A and 3-B of Law No. 8.666, of 21 June 1993 of Brazil; and article 19.2 of the Law on Public Procurement of the Republic of Lithuania. Article 3-A of the Brazilian Law, for example, read that “all organs of the Public Administration, autonomous entities and public foundations shall publish at the appropriate time through their own Internet sites or through specific sites of the Federal, State or Municipal Administration, data and information relating to procurement proceedings in course, and their results”. Article 3-B further states that State governments shall create specific Internet sites for the publication, under standing agreements, of information relating to procurement carried out by municipalities with less than 100,000 (one hundred thousand) inhabitants that do not possess the technical or financial resources necessary to comply with article 3-A.

⁴⁶ See, e.g., article 23 (1) of the Public Procurement Act of the Republic of Croatia of 14 December 2001, available at <http://www.oecd.org/dataoecd/54/62/35013293.pdf>.

⁴⁷ See, e.g., articles 35 and 36 of the EU Public Procurement Directive, and article 19.5 of the Law on Public Procurement of the Republic of Lithuania.

⁴⁸ See the Electronic Government Procurement Roadmap, available in the MDBs’ Electronic Government Procurement Portal (<http://www.mdb-egp.org/data/default.asp>), p. 32.

Alternatively, it may be decided that provisions in the Guide could sufficiently address those issues. Subject to the Working Group's position on the issue, the Guide could elaborate on desirability of a single centralized medium where all legally-binding, authentic and authoritative procurement-related information is to be consistently and in a timely manner made available to the public and systematically maintained, and a desirability of discontinuing websites of various procuring entities. Alternatively, it may provide specific guidance as regards multi-posting of procurement-related information on the Internet, in particular regarding the need of (i) establishing a clear hierarchy of existing websites and making such a hierarchy known in all websites where procurement-related information is posted by procuring entities or other authorities, (ii) including a mandatory disclaimer about unofficial nature of information posted in websites other than centrally designated website, (iii) providing an obligatory link to the central website, and (iv) defining timing for posting procurement-related information on various websites (e.g. no information could be posted on individual websites before its appearance on the central website).

D. Fees charged

32. The information disseminated through electronic means is usually made available to the public free of charge. Nevertheless, in some instances, subscription or other types of access fees may be charged that may hinder access to information.⁴⁹

33. The Model Law envisages a possibility of charging a fee only for the provision of prequalification and solicitation documents and requests for proposals (articles 7, 26 and 37) and provides that the price that the procuring entity may charge in such cases must reflect only the cost of printing and providing information to suppliers or contractors, although the term "providing" is not defined. The issue of charging fees for information generally made available to the public was before the Working Group at its seventh session (see A/CN.9/WG.I/WP.34 and addenda). The Working Group deferred consideration of the issue. The Working Group may wish to consider whether the Guide to Enactment should contain a discussion regarding negative consequences that charging fees may have for access to general procurement-related information.

III. Drafting suggestions

A. Article 5

34. At its seventh session, the Working Group agreed that general principles regulating the publication of procurement-related information under the Model Law should be consolidated in a revised article 5 of the Model Law, which as revised would apply not only to the publication of legal texts as article 5 currently does but also to the publication of information currently dealt with in other articles of the Model Law, such as invitations to participate in specific procurement (articles 24, 37, 46, 47 and 48 of the Model Law), and notices of contract awards (article 14 of the Model Law), as well as to other information, the publication of which may be envisaged in the revised Model Law. It was further agreed that revised article 5 would be based on the general principles that any means of publication or combination thereof could be chosen, and that the chosen means had not to be justified, provided that the chosen means of publication complied with

⁴⁹ See, e.g., South Africa (http://origin.sundayobserver.lk/2001/pix/gov_gazette.html).

certain “accessibility standards”, such as they should not unreasonably restrict access to procurement proceedings and should not discriminate against and among suppliers (A/CN.9/575, paragraphs 25-26). These general principles and the “accessibility standards” are dealt with in draft article 4 bis discussed in a note by the Secretariat (A/CN.9/WG.I/WP.38 and addendum).

35. At its seventh session, the Working Group also agreed that in the continuation of its deliberations regarding draft article 5 at a future session, the following text would be considered:

“Article 5. Public accessibility of procurement-related information

“(1) The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereto, as well as any other documents and information required to be published [or being published under this Law] shall be promptly made accessible to the public and systematically maintained.

“[(2) Any further information, such as regarding forthcoming opportunities, internal controls or guidance, that an enacting State or procuring entity chooses to publish shall be promptly made accessible to the public [and systematically maintained].]”

36. As regards paragraph 1 of the revised article, the wording in square brackets intends to cover the information that, for example, although not required to be published under the Model Law, is nevertheless required to be made available for inspection by the general public and is made available for such purpose through the publication (see article 55 (3) of the Model Law as regards the decisions taken in the course of procurement review proceedings). The Working Group may wish to consider adding a specific reference in the paragraph to judicial decisions and policies, procedures and practices related to procurement and expanding the commentary in the Guide to Enactment by drawing from the wording of paragraph 68 of the UNCITRAL Model Law on Electronic Commerce⁵⁰ that defines “the law” as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law, including common law rules.

37. Paragraph 2 of the revised article has not been considered by the Working Group. It is intended to cover other information that is made available to the public at the discretion of public authorities, including procuring entities. The Guide could elaborate on the value of publicizing all regulatory texts related to procurement specifying that, while such requirement might be too onerous when only paper means are available, this might not be the case when electronic means are used. It is expected that the advantages of the use of electronic means of communication in procurement, including for the publication of procurement-related information and its systematic maintenance, would be discussed in the Guide in the context of functional equivalence of all means of communicating, publishing, exchanging or storing information or documents, which is now addressed in draft article 4 bis. The commentary to revised article 5 could usefully cross-refer to the relevant discussions in the Guide.

⁵⁰ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>).

38. A reference to information on forthcoming procurement opportunities in paragraph 2 of the revised article should be considered together with a proposed article 5 bis (see subsection B below). The way of treating such information in the revised article 5 will depend on whether the Model Law would deal with the subject at all and, if so, under what terms, in particular whether the publication of such information would be optional or mandatory (see paragraphs 16 and 17 above).

39. The Working Group, in conjunction with its consideration of the revised article 5, may wish to consider formulating general rules of publication of information, as discussed in section II above (see, in particular, paragraphs 22-24, 26 and 31 above), and its position as regards the charging of fees for information generally made available to the public (see paragraph 33 above), for inclusion in the Model Law or the Guide to Enactment. It may also wish to assess whether the same general principles of the publication of procurement-related information (see paragraph 34 above), any rules of publication that the Working Group may wish to formulate, “accessibility standards” (see A/CN.9/WG.I/WP.38 and addendum) and the obligation of “systematic maintenance” (see paragraphs 23-24 above) would equally apply to the information required to be published under paragraph 1 and information referred to in paragraph 2 of the revised article 5.

B. Article 5 bis (publication of information on forthcoming opportunities)

40. At its seventh session, the Working Group expressed a preference for Variant B of the proposed article 5 bis “Notice of procurement opportunities”, as contained in A/CN.9/WG.I/WP.34/Add.2, which provided as follows:

“Within [the enacting State specifies a time-limit] after the begin of a fiscal year, procuring entities may publish notice of their expected procurement requirements for the following [the enacting State specifies a period].”

41. Subject to the Working Group’s decision on the publication of information on forthcoming procurement opportunities under the Model Law, Variant B could be expanded, in particular, to address other terms of publication of such information, or relevant guidance could be given in the Guide to Enactment (see paragraphs 16 and 17 above). The Guide could also draw the enacting State’s attention to the value of publication of such information. In particular, it could state that such information, while not being binding on procuring entities and therefore not having negative interference with the budgeting process, disciplines procuring entities in procurement planning, diminishes cases of “ad hoc” and “emergency” procurements and consequently, recourses to less competitive methods of procurement. The Guide could also elaborate that publication of such information enables more suppliers to learn about procurement opportunities, assess their interest in participation and plan their bids in advance accordingly, which also positively affects competition, transparency and cost-saving in procurement. The positive impact such information could have in a broader governance context, in particular in opening procurement for general public review and local community participation, could also be highlighted.

C. New provisions

42. The Working Group may wish to consider publication of additional information, necessitated by specific procurement techniques and features, such as suppliers lists, framework agreements and electronic reverse auctions (see document A/CN.9/WG.I/WP.39, paragraph 12), together with other substantive issues involved in such procurement techniques and features that the Working Group will take up in due course.

**D. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services:
drafting materials for the use of electronic reverse auctions
and addressing abnormally low tenders in public procurement,
submitted to the Working Group on Procurement at its eighth session
(A/CN.9/WG.I/WP.40 and Add.1) [Original: English]**

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”)¹ is set out in paragraphs 5 to 33 of document A/CN.9/WG.I/WP.37, submitted to the Working Group for its consideration at the current session.

2. At its seventh session (New York, 4-8 April 2005), the Working Group addressed the following topics: electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process (such as controls over their use), electronic reverse auctions, and abnormally low tenders (see, further, document A/CN.9/575). The Working Group requested the Secretariat to prepare drafting materials for consideration on these topics at its eighth session (as regards the Working Group’s conclusions regarding electronic reverse auctions in particular, see A/CN.9/575, paras. 60-67).

3. This note will present for the Working Group’s consideration the drafting materials requested for provisions to govern the use of electronic reverse auctions and to address abnormally low tenders. It draws on, and should be read in conjunction with, the related notes by the Secretariat presented to the Working Group on the topics at its seventh session (A/CN.9/WG.I/WP.35 and Add.1 and A/CN.9/WG.I/WP.36).

II. General remarks

4. At its seventh session, the Working Group noted that electronic reverse auctions were increasingly used as a method of procurement in those countries where e-commerce had become a norm. The prevailing view of the Working Group at that session was that, taking account of their increasing use and the twin aims of harmonization and promotion of best practice, provisions governing the use of electronic reverse auctions should be included in the text of the Model Law (A/CN.9/575, para. 60). The Working Group also decided at its seventh session to consider the more detailed aspects of electronic reverse auctions, such as conditions for their use and their modalities, at its eighth session (A/CN.9/575, paras. 9 and 67).

5. The Working Group therefore requested the Secretariat to draft general enabling provisions for the Model Law to provide for the use of electronic reverse auctions, and to set out the key principles for their use. The Working Group requested that the related draft text of the Guide to Enactment should address the use of electronic reverse auctions in detail, in particular their advantages and disadvantages, and how to address any risks that they pose.

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum* (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law, Volume XXV: 1994* (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

6. The Working Group has also given the Secretariat the following additional guidance when drafting these materials for its consideration:

(a) The enabling provisions should be based on the use of electronic reverse auctions as a procurement method rather than a phase in other procurement methods;

(b) The enabling provisions should address the general conditions for use of electronic reverse auctions, and should not exclude any category of procurement (goods, construction or services) per se;

(c) It should be made clear that the main condition as regards the suitability of electronic reverse auctions as a procurement method is whether or not the specifications can be drafted with precision and the criteria to be subject to auction easily and objectively quantified; and

(d) The materials should take account of the approach on the same subject taken by the parties currently revising the plurilateral Government Procurement Agreement of the World Trade Organization (GPA) as regards the use of electronic reverse auctions (A/CN.9/575, paras. 62, 66 and 67).²

7. The Secretariat has presented the drafting materials so that the provisions are consistent with those applied by the Model Law to other methods of procurement. Consequently, as tendering is the general procurement method for goods and construction, the provisions enable an electronic reverse auction procedure that follows the pattern of the standard tendering method, adapted to provide for an electronic reverse auction. The conduct of the auction itself would under the draft text below be governed by the principles and objectives of the rules governing tendering. The Secretariat has also identified the articles of the current text of the Model Law that would require consequential amendment so as to enable the use of electronic reverse auctions, and those consequential amendments are set out in chapter V of the addendum to this Note (A/CN.9/WG.I/WP.40/Add.1).

8. As electronic reverse auctions may also be appropriate in the circumstances in which the Model Law allows use of restricted tendering under article 20 (in cases in which the time and costs of a tendering procedure would be disproportionate, or in cases of a limited number of suppliers because of highly complex or specialized goods), the materials also include an option to provide for an equivalent to a restricted tendering procedure (see, further, para. 24 below).

III. Draft provisions to enable the use of electronic reverse auctions under the Model Law and to establish conditions for their use

A. General remarks

9. Proposed article 19 bis for the Model Law offers options for the Working Group to consider as to the conditions for use of electronic reverse auctions, and operates as the general enabling provision requested. As to its location, the Working Group may consider

² The Secretariat has been advised in consultations with the World Trade Organization that there is as yet no decision as to whether electronic reverse auctions will be included in the revised text of the GPA.

that the draft article should be presented as part of chapter II (“Methods of procurement and their conditions for use”) and, as a form of tendering, after the current article 19 (“Conditions for use of two-stage tendering, requests for proposals or competitive negotiation”).

10. Commentary on the proposed text for the Model Law, and outstanding issues for the Working Group to address follow the draft itself. Suggestions for the Guide to Enactment text, which explains the features of the draft article appear thereafter. Amendments and additions to the drafting suggestions, notably to the Guide to Enactment text, will therefore be required to reflect the Working Group’s conclusions as to the outstanding issues. This format will be followed for each of the draft articles presented in this Note.

B. Proposed new text for the Model Law: new article 19 bis

Article 19 bis. Conditions for use of electronic reverse auctions

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article 47 bis and ter,* in the following circumstances:

(a) Where it is feasible for the procuring entity to formulate detailed [, and] precise [and accurate] specifications for the goods [construction or services] such that homogeneity in the procurement can be achieved [;

(b) Where there is a competitive market of at least [ten] suppliers or contractors [that are anticipated to be qualified to participate in the electronic reverse auction]; and]

[(c) The goods [, construction or services] to be procured are [standardized] [standard products] [commodities], [[such that] [and] the price [and other quantifiable criteria expressed in figures or percentages] thereof [is] [are] the only [criterion] [criteria] to be used in determining the successful bid] [[such that] [and] all criteria that are to be submitted and evaluated in the auction can be evaluated automatically].

C. Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment regarding article 19 bis

11. There are no definitions of the terms “electronic”, “reverse”, and “auction” provided for in the draft articles of the Model Law. The Working Group is to consider at its eighth session whether or not to include a definition of the term “electronic” in the context of the use of electronic communications in the procurement process (see, section III.D of A/CN.9/WG.I/WP.38/Add.1). The Working Group may wish to consider whether any definition of an “electronic reverse auction” in the text of the Model Law is necessary, or whether the definition proposed in the Guide to Enactment text will be sufficient.

12. The description of an electronic reverse auction assumes that all participants will use electronic means of communication in the auction itself (see para. 23 of

* See chapter IV below for the proposed draft text of that article.

A/CN.9/WG.I/WP.38, the drafting suggestions following which allow the compulsory use of electronic means of communication). It is possible for entities to facilitate the participation of suppliers that do not have Internet access by setting up a proxy (possibly in the offices of the procuring entity) to bid on the supplier's behalf during the auction, based on telephone instructions from the supplier. The draft article does not address this point,³ and the Guide to Enactment could refer to this possibility. The Guide could also address issues arising from the relative novelty of electronic reverse auctions, such as the provision of training and holding simulated auctions.

13. The main issue from the drafting perspective is the extent to which the Model Law should prescribe the conditions for the use of electronic reverse auctions, such as the level of detail and accuracy in the specification of the items to be procured (para. 1 (a) of the draft article), and the degree of competitiveness in the market (para. (1) (b)).

14. Paragraph (1) (c) presents options that would enable the procuring entity to use electronic reverse auctions for the procurement of construction and services as well as goods, sets out the extent to which appropriate goods must be specified in order to use electronic reverse auctions, and presents options for the presentation of only price criteria, or both price and non-price criteria through the auction. Paragraphs 20 to 25 of A/CN.9/WG.I/WP.35 discuss equivalent conditions for use that are in current use under various procurement systems. Most systems limit the use of electronic reverse auctions to items for which precise specification is possible, and exclude most construction procurement, but in other respects, there is some variation in the degree of prescription to be found. The Working Group may wish to consider the extent to which the article should be prescriptive or facilitative, and the level of guidance on these questions that should be included in the Guide to Enactment.

15. Also, as regards paragraph (1) (c), the Working Group may wish to consider the extent to which the conditions for use of electronic reverse auctions should be specified. For example, should auctions be used only for standardized products, for those whose variable criteria can be expressed in figures or percentages, for products whose variable criteria can be expressed in price equivalents, or a combination of these features? An example of a product whose variable criteria can be expressed in price equivalents may arise as follows: the aesthetics of a building or product design can be given a score out of 100 that can be expressed in price terms (for every extra design point the procuring entity would be willing to pay an extra, say, 5,000 euros). Thus, design could be taken into account as an award criterion, by allocating points that have a price equivalent before the auction is held, and these points can then be taken into account automatically in the auction itself.⁴ However, the design itself is not itself evaluated during the auction. The Working Group may care to note that the draft text for the conduct of the auction itself, set out in chapter IV below, implicitly requires that all criteria that are to be submitted and evaluated in the auction can be evaluated automatically.

16. A final issue that the Working Group may wish to consider is whether only electronic reverse auctions (as opposed to reverse auctions in their conventional, non-electronic form) are to be provided for in the Model Law (see, further, para. 63 of A/CN.9/575, in which are recorded the strong reservations expressed at the Working Group's seventh session as to

³ If enacting States' domestic systems allow suppliers to operate through agents, explicit provision may not be needed.

⁴ An auction with such a criterion would be a Model 2 electronic reverse auctions as described in paragraph 33 of A/CN.9/WG.I/WP.35.

whether the use of conventional reverse auctions constitutes the best practice that the Model Law should promote). The draft provisions and commentary above are presented on the basis of providing for electronic reverse auctions alone.

D. Proposed text for the Guide to Enactment regarding article 19 bis

17. The Working Group may wish to consider the following draft text for the Guide to Enactment, noting that stylistic and other minor changes may be needed to ensure internal consistency in the Guide when finalized.

Article 19 bis. Conditions for use of electronic reverse auctions

(1) An electronic reverse auction (electronic reverse auction) can be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who compete against each other to win the contract by submitting successively lower-priced or better-ranked bids during a scheduled time period. Such auctions have been increasing in use since the text of the original Model Law was adopted in 1994. It has been observed that electronic reverse auctions have many potential benefits. First, they can improve value for money (in that better value for money can be achieved through a competitive market price, and substantial cost savings can be realized through dynamic and real-time trading). Secondly, they can enhance the efficient allocation of resources (reducing the time required to conduct a procurement, and reducing the administrative costs of the traditional open tendering procedure). Thirdly, they can enhance transparency in the procurement process, in that information on other bids is available and the outcome of the procedure visible to participants, matters that also disfavour abuse and corruption. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs. However, concerns have been expressed that electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can tend to overuse and use in inappropriate situations.

(2) In order to allow procuring entities in enacting States to take advantage of this new procurement method in an appropriate way, the Model Law has been revised so as expressly to authorize the use of electronic reverse auctions as a procurement method, but subject to the conditions set out in articles 19 bis, and 47 bis and ter. Further guidance on the various aspects of the provisions is set out in the article-by-article commentary below.

(3) *[insert guidance on conditions in paragraph (1)(c)—see paragraphs 13 and 14 above].*

(4) In the light of the matters set out above, enacting States may wish to specify further conditions for the use of electronic reverse auctions in regulations. For example, their use may be restricted to [standardized goods] [standard products] [commodities], [and some simple types of construction and services], such as commodities (fuel, standard information technology equipment, office supplies and primary building products), and items with no or limited impact from post-acquisition costs and without services or added benefits after the initial contract is completed. Although illustrative lists may be used to identify goods [construction and services] that may be procured using electronic reverse auctions, enacting States should be aware that such lists will require periodic updating as new commodities or other appropriate items appear. It has been observed that some construction works and services (e.g. road maintenance) may be appropriately procured through

electronic reverse auctions, but the requirement for detailed [, and] precise [and accurate] specifications will exclude most services and construction from the use of this procurement method.

(5) In order to minimize the risk of collusive practices, including price signalling, and to preserve bidders' anonymity during the electronic reverse auction, enacting States may wish to specify the minimum number of suppliers or contractors in the appropriate market [that are anticipated to participate in the electronic reverse auction]. Article 47 bis* provides that the electronic reverse auction is to be [suspended/abrogated] should the number of bidders drop below that minimum before the opening of the electronic reverse auction itself.

IV. Draft provisions addressing the conduct of electronic reverse auctions under the Model Law—proposed new article 47 bis and ter

18. For the ease of the Working Group during its deliberations, the proposed text to provide for the conduct of electronic reverse auctions has been separated into two periods—the pre-auction period and the auction itself, presented as new articles 47 bis and ter respectively—and with suggested Guide to Enactment text and additional commentary thereafter. The Working Group may wish to consider whether the final version of the provision should be combined into a single article, for the ease of use of enacting States.

A. Pre-auction period

1. General remarks

19. The Working Group may wish to address the conduct of the electronic reverse auction itself entirely in the Model Law or in draft regulations, or some combination thereof, with appropriate commentary in the Guide to Enactment in each case. The draft below is presented as a draft article for the Model Law, but some of the text could equally take the form of draft regulations. For example, and given their specificity, regulations may be more suitable for the items in paragraph (4) (e) (i) to (xi) (which are accordingly presented in square brackets).

20. Paragraphs 7 to 21 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

2. Proposed new text for the Model Law: new article 47 bis

Article 47 bis. Conduct of electronic reverse auctions in the pre-auction period

(1) The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.

[(2) In any procurement by means of an electronic reverse auction, the procuring entity [shall] [may] engage in prequalification proceedings in accordance with article 7].

* See chapter IV below for the proposed draft text of that article.

(3) Suppliers or contractors shall, prior to the auction, submit initial tenders that are complete in all respects, except that the tenders need not include the features that are to be presented through the auction. [The procuring entity may, however, require that tenders include such features.]

(4) (a) The procuring entity shall carry out on an initial evaluation of tenders to determine responsiveness in accordance with article 34, and to assess all features of tenders that are not to be presented in the auction in accordance with the award criteria set and with the weighting fixed for them. [The procuring entity shall rank the tenders on the basis of the features of tenders that are not to be presented in the auction in accordance with the award criteria.]

(4) (b) Following the evaluation referred to in paragraph (4) (a), the procuring entity [shall send an invitation to participate in the auction to all suppliers or contractors except for those whose tenders have been rejected under paragraph (4) (a)] [may send an invitation to participate in the auction to the tenders that have received the highest ranking in accordance with the preceding paragraph, subject to the provisions of paragraph (e) below].

(4) (c) The invitation to participate shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction.

(4) (d) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors [qualified to participate in/admitted to/that have registered to participate in] the auction [falls below [number]] [is in the opinion of the procuring entity insufficient to ensure effective competition], the procuring entity shall [withdraw the electronic reverse auction].

(4) (e) Unless already provided to suppliers or contractors, the invitation to participate in the electronic reverse auction shall include [the following information] [the items set out in article 27 (n) bis,* and]:

(i) If features of tenders other than price have been used in the initial evaluation, the results of the initial evaluation of the invitee's own tender;

[(ii) The date and time of the opening of the electronic reverse auction;

(iii) The website address at which the electronic reverse auction will be held, and at which the auction rules, the tender and other relevant documents will be accessible;

(iv) The requirements for registration and identification of bidders at the opening of the auction;

(v) The features of the tender that are to be presented at the auction;

(vi) If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price features to be presented [any such feature is to be quantifiable and capable of expression as a figure or percentage]. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender;

(vii) The information that will be made available to bidders in the course of the auction and, where appropriate, how and when it will be made available;

* For the text of article 27 (n) bis (contents of the solicitation documents), see chapter V of A/CN.9/WG.I/WP.40/Add.1.

(viii) All relevant information concerning the auction process itself, including any identification data for the procurement, technical requirements as to information technology equipment to be utilized, whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);

(ix) The conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other features that will [be required when bidding] [must be improved in any individual new submission during the auction] [and the time which the procuring entity will allow to elapse after receiving the last submission before closing the auction];

(x) All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;

(xi) The criteria that shall determine the closure of the auction;] and

(xii) All [other] information necessary to enable the supplier or contractor to participate in the auction. [The procurement regulations may prescribe the information that is to be so provided.]

(5)] The procuring entity shall allow a period of time to elapse between the issuance of the invitation to participate in the electronic reverse auction and the opening of the auction sufficient so as to ensure sufficient participation in the auction. The procurement regulations may set out a minimum time period for this purpose.

3. Commentary and further issues for consideration by the Working Group and possible inclusion in the Guide to Enactment

21. Paragraph 2 of the draft article addresses the qualification of potential bidders. The aim of prequalification proceedings is to ascertain that applicants meet the minimum requirements for performance of the contract, such that the successful supplier or contractor is known at the closure of the auction. A pre-qualification phase also enables the number of participants to be invited to the electronic reverse auction to be assessed. If a smaller number than anticipated is received, and if no effective competition can be expected, a procuring entity may be required to withdraw the auction under paragraph 4 (d).

22. In electronic reverse auctions conducted under the Brazilian system, there is no qualification phase until after the closure of the auction, so as to save the time and costs involved in a pre-auction qualification phase that could involve the qualifications of many suppliers being assessed.⁵ The Working Group may wish to consider the costs and benefits of pre- and post-auction qualification, and whether the procuring entity should be given the option of selecting when to conduct the qualification phase, prior to instructing the Secretariat as to how to provide for qualification in the context of electronic reverse auctions.

23. Paragraph 4 (a) of the draft article presents as an option that the procuring entity is to rank the tenders on the basis of the features of tenders that are not to be presented in the auction in accordance with the award criteria. This option is appropriate if Model 2 electronic reverse auctions as described in paragraph 33 of A/CN.9/WG.I/WP.35 are to be

⁵ See, further, para. 40 and endnote 68 of A/CN.9/WG.I/WP.35.

permitted (rather than just Model 1 auctions, in which all aspects of tenders that are to be evaluated in selecting the winning bidder are presented through the electronic reverse auction, and no ranking is required). The Working Group may therefore wish to consider whether both Models 1 and 2 should be provided for in the Model Law, or only Model 1.

24. Paragraphs 4 (a) and 4 (d) of the draft article also address the question of the number of potential bidders to be invited to participate in the auction. The issue for consideration is the additional time and costs burden of running larger auctions as against their more rigorous competitive effect. The Working Group may wish to consider whether open tendering should be required, whether limiting the number of participants in the auction should always be permissible, or whether the procuring entity should be entitled to adopt either approach, for example, taking into consideration the conditions for use of restricted tendering set out in article 20 of the text of the current Model Law. Article 20 provides that “the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 47, when: (a) the goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.”

25. As regards paragraph (4) (e), the Working Group may wish to consider whether details of the information necessary to enable the supplier or contractor to decide whether to participate in the auction (items 4 (e) (ii) to (xi)) should be set out expressly in the text of the draft article. Alternatively, the obligation under draft article 47 bis of the Model Law could be to provide all relevant information to the extent that the solicitation documents have not already done so. Details of the information could also or alternatively be included in procurement regulations, with appropriate further commentary in the Guide to Enactment.⁶

4. Proposed additional text for the Guide to Enactment regarding new article 47 bis

Article 47 bis. Conduct of electronic reverse auctions in the pre-auction period

(1) The electronic reverse auction is to be conducted as a tendering procedure, and accordingly the provisions of chapter III of the Model Law apply unless they are inconsistent with the nature of an auction procedure.

(2) [insert guidance on qualification of bidders—see paragraph 21 above].

(3) Paragraph 3 considers the contents of initial tenders. Requiring initial tenders to include all features, including those to be presented through the auction, may assist the procuring entity in setting a starting price for the auction. However, procuring entities may find this information unnecessary, and it may become a costly burden for suppliers. Such information may become less important as experience with auctions increases.

(4) Paragraphs 4 (a) and (b) allow for either open tendering principles to be adopted (that is, all qualified suppliers can participate), or limited tendering, such that only those bidders that have the best-ranked bids are invited to participate. [insert guidance regarding ranking of initial tenders—see paragraph 23 above—and guidance on use of open and restricted tendering—see paragraph 24 above].

⁶ See, also, chap. V of A/CN.9/WG.I/WP.40/Add.1, discussing equivalent information to be provided under article 27 (n) bis (regulating the contents of the solicitation documents).

(5) Paragraph 4 (d) addresses the registration of prospective participants, a procedure that involves assigning an identification code and password to allow the participants to log in to the system to participate in electronic reverse auction, giving security information if necessary.

(6) Paragraph 4 (e) is aimed at ensuring transparency of information for suppliers. Among other things, the provision requires the formula for evaluation of non-price criteria that are to be presented in the auction to be disclosed in the invitation documents. The Model Law does not, in general, require entities to formulate and disclose precise formulae for evaluation, although its rules encourage enacting States to be as objective as possible. However, an auction including non-price criteria requires the procuring entity to develop a precise evaluation formula, which should, in the interests of transparency, be disclosed. In addition, only features of tenders that are quantifiable as price equivalents so as to allow for automatic evaluation during the auction itself may be presented through the auction. Even if the use of auctions is limited to standardized goods and services, non-price considerations (such as running and maintenance costs of vehicles) may be significant.

(7) As regards paragraph 5, enacting States may wish to set a minimum period by regulation, though allowing for longer periods in cases of complicated procurement.

B. The holding of the auction

1. General remarks

26. As for the pre-auction period set out above, the Working Group may wish to address the conduct of the auction itself in the Model Law or in draft regulations, with appropriate commentary in the Guide to Enactment in either case. The draft below is presented as a draft article for the Model Law, but the text could equally take the form of draft regulations.

27. Paragraphs 22 to 37 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under existing procurement systems.

2. Proposed new text for the Model Law: article 47 ter

Article 47 ter. Conduct of electronic reverse auctions during the auction itself

(1) During an electronic reverse auction:

(a) There shall be automatic evaluation of all bids;

(b) Procuring entities must [provide] [instantaneously communicate to] all bidders on a continuous basis during the auction [with] sufficient information [to enable each to establish its own current ranking in the auction] [whether it has the top ranking in the auction] [to establish the changes needed to any bid to give it the top ranking in the auction]];

(c) All participating suppliers and contractors shall have an equal and continuous opportunity to revise their tenders in respect of those features presented through the auction process.

(2) The auction shall be closed in accordance with the precise method, dates and times specified in the solicitation documents or in the invitation to participate in the auction, as follows:

- (a) When the date and time specified for the close of the auction has passed; or
 - (b) When a certain period of time, as specified, has elapsed [without a valid new submission that improves on the top-ranked bid] [when the procuring entity receives no more new prices or new values which meet the requirements concerning minimum differences];
 - (c) The procuring entity [may also at any time announce the number of participants in the auction but] shall not disclose the identity of any bidder [during the auction] [until the auction has closed. Articles 33 (2) and (3) shall not apply to a procedure involving an electronic auction].
- (3) The procuring entity may suspend the electronic reverse auction in the case of system or communications failures.
- (4) There shall be no communication between the procuring entity and suppliers or contractors during the electronic reverse auction other than as provided for in paragraphs 1 (b) and (c) above.
- (5) The successful bid shall be the bid that is first in the ranking as determined by the automatic evaluation mechanism at the time the auction closes.
- (6) If the supplier or contractor submitting the successful bid in a procedure involving an electronic auction is requested to demonstrate again its qualifications in accordance with article 34 (6) but fails to do so, if the supplier or contractor fails to sign a written procurement contract when required to do so, and/or fails to provide any required security for the performance of the contract, the procuring entity may [not] select another bid in accordance with article 34 (7) or article 36 (5) [, but shall reopen the electronic reverse auction, which shall then be conducted in accordance with the provisions of this article/adopt another method of procurement].
- (7) Where appropriate, [any reference to a tender in the Model Law] [the reference to a tender in articles [see paragraphs 33 and 34 below] shall be read to include a reference to an initial tender submitted in a procedure involving an electronic reverse auction.*

3. Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment

28. As regards paragraph 2 (c), the identity of the winner of a contract will generally be made available under article 11 of the Model Law. Information on the other tenders may also be available under article 11, but may be withheld when there is good reason (article 11 (3)). In tendering procedures, articles 33 (2) and (3) also provide for the opening of tenders in the presence of participants, and the provision of information to suppliers on the identity and price of other tenders, to enable suppliers to monitor the application of the rules, but only once the tendering phase is complete. Without further provision, this procedure would apply to the opening of the initial tenders submitted under article 47 bis (3), and auction anonymity would be compromised. As final prices are determined through the auction, prior disclosure of bidders' identities may be unnecessary,

* See paras. 33 and 34 for an explanation of this provision.

and such disclosure also contravenes the principle that the identity of the parties should not be disclosed while the procurement proceedings are not complete. The second alternative given in square brackets in paragraph 2 (c) would therefore disapply articles 33 (2) and (3) in the case of auctions.^{7, 8}

29. As regards paragraph 1 (b) of the draft article, the Working Group may wish to review the matters set out in paragraphs 30 to 33 of A/CN.9/WG.I/WP.35/Add.1, prior to giving guidance to the Secretariat as to the extent of the disclosure obligation (for example, whether in addition to a bidder's ranking, information is provided as to the extent to which the bid must be improved to win the contract).

30. As regards paragraph 2 of the draft article, the Working Group may wish to restrict the manner in which extensions to the auction time can be granted. See, further, paragraphs 25 and 26 of A/CN.9/WG.I/WP.35/Add.1. It has been observed that extensions may be appropriate only for high value procurements, as they can be seen as imposing undue pressure on bidders to lower prices and disadvantaging bidders who may have allocated a fixed period of time to attend the electronic reverse auction. On the other hand, it has been observed that bids increase in volume and prices fall most just before an auction closes, and so it may improve value for money should there be a possibility of extension.

31. As regards paragraph 6 of the proposed draft article, the electronic reverse auction normally identifies only the best bid, and not (unless specifically requested) the best bids that other participants could have offered. If the successful bidder fails to enter into a procurement contract, one option is to allow the procuring entity to negotiate with other bidders. However, as it cannot generally be known who would have submitted the next best bid had the auction continued (since bidders may withdraw without submitting their best bid, if other bidders bid too low a price and it may not therefore be possible to identify the second-best bidder), negotiations would be required with all other bidders. The solicitation documents or the instructions for the auction could require all suppliers to submit their best possible bid even if it is not the apparently winning bid, so that the next best bidder can be identified. It would then be appropriate to use the Model Law's usual procedure in article 36 for dealing with cases in which the apparent winner does not conclude the contract—that is, awarding the contract to the second best bidder. The solicitation documents in such a case could also set out that the second best bidder would be awarded the contract. The other options presented may be more transparent from some perspectives, but involve additional time and costs. This issue is discussed in paragraphs 39 to 41 of A/CN.9/WG.I/WP.35/Add.1, and the Working Group may wish to consider the various options and how they should be regulated, perhaps in the form of guidance in the Guide to Enactment.

32. Another reason why a procuring entity may not wish to award a contract to the successful bidder is because the price (or other terms) offered in the bid are so favourable to the entity that it considers that the bidder will not be able to fulfil to the contract on those terms (see, further, A/CN.9/WG.I/WP.36). The Working Group has decided to address the

⁷ A provision disapplying article 33 (2) and (3) could, alternatively, be placed instead in the paragraph dealing with the initial evaluation of tenders, but as its importance relates to the conduct of the electronic reverse auction, the Working Group may consider that it is better located within draft article 47 ter.

⁸ Two-stage tendering, like an auction, involves successive tendering phases, but the Model Law does not give any guidance on how article 33 applies to two-stage tendering. The Working Group may also wish to make an equivalent provision in two-stage tendering.

issue of abnormally low bids separately (see, further, A/CN.9/575, paras. 81 and 82, and A/CN.9/WG.I/WP.40/Add.1, chap. VI).

33. Paragraph 7 of draft article 47 ter addresses the articles in the Model Law that refer to a “tender”. In procedures involving an electronic auction, some of these provisions apply to the initial tenders envisaged under paragraph 4 (a) of that draft article (that is, the tenders submitted and evaluated prior to the auction phase). The relevant articles include:

- (e) Article 30 (1) (requirement to fix the place for and a specific date and time as a deadline for submission of tenders);
- (f) Article 30 (2) (requiring entities to extend the tendering deadline when it makes changes to its requirements);
- (g) Article 30 (3) (extension of the deadline for submitting tenders);
- (h) Article 30 (6) (requirement to return late tenders unopened);
- (i) Article 33 (1) (opening of tenders at the deadline);
- (j) Article 34 (1) (a) (possibility for asking for clarifications of tenders);
- (k) Article 34 (1) (b) (rules on correcting errors);
- (l) Article 34 (3) (on tenders that the entity cannot accept); and
- (m) Article 34 (2) on when a tender is responsive.

34. The Working Group may wish to specify the articles concerned as listed above in paragraph 7 of draft article 47 ter or to modify the reference to “tender” in the various relevant provisions. This latter approach, although providing clarity, would make the relevant provisions more difficult to read for the majority of cases in which no auction is used. Alternatively, the Working Group may wish to include as paragraph 7 a simpler provision that the word tender should apply to initial tenders, when appropriate, perhaps listing the articles concerned in the Guide to Enactment.

35. The Working Group may wish the Guide to Enactment to refer enacting States to the possibility of providing specific procedures for the right to review in the conduct of electronic reverse auctions, such as the issue of the invitation, exclusion from participation, the selection of participants for auctions with a limited number of participants, any suspension of the auction, and the closure of the auction and award. The Working Group may also wish to specify that the review periods in such cases are shorter than those for other procurement methods (normally 20 days under article 52), such as periods of 3-7 days, and whether the electronic reverse auction may be reopened in such cases. This issue is discussed in paragraphs 46 and 47 of A/CN.9/WG.I/WP.35/Add.1.

4. Proposed additional text for the Guide to Enactment regarding new article 47 ter

Article 47 ter. Conduct of electronic reverse auctions during the auction itself

- (1) At the beginning of the auction: (a) the participating bidders access a screen by logging in to the auction address provided in the notice of auction or invitation to the auction, as applicable, using their respective identification and personal password that permits them to participate in the auction; (b) the object of the electronic reverse auction is announced (usually a screen is completed to describe the items to be procured); (c) the auction rules are announced (i.e. start time, duration, minimum bid, the method of termination etc.); and (d) the call for bids is communicated

simultaneously to all bidders. The extent of appropriate regulation in a given case may depend on the size and complexity of the procurement.

(2) Enacting States may wish to stipulate whether online bids only are acceptable, or whether bids through a proxy may be presented, if technical reasons or difficulties in connection so dictate, whether each bid cancels the previous one and whether each bid has to be necessarily lower than the value of the last bid registered by the system, whether participants who did not bid at all or did not vary their bids within the fixed increment are subsequently excluded, and whether bidders may disconnect at any time.

(3) The provision of information during electronic reverse auctions as provided for in paragraph 1 (b) may give rise to concerns, in that so doing may encourage price signalling or collusive behaviour. *[insert guidance on the provision of information, whether the lowest current price in particular should be disclosed—see paragraph 29 above]*.

(4) Enacting States may wish to provide guidance as to how auctions may be closed under paragraph 2. The software used for the auction may provide for the closure to be effected electronically or the procuring entity may close the auction, with safeguards in place to avoid the risk of abuse. The requirement for the record of the procurement proceedings to include all decisions taken in the proceedings should include details of how any decision to close the auction was arrived at.* Events that may trigger closure include: (a) the date and time fixed in advance as communicated to bidders in the invitation; (b) when procuring entities receive no more new prices or new values which meet the requirements concerning minimum differences; (c) when the number of phases fixed in the invitation has been completed, and (d) if there are serious and objective grounds for so doing (in which case, the ground should be publicized on the relevant website immediately). In practice, the greater the value and complexity of the procurement, the longer the normal duration of the electronic reverse auction. It has been observed that electronic reverse auctions rarely close after a fixed duration of time has expired (known as a “hard close time”). More commonly, the closing time of the electronic reverse auction is automatically extended for a specified period of time (e.g. 5 minutes) if a new lowest bid or a bid that changes top bid rankings is received in the last few minutes (e.g. within 2 minutes of the closing time). Such extensions may be continuous for an indefinite period of time (known as “unlimited soft close”) or limited (e.g., maximum of three 5-minute extensions). This process continues until there are no longer any lower bids being submitted within the stated period prior to closing. *[insert further guidance as regards closure of auction—see paragraph 30 above]*.

(5) Paragraph 2 (c) protects the anonymity of the bidders prior to the closure of an electronic reverse auction. *[insert guidance as regards articles 33 (2) and (3)—see paragraph 28 above]*.

(6) As regards paragraph 3, and to guard against abuse, any decision to suspend an auction and the reasons therefor should be included in the record of the procurement

* For a fuller discussion of the requirement of the record of the procurement that is to be maintained under article 11 of the Model Law, and for each decision in the procurement process to be verified and traceable (and automatic data processing or calculations can be reconstituted), see section III.F of A/CN.9/WG.I/WP.38/Add.1.

proceedings.* Similarly, paragraph 4 is designed to avoid the risk of abuse if communications between the procuring entity and bidders were enabled.

(7) The term “successful bid” used in paragraph 5 is the same term used in article 34 (4) (b): it denotes the bid selected at the end of the regular procurement process. Enacting States may wish to provide in regulations that the name of the successful bidder is to be posted immediately after closure of the auction at the Internet address fixed in the invitation documents, and to provide for the content of the notice of the winning bid, including the identity and coordinates of the winning bidder, the price of the winning bid.

* For a fuller discussion of the requirement of the record of the procurement that is to be maintained under article 11 of the Model Law, and for each decision in the procurement process to be verified and traceable, see paragraphs 45 and 46 of A/CN.9/WG.I/WP.38.

A/CN.9/WG.I/WP.40/Add.1

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services: drafting materials for the use of electronic reverse auctions and addressing abnormally low tenders in public procurement

ADDENDUM

[Chapters I through IV are published in document A/CN.9/WG.I/WP.40]

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V. Draft provisions enabling the use of electronic reverse auctions in procurement proceedings conducted under the Model Law

A. Amendments to articles of the 1994 text so as to enable the use of electronic reverse auctions in procurement proceedings

1. General remarks

1. The Working Group may wish to consider whether the following changes to the text of the Model Law may be necessary, so as adequately to provide for the use of electronic reverse auctions in procurement proceedings, if the Working Group decides to include a form of proposed draft articles 19 bis and 47 bis and ter in the revised text of the Model Law (for the proposed text and commentary regarding those drafts, see A/CN.9/WG.I/WP.40).

2. The text of the 1994 Model Law is restated below so as to aid the Working Group in its deliberations (in normal font), and proposed additional text is underlined in each case. This format will be followed throughout this Note where additions to the existing articles of the Model Law are proposed.

2. Proposed revision to article 11 of the Model Law, addressing the record of procurement proceedings

3. The Working Group may wish to include in the list of information to be maintained pursuant to Article 11 (record of procurement proceedings) a reference to the fact that the procurement was conducted by way of electronic reverse auction, as follows:

Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(i) bis In procurement proceedings involving the use of a procurement method pursuant to article 19 bis, the fact that electronic reverse auction was held.

3. Proposed revision to article 18 of the Model Law, addressing methods of procurement

4. Article 18 sets out the procurement methods available to procuring entities, and the Working Group may wish to consider whether reference to the article authorizing the use of electronic reverse auction should be made in paragraph (2) of that article, as follows:

Article 18. Methods of procurement

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 19, 19 bis 20, 21 or 22.

5. Paragraph (3) of article 18 of the Model Law would allow the use of electronic reverse auctions for the procurement of services, though the Working Group may wish to provide a statement to such effect in the Guide to Enactment on the question.

4. Proposed revisions to article 25 of the Model Law, to require the invitation to tender and invitation to prequalify to state whether an electronic reverse auction will be held

6. The Working Group may wish to consider whether the procuring entity should be required to state in the invitation to tender, or the invitation to prequalify as the case may be, that an electronic reverse auction will be held, as a condition of using the electronic reverse auction as a method of procurement. The aim of such a provision is to provide transparency in the proceedings.

Article 25. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

...

(d) bis Whether the tendering proceedings shall be conducted by way of an electronic reverse auction pursuant to article 47 bis and ter;^a

...

(j) The place and deadline for the submission of tenders or, if the tendering proceedings are to be conducted by way of an electronic reverse auction pursuant to article 47 bis and ter, the date and time of the opening of the electronic reverse auction.

5. Proposed revisions to article 27 of the Model Law, to require the procuring entity to provide all relevant information in the solicitation documents

7. The Working Group may wish to consider whether the procuring entity should be required to provide all information that will enable suppliers and contractors to decide whether or not to participate in the auction in the solicitation documents or to give the procuring entity the option of providing the information in the invitation to participate in the electronic reverse auction under proposed draft article 47 bis. As is noted in Chapter IV of document A/CN.9/WG.I/WP.40 as regards the conduct of an auction, the Working Group may wish to address information to be provided as regards an electronic reverse auction in the Model Law or in draft regulations, with appropriate commentary in the Guide to Enactment in either case. The draft below is presented as a draft article for the Model Law, but the text sub-paragraphs (n)(i) to (n)(ix) could be presented as draft regulations, such that the obligation under the Model Law is to provide all information necessary to enable the supplier or contractor to participate in the auction. The information concerned is the same as that proposed regarding in the invitation to participate in the electronic reverse auction under draft article 47 bis. Details of the relevant information could alternatively be set out in regulations or guidance, as the case may be.

^a For the text of the proposed article 47 bis and ter, see Chapter IV of document A/CN.9/WG.I/WP.40.

Article 27. Contents of solicitation documents

27. The solicitation documents shall include, at a minimum, the following information:

(n) bis Where the tendering proceedings are to be conducted by way of an electronic reverse auction pursuant to article 47 bis, a statement to such effect, and;

[(i) The date and time of the opening of the electronic reverse auction;

(ii) The website address at which the electronic reverse auction will be held, and at which the auction rules, the tender and other relevant documents will be accessible

(iii) The requirements for registration and identification of bidders at the opening of the auction

(iv) The features of the tender that are to be presented at the auction;

(v) If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price features to be presented. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender;

(vi) The information that will be made available to bidders in the course of the auction and, where appropriate, how and when it will be made available;

(vii) All relevant information concerning the auction process itself, including any identification data for the procurement, technical requirements as to information technology equipment to be utilized, whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);

(viii) The conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other features that [will be required when bidding] [must be improved in any individual; new submission during the auction] [and the time which the procuring entity will allow to elapse after receiving the last submission before closing the auction];

(ix) All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;

(x) All [other] information necessary to enable the supplier or contractor to participate in the auction. [The procurement regulations may prescribe the information that is to be so provided.]

8. Paragraphs 16 to 18 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

6. Proposed revisions to article 28 of the Model Law, addressing the clarification and modifications of solicitation documents

9. Article 28(2) allows the procuring entity to modify the documents at any time prior to the deadline for submission of tenders. However, in the context of an electronic reverse auction, although it may be appropriate to allow amendments before initial tenders

(required under draft article 47 bis (3)) are submitted, modifications could be prohibited after that point and prior to commencing the auction, given the practical difficulties and costs such modifications would pose to contractors and suppliers.

10. Paragraph 19 of A/CN.9/WG.I/WP.35/Add.1 describes equivalent provisions under other existing procurement systems.

11. If the Working Group considers that the solicitation documents should not be revised after the submission of initial tenders, article 28(2) could be amended to provide as follows:

Article 28. Clarification and modifications of solicitation documents

...

(2) At any time prior to the deadline for submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis, the procuring entity may, for any reason, ...

7. Proposed revisions to article 31 of the Model Law, addressing the period of effectiveness; modification and withdrawal of tenders, and to article 32 of the Model Law, addressing tender securities

12. The Working Group may wish to consider amendments to the rules on withdrawing and modifying initial tenders prior to the auction phase. Article 31 of the Model Law states that tenders are effective for the period specified in the contract documents, a provision that is suitable for electronic reverse auctions, since it is for the procuring entity to specify the period of validity. However, article 31(3) then provides that tenders may be withdrawn prior to the deadline for submission. Where an electronic reverse auction is used, the Working Group may consider that it is appropriate to allow entities to withdraw their tenders before the deadline for submitting initial tenders, but not subsequently. Consequential changes to paragraph (3) of article 31, which permits the withdrawal or modification of tender securities prior to the deadline for the submission of tenders without forfeit of tender security could therefore be made, with appropriate commentary in the Guide to Enactment.

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

...

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis and 47 ter, without forfeiting its tender security.

13. Consequential changes to article 32(1) (which refers to withdrawal of the tender before the deadline for submission tenders as being one of the permitted purposes of a tender security), and article 32(2)(d) (which provides for the return of a tender security where the tender is withdrawn before the deadline for submission of tenders) also could therefore be made, as follows, with appropriate commentary in the Guide to Enactment.

Article 32. Tender securities

1(f) (i) Withdrawal or modification of the tender after the deadline for submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with articles 47 bis and 47 ter, or before the deadline if so stipulated in the solicitation documents;

(2) (d) The withdrawal of the tender prior to the deadline for the submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis, unless the solicitation documents stipulate that no such withdrawal is permitted.

8. Proposed revisions to article 34(1) of the Model Law, addressing the examination, evaluation and comparison of tenders

14. Article 34(1)(a) of the Model Law provides as follows:

Article 34. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

15. The last sentence provides, therefore, that no change in a matter of substance shall be sought offered or permitted during the evaluation of tenders. As offers are changed during an electronic reverse auction, this provision is inconsistent with the conduct of an auction. However, the provision is still relevant in respect of other changes to tenders. The Working Group may wish to adapt this provision for auctions, to add the following words to the end of that sentence:

No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted, except to the extent that elements of the tender are presented in an electronic reverse auction under article 47 bis and 47 ter.

9. Proposed revisions to article 34(8) of the Model Law, to permit the disclosure of information during an electronic reverse auction

16. Article 34(8) provides as follows:

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

17. However, it is in the nature of an auction process that information on other bids is disclosed during the auction phase (although, as noted in draft article 47 ter (2)(c) in Chapter IV of A/CN.9/WG.I/WP.40, not the identity of bidders), and so the rules on auctions should make an exception to this provision for certain information, by adding the words "and article 47 ter (2)(c)" to the end of the article. Paragraphs 30 to 33 of

A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

10. Further issues to be addressed in procurement regulations and the Guide to Enactment

18. The Working Group may wish to address some issues relating to auctions in more detail in regulations and the guidance to be provided in the Guide to Enactment. For example, and because of the novelty of this method of procurement, it might be useful for the Guide to Enactment to provide some guidance on when to make use of this procedure and how to conduct it within the framework of the law (see, further, the discussion of the conditions for use in Chapter III of A/CN.9/WG.I/WP.40).

19. In the light of the concern expressed by the Working Group that procurement practices could be developed that would be divergent and inconsistent with the principles of the Model Law (A/CN.9/575, paragraph 61), the Working Group may wish to include more detailed guidance on procedural matters than has hitherto been found in the Guide to Enactment—for example, on issues such as the need to train suppliers, holding simulated auctions, possible conflicts of interest arising in the use of centralized or commercial procurement agencies, etc.

20. In addition, guidance may be needed regarding the rules for dealing with technical problems during the auction phase, such as disconnection or equipment failure either by individual suppliers or by the procuring entity. There are various possible solutions: for example, providing a service for suppliers to relay instructions by telephone when individual suppliers experience problems, or extending the auction, or suspending it temporarily (see, for example, the Brazilian system discussed in paragraph 30 of A/CN.9/WG.I/WP.35/Add.1). Article 30(3) of the Model Law in general provides for a discretion to extend the deadline which, if left unamended, would apply to auctions. The Working Group may wish to regulate this subject in more detail or to require any such decision and reasons therefore to be included in the record of the procurement proceedings (see, further, section III.F of A/CN.9/WG.I/WP.38/Add.1).

VI. Abnormally Low Tenders

21. The Working Group has decided to address the issue of abnormally low tenders as a discrete issue (see, further, A/CN.9/575, paragraphs 81 and 82, and A/CN.9/WG.I/WP.40, paragraph 31). The Working Group at its seventh session requested the Secretariat to provide it with drafting suggestions to address the topic (A/CN.9/575, paragraphs 76 and 79-82). An abnormally low tender is one that involves a risk that “the tenderer would be unlikely to be able to perform the contract at [the tender price] ... or could do so using only substandard workmanship or materials by suffering a loss ... it could also indicate collusion between the tenderers” (A/CN.9/WG.V/WP.22).

22. At its seventh session, the Working Group decided that the Model Law should be amended so as to allow procuring entities to investigate possible abnormally low tenders through a price justification procedure.

A. Proposed revisions to article 34. Examination, evaluation and comparison of tenders

11. Proposed additions to article 34, to provide for the investigation of abnormally low tenders and rejection thereof

23. As an abnormally low tender may be suspected on the basis of the qualifications of the supplier as well as the tender submitted, the Working Group may wish as a first step to consider the following draft addition to article 34(4)(b) of the Model Law:

Article 34. Examination, evaluation and comparison of tenders

(4)(b) The successful tender shall be that submitted by a supplier that has been determined to be fully qualified to undertake the contract, and whose tender is:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or ...

24. However, the Working Group has expressed the view that that this provision alone would be insufficient to address the concerns raised by abnormally low tenders (A/CN.9/575, paragraph 80), and that further provision in article 34 is required, together with guidance in the Guide to Enactment.

25. In this regard, the Working Group has requested the Secretariat to provide drafting suggestions for a new article 34 (3)(d) bis of the Model Law, or elsewhere, to provide that if a tender price were abnormally low and raised justified concerns as to the ability of the tenderer to perform the contract, the procuring entity should be authorized to reject the tender (A/CN.9/575, paragraph 79). The Working Group also noted that any rejection in such cases would be subject to two qualifications: first, that the tenderer had been given an opportunity to explain its prices through a price justification procedure and, second, that justification for the rejection should be included in the record of the procurement proceedings, such that any challenge to the rejection could be considered in the light of that justification.

26. Accordingly, the Working Group may wish to consider the following draft text for inclusion in the Model Law:

Article 34. Examination, evaluation and comparison of tenders

...

(3) The procuring entity shall not accept a tender:

...

(d) bis. If the tender price is abnormally low in relation to the goods, construction or services to be procured, and raises concerns as to the ability of the tenderer to perform the contract, provided that:

(i) The procuring entity has requested in writing pursuant to article 34(1)(a) details of the constituent elements of the tender that gives rise to the concerns as to the ability of the tenderer to perform the contract;

(ii) The procuring entity has taken account of the information supplied but continues to hold those concerns; and

(iii) The procuring entity has included in the record of the procurement proceedings that it is required to maintain under article 11 the concerns as to the ability of the tenderer to perform the contract and the reasons therefore, and all communications between the procuring entity and the tenderer regarding those concerns.

12. Proposed revisions to the Guide to Enactment text regarding article 34, to provide for the investigation of abnormally low tenders and rejection thereof

27. First, following the instruction of the Working Group in A/CN.9/575, paragraph 79, the text of paragraph 1 of the current Guide to Enactment text addressing article 34(1)(a) could be amended by removing the statement that the clarification authority given to procuring entities is not to be used in the case of a suspected abnormally low tender, as follows:

(1) The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender.²²

28. Additional commentary could then be included as follows:

(1) bis A clarification request under paragraph 1(b) may be made, inter alia, if a procuring entity suspects that an abnormally low tender price has been submitted, possibly arising from a misunderstanding of or other error not apparent on the face of the tender. A tender price is assumed to be abnormally low if it seems to be unrealistic; that is, the price is below cost, or if it may not be feasible to perform the contract at the price submitted and to make a normal level of profit. From the perspective of the procuring entity, an abnormally low tender involves a risk that the contract cannot be performed, or performed at the price tendered, and additional costs and delays to the project may therefore ensue. The procuring entity should therefore take steps to avoid running such a performance risk.

(1) ter Where an abnormally low tender is suspected, the procuring entity shall permit a supplier or contractor to justify the price tendered, by requesting in writing details of the constituent elements of the tender that the procuring entity considers relevant. Those details may include:

(a) the methods and economics of the manufacturing process for the goods or of the construction methods or of the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the construction or for the supply of the goods or services;

(c) the originality of the construction, supplies or services proposed by the tenderer.

(1) quater The procuring entity should take account of the response supplied in evaluating the tenders. A procuring entity may conduct a price justification procedure in any procurement, including one conducted by

means of an electronic reverse auction (which may be suspended for the purpose), and should set out all relevant information in the record of the procurement proceedings required to be maintained under article 11. Only if there has been a price justification procedure, and the information supplied does not alleviate the concerns of the procuring entity, may the tender be rejected as constituting an abnormally low tender under [article 3(3)(d) bis].

(1) quinques Enacting States may also wish to take some or all of the following steps so as to assist in the avoidance of abnormally low tenders.

(a) To promote awareness of the adverse effects of abnormally low tenders, to provide training to procurement officers, and to ensure that the procurement entity has adequate resources and information, including reference or market prices where possible;

(b) To ensure appropriate emphasis is given to both price and non-price criteria in procurement proceedings;

(c) To allow for sufficient time for each stage of the procurement process;

(d) To ensure effective qualification criteria, authorizing the compilation of accurate and comprehensive information about the qualifications and past performance of a bidder;

(e) To ensure that the specification is drafted as clearly as possible, and where appropriate, include potential suppliers in the drafting phase;

(f) To include in the solicitation documents a statement to the effect that the procuring entity is not obligated to accept the lowest-priced, or any tender, and that a procuring entity may carry out analyses of potential performance risk and prices submitted, perhaps in addition to qualification criteria;

(g) To ensure thorough evaluation of suppliers' qualifications and tenders, including risk and price analyses (incorporating maintenance and replacement costs where appropriate);

(h) To require price justification as described in paragraph [cross refer to price justification paragraph] above if an abnormally low tender is suspected;

(i) To regulate the factors that procuring entities may take into account when assessing the responses of suppliers to price justification requests;

(j) To reinforce general prohibitions against post-tender negotiations, and to restrict negotiations appropriately; and

(k) To require all steps taken to address a possible abnormally low tender be adequately reflected in the record of the procurement proceedings.

29. Secondly, the Working Group will note that some of the items set out above paragraph address stages of the procurement cycle which are not currently regulated in the Model Law: that is, the pre-procurement or planning stage. If the Working Group considers that commentary on those stages is appropriate, it may also wish in the interests of balance to address the contract administration phase, including commenting on setting limits to variations to the contract awarded, on ensuring that specifications are strictly enforced, on contractor and subcontractor relations, and on adequate dispute resolutions measures should it become necessary to terminate contracts or fire contractors. There is no current article in the Model Law to which such commentary could be attached, though as it

flows from the discussion set out above, it could be included in the commentary to the current article 34 of the Model Law. The more general question of whether or not the Model Law should regulate the contract administration phase is addressed in more detail in paragraphs 12 and 13 of A/CN.9/WG.I/WP.38.

**E. Report of the Working Group on Procurement on the work
of its ninth session (New York, 24-28 April 2006)**

(A/CN.9/595) [Original: English]

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work at its sixth session (Vienna, 30 August 3 - September 2004) (A/CN.9/568). For the reports of the Working Group on the work of its sixth to eighth sessions, see A/CN.9/568, A/CN.9/575 and A/CN.9/590.
2. At its thirty-eighth session, in 2005, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172).

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its ninth session in New York from 24 to 28 April 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Cameroon, Canada, Chile, China, Colombia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Jordan, Kenya, Lithuania, Madagascar, Mexico, Pakistan, Qatar, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America and Uruguay.
4. The session was attended by observers from the following States: Bolivia, Cape Verde, Democratic Republic of the Congo, El Salvador, Indonesia, Mali and the Philippines.
5. The session was also attended by observers from the following international organizations:
 - (a) *United Nations system*: United Nations Secretariat and the World Bank;
 - (b) *Intergovernmental organizations*: African Development Bank (AfDB), Economic Community of West African States (ECOWAS), European Commission, European Space Agency (ESA), Inter-American Development Bank (IADB), and World Trade Organization (WTO);
 - (c) *International non-governmental organizations invited by the Commission*: International Bar Association (IBA), International Law Institute (ILI) and the European Law Students’ Association (ELSA).
6. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Rapporteur: Mr. Gonzalo SUÁREZ BELTRÁN (Colombia).
7. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.I/WP.41);

- (b) A note concerning the use of electronic communications and publication in the procurement process (A/CN.9/WG.I/WP.42 and Add.1);
 - (c) A note concerning electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.43 and Add.1);
 - (d) A comparative study of framework agreements (A/CN.9/WG.I/WP.44 and Add.1); and
 - (e) A note concerning suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1).
8. The Working Group adopted the following agenda:
- 1. Opening of the session.
 - 2. Election of officers.
 - 3. Adoption of the agenda.
 - 4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
 - 5. Other business.
 - 6. Adoption of the report of the Working Group.

III. Deliberations and decisions

9. At its ninth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat A/CN.9/WG.I/WP.42 and Add.1, and A/CN.9/WG.I/WP.43 as a basis for its deliberations. Consideration of the remainder of A/CN.9/WG.I/WP.43, A/CN.9/WG.I/WP.43/Add.1, and A/CN.9/WG.I/WP.44 and A/CN.9/WG.I/45 and their addenda was deferred to the Working Group's next session.

10. On Friday morning, the Secretariat summarized its understanding of the revisions that the Working Group requested to be made to the drafting materials for the Model Law and the Guide, on the use of electronic means of communications in procurement process and on electronic reverse auctions, reflecting the deliberations at the current session. The Working Group also heard a summary of the remaining topics on its agenda (listed in A/60/17, para. 171) and information on the work of other regional and international organizations in the field of public procurement.¹ The Working Group noted that the United Nations Convention against Corruption had recently entered into force and that although the main elements of its provisions addressing procurement were consistent with those of the Model Law, its requirements for domestic review provisions and those addressing conflicts of interest went beyond the current provisions of the Model Law, and might warrant the further attention of the Working Group in due course.

¹ The representatives of AfDB, COMESA, IADB and WTO briefed the Working Group in this regard. A summary of their work in the field of public procurement is found in A/CN.9/598/Add.1.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. The use of electronic communications in procurement (A/CN.9/WG.I/WP.42 and Add.1)

1. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents (A/CN.9/WG.I/WP.42, paras. 7-16, and A/CN.9/WG.I/WP.42/Add.1, paras. 1 and 2)

Article 4 bis

11. A number of drafting suggestions were made to the proposed new text of article 4 bis: (i) to use the term “means of communication” instead of “methods of communication”, so as to avoid confusion as the term “methods” was already used in the Model Law and the Guide in the context of procurement methods, and so as to conform with the text in the Model Law on Electronic Commerce; (ii) to delete the text in square brackets, except for the cross-reference; (iii) to move an illustrative list of examples of “electronic, optical or comparable means” of communication to the Guide to Enactment and to remove obsolete references; (iv) to delete the words “comparable means” as being undefined but to keep the examples listed in the text of the Model Law; (v) to end the article with “comply with article 4 [ter]”; (vi) to add the word “communicating” after the words “related to” and a reference to “data message”; and (vii) to replace the word “include” in the second pair of square brackets with “such as”.

12. The Working Group noted that the adoption of some of the above suggestions would result in the text that would deviate from equivalent provisions in the recently adopted United Nations Convention on Electronic Contracting² and other UNCITRAL texts. Nevertheless, it was agreed that making some of the suggested changes would simplify and streamline the text for the specific purposes of the Model Law, and that the Guide would explain that the provision was to the same effect as other UNCITRAL texts.

13. The Working Group agreed with some of the proposed suggestions and decided that the article should be amended as follows:

“Article 4 bis. Functional equivalence of all ~~{means}{methods}~~ of communicating, publishing, exchanging or storing information or documents

“Any provision of this Law related to communicating, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to ~~incorporate [any means of such activity, including], include~~ electronic, optical or comparable means [by which such activities take place], [including, but not limited to,] electronic data interchange (EDI), electronic mail, telegram, telex or telecopy, provided that the means chosen complies with ~~the [provisions of accessibility standards set out in]~~ article [4 ter].”

14. It was agreed that the Guide would contain an illustrative list of examples of “electronic, optical or comparable” means deleted from the text of the article, which would be updated, especially as regards references to telex and telegram. On the other hand, it was pointed out that which means of communication were obsolete would vary from

² General Assembly resolution 60/21.

jurisdiction to jurisdiction, and thus the Guide text should take into account the level of penetration of various types of electronic communications and technologies in the relevant market. It was also agreed that the Guide would state that the provisions of the article were intended to be interpreted broadly so as to encompass any provisions in the Model Law implying physical presence or a paper-based environment.

15. The Working Group noted an inconsistency between the principle of “technological neutrality” in article 4 bis and the proposed article 9 (3) where a reference was made to a specific technology, which would have to be reconsidered in due course.

16. As regards the location of provisions in article 4 bis, some delegates were of the view that they should be included in either article 4 ter or article 9. Another suggestion was to move them to the end of article 2 (Definitions). Concern was expressed at the latter suggestion, since the proposed article 4 bis did not provide for a definition but contained a fundamental principle that would apply throughout the Model Law. It was proposed therefore to retain provisions of article 4 bis as a separate article early in the text of the Model Law, perhaps as article 2 bis. On the other hand, it was noted that such an early placing of the provisions in a separate article would result in substantial renumbering of articles of the Model Law. It was noted that the Working Group should keep in mind the impact that renumbering and other changes in the structure of the Model Law, arising from revisions, would have on jurisdictions that had enacted their procurement laws on the basis of the Model Law. It was suggested in this context that for ease of reference each new provision and all those amended should be accompanied by an appropriate explanatory footnote.

17. Following the Working Group’s consideration of articles 4 ter and 9, further amendments were proposed to the text of article 4 bis, its title and location (see paras. 36 and 37 below).

Guide to Enactment text

18. It was suggested that in the Guide to Enactment text addressing the use of electronic communications in the procurement process: references to “communications” should be replaced with “electronic means” when and as appropriate since the notion of communications in the text of the Model Law had a very broad ambit; and some discussions on the role and place of electronic procurement in the context of electronic government should be added.

19. As regards the text under subheading (i), paragraph 2, it was pointed out that: some parts of the text referring to administration of contracts and to compliance with rules and policies should be deleted as those issues were not encompassed by the scope of the Model Law (see however paras. 81 to 86 below); the French translation of the term “electronic procurement”, referring to “procédures dématérialisées” rather than the more literal translation of the English text, “marchés électroniques”, was rather broader in scope, and therefore the texts in both language versions should be reviewed and conformed; and paragraphs 3 and 4 should be aligned with article 4 ter.

20. As regards the text under subheading (ii), paragraph 7, it was agreed that the word “universally” before the word “legible” should be deleted. The initial concern was expressed that an immediately following reference to “unaltered over time” might be interpreted as imposing higher requirements on electronic communications than on paper communications and therefore the Guide should elaborate on the time frame intended. The Working Group’s understanding was however that no detailed elaboration on that point

would be necessary, as the text simply listed qualitative requirements applicable to both electronic and paper communications, such as that communications should not degenerate over time.

21. As regards the text under subheading (ii), paragraph 14, it was suggested that more detail should be added to the first sentence, so as to spell out situations in which the use of electronic means under the Model Law would be required, such as in the case of electronic reverse auctions or when a procuring entity specifically requires such use. The text would also provide more guidance on the impact of varying levels of use of electronic commerce in enacting States.

22. It was suggested that, consistent with the current drafting of the Guide, no subheadings in the Guide would be required.

2. Accessibility standards (A/CN.9/WG.I/WP.42, paras. 17-19, and A/CN.9/WG.I/WP.42/Add.1, para. 3)

Article 4 ter

23. The Working Group recalled that the proposed text for article 4 ter contained four elements, addressing the means of communication (which term includes publishing, exchanging or storing information or documents, holding meetings, and submission and opening of tenders) from the following standpoints:

- (a) Non-discrimination;
- (b) Not posing an obstacle to the procurement process;
- (c) General availability; and
- (d) General compatibility with other means of communications in use.

24. Various suggestions were made as regards which of those elements should be retained in the proposed article 4 ter.

25. It was observed that the term “accessibility standards” in the title of the proposed article might involve some unintended connotations, since the notion of “accessibility” had become associated with civil rights of access as a general notion regarding certain minority groups. Accordingly, an alternative term, “availability”, was proposed. It was noted that the term “accessibility” was used in the current article 5 of the Model Law (referring to the public accessibility of legal texts related to procurement), and that it denoted a broader concept than “availability” (which was more fact-based). On the other hand, it was noted that requiring the procuring entity to address the notion of “accessibility” in this regard might involve the procuring entity in assuming the costs of ensuring such accessibility, which would be onerous and might exceed the aims of the Working Group. Accordingly, the Working Group decided that the term “availability” should be used so as to avoid unintended connotations.

26. It was observed that the main issue to be addressed in this article was non-discrimination in communications, and that this notion already existed in article 9 (3) of the current text of the Model Law. It was also noted that the notions of “availability” and “compatibility” could be viewed as either aspects of non-discrimination, or related but distinct concepts.

27. It was further recalled that the 2004 European Union procurement directives included a requirement of availability, but from the perspective that the means of communication in

the procurement process should not restrict access to the procurement. It was noted that the proposed text 4 ter addressing non-discrimination could be viewed as encompassing the requirements set out in the directives, as the proposed text included a reference that the means of communication chosen should not limit competition.

28. Accordingly, it was suggested that the text of article 4 ter should comprise the first two paragraphs proposed, addressing non-discrimination alone. Nonetheless, the Guide to Enactment should expand on the concept of non-discrimination, to clarify that the means of communication chosen should not pose an obstacle to the procurement process and should address general availability.

29. It was also observed that the question of discrimination in the means of communication chosen (or, indeed, the method of procurement selected), was one that had been considered when the current Model Law was being drafted, and that it was also possible to discriminate in the application of any such decisions. These possibilities had been recognized in the drafting of article 9 (3) of the current text of the Model Law.

30. The view, however, prevailed that the elements contained in (a), (b) and (d) of paragraph 23 above, should be deleted. As regards (b), not posing an obstacle to the procurement process, it was observed that the provision could be viewed as encompassing all the objectives in the preamble to the Model Law, and would enable the flexibility that would be desirable in selecting the means of communication and related matters. On the other hand, it was noted that a decision on what was an “obstacle” to the procurement process was subjective and therefore the provision could be abused. Nevertheless, the understanding in the Working Group was that the Guide would clarify that the means of communication chosen should not pose an obstacle to the procurement process, as otherwise they would jeopardize the promotion of the Model Law’s objectives of maximizing economy and efficiency in procurement, as stated in its preamble paragraph (a).

31. As regards the element in paragraph (a) of paragraph 23 above, it was observed that the notion of non-discrimination existed in some provisions of the current text of the Model Law, such as article 9 (3), and in positive terms of fair and equitable treatment of suppliers and contractors in the preamble paragraph (d). Differing views were expressed on whether a general principle of non-discrimination should be included in the Model Law. The prevailing view was that it should not as it would exceed the mandate of the Working Group, which is to review the Model Law to ensure functional equivalence and allow for the use of new methods of procurement. It was also mentioned that non-discrimination with respect to both means of communication and in general was recognized as an important principle. Therefore, the objective of providing for the fair and equitable treatment of all suppliers and contractors reflected in the preamble should be reflected in the Model Law through specific norms as and when appropriate.

32. The Working Group noted that the non-discrimination provisions of article 9 (3), intended to address risks of discrimination in the context of closed communication systems, would become obsolete and in fact contradict the proposed revisions, in particular those in the proposed article 9 that would give the procuring entity the ability to select the means of communication.

33. It was further observed that provisions on non-discrimination might have an inadvertent and negative effect on the use of electronic means of communication in public procurement: procuring entities might be reluctant to have recourse to electronic means because of the fear that some suppliers or contractors who felt aggrieved by the choice of

the means of communication would seek a review of the decision involved, and such a right of review might itself become an obstacle to the procurement process. It was further noted that any possible discrimination as well as challenges and integrity of communication were concerns that should be considered when the procurement entity assessed the potential benefits of electronic procurement. The risk could arise that merely because a small number of suppliers did not have access to the relevant technologies required, electronic procurement would not be introduced and its benefits would not take effect.

34. Introducing a qualifier to the notion of discrimination, for example “unreasonable”, “manifest”, “obvious” or “deliberate”, as proposed, might not alleviate such a risk completely and might also introduce an element of subjectivity. In addition, such a qualifier could introduce new concepts of discrimination bringing inconsistency with other existing provisions on discrimination in the Model Law. Nonetheless, it was agreed that the Guide to Enactment should address the notion of discrimination and explain with examples how it might arise in practice. (See also para. 60 below).

35. Noting that discrimination might arise only when the use of certain means of communications could not be objectively justified, the Working Group decided that the notions of “general availability” contained in the last paragraph of the proposed article 4 ter could be viewed as a means to provide for non-discrimination. Accordingly, the Working Group decided that the text of article 4 ter should comprise the first and the last paragraphs proposed and should read as follows:

“The procuring entity shall ensure that the means of communicating, publishing, exchanging or storing information or documents, of holding meetings, and of submitting and opening of tenders are readily capable of being utilized with those in general use among suppliers or contractors.”

36. Subsequently, it was agreed that this wording should be reflected in the provisions of article 4 bis as follows (with the deletion of article 4 ter in its entirety):

“Any provision of this Law related to communicating, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means [by which such activities take place], provided that the means chosen are readily capable of being utilized with those in general use among suppliers or contractors.”

37. As regards the location of the amended consolidated provisions, it was agreed that they, together with some provisions of the proposed article 9 (see paras. 39 and 40 below), would comprise a separate article that would set out a fundamental principle relating to the use of communications (in its broadest sense) in the procurement process, and therefore should be placed early in the Model Law, perhaps after article 5 (to follow the chronology of the procurement process, that is, before any identification of suppliers or contractors). A new title would reflect a new expanded scope of the consolidated provisions and therefore references to “accessibility” or “availability” standards and to “functional equivalence” would have to be amended accordingly.

38. As regards the proposed Guide to Enactment text, the Working Group agreed that, apart from what was stated in paragraphs 30 and 34 above, the Guide would reflect the Working Group’s decision on the text of articles 4 bis, 4 ter and 9 and: (i) expand on the notion of general availability of means of communication (for example, from the perspective that procuring entities should take account of the level of penetration of

electronic communications and technologies in the relevant market when making their selection of the means of communication for the procurement concerned as well as costs of such means); (ii) highlight that recourse to which means of communication was objectively justifiable would vary from jurisdiction to jurisdiction and from procurement to procurement; (iii) address interoperability and compatibility issues, references to which had been deleted from the last subparagraph of the proposed article 4 ter; and (iv) advise that stricter requirements might apply (for example, under international treaties or imposed by multilateral development banks).

3. Form of communications (A/CN.9/WG.I/WP.42, paras. 20-28, and A/CN.9/WG.I/WP.42/Add.1, paras. 4 and 5)

39. In the context of the consideration of article 9, it was decided that article 4 bis as amended (see paras. 36 and 37 above) should be merged with draft article 9 (1) requiring the procuring entity to set out its chosen means of communication when first soliciting participation in the procurement process, and with draft article 9 (4) requiring the procurement regulations to make provision addressing the authenticity, integrity, accessibility and confidentiality of communications.

Proposed article 5 bis

40. The Working Group decided to consider the following text at its next session:

“Article 5 bis [title to be considered for the tenth session]

(1) Any provision of this Law related to communicating[, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting,] shall be interpreted to include electronic, optical or comparable means [by which such activities take place], provided that the means chosen are readily capable of being used with those in general [or common] use among suppliers or contractors.

(2) Documents, notifications, decisions and other communications ~~[referred to in this Law]~~ between suppliers or contractors and the procuring entity shall be provided, submitted or effected by the means of communication specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, provided that the means specified are capable of being used as set out in the preceding paragraph.

(3) The [procurement regulations or the procuring entity] [shall or may] establish measures to ensure the authenticity, integrity, accessibility and confidentiality of communications.

[(4) The provisions of paragraph 1 of this article shall apply equally to any provision of this Law related to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting.]”

41. The Working Group noted that the first paragraph of the article above addressed not only communications, but also writing, publication of information, submission of tenders in a sealed envelope, opening of tenders, records and meetings. However, the second and third paragraphs addressed communications alone. The Working Group agreed to consider at a subsequent session whether these other items should be included in the first paragraph,

alternatively as a separate fourth paragraph in this draft article, or elsewhere in the text, and that the bracketed text in paragraphs (1) and (4) would reflect that outstanding issue.

42. As regards paragraph (2) of the article above, it was agreed that the restriction of “documents, notifications, decisions and other communications” in the previous version of the text to those “referred to in this Law” should be deleted, so as to refer to any communications generated in the procurement process, and the same change should be made in the remainder of the proposed article 9 (see para. 44 below).

43. As regards paragraph (3) of the article above, the Working Group noted that the obligations in the remainder of the article fell upon the procuring entity. The Working Group therefore agreed to consider whether the procuring entity, rather than the enacting State by means of regulations, should address the issues of authenticity, integrity, accessibility and confidentiality of communications set out in that paragraph, and whether either the procuring entity or the enacting State should be given the option or should be required to do so. The bracketed text in the proposed text would reflect that outstanding issue. It was also agreed that the Guide to Enactment should discuss in detail the issues raised by the authenticity, integrity, accessibility and confidentiality of communications.

Article 9

44. As regards the remainder of the previously proposed article 9, addressing the form of communications, it was suggested that the article should address the requirement that communications should contain a record of their content. Accordingly, the Working Group agreed to continue its deliberations on a revised article 9 based on the following text:

“Article 9. Form of communications

(1) Subject to other provisions of this Law, documents, notifications, decisions and other communications ~~referred to in this Law~~ to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication and is accessible so as to be usable for subsequent reference.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44(b) to (f) and 47 (1) [update for revisions to Model Law] may be made by a means of communication that does not provide a record of the ~~confirmation~~ content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the content of the communication and is accessible so as to be usable for subsequent reference.”

45. It was agreed that the wording of the previously proposed article would be changed from an obligation to provide a “record of the confirmation” to one to provide a “record of the content of the communication” so as to ensure that the content and the fact of the communication should be recorded.

Guide to Enactment text

46. The Working Group decided not to consider the text for the Guide that would have to be changed in the light of the discussions at the current session.

4. Legal value of procurement contracts concluded electronically
(A/CN.9/WG.I/WP.42, paras. 29-30, and A/CN.9/WG.I/WP.42/Add.1, para. 6)

47. The Working Group requested that the reference to the “execution” of a contract in the final sentence of proposed paragraph (1) bis should be changed to the “conclusion” of a contract, so as to avoid any unintended technical connotations from the use of the term “execution” that might arise in individual jurisdictions.

48. As regards paragraphs (1) bis and quater, it was agreed that the references referring to the need for enacting States to address the adequacy of electronic commerce laws should use the verb “may” rather than “will”, so as to confer flexibility and to allow enacting States to take account of differing factual circumstances.

5. Requirement to maintain a record of the procurement proceedings
(A/CN.9/WG.I/WP.42, paras. 31-32, and A/CN.9/WG.I/WP.42/Add.1, para. 7)

49. It was observed that the Guide to Enactment should explain the ambit of proposed paragraph (b) bis, so that the record should set out any particular computer software or other criteria used for the means of communication chosen by the procuring entity.

50. It was noted that the Guide to Enactment text should be conformed to the proposed article 5 bis, and that the requirement that the procuring entity select a means of storage of information in the record that would remain accessible “until the time for review under article 52 of the Model Law [had] elapsed” should be expanded to include any different period of time that the law in a particular system may apply to document retention systems.

51. It was also agreed that the obligation to “ensure that record retention systems are fully compatible (or interoperable)” should be deleted from the text. The overriding consideration was that the information in the record could be made available to third parties entitled to receive it, and the accessibility requirements set out in the text would adequately address the issue.

6. Electronic submission of tenders, proposals and quotations (A/CN.9/WG.I/WP.42, paras. 33-34, and A/CN.9/WG.I/WP.42/Add.1, para. 8)

52. It was observed that there were two significant notions regarding the electronic submission of tenders: the need to foster trust and confidence in electronic systems, and to identify and work towards the objectives of the proposed amendments. Transferring the safeguards of the traditional means of submission of tenders to the electronic environment would be critical. The introduction of any new system would raise new risks, and measures to alleviate them, particularly in the transitional period, should be adopted.

53. The Working Group noted that it would be important for the procuring entity’s selection of the means of submission of tenders to be set out in the solicitation documents. Although the procuring entity would have to comply with the requirements of proposed article 5 bis when making its selection, it was considered that an express reference to those requirements would not be necessary in article 30 (5)(a) of the Model Law. Accordingly, the proviso in the text referring to the proposed article 5 bis should be deleted.

54. The Working Group also considered the proposed deletions from the original text of article 30 (5)(a) of the Model Law, referring to the requirements for tenders to be submitted “in writing, signed and in a sealed envelope”. It was observed that these requirements were critical safeguards for the submission of tenders.

55. The Working Group also heard that in many jurisdictions, the overwhelming majority of tenders continued to be submitted in traditional, paper-based format, and that the above requirements remained relevant.

56. The Working Group heard that some jurisdictions had sought to avoid the technical consequences of requiring an electronic document to be signed by referring to such documents being capable of authentication. If the principle of technical neutrality conflicted with the fundamental principles of the Model Law itself, such as the requirement for tenders to be in writing, signed and in a sealed envelope, the latter should prevail. Accordingly, although the requirements implied a paper-based environment, they should be retained in the text of article 30 (5)(a). It was also noted that the provisions of proposed article 5 bis would allow these safeguards to be translated into the electronic environment using the functional equivalence principle.

57. It was also noted that the Guide to Enactment on this question would need to address the practical issues that arise in permitting the electronic submission of tenders, including the equivalent safeguards to writing, signature and a sealed envelope (such as an encrypted electronic tender to equate to a one in a sealed envelope). In addition, a virus could delete an electronic tender when it was opened, so that the tender would no longer exist. Accordingly, the Guide could recommend (as some systems do) the use of virus scanning software to identify any potential risks of this type, which again would enhance both confidence and transparency in the electronic environment.

58. The Working Group considered how to address the possibility that an electronic system for the receipt of tenders might fail. It was noted that there should be no liability upon the procuring entity should a tender not be received—the risk of submission of a tender was the supplier's, and the procuring entity was liable only to provide a receipt for the submission. However, it was considered that steps could be taken to alleviate the risks involved, for example by allowing for the submission of duplicate tenders in a different format as a safeguard against system failure (which some systems already permitted). Although it was noted that suppliers could seek to alter the terms of their tenders when submitting a duplicate, and that instances of this practice had been observed, it was considered that the benefits of allowing back-up submissions would exceed the potential disadvantages.

59. Furthermore, the Working Group heard that in many countries, the practice was not to require one exclusive means of submission of tenders. In such cases, a mixed system operated in which some suppliers submitted tenders in traditional format, and others electronically. (Further variants of a mixed system would include the use of different methods of communication during the procurement process, and the option to suppliers to submit some parts of their tenders, such as samples or, technical drawings or legal certificates, in physical or paper-based format). It was commented that allowing a mixed system would not only promote confidence, but would also lead to enhanced levels of participation. Accordingly, it was decided that the procuring entity should be able to select either traditional, paper-based means of submission of tenders (and communications generally), or electronic means, or both, and that the text of the Model Law should expressly allow more than one means to be selected.

60. Although the Working Group heard that allowing the suppliers themselves to select the means of submission might enhance participation, it was agreed that the selection should be left up to the procuring entity. The supplier might have recourse if the procuring entity acted in a discriminatory way in making the selection, but would otherwise be

required to comply with the means of submission selected by the procuring entity, as set out in the solicitation documents. In connection with this issue, it was observed that the non-discrimination provision in the text of the current article 9 (3) of the Model Law, which sought to prevent discrimination in the application of the selection of the means of communication, remained pertinent even in the light of the proposed article 5 bis of the Model Law. Accordingly, the Working Group decided to consider at its next session whether an express non-discrimination provision should be retained and, if so, its location.

61. In this regard, it was also noted that the Guide to Enactment should stress that the use of mixed systems would be most appropriate during the transitional period after the introduction of electronic means of communications in procurement, and that the use of only electronic means would be promoted where appropriate in the longer term.

62. It was further observed that the proposed text of article 30 (5)(a) referred to the “form”, whereas the proposed article 5 bis referred to the “means”, of submission of tenders. It was noted that the two provisions should be consistent in this regard, as well as in references to the requirements of tenders to be in a sealed envelope, and that if the form were specified as being “in writing, signed and in a sealed envelope”, the reference to the manner of their submission should perhaps be to the “means” of their submission, so as to achieve the desired consistency.

63. Accordingly, the Working Group decided that at its next session it would consider the following text for article 30(5)(a): “A tender shall be submitted [by the means specified in the solicitation documents, and shall be submitted] in writing, signed and in a sealed envelope”.

7. Electronic opening of tenders (A/CN.9/WG.I/WP.42, paras. 35-37, and A/CN.9/WG.I/WP.42/Add.1, para. 9)

64. It was observed that the use of a sealed envelope in the submission of tenders discussed in the preceding section was also an essential feature of the opening of tenders, because the existence of the seal until the time of opening was a critical element of confidence in the process.

65. As regards the proposed text for article 33 (4) of the Model Law, it was noted that the requirement for suppliers to be able to follow the opening of tenders “simultaneously” or “instantaneously” should be changed to “contemporaneously”, which would require the procuring entity to open the electronic tenders and upload them onto the relevant website immediately thereafter, a procedure equivalent to and not more onerous than the traditional public opening of tenders. It was also suggested that the final part of the proposed text should read “if [suppliers] are capable of following the opening of the tenders contemporaneously through the electronic, optical or comparable means of communication used by the procuring entity”.

8. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.42, paras. 38-45, and A/CN.9/WG.I/WP.42/Add.1, para. 10)

Article 5

66. It was stressed that the article was important and used by multilateral development banks as a benchmark to assess a level of transparency in procurement regulation in various countries. It was suggested that provisions in article 5 should remain as clear as possible and not be overloaded with extensive requirements.

67. The prevailing view was that the current scope of the article should be maintained. It was observed that while the objective of transparency was important, it should not be achieved at the expense of other important considerations, such as costs and other burdens on procuring entities.

68. The desirability of including a reference to “all judicial decisions on the application thereof” in the revised article was questioned. Concerns were expressed that in some jurisdictions, it would be impossible to comply with the requirement to make this information promptly accessible to the public and systematically maintain. Some delegations were of the view that the imposition of this requirement should be restricted to judicial decisions with precedent value and “of general application”.

69. Questions were raised about the meaning of the phrase “systematic maintenance”. It was suggested that the phrase sought to capture the requirement to update and that it could be onerous with respect to certain types of information. The suggestion was made that such a requirement should apply only to the procurement law and procurement regulations, while a less stringent regime should apply, for example, to administrative rulings.

70. The point was also made that a difference should be drawn between the requirement to make legal texts accessible and the requirement to publish them. While the former could in most cases be easily complied with in practice as regards all legal texts referred to in the article, the latter would pose practical problems of compliance, especially if it applied to all judicial decisions and administrative rulings. It was stressed, on the other hand, that the requirement to make legal texts accessible could also be burdensome in practice as, for example, judicial decisions and administrative rulings might be available but not necessarily easily accessible.

71. Some support was expressed for splitting article 5 into two paragraphs: the first paragraph dealing with legal texts that had to be published (law, procurement regulations and directives of general application); and the second paragraph dealing with significant important judicial decisions and administrative rulings that should be maintained on an ongoing basis. It was suggested that different requirements should apply to these two categories of information. As regards the first category of legal texts, the requirements would remain as they were in the current article 5, in particular the notion of timeliness was stressed to be important and therefore the word “promptly” should be kept in the article. As regards the second category, the requirement to “systematically maintain” would be replaced with the requirement “to update on a regular basis if need be”.

72. The prevailing view was that the Secretariat should take into account this approach when preparing a revised text of article 5 and that further details should be included in the Guide, in particular issues that would be desirable to regulate in procurement regulations, such as media and manner of publication.

73. Some support was expressed for the retention of the first proposed addition in article 5. The reference to “other information” in it was proposed to be restricted by the addition at the end of the words “regarding procurement policies”. On the other hand, it was questioned whether the suggested wording would be appropriate in the Model Law, as an enacting State would in any case have options to add provisions to those existing in the Model Law, and whether it would not already be covered by the general objective of transparency.

74. The prevailing view was that all proposed possible additions in square brackets should be reflected only in the Guide. It was suggested that the second proposal should

specify, for the benefits of enacting States, requirements regarding publication found in the Model Law. Reference to systematic maintenance in this context should be reconsidered as being onerous, and its benefits illusory.

Provisions on “forthcoming procurement opportunities”

75. Divergent views were expressed as regards the desirability of including these provisions in the Model Law. On the one hand, it was stated that this approach would be desirable as provisions were conducive to transparency in public procurement and promoting competition. In addition, it was pointed out that this would align the Model Law in the respective part with the WTO Agreement on Government Procurement.

76. Suggestions were made that the proposed provisions should be amended as follows so that to clearly state that they would not constitute calls for tenders: “as promptly as possible after beginning of a fiscal year procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period], and this information shall not constitute the solicitation documents or parts thereof”. Another suggestion was to replace the verb “may” with the word “shall” or “should”. Some delegates however expressed the view that if the provisions were to be included in the Model Law, they should remain enabling rather than prescriptive. The suggestion was made that they might be included in article 5.

77. On the other hand, some delegates were of the view that the proposed provisions would be more appropriately located in the Guide. They were against making the provisions prescriptive as they would in such case impose burdensome requirements on procuring entities in the sense that they could be interpreted as proposing a new standard or step for the procuring entity with respect to publication of information prior to solicitation.

78. The suggestion was made that in the consideration of this issue, the Working Group should assess whether the practice of publication of this type of information would be consistent with objectives of the Model Law, and if so whether there would be the need for a specific enabling provision in the Model Law to promote the practice.

Guide to Enactment text

79. It was suggested that the sentence beginning with the words “Incentives may be provided” in paragraph 2 of section (a), the second sentence of paragraph 4 of section (a), and paragraph 2 of section (b) should be deleted. In the sentence beginning with “Although the Model Law requires” in paragraph 2 of section (a), it was suggested to replace the last portion of the sentence beginning with the words “and might operate” with the following phrase “and enacting States should consider the cost of additional publication having regard of the benefits to recipients”.

9. Outstanding issues (A/CN.9/WG.I/WP.42, paras. 36-48)

80. As regards the general approach to redrafting the Model Law, the point was made that amendments should be kept to the minimum and be drafted in a flexible manner to accommodate varying conditions in different countries. It was also noted that the revised Model Law should be as user-friendly as possible.

81. As regards whether scope of the Model Law and the Guide should be expanded to address procurement planning and contract administration, it was pointed out that the

procurement in fact covered these stages, and involved various public agencies. However, it was observed that some of these stages did not fall within the purview of procurement legislation, but rather budgetary legislation (procurement planning) and contract law (contract administration). Nevertheless, it was pointed out that these stages were integral parts of the entire procurement process with the result that deficiencies at one stage would have a negative impact on other stages and the overall procurement process, with a risk that the Model Law's objectives could be compromised. Therefore, it was stressed that the proper regulation of all the stages leading and following the selection of a contractor, the current scope of the Model Law, was paramount.

82. Accordingly, suggestions were made that, if not by establishing general principles in the Model Law, the Guide should address *inter alia* best practice in procurement planning and contract administration so as to cover the entire procurement process. On the other hand, it was noted that it might be more feasible in the expanded Model Law and/or the Guide to deal with the issues of procurement planning alone, as regulation of contract administration was a considerably more complex undertaking. The Working Group recalled in this respect the UNCITRAL Legislative Guide on Drawing Up International Contracts for the Construction of Industrial Works, which dealt with pre-contract issues as well as with the specific provisions of a works contract. It was pointed out that in some jurisdictions the contract administration stage was regulated by separate legislation.

83. Specifically in the context of procurement planning, it was pointed out that the Working Group had already touched upon one of the issues related to the procurement planning stage, the publication of information on forthcoming procurement opportunities. Support was expressed that the Guide should encourage the publication of this information in enacting States as conducive to proper procurement management, good governance and transparency. Caution was expressed as regards the inclusion in the Model Law of anything beyond general principles that should govern procurement planning since otherwise the flexibility necessary in that stage would be eliminated. Suggestion was made that the Guide or other tools that could be developed to assist States with enacting and implementing the Model Law was an appropriate place to discuss details about procurement planning and some good practices to be encouraged. Nevertheless, it was pointed out that there might be practical difficulties in finding the relevant information and solutions that would accommodate all various local conditions.

84. Specifically in the context of contract administration, it was suggested that the Model Law or the Guide should alert enacting States to problems that might arise (i) on the one hand, at the stage of the selection of a contractor, which might have negative impact on contract administration, especially as regards the ultimate price that State would have to pay for goods, works or services provided, and, (ii) on the other hand, at the contract administration stage, where variations might significantly increase the final price, undermine the integrity of the procurement process and negatively affect the legitimate interests of the parties. It was suggested that the Guide, where appropriate and possible, should provide guidance to enacting States on how to prevent and deal with these possible issues.

85. As regards the nature of the Guide, suggestions were made that the Guide should not only be addressed to legislators but should also be a more general guide to the implementation and use of the Model Law, addressed to a broader audience. It was agreed that drafting regulations as part of such a guide would not be feasible as they would require even a higher level of specificity than that required for the Model Law and would need to reflect divergent systems. The revised Guide could elaborate on issues that would be

important to reflect in procurement regulations. The view was expressed that model clauses could also be provided in the Guide, which could be especially valuable, if they drew from practical experience of various stakeholders, including development banks. A preference was expressed for using the verb “may”, not “will”, in the Guide to Enactment, when referring to general legislative issues to be addressed by enacting States.

86. The Working Group decided to take up these issues in due course, at which stage the Secretariat might be requested to undertake a study that would enumerate problems commonly encountered at procurement planning and contract administration stages and analyse ways of dealing with them in various domestic, regional and international regulations.

B. Draft provisions to enable the use of electronic reverse auctions under the Model Law (A/CN.9/WG.I/WP.43)

1. General remarks

87. It was pointed out that in drafting any provisions on electronic reverse auctions (ERAs) in the Model Law and the Guide, conditions in and interests of countries that would primarily benefit from the Model Law should be kept in mind. It was pointed out that the Model Law had promoted so far traditional open tendering as a “gold standard”, whose fundamental principles included prohibition of negotiations and a single opportunity for a supplier to submit its best tender, which were contradicted by the inherent features of ERAs. Acknowledging and regulating ERAs in the Model Law could mean deviation from these fundamental principles and dilution of the “gold standard” of open tendering.

88. The Working Group noted developments in the use and regulation of ERAs at national and regional levels, as well as the multilateral development banks’ stance in that respect. In reiterating that ERAs posed a number of new risks and might increase those present in the traditional sealed envelope environment, the general view was that the Working Group should consider all problems that ERAs raised so as properly to mitigate them through regulation.

89. It was acknowledged that because of the novelty of ERAs, it would be difficult to set out best practice in their use. Therefore, the view was expressed that the Model Law’s provisions on ERAs should be drafted as broadly as possible to allow evolution of the practice with ERAs. At the same time, it was stated, it would be important to establish the essential legal framework for their operation, based on general procurement principles and principles specific to the operation of ERAs. Anonymity of bidders and clear specifications established and made known to suppliers at the outset of procurement were named as such important considerations. The importance of preserving the anonymity of bidders was also highlighted in the broader context of competition and fair dealing.

90. Experience with ERAs in at least one jurisdiction, it was said, indicated that they might be a costly tool for procurement of demands for only one procuring entity as third-party contractors were hired. Therefore, consolidated purchases were encouraged.

91. The initial preference was that the provisions should be drafted in such a way as to allow the price to be the only award criteria when ERAs were used. Allowing criteria other than price would open the possibilities of abuse as a subjective element could be introduced into the process when trying to quantify these criteria. The view was expressed

that establishing the lowest price below which tender would not be accepted could be an important safeguard for a proper management of ERAs and against abnormally low tenders.

92. The preference was also expressed for standard goods and commodities to be subject to ERAs. The point was made that even standard services (for example, cleaning services) could have qualitative elements and therefore procurement through ERAs could compromise quality. On the other hand, it was stated that it would not be desirable to limit ERAs to any particular type of procurement as at this stage it would be difficult to predict how the tool would evolve. As experience in some countries suggested, services were capable of being procured through ERAs even when quality mattered with a two phase approach, the first phase involving the assessment of quality aspects.

93. A number of objections were raised to providing exclusively for Model 1 ERAs as they presupposed a fully automated process, which especially at a transitional stage in development, could not be achieved without the risk of excluding a substantial number of suppliers.

94. It was agreed that ERAs should not be restricted to a stand-alone procurement method, to avoid prejudicing their evolution. ERAs should also be allowed as an optional phase in some procurement methods.

2. Conditions for use of electronic reverse auctions (A/CN.9/WG.I/WP.43, paras. 9-37)

95. The following text was proposed to be included in the end of chapter III “Tendering proceedings”, as a new section IV “Electronic reverse auctions”, where all ERA related provisions, including the proposed text for articles 47 bis and ter, should be consolidated:

“Article [36 bis]. Conditions for use of electronic reverse auctions

“A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article[s 47 bis and ter] in the following circumstances:

- (a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods, construction and services;
 - (b) Where there is a competitive market of suppliers or contractors that are anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured;
 - (c) Where it concerns
 - (i) commonly used goods, the characteristics of which are generally available on the market; or
 - (ii) commonly used services or constructions, the characteristics of which are generally available on the market and provided that the services or constructions are of a simple nature; and
 - (d) the price is the only criterion to be used in determining the successful bid;
- or (e) [option for the legislator:]the price and other criteria that can be expressed in figures or transformed into monetary units and can be evaluated automatically are to be used in determining the successful bid.]”

96. Support was expressed for the suggested wording, which, it was observed, represented a compromise solution, drafted in a sufficiently broad and flexible manner to

allow evolution of ERAs within a number of parameters. There was agreement in the Working Group that all provisions in the proposed article 36 bis should be taken as a package, so as to preserve the effect of all safeguards contained therein.

97. An observation was, on the other hand, that the proposed text favoured price considerations at the expense of quality and that the approach should be reconsidered. In response, it was observed that that situation was inherent in ERAs and thus in procurement where quality was more important than or equal to price, other procurement methods might be more suitable. Concerns were also expressed on whether the article provided sufficient assurances regarding responsiveness. The point was made, however, that the issue of responsiveness was addressed in article 47 bis.

98. A number of amendments were proposed with respect to the text: throughout the text, to use consistently “construction or services” in square brackets (consistent with the Model Law’s terminology); in paragraph (a), to remove the reference to the procuring entity; in paragraph (c), to delete “the characteristics of”; in subparagraph (c)(ii), to put in brackets the phrase “generally available on the market”; and in the optional paragraph (e), to insert the word “only” before the phrase “other criteria”, to consider the appropriateness and location of the phrase “option for the legislator”, to include alternative wording to “evaluated automatically”, such as “evaluated in automatic processes”, to replace the term “bid” with the term “tender” and to refer to paragraph (d) and optional paragraph (e) as alternative text for paragraph (d).

99. With reference to paragraph (a), it was also observed that the paragraph might be redundant in the light of article 27 (d) of the Model Law, and the Working Group would revisit the question. With reference to paragraph (e), it was also questioned whether the paragraph should stay in the Model Law or be moved to the Guide.

100. It was suggested that the Guide should explain that construction or services would not normally fulfil conditions for ERAs, unless they were of a highly simple nature. Strong support was expressed for that suggestion and reference in this regard was made to paragraph 35 of A/CN.9/WG.I/WP.43, in particular its provisions on commodities, that, it was said, should remain as the text for the Guide accompanying the proposed article 36 bis. It was also pointed out that, while the proposed article envisaged criteria other than price for ERAs, the Guide should alert to potential dangers if such other criteria were included. Another proposal was for the Guide to clarify that the term “qualified” used in subparagraph (b) should not mean that pre-qualification would necessarily be involved in ERAs.

101. Among other considerations to be reflected in the Guide suggested were the need to ensure the anonymity of bidders (pointing out that the requirement that reverse auctions should therefore be only in electronic form); that ERAs would be a single and final round before a winner was selected to prevent abuses; the winning price would figure in the contract, including in the case of framework agreements; opening and closing of the auctions would be clearly specified in advance; and on the importance of a sufficient number of participating suppliers to ensure competition. The Working Group heard that the type of non-price criteria contemplated included delivery times and technical considerations. The Working Group agreed that no criteria other than those in (d) and optional (e) should be auctioned.

102. In addition, to preserve the benefits of ERAs as an efficient tool and to alleviate difficulties with drafting precise specifications, it was suggested that the Guide should elaborate on advisability of common procurement vocabulary that would identify goods,

construction or services by codes or by reference to general market-defined standards (that is, standardized products). Developing lists with goods, construction or services that were not suitable for ERAs or a list that would describe characteristics of goods, construction or services, which if present would make such goods, construction or services suitable for ERAs were also suggested (as opposed to developing a positive list that would be difficult to update). Reference in this regard was made to paragraph 35 of A/CN.9/WG.I/WP.43.

103. With respect to the term “standardized”, appearing in proposed article 19 bis in A/CN.9/WG.I/WP.43 and not reflected in the proposed article 36 bis, the tentative preference expressed was to avoid that term as it was prone to different interpretations and therefore could give rise to review. The term “commonly used” was considered to be aimed at the same objective as “generally available”, with the meaning easily and more uniformly comprehensible but both might be retained. It was also agreed that no approval of a third party would be required for ERAs to be used. As the proposed location of the article indicated, the Working Group’s understanding was that ERAs would essentially be a part of tendering proceedings, while not excluding the possibility of using it as a stand-alone method or a phase in multi-stage framework agreements.

104. The Secretariat was requested to reconsider the example in paragraph 32 of A/CN.9/WG.I/WP.43 as well as the addition in paragraph 5 of the Guide text proposed for article 19 bis.

3. Procedures in the pre-auction period (A/CN.9/WG.I/WP.43, paras. 38-53)

105. As regards proposed article 47 bis, it was queried whether the article contemplated that suppliers could withdraw from the ERA before its closure. The Working Group heard that there was no express provision in the article, but the implication of the continuing obligation upon the procuring entity to ensure sufficient competition implied that suppliers could indeed withdraw. The Working Group also heard that in some jurisdictions, suppliers were not permitted to withdraw once they had committed to participate in the ERA.

106. It was further noted that there were two distinct types of ERA that could be contemplated: in the first, the full series of steps in an ordinary tendering proceeding would be conducted, including an assessment of the responsiveness of the initial tender and the qualifications of the suppliers, with all the safeguards of the sealed envelope system. Thereafter, all qualified suppliers would be invited to participate in the ERA that would determine the winner. In such a system, it would be possible for suppliers to withdraw, as the pre-ERA assessment ensured that the winner could fulfil the contract.

107. In a second type of ERA, there would be no initial assessment, and no control of the responsiveness of the tender or qualifications of the supplier until after the ERA had closed. The attention of the Working Group was drawn to the existence of ERAs already conducted in this manner, and that these procedures might minimize the risk of fraud in the operation of the ERA, in that sensitive information that would be submitted in an initial tender would not be available prior to the ERA itself. In this system, the suppliers simply confirmed their acceptance of the specifications and that they were qualified to participate in the procurement online as the ERA commenced. It was observed that post-ERA assessment of responsiveness and qualification raised the risk that the winning supplier was then found to be unqualified or its tender non-responsive, in which case another supplier would be awarded the contract (according to defined rules). In this system, since

there was no guarantee that the winning supplier could fulfil the contract, it might be unadvisable to permit suppliers to withdraw.

108. The Working Group considered that the Model Law should be sufficiently flexible to enable either system to operate, provided that sufficient safeguards were in place to protect against fraud and abuse. The Working Group requested that proposed article 47 bis be redrafted to confer sufficient flexibility in this regard. As regards the current text, it was agreed that paragraph 2 should provide that where the first type of ERA above was contemplated, suppliers or contractors should, prior to the auction, submit initial tenders that were complete in all respects. It was also agreed that the article should refer to “tenders” rather than “bids”, and that a more appropriate term for the parts of the tender that would be subject to the ERA than “elements” would be sought.

109. The Working Group considered that the Guide to Enactment text should explain that the provisions in the Model Law were intended to confer sufficient flexibility to allow an ERA to operate in either of the ways described in paragraphs 106 and 107 above, depending on the circumstances prevailing in the country concerned. In addition, the Guide should address the safeguards that should be in place to allow either system to operate consistently with the objectives and main procedures of the Model Law, including any differences between ERAs and those main procedures.

110. As regards the possibility of suppliers withdrawing from the ERA and ensuring effective competition, it was agreed that paragraph 3(d) should provide that:

“The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors at any time before the closure of the auction, is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity [may/shall] withdraw the electronic reverse auction.”

The Working Group agreed to consider at its next session whether the procuring entity should have the option, or be required, to withdraw the ERA in such circumstances, in the light of whether or not suppliers should be permitted to withdraw from the ERA. The Working Group considered that the Guide to Enactment text should address when and how suppliers might withdraw from the ERA process before its closure.

**F. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services:
drafting materials addressing the use of electronic communications
in public procurement, submitted to the Working Group on
Procurement at its ninth session**

(A/CN.9/WG.I/WP.42 and Add.1) [Original: English]

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 43 of document A/CN.9/WG.I/WP.41, which is before the Working Group at its ninth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic communications and technologies, in public procurement.

2. Such use, including the electronic submission and opening of tenders, and holding meetings, storing information and the publication of procurement-related information electronically, was included in the topics before the Working Group at its sixth to eighth sessions.¹ At its sixth session (Vienna, 30 August-3 September 2004), the Working Group held a preliminary exchange of views on these issues and requested the Secretariat to prepare drafting materials addressing them for consideration at its seventh session (A/CN.9/568, paras. 29 and 40).

3. At its seventh session (New York, 4-8 April 2005), the Working Group considered these drafting materials, and requested the Secretariat to revise them for its eighth session. It also requested the Secretariat to prepare a study reviewing practices under various procurement regimes regarding the publication of procurement-related information that the Model Law did not currently require to be published, in connection with consideration of a possible expansion of article 5 of the Model Law (“Public accessibility of legal texts”) and any new provision or guidance (A/CN.9/575, paras. 9, 27 and 31).

4. At its eighth session (Vienna, 7-11 November 2005), the Working Group considered the revised drafting materials and the study, and requested the Secretariat to prepare revised materials for further consideration (A/CN.9/590, para. 10). This note has been prepared pursuant to that request.

II. Proposed draft text for the revised Model Law and Guide to Enactment

A. General guidance for drafting (A/CN.9/WG.I/WP.38, paragraphs 14-16, and A/CN.9/590, paragraph 16)²

5. The Working Group has noted that the aims of the proposed revisions to the Model Law are to enable the use of electronic procurement by ensuring that all forms of communication are afforded equivalent status under the Model Law. Although electronic communications are to be promoted where appropriate, there should be no discrimination against traditional, paper-based, communications (see, further, para. 15 below).³ The Working Group has confirmed that the provisions in the Model Law are to be based on general principles of functional equivalence and technological neutrality,⁴ being those

¹ As regards electronic reverse auctions, see A/CN.9/WG.I/WP.43 and Add.1.

² See further A/CN.9/WG.I/WP.38, chapter II, section B, subsection 2(b).

³ See also A/CN.9/590, para. 16.

⁴ See A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 12, A/CN.9/WG.I/WP.38, para. 16, and A/CN.9/590, para. 19.

found in the UNCITRAL Model Law on Electronic Commerce (1996) (the “Model Law on Electronic Commerce”).⁵

6. Furthermore, the Working Group has decided to apply appropriate safeguards to the procuring entity’s selection of the means of communication, such that procuring entities do not discriminate among suppliers and contractors, and select means that are sufficiently widely available (these notions are to be referred to as “accessibility standards”).⁶

**B. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents
(A/CN.9/WG.I/WP.38, paragraphs 24-29, and A/CN.9/590, paragraphs 19-27)**

1. Proposed new text for the Model Law: new article 4 bis

7. The Working Group decided at its eighth session to continue its deliberations on the basis of Variant B for proposed article 4 bis of the Model Law set out in paragraph 25 of A/CN.9/WG.I/WP.38, with the following amendments agreed at that session.⁷ The revisions are shown as tracked changes from the previous text in the addendum (A/CN.9/WG.I/WP.42/Add.1, paragraph 1).

“Article 4 bis. Functional equivalence of all [means][methods] of communicating, publishing, exchanging or storing information or documents

Any provision of this Law related to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to incorporate [any means of such activity, including], electronic, optical or comparable means, [including, but not limited to,] electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], provided that the means chosen complies with the [provisions of/accessibility standards set out in] article [4 ter].”⁸

Commentary

8. The Working Group has provisionally decided that the “accessibility standards” should be removed from this article and set out elsewhere in the revised Model Law, and their formulation is considered separately (see, further, paras. 17 and 18 below).⁹

9. The Working Group has also requested that the previous formulation “provided that the enacting State or procuring entity is satisfied that such use complies with the

⁵ For the text of the Model Law on Electronic Commerce, see *Official Records of the General Assembly, Fifty-first session, Supplement No. 17* (A/51/17), annex I (also published in the UNCITRAL Yearbook, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.

⁶ See section C below and A/CN.9/575, paras. 12-14.

⁷ A/CN.9/590, paras. 19 to 26, drawing on A/CN.9/575, para. 12.

⁸ The Working Group may recall that the first formulation is more common in the Model Law and Guide to Enactment, but may wish to consider whether explicit references to the “accessibility standards” would be of more assistance to the reader.

⁹ A/CN.9/590, paras. 25 and 26.

[accessibility standards]” should be rephrased as “provided that such use complies with the [accessibility standards]”, so as to ensure objectivity.¹⁰ The further minor revision to the final sentence of the article has been made for reasons of style.

10. The text has been expanded to address the publication of procurement-related information, the electronic opening of tenders, and the requirement for a document to be in a sealed envelope.¹¹

11. The Working Group has deferred its consideration of whether to refer to “means” or “methods” of communication in the title and text of the article.¹² Both phrases are to be found in United Nations and UNCITRAL texts. For example, the General Assembly resolution adopting the Model Law on Electronic Commerce¹³ refers to “methods of communication”, and the text of the Model Law on Electronic Commerce refers to “means of communication”, as does the text of article 9 (2) of the current Model Law.

12. The Working Group may also wish to consider whether the term “electronic, optical or comparable means” is sufficiently broad to encompass information posted on websites.

2. Guide to Enactment text addressing the use of electronic communications during the procurement process

13. The revised text set out below comprises those paragraphs of the original text following paragraph 23 of A/CN.WG.I/WP.38 that have been amended (paras. 1, 5, 11, 12, 15 and 16 from the previous draft, which remain unchanged, are not repeated). The revisions are shown as tracked changes from the previous text in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 2).

(a) General introductory remarks in the Guide to Enactment (A/CN.9/590, paragraphs 17-18, and A/CN.WG.I/WP.38, paragraph 23)

“(i) Provisions governing the use of electronic communications in the procurement process¹⁴”

(1) Unchanged

(2) Since the adoption of the Model Law in 1994, the use of electronic communications and technologies in public procurement (which includes using electronic equipment for the processing, digital compression and storage of data that are transmitted, conveyed and received by wire, by radio, by optical or by other electromagnetic means) has increased rapidly, including the use of procurement methods based on the Internet, to which this Guide will refer generally as “electronic procurement”.¹⁵ Electronic procurement has been observed to offer many potential

¹⁰ See further A/CN.9/590, para. 24.

¹¹ A/CN.9/590, paras. 22 and 26.

¹² A/CN.9/590, para. 27.

¹³ General Assembly resolution 51/162 of 16 December 1996.

¹⁴ The Working Group may wish to consider whether the sub-headings in the draft Guide to Enactment text, which have been included primarily for ease of reference during the drafting process, should be retained in the final text. On the one hand, sub-headings are useful tools for navigation, but on the other, they may impede the flow of the text.

¹⁵ This addition addresses the request of the Working Group that a description of “electronic” and related terms should be included in the Guide to Enactment, rather than including a definition of such terms in the Model Law itself (see, further, A/CN.9/590, para. 43 A/CN.9/WG.I/WP.38/Add.1, paras. 6-12).

benefits, including improved value for money from more rigorous competition in a broader procurement market, better information for suppliers and contractors and more competitive techniques, savings in time and costs, improved administration of contracts awarded, and, in some cases, improved compliance with rules and policies and fewer opportunities for corruption and abuse. Further, electronic procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process. The Commission therefore considered that the Model Law should make provision so as to enable the use of electronic procurement.

(3) However, controls on the use of electronic procurement may be needed to address possible discrimination where access to the necessary infrastructure may be lacking, issues of security, confidentiality and authenticity in electronic communications, and the impact of modern procurement methods on [other] policy goals. The revisions to the 1994 Model Law seek to address these concerns, and this Guide sets out the objectives of the revisions themselves.

(4) Although some of the issues raised by electronic procurement can be accommodated within the 1994 Model Law's provisions (or through the interpretation of existing laws and rules, including as set out in the 1994 Guide to Enactment), the Commission has revised the text of the Model Law so as to make appropriate provision or provide clarification where necessary and, where appropriate, to promote the use of electronic procurement as a means of enhancing the achievement of the objectives of the Model Law itself. The aim of the provisions is to ensure that all [means/methods] of communication are afforded equivalent status under the Model Law and that their use will be subject to appropriate safeguards such as that procuring entities, when selecting the means of communication for a procurement, [do not discriminate among suppliers and contractors][select means that are [generally][reasonably][commonly] available [and that are compatible [or interoperable] with those in common or general use]. It should be noted that these provisions are intended to apply to international and domestic procurement, so as to ensure non-domestic suppliers' access to procurement markets even where there may be uneven availability of electronic infrastructure within the field of potential suppliers and contractors.

(ii) Interaction between legislation concerning electronic procurement and electronic commerce legislation

(5) Unchanged

(6) One of the main requirements for the effective use of electronic communications is certainty as to the legal recognition, validity and enforceability of electronic communications generated in the contractual process. Accordingly, the UNCITRAL Model Law on Electronic Commerce seeks to enable commercial transactions to be conducted electronically, by providing certainty in the use of electronic communications, such that requirements for "written" or "original" communications and documents, the formalities of contract formation and the admissibility of evidence in court encompass both paper-based and electronic communications and documents.

(7) The approach of the Model Law on Electronic Commerce is to provide a general principle of functional equivalence in communications, such that electronic communications are afforded the same degree of recognition as paper-based documents, so that both are universally legible, remain unaltered over time, are capable of reproduction (with each party holding a copy of the same data), can be

authenticated by means of a signature, and are in a form acceptable to public authorities and courts.

(8) Articles 5, 6, 7 and 8 of the Model Law on Electronic Commerce in material part provide for the functional equivalence of paper-based and electronic communications, addressing the “legal recognition of data messages [electronic communications]”, and the notions of “writing”, “signatures”, and “original”. The combined effect of these provisions, which should be read together, is that electronic communications have the same degree of legal recognition and validity as paper-based ones, so that they will not be denied legal effect, validity and enforceability solely on the grounds that they are electronic and not paper-based communications.

(9) Deleted

(10) The specific considerations arising when documents are signed electronically, and those arising in the conclusion of contracts by electronic means are addressed in the commentary to article 36 (“Acceptance of tender and entry into force of procurement contract”) below.

(11) Unchanged

(iii) Approach to enabling the use of electronic communications in the revised Model Law

(12) Unchanged

(13) The provisions presented in this revised Model Law set out that any requirement for writing, publication of information, the submission and opening of tenders, for a record or a meeting in the Model Law itself can be met by using any means of communication, electronic or otherwise, to the same effect. (In the context of a meeting, using electronic communications means that the participants can follow and participate in the proceedings by electronic means of communication.) Although the legal validity of such communications should explicitly be provided for in an enacting State’s general electronic commerce legislation, the procurement context requires specific and additional provision in areas such as regarding the submission of tenders under the provisions of articles 27 (h), (q), (r) and (z), 30, 31 (2) and 33 of the [1994] Model Law [update cross references]. In such cases, the reasons for the need and objectives of the provisions are set out in the relevant section of this Guide [insert cross references].

(14) The revised Model Law also, where appropriate, encourages but does not generally require the use of electronic procurement. However, the procuring entity may require the use of electronic communications in the procurement process under articles [4 ter and 9], and electronic procurement is required in the case of [cross reference to electronic procurement, such as electronic reverse auctions and dynamic purchasing systems].

(15), (16) Unchanged”

Commentary

14. Paragraph 4 of the above text will be conformed to the drafting of the “accessibility standards” (see, further, paras. 17 and 18 below). The Working Group has noted that the Guide to Enactment text should address discrimination that may arise due to differing

levels of infrastructure,¹⁶ and may therefore wish to consider the suggested guidance set out in the final sentence of paragraph 4.

(b) Guide to Enactment text addressing article 4 bis

15. The Guide to Enactment text addressing article 4 bis, to be drafted once the text of the Model Law's provisions has been settled, will state that the aim of the provision is to ensure the functional equivalence of all forms of communication, and will cross refer to the general introduction. While the relative novelty of electronic communication may warrant some explanation not required by traditional forms, the text will be drafted so as to avoid obsolescence.

16. The Working Group has requested that the generic description of the items addressed by the article should be expanded. The Guide to Enactment will therefore stress that the article should be interpreted broadly, to include any requirement implying physical presence or a paper-based environment.¹⁷

C. Accessibility standards (A/CN.9/WG.I/WP.38, paragraphs 30-32, and A/CN.9/590, paragraphs 28-33)

1. Proposed new text for the Model Law: new article 4 ter

17. The Working Group at its eighth session requested the Secretariat to revise the draft text for the "accessibility standards" discussed at its eighth session, so that they address all means of communication, not just electronic means,¹⁸ and all phases of procurement,¹⁹ to separate the provision from that addressing functional equivalence,²⁰ and to base the draft on the text set out in paragraph 30 of A/CN.9/590, with two possible additions. The revisions are shown as tracked changes from the previous text in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 3).

"Article 4 ter. Accessibility standards

The procuring entity shall ensure that [means/method]²¹ of communicating, publishing, exchanging or storing information or documents, of holding meetings, and of submission and opening of tenders,

Shall not [[unreasonably] discriminate] [result in [unreasonable] discrimination] among or against potential suppliers or contractors or otherwise [substantially] limit competition.

[possible additions]

Shall not represent an obstacle to the procurement process; and

that the [means/methods] of communication shall be [generally] [reasonably][commonly] available [and compatible [and interoperable] with those in common or general use]."

¹⁶ A/CN.9/590, para. 40.

¹⁷ A/CN.9/590, para. 22, drawing on the list found in A/CN.9/WG.I/WP.38, para. 25.

¹⁸ A/CN.9/590, para. 23.

¹⁹ A/CN.9/590, para. 36.

²⁰ Currently article 4 bis, set out above. See also A/CN.9/590, para. 28.

²¹ See para. 11 above.

Commentary

18. The Working Group at its eighth session agreed further to consider the “accessibility standards” provisions at its ninth session, to address the following outstanding issues:

(a) Which, or which combination, of the following qualifications to the appropriate means of communication would be retained: those that “do not represent an obstacle to the procurement process”, that are “generally”, “reasonably”, “commonly” available, and “compatible” or “interoperable” with those in common or general use (the Working Group may also consider that the word “interoperable” is overly technical for this type of text). The Working Group has noted that the term “generally” involves the notion of universality, the term “reasonably” addresses a separate consideration (that once technology is widely-used and relatively inexpensive, it would not be discriminatory to require its use), and that the term “commonly” means that the technology is widely available, but perhaps not to all or nearly all users;²²

(b) Whether the words “unreasonably” and “substantially” should be deleted from the introductory paragraph, and whether the phrase should read “shall not discriminate” or “shall not result in discrimination”;²³

(c) Whether the notions of “general availability” and “non-discrimination” require separate provision, whether one encompasses the other and whether they may have a degree of inconsistency;²⁴

(d) The location of the “accessibility standards” provisions in the text of the Model Law. The Working Group has requested the Secretariat to make proposals on the question for its consideration at its next session.²⁵ Such proposals are discussed in para. 22 below.

2. Guide to Enactment text addressing article 4 ter

19. The Working Group may wish to consider the following text regarding the “accessibility standards”.²⁶ This text is new, and replaces that set out in paragraph 32 of A/CN.9/WG.I/WP.38 in its entirety.

“Article 4 ter. Accessibility standards

(1) Article 4 ter of the Model Law provides that the procuring entity may choose the means by which it will communicate with suppliers or contractors in the procurement process, including the submission of tenders (the electronic submission of which could not be required under article 30 of the 1994 text). The objective of this provision is to afford the procuring entity the option of insisting on a particular means of communication, such as electronic means, without having to justify its choice. However, that option is subject to the control that the means of communication comply with the “accessibility standards”, which will apply to any means of communication chosen. The “accessibility standards” have been included

²² A/CN.9/590, para. 29, and para. (4) of the general introductory remarks in the Guide to Enactment introducing the use of electronic communications in the procurement process, following para. 13 above.

²³ A/CN.9/590, para. 31.

²⁴ A/CN.9/590, para. 32.

²⁵ A/CN.9/590, para. 33.

²⁶ The proposed text has minor amendments compared with that proposed at the eighth session to accompany the revised article 9 of the Model Law, set out following paragraph 4 of A/CN.9/WG.I/WP.38/Add.1.

to strengthen the safeguards contained in the article against discriminatory or otherwise exclusionary practices by the procuring entities, and to prevent the means of communication chosen from operating as a barrier to access, so as to safeguard the objectives of the Model Law.

(2) The “accessibility standards” are also included to guide procuring entities in selecting means of communication appropriate for each procurement in a time of rapid pace of technological advancement when new technologies may emerge that, for a period of time, may not be sufficiently accessible (whether for technical reasons, reasons of cost or otherwise). [Add any further discussion regarding compatibility and interoperability, and the underlying need for an open and generally available network able to handle and transmit digital signals].

(3) The obligation on the procuring entity to comply with the “accessibility standards” will be open to review under article 52, and requiring the choice of the means of communication to be included in the record maintained pursuant to article 11 will enable the procuring entity’s decision and its compliance with the “accessibility standards” to be reviewed.

(4) The provisions are also designed to ensure that suppliers and contractors do not have the right to insist on any particular means of communication with a procuring entity, and that no such right can be construed.”

D. Form of communications (A/CN.9/WG.I/WP.38/Add.1, paragraphs 1-5, and A/CN.9/590, paragraphs 34-42)

1. Proposed revisions to article 9 of the Model Law

20. The Working Group at its eighth session requested the Secretariat further to revise the proposed additions to the text of article 9, set out following paragraph 3 of A/CN.9/WG.I/WP.38/Add.1.²⁷ The consequent revisions are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 4).

“Article 9. Form of communications

(1) Documents, notifications, decisions and other communications [referred to in this Law] between suppliers or contractors and the procuring entity shall be provided, submitted or effected by the means of communication specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, provided that the procuring entity shall in each case comply with the [provisions of/accessibility standards set out in]²⁸ article [4 ter].

(2) Subject to other provisions of this Law, documents, notifications, decisions and other communications [referred to in this Law] to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication and is accessible so as to be usable for subsequent reference.

(3) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3),

²⁷ A/CN.9/590, para. 42.

²⁸ See endnote 8 above.

44 (b) to (f) and 47 (1) [update for revisions to Model Law] may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation and is accessible so as to be usable for subsequent reference.

(4) The procurement regulations shall establish measures to ensure accessibility of communications and non-discrimination among suppliers or contractors so as to give effect to the [provisions of/accessibility standards set out in] article [4 *ter*], and may establish measures to ensure the authenticity, integrity, accessibility and confidentiality of communications, and the interoperability of the systems used to transmit and receive them.”²⁹

Commentary

21. The Working Group has requested the elimination of any repetition between these provisions and the functional equivalence and “accessibility standards” provisions, and paragraph 3 of the existing text has been deleted accordingly.³⁰

22. The Working Group has also considered whether the scope of article 9 should be expanded, such that the functional equivalence and “accessibility standards” and the form of communication appear together. However, the Working Group may consider that so doing might be confusing given the formerly restricted ambit of the article,³¹ that further, equivalent standards to govern the publication and storage of information (articles 5 and 11 of the Model Law) would then be needed, and that such additions would be repetitive and lengthen the Model Law unnecessarily.

23. Paragraph 1 of the above draft has replaced the provision in paragraph 1 of the 1994 Model Law text (which permitted the procuring entity to stipulate the form of communications in the solicitation documents), and the previously proposed paragraphs 1 bis and 1 *ter* (which permitted the procuring entity to stipulate the means of communication and the electronic submission of tenders) with a positive obligation to set out the chosen form of communication in those documents. The Working Group requested these changes pending finalization of its deliberations on “functional equivalence”.³²

24. Paragraphs 1 and 2 include a reference to communications “referred to in this Law” in square brackets. The inclusion of that phrase is consistent with the 1994 text, but the Working Group may consider that any communications generated between suppliers or

²⁹ The Working Group may consider that all discussion and provision relating to the “accessibility standards” should be located in one place, such as article 4 *ter*. If the Working Group so determines, the provisions of this paragraph, and the relevant Guide to Enactment text (paras. 3 bis, *ter*, *quater* and *quinquies*) could be relocated.

³⁰ A/CN.9/590, paras. 35 and 38.

³¹ A/CN.9/590, para. 34. For example, the “accessibility standards” could be included as a proviso to paragraph (1) of the above draft, and the functional equivalence provisions could be included following paragraph (2).

³² Though if the previous paragraph 1 bis were retained in the ultimate provision on “functional equivalence”, the Working Group requested that the reference to “communications with” suppliers or contractors should be to “communications between the procuring entity and suppliers or contractors”.³² See, further, A/CN.9/590, para. 37. This request has been applied to the proposed paragraph 1.

contractors and the procuring entity should be subject to the provisions of this article, whether or not expressly referred to in the Model Law.

25. The Working Group has also requested the provisions to require enacting States to issue regulations ensuring the accessibility of those communications, and would invite them to do so for technical issues raised by the use of electronic communications.³³ However, the Working Group may consider that such matters could alternatively be included with the “accessibility standards” in proposed article 4 ter.³⁴

2. Guide to Enactment text addressing article 9 of the Model Law

26. The text below sets out revisions to the text following paragraph 4 of A/CN.9/WG.I/WP.38/Add.1. There are no revisions to the paragraphs before 3 bis, save that the Working Group may consider that paragraph 2 of the 1994 text should be deleted, and that text is therefore not repeated. The revisions are shown as tracked changes from the previous text in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 5).

“Article 9. Form of communications

(1) Unchanged

(1) bis. [Article 4 ter] of the Model Law enables the procuring entity to select the means of communication to be used in a particular procurement, and the “accessibility standards” (which apply equally to all means of communication, be they electronic, paper-based or other means) attach conditions to that choice, so as to safeguard the objectives of the Model Law (including that the means of communication chosen should not operate as a barrier to access). The provisions of this article require the choice as to the form of communications to be set out in the solicitation documents, and refer to a single choice of communications for each procurement (and not for each supplier or contractor). The solicitation documents may, however, provide alternative means of submission for identified documents or classes of documents that cannot be submitted in means of communication chosen (such as tender securities, complex drawings, and formal certificates of incorporation, payment of taxes, etc., which (at the time of writing) are not generally available in electronic form).³⁵

(2) (3) Unchanged

(3) bis³⁶ New paragraph (3) has been inserted so as to draw the attention of enacting States that:

(a) There should be appropriate procedures and systems to establish the authenticity of communications;

(b) The means used to send and receive communications should be sufficient to ensure that the integrity of data is preserved;

(c) The confidentiality of information submitted by or relating to suppliers is maintained;

³³ A/CN.9/590, paras. 39 and 40.

³⁴ See endnote 29 above.

³⁵ This text replaces that set out in paragraph 3 bis in the previous version. See, further, A/CN.9/WG.I/WP.43/Add.1, paras. 1 to 4.

³⁶ The Working Group may wish to locate the provisions in this and following paragraphs in article 4 ter, addressing the “accessibility standards”. See endnote 29 above

(d) The tools or systems used to send and receive communications are fully compatible (or interoperable);

(e) The means used to send and receive communications should enable the date and, where relevant, the time of receipt of documents to be established. The time of receipt is relevant for the application of the rules of the procurement process to, for example, the submission of requests to participate and tenders/proposals; and

(f) The means used to send and receive communications should be secure, that is, they ensure that tenders and other significant documents cannot be accessed by the procuring entity or other persons prior to any deadline, to prevent procuring entities' passing information on other tenders to favoured suppliers and to prevent competitors from gaining access to that information themselves.

(3) ter. As regards electronic communications, items (a), (b) and (c) of the preceding paragraph fall to be addressed in general electronic commerce law, and as noted in paragraph [cross refer to general guidance section] above, enacting States [may/will]³⁷ wish to consider the extent to which their existing laws provide adequate controls over the communications that may be generated in the procurement process, whether further regulation is needed, and whether to make reference to the need for such controls in their procurement regulations. For example, procuring entities should ensure that their systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

(3) quater. Items (d), (e) and (f) require procurement-specific solutions, arising most notably in connection with the submission of tenders electronically, and are addressed in paragraphs [cross reference] below.

(3) quinquies. Enacting States may wish to permit procuring entities to charge for any proprietary systems (such as software) required for communications for a particular procurement, but should ensure that procuring entities may not use a charging facility to levy disproportionate charges or to restrict access to the procurement.”

Commentary

27. The Working Group has noted that the Guide to Enactment should stress the functional equivalence of all means of communication so that higher standards of authenticity, integrity, interoperability and confidentiality are not imposed on electronic than paper-based communications, and should address the technical issues raised by the use of electronic communications and the links between this article and contents of solicitation documents, which may carve out exceptions for non-electronic documents (e.g. tender securities, drawings, and formal certificates such as incorporation, payment of taxes, etc, discussed in paras. 1-4 of A/CN.9/WG.I/WP.43/Add.1).³⁸

28. The Working Group has also requested that the Guide to Enactment should note that procuring entities may levy a proportionate charge for software required.³⁹

³⁷ See para. 48.

³⁸ See, also, A/CN.9/590, paras. 40 and 42.

³⁹ A/CN.9/590, para. 41.

E. Legal value of procurement contracts concluded electronically (A/CN.9/590, paragraph 44, and A/CN.9/WG.I/WP.38/Add.1, paragraphs 13-15)

1. Proposed revisions to Guide to Enactment addressing article 36 of the Model Law

29. The Working Group requested the following changes to the text of the Guide to Enactment addressing article 36. The revisions are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 6):

“Article 36. Acceptance of tender and entry into force of the procurement contract

(1) bis. Articles 27 (y) and 38 (u) of the Model Law refer to a “written” procurement contract, and article 36 (2)(a) and (b) provide that the solicitation documents may require the supplier or contractor whose tender has been accepted to “sign a written procurement contract”. Enacting States [may/will]⁴⁰ wish to ensure that their existing legislation recognizes procurement contracts that are executed electronically.

(a) Electronic contracting⁴¹

(1) ter. Article 11 of the Model Law on Electronic Commerce seeks to promote international trade by providing increased legal certainty as to the formation and conclusion of contracts by electronic means (even if offer and acceptance are generated by computers). The provisions state that a contract shall not be denied validity or enforceability on the sole ground that it was concluded using electronic communications.

(b) Electronic signatures

(1) quater. Enacting States [may/will]⁴² also wish to prescribe the manner in which the parties will sign or otherwise authenticate a procurement contract concluded electronically, in accordance with their laws on electronic commerce. Some States may have requirements for digital or other authenticated forms of electronic signatures in electronic commerce, which may be applied to procurement provided that they do not operate so as to restrict access to the procurement.

(1) quinquies. Article 7 of the Model Law on Electronic Commerce and the Model Law on Electronic Signatures⁴³ promote reliance on electronic signatures by providing that they are functionally equivalent to handwritten signatures. The provisions themselves state that an electronic signature will meet a requirement of law for a “signature” if the signature is as reliable as would be appropriate for the purpose of the relevant electronic communication in the circumstances, including any relevant agreement.”

⁴⁰ See para. 48.

⁴¹ As regards the retention of subheadings in the text, see endnote 14 above.

⁴² See para. 48.

⁴³ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).

Commentary

30. The Working Group may wish to revisit the statements regarding electronic signatures, so as to consider whether the guidance should address whether such provisions would be appropriate in the procurement as well as the commercial context.

F. Requirement to maintain a record of the procurement proceedings (A/CN.9/590, paragraphs 24 and 45, and A/CN.9/WG.I/WP.38/ Add.1, paragraphs 16-18)

1. Proposed addition to article 11 of the Model Law

31. The Working Group has requested that the application of the “accessibility standards” be reflected by recording the decision as to the means of communication in the record of the proceedings, and accordingly the new subparagraph below is proposed.⁴⁴

“Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(b) bis. The procuring entity’s decision as to the means of communication to be used in the procurement proceedings.”

2. Guide to Enactment text addressing article 11 of the Model Law

32. The Working Group requested the previous text to be revised so that the procuring entity must keep information accessible only until the time for review under article 52 of the Model Law have elapsed, and to take account of the “accessibility standards”.⁴⁵ The revisions are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 7):

“Article 11. Record of procurement proceedings

...

(1) bis. Article 11, however, focuses on the accessibility and availability of information forming the record, and does not contain requirements as to the form of the record, nor the conditions to be in place for a record to be maintained in any particular format. The “accessibility standards” set out in [article 4 ter], however, require the procuring entity, when maintaining the record, to select a means of storage of information that will enable the information concerned to be and remain accessible until the time for review under article 52 of the Model Law has elapsed.⁴⁶ Further, enacting States [may/will]⁴⁷ wish to pass regulations that ensure that record retention systems are fully compatible (or interoperable), and that they allow each communication in the procurement process to be verified, such that the traceability (sender, recipient and time and duration) of each communication can be established

⁴⁴ A/CN.9/590, para. 24.

⁴⁵ See, further, A/CN.9/590, para. 45.

⁴⁶ The precise wording of this provision will depend on the Working Group’s conclusions as to the formulation of the “accessibility standards”.

⁴⁷ See para. 48.

(and automatic data processing or calculations can be reconstituted). Further, the regulations may address whether access to the record and contract documents should be recorded and any data protection issues that would arise, to ensure the integrity and security of data, and confidentiality of communications and information, as more fully set out in [cross reference to appropriate paragraph of the Guide.] The provision in [paragraph 1 (b) bis] requiring the procuring entity to record the means of communication chosen in the record of the procurement proceedings is included so as to enable the procuring entity's decision and its compliance with the "accessibility standards" contained in [articles 4 ter and 9] to be reviewed under article 52 if necessary."

**G. Electronic submission of tenders, proposals and quotations
(A/CN.9/590, paragraphs 46-49 and A/CN.9/WG.I/WP.38/Add.1,
paragraphs 19-23)**

1. Proposed revisions to the text of article 30 of the Model Law

33. The Working Group requested the following changes to the text of article 30.⁴⁸ The revisions requested are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 8).

"Article 30. Submission of tenders

...

(a) A tender shall be submitted in the form specified in the solicitation documents, provided that the means of submission chosen by the procuring entity shall comply with [the provisions of/accessibility standards set out in] article [4 ter] when choosing the means of submission"

Commentary

34. The Working Group has deferred its consideration of the accompanying Guide to Enactment text set out in A/CN.9/WG.I/WP.38/Add.1, paragraphs 26-27, and the issue of whether further provision addressing the modification of tenders will be required, pending its finalization of the revisions to article 30 (5)(a) of the Model Law.^{49, 50}

⁴⁸ A/CN.9/590, para. 47.

⁴⁹ A/CN.9/590, para. 51.

⁵⁰ The Working Group has requested that article 27 (Contents of solicitation documents) of the Model Law should include an obligation on the part of the procuring entity to set out in those documents the form in which tenders should be submitted, with appropriate cross-references to the "functional equivalence" provisions. See, further, A/CN.9/590, para. 47. The Secretariat will present a revised text for article 27 in due course.

H. Electronic opening of tenders (A/CN.9/590, paragraphs 50-51 and A/CN.9/WG.I/WP.38/Add.1, paragraphs 28-32)

1. Proposed revisions to the text of article 33 of the Model Law

35. The Working Group requested the following changes to the text of article 33.⁵¹ The revisions requested are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 9).

“Article 33. Opening of tenders

...

(4) Where the procurement proceedings were conducted electronically in accordance with [insert provisions dealing with electronic communications, reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders in accordance with the requirements of article 33 (2) if they are allowed to follow the opening of the tenders [simultaneously/ instantaneously/through the electronic means of communication used by the procuring entity.]”

Commentary

36. In the context of a meeting, using electronic communications means that the participants can follow and participate in the proceedings through those electronic means.⁵² The Working Group may wish to consider whether the reference to “electronic” means of communication is appropriate given its stated wish to present technologically neutral provisions, and whether a reference to instantaneous or simultaneous communication would be required so as to provide the safeguards that the original article included.

37. The Working Group has deferred its consideration of the accompanying Guide to Enactment text set out following paragraph 32 of A/CN.9/WG.I/WP.38/Add.1, pending its finalization of the text of the Model Law.⁵³

I. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.39/Add.1, paragraphs 34-42, and A/CN.9/590, paragraphs 52-63)

1. Proposed revisions to the text of article 5 of the Model Law

38. The Working Group requested the following changes to the proposed text for article 5.⁵⁴ The revisions requested are shown as tracked changes in the addendum (A/CN.9/WG.I/WP.42/Add.1, para. 10).

“Article 5. Public accessibility of [legal texts] [procurement-related information]

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this

⁵¹ A/CN.9/590, para. 50.

⁵² Equivalent provision will be made to other articles of the Model Law referring to meetings.

⁵³ A/CN.9/590, para. 51.

⁵⁴ A/CN.9/590, paras. 57 and 58.

Law, all amendments thereto, and all judicial decisions on the application thereof shall be promptly made accessible to the public and systematically maintained.

Possible additions

[[An enacting State may choose to make accessible to the public additional information regarding internal controls, guidance or other information.]]

[All other documents and information that this Law requires to be published shall be promptly made accessible to the public and systematically maintained].

[The procurement regulations shall provide for the media and manner of publication of information under this Law.]”

Commentary

39. The Working Group has not formulated its position with respect to the proposed additions.

40. The first proposed addition gives an enacting State an option to add any further information that it may require to be published.

41. The second proposed addition covers the publication of information required to be published under the Model Law, other than legal texts referred to in paragraph 1. (This information includes a notice of contract award (article 14), solicitation of tenders or applications to pre-qualify (article 24) (see also relevant provisions in articles 37, 46, 47 and 48) and other information that may be required to be published under revised provisions of the Model Law or by an enacting State if it exercises the option provided for by proposed para. 2).

42. The third proposed addition consolidates provisions on the media of publication that are currently found in several articles of the Model Law (see articles 14, 24, 37, 47 and 48) and also addresses outstanding issues from the eighth session.⁵⁵ The Working Group has noted that regulations might not adequately deal with concerns arising from the electronic (rather than paper-based) publication of procurement-related information, and which therefore may necessitate specific regulation, including proliferation of procurement-related websites and an over-abundance of procurement-related information, complicating the retrieval of information that is necessary, useful and accurate.

43. The Working Group noted that these concerns are addressed in some domestic legislation through requiring a single centralized medium where all legally-binding, authentic and authoritative procurement-related information must be made accessible to the public and systematically maintained. Most of these regulations also prohibit the publication of procurement-related information in alternative media before it is published in the designated medium. Some specifically state that the same information published in different media must contain the same data.⁵⁶ The Working Group may consider that the Model Law should require procurement regulations to address these matters, and the Guide should elaborate as regards good practices in this respect.

⁵⁵ A/CN.9/590, para. 63.

⁵⁶ A/CN.9/590, para. 63 and A/CN.9/WG.I/WP.39/Add.1, para. 29.

2. Proposed provisions addressing the publication of information on forthcoming procurement opportunities

44. The following provision on the publication of such information (the underlined text shows the amendment proposed at the Working Group's eighth session) could be included in the revised Model Law as a separate article after the article dealing with the public accessibility of [legal texts] [procurement-related information] (currently article 5) or merged with the latter as was suggested at the eighth session of the Working Group:⁵⁷

“As promptly as possible after the beginning of a fiscal year, procuring entities may publish notice of their expected procurement requirements for the following [the enacting State specifies a period].”

3. Guide to Enactment text addressing the publication of additional procurement-related information

45. The Working Group may wish to consider the following text:⁵⁸

(a) Publication of additional procurement-related information

“(1) With modern means of publishing information and resulting savings in costs, time and effort, more procurement-related information than is required by the Model Law has become available to the public, often electronically. Such information includes (i) procurement manuals, handbooks and guidance, (ii) solicitation documents or pre-qualification documents in their entirety, (iii) various lists of standardized goods, (iv) information on the status of ongoing procurement proceedings, including notices on suspension and procedures cancelled, (v) records of procurement proceedings, (vi) statistical reports inter alia on the results of procurement and contracts concluded, and (vii) any useful general information, such as information on a contact point for general procurement-related inquiries.

(2) The Model Law does not explicitly address these additional types of information. Nevertheless, the Model Law does not preclude enacting States from requiring, encouraging or explicitly enabling additional information to be made accessible to the public for the benefit of suppliers or contractors. In particular, procurement manuals, handbooks and guidance, which often do not have the status of legal texts and therefore may not be within the scope of [paragraph 1 of article 5], may cover important aspects of domestic procurement practices and procedures, which would be desirable to make available to the public. Incentives may be provided for the publication of certain types of information, for example solicitation documents in their entirety, by allowing shortening time required for submission of tenders. Although the Model Law requires the minimum information necessary to achieve transparency in the procurement process to be made accessible to the public and systematically maintained, applying equivalent requirements to the publication of further information that is useful but not strictly necessary may be onerous, and might operate as a disincentive to publication itself. Accordingly, there is no requirement to maintain such information systematically, but keeping such information up to date should be encouraged.

⁵⁷ A/CN.9/590, paras. 59 and 62.

⁵⁸ Further amendments might also be required to reflect the Working Group's decision on the ambit of article 5.

- (3) An enacting State should also consider the extent of and manner in which the information made accessible to the public. The aim is to ensure easy public access to information of practical use and importance, which may be impeded considerably if abundant information is available from many sources, whose authenticity and authority may not be certain, and the systematic maintenance of which may be jeopardized. If the same information posted in various media is not available instantaneously to all interested suppliers, some may receive better information and unintentionally be placed in a more advantageous position. The contents may also raise concerns, including over legitimate commercial interests of the suppliers or contractors, law enforcement and fair competition.

(4) The Model Law deals with these problems by requiring that any information published under the Model Law has to be made accessible to the public in accordance with the “accessibility standards” contained in article [4 ter]. These standards require that any means of publication used [shall not represent an obstacle to the procurement process, shall not result in discrimination among or against potential suppliers or contractors or otherwise limit competition]. An enacting State [may wish to] consider additional safeguards that may be included in procurement regulations to be adopted under article 4 of the Model Law or any other appropriate regulations. For example, the procurement regulations may establish the primacy of a single centralized medium where all legally-binding, authentic and authoritative procurement-related information is to be consistently and in a timely manner made accessible to the public and systematically maintained, and where rules defining relations with other possible media where such information may appear are spelled out (akin “official publications” or “official newspapers”). Regulations may explicitly prohibit the publication in different media before information is published in a specifically designated central medium, and require that the same information published in different media must contain the same data.”

(b) Publication of information on forthcoming opportunities

“(1) Modern means of publication of information have also made the publication of information on forthcoming opportunities easier. Although not binding, such publication disciplines procuring entities in procurement planning, diminishes cases of “ad hoc” and “emergency” procurements and consequently, should diminish recourse to less competitive methods of procurement (it should also not interfere in the budgeting process). It also enables more suppliers to learn about procurement opportunities, assess their interest in participation and plan their bids in advance accordingly, which also promotes competition, transparency and cost-saving in procurement. Such information may also have the positive impact in a broader governance context, in particular in opening procurement for general public review and local community participation.

(2) [other provisions are subject to the Working Group’s decision on the publication of information on forthcoming procurement opportunities under the Model Law.] An enacting State may [require the publication of such information or treat it as optional,] [impose any special conditions on publication of such information, such as establish a threshold when the publication of such information would be required, and] define in its procurement regulations other terms of publication, such as the content of information published, the period covered and time frame for publication.”

III. Outstanding issues regarding the use of electronic communications in the procurement process: scope of the Model Law and the Guide to Enactment (A/CN.9/WG.I/WP.38, paragraphs 4-23, and A/CN.9/590, paragraphs 12-16)

46. The Working Group has deferred its consideration of whether the current scope of the Model Law (covering the phase of the selection of a successful supplier or contractor only) should be broadened to address the procurement planning and contract administration phases,⁵⁹ notably as regards whether minimum general principles applicable to those additional phases should be provided for in the Model Law itself, or whether the Guide to Enactment should address good practice in procurement planning and contract administration. Additional detail could be included in paragraph 10 of the Guide, which currently notes, for example, that the “enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.”

47. The Working Group has also deferred its consideration of whether the Guide should be expanded to provide greater detail of matters to be addressed in regulations and to include draft regulations (for example, to address authenticity, confidentiality and security of electronic communications). The Working Group has noted the value that regulations could have for harmonization of procurement law, but that they should be facilitative and not prescriptive, and should provide flexibility for enacting States. The Working Group has also deferred its consideration of whether the Guide to Enactment should become a guide not only to legislators, but also to users such as procurement officials in enacting states, and if so, the form that any expanded guidance should take.⁶⁰

48. The Working Group has yet to decide whether references in the text of the Guide to Enactment referring to the need for adequate electronic commerce legislation and related regulations should be phrased as enacting States “will” or “may” wish to make appropriate provision for such matters.

⁵⁹ A/CN.9/590, para. 13, A/CN.9/WG.I/WP.36, para 78, and A/CN.9/WG.I/WP.38, paras. 12 and 13.

⁶⁰ See further A/CN.9/WG.I/WP.38, paras. 9-11 and 19-23.

A/CN.9/WG.I/WP.42/Add.1

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement

ADDENDUM

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[Chapters I to III are published in A/CN.9/WG. I/WP.42]

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IV. Revisions from drafts presented at the eighth session of the Working Group

The text below shows the revisions to the drafting materials before the Working Group at its ninth session, as compared with the texts presented at the eighth session.

A. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

1. Proposed new text for the Model Law: new article 4 bis

“Article 4 bis. Functional equivalence of all [means][methods] of communicating, publishing, exchanging or storing information or documents

Any provision of this Law related to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to ~~include~~ incorporate ~~[any means of such activity, including]~~ electronic, optical or comparable means, [including, but not limited to,] electronic data interchange (EDI), electronic mail, telegram, telex or telecopy] provided that the means

chosen complies with the [provisions of/accessibility standards set out in] article [4 ter].”~~the enacting State or procuring entity is satisfied that such use:~~

- ~~—— (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];~~
- ~~—— (b) Promotes economy and efficiency in the procurement process; and~~
- ~~—— (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the enacting State or procuring entity is satisfied that such use complies with the accessibility standards contained in article [**].][with the inclusion of the list found in Variant A in the Guide to Enactment.] (A/CN.9/568, para. 13).~~

B. Guide to Enactment text addressing the use of electronic communications during the procurement process

2. General introductory remarks in the Guide to Enactment

“(i) ~~Introduction to p~~ Provisions introducing governing the use of electronic communications in the procurement process

(1) The UNCITRAL Model Procurement Law (1994 version) was adopted at a time at which the use of information technology and electronic communications was anticipated, but not yet widespread. Although some of its provisions may allow for the use of electronic communications and technologies in the procurement process, the Model Law was not primarily concerned with legal issues related to the use of these technologies, and a number of its provisions reflect a background of communications, record-keeping and evidentiary systems that were largely based on information recorded on paper. Examples include references to “documentary evidence” and similar concepts set out in articles 6 (2), 7 (3)(a)(iii), 10, 27 (c), 36, 38 (f) of the current 1994 Model Law, the rules on preparation, modification, withdrawal, submission and opening of tenders, and the conclusion of a procurement contract.

(2) Since the adoption of the Model Law in 1994, the use of electronic communications and technologies in public procurement (which includes using electronic equipment for the processing, digital compression and storage of data that are transmitted, conveyed and received by wire, by radio, by optical or by other electromagnetic means) has increased rapidly, including the use of procurement methods based on the Internet, to which this Guide will refer generally as “electronic procurement”, ~~has increased rapidly~~. Electronic procurement has been observed to offer many potential benefits, including improved value for money from more rigorous competition in a broader procurement market, better information for suppliers and contractors and more competitive techniques, savings in time and costs, improved administration of contracts awarded, and, in some cases, improved compliance with rules and policies and fewer opportunities for corruption and abuse. Further, electronic procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process. ~~UNCITRAL~~ The Commission therefore considered that the Model Law should make provision so as to enable the use of electronic procurement.

(3) However, ~~concerns have also been expressed that~~ controls on the use of electronic procurement may be needed to address ~~the relative novelty of electronic communications~~, possible discrimination where access to the necessary infrastructure may be lacking, issues of security, confidentiality and authenticity in electronic

communications, and the impact of modern procurement methods on [other]—~~socio-economic~~ policy goals. The revisions to the ~~original~~ 1994 Model Law seek to address these concerns, and this Guide sets out the objectives of the revisions themselves.

(4) Although some of the issues raised by electronic procurement can be accommodated within the 1994 Model Law's ~~existing~~ provisions (or through the interpretation of existing laws and rules, including as set out in the 1994 Guide to Enactment), ~~UNCITRAL~~ the Commission has revised the text of the Model Law so as to make appropriate provision or provide clarification where necessary and, where ~~possible~~ appropriate, to promote the use of electronic procurement as a means of enhancing the achievement of the objectives of the Model Law itself. The aim of the provisions is to ensure that all [means/methods] of communication are afforded equivalent status under the Model Law and that their use will be subject to appropriate safeguards such as that procuring entities, when selecting the means of communication for a procurement, [do not discriminate among suppliers and contractors][select means that are [generally][reasonably][commonly] available [and that are compatible [or interoperable] with those in common or general use]. It should be noted that these provisions are intended to apply to international and domestic procurement, so as to ensure non-domestic suppliers' access to procurement markets even where there may be uneven availability of electronic infrastructure within the field of potential suppliers and contractors.

(ii) Interaction between legislation concerning electronic procurement and electronic commerce legislation

(5) Electronic procurement has a natural dependence on the existing level of use and regulation of electronic commerce in general. This Guide will also, therefore, make reference to the interaction between the legislation governing electronic commerce and that governing procurement where appropriate. It will not be appropriate for a procurement law to govern electronic commerce generally in an enacting State, and for this reason, the Model Law will not address issues that fall to be treated as a matter of general electronic commerce law. However, provision is made where the procurement context requires additional measures (such as the submission of tenders). In the light of the above, enacting States may wish to ensure that their existing legislation governing the use of electronic commerce indeed provides adequate recognition of electronic communications, and that it addresses the issues set out in the following paragraphs. For ease of reference of enacting States, the solutions to the issues that UNCITRAL has provided in its main electronic commerce text (the UNCITRAL Model Law on Electronic Commerce (1996)) are also set out.¹

(6) ~~One of the main fetters on the requirements for the effective use of electronic communications is a legal obstacle: that is uncertainty as to the legal recognition, validity or and enforceability of electronic communications generated in the contractual process. These obstacles may arise in requirements for "written" or "original" communications and documents, the formalities of contract formation and the admissibility of evidence in court (A/CN.9/568, para. 30 and A/CN.9/WG.I/WP.34/Add.1, para. 44). Accordingly, the UNCITRAL Model Law on Electronic Commerce seeks to enable commercial transactions to be conducted electronically, by removing these legal obstacles and so providing~~

¹ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.

certainty in the use of electronic communications, such that requirements for “written” or “original” communications and documents, the formalities of contract formation and the admissibility of evidence in court encompass both paper-based and electronic communications and documents.

(7) The approach of the ~~UNCITRAL~~ Model Law on Electronic Commerce is to provide a general principle of functional equivalence in communications, such that electronic communications are afforded the same degree of recognition as traditional paper-based documents, so that both are universally legible, remain unaltered over time, are capable of reproduction (with each party holding a copy of the same data), can be authenticated by means of a signature, and are in a form acceptable to public authorities and courts. ~~The functions of documents, including communications, are more fully described in paragraph 16 of the Guide to Enactment accompanying that Model Law, which notes that they should, inter alia, fulfil the following functions: “to ... be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.”~~

(8) Articles 5, 6, ~~7~~ and 8 of the ~~UNCITRAL~~ Model Law on Electronic Commerce in material part provide for the functional equivalence of paper-based and electronic communications, addressing the “legal recognition of data messages [electronic communications]”, and the notions of “writing”, “signatures”, and “original”. The combined effect of these provisions, which should be read together, is that electronic communications have the same degree or legal recognition and validity as paper-based ones, so that they will not be denied legal effect, validity and enforceability solely on the grounds that they are electronic and not paper-based communications.

~~— (9) The UNCITRAL Model Law on Electronic Commerce addresses these issues as follows:~~

~~— (a) Article 5: “[I]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”. The commentary to that article in the Guide to Enactment of the Model Law on Electronic Commerce notes that “article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein”;~~

~~— (b) Article 6: “[w]here the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.” The commentary notes that “article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement ... that information be retained or presented “in writing” (or that the information be contained in a “document” or other paper-based instrument)”;~~ and

~~— (c) Article 8: “[w]here the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.” The commentary explains that although the adjective “original” normally refers to documents of title and negotiable instruments, the provision may be needed in some jurisdictions in certain additional transactions.~~

(10) [The specific considerations arising when documents are signed electronically, and those arising in the conclusion of contracts by electronic means are addressed in the commentary to article 36 (“Acceptance of tender and entry into force of procurement contract”) below.] ~~[As regards the electronic signature of documents, article 7 of the UNCITRAL Model Law on Electronic Commerce, provides as follows: “[w]here the law requires a signature of a person, that requirement is met by a data message if (a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement...”].]~~

(11) Enacting States may also wish to issue regulations covering such matters as technical disruptions, disclaimers of liability and practical issues such as time zones, issue of receipts, etc.

(iii) Approach to enabling the use of electronic communications in the revised Model Law

(12) The Model Law addresses the use of electronic communications in the procurement process adopting the functional equivalent approach from the UNCITRAL Model Law on Electronic Commerce, but, as noted above, will not make provision for matters addressed in the general law of electronic commerce unless the procurement context requires additional provisions. Consequently, the Model Law does not address the following topics: the general legal recognition of electronic communications, what is meant by “writing”, what is an “original” document, electronic or digital signatures, the general admissibility and evidential weight of electronic communications, the formation, validity and operation of contracts, the attribution of electronic communications, and acknowledgements of receipt of electronic communications other than tenders.

(13) The provisions presented in this revised Model Law set out that any requirement for writing, publication of information, the submission and opening of tenders, for a record or ~~to~~ a meeting in the Model Law itself can be met by using any forms means of electronic communication, electronic or otherwise, to the same effect. (In the context of a meeting, using electronic communications means that the participants can follow and participate in the proceedings by electronic means of communication.) ~~It does not provide that such communications are of themselves legally valid, a matter that~~ Although the legal validity of such communications will ~~should~~ be explicitly provided for in an enacting State’s general electronic commerce legislation. ~~However,~~ the procurement context requires specific and additional provision in areas such as regarding the submission of tenders under the provisions of articles 27 (h), (q), (r), and (z), 30, 31 (2) and 33 of the ~~current~~ 1994 Model Law [update cross references]. In such cases, the reasons for the need and objectives of the provisions are set out in the relevant section of this Guide (A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 11) [insert cross references].

(14) The revised Model Law also, where appropriate possible, encourages (but does not generally require) the use of electronic ~~communications and technologies in public~~ procurement. However, the procuring entity may require the use of electronic communications in the procurement process under articles [4 ter and 9], and electronic procurement is required (A/CN.9/575, para. 10, A/CN.9/568, para. 33), though such use is ~~required save~~ in the case of [cross reference to electronic procurement, such as electronic reverse auctions and dynamic purchasing systems].

(15) The use of electronic communications raises issues of authenticity, confidentiality and integrity of communications, documents and data, as noted above. Enacting States [will also] [may] wish to consider the extent to which their domestic

electronic commerce law provides adequate controls over communications that could be generated in the procurement context. This topic is further addressed in the sections of this Guide addressing the form of communications (under article 9 of the 1994 Model Law) and the submission of tenders by electronic means (under article 30 of the 1994 Model Law).

(16) The principle of flexibility in method of communicating, based on functional equivalence, applies not only to general communications in procurement, but equally to the publication of opportunities and procurement-related information, the exchanging of information concerning procurement, the submission and opening of tenders, holding pre-tender conferences, the maintenance, storage and dissemination of information and documents (including the record of the procurement proceedings required under article 11 of the Model Law), and the conclusion of contracts. Accordingly, proposed article [4 ter] is drafted in broad fashion, so as to cover all aspects of the generation, transfer and storage of information in communications and documents, and the controls and accessibility standards described in the preceding paragraphs should apply equally to these broader notions.”

C. Accessibility standards

3. Proposed new text for the Model Law: new article 4 ter

“Article 4 ter. Accessibility standards

The procuring entity shall ensure that ~~its use of any~~[means/method] of ~~communication communicating, for publishing, exchanging or storing information or documents, or of holding a meetings, during the procurement process and of submission and opening of tenders,~~

~~—(a) Shall not [[unreasonably] discriminate] [result in [unreasonable] discrimination] among or against potential suppliers or contractors or otherwise [substantially] limit competition.~~

[possible additions]

Shall not represent an obstacle to the procurement process; and

~~shall use that the~~ [means/methods] of communication shall be [generally] [reasonably][commonly] available [and compatible [and interoperable] with those in common or general use].”

~~—(b) Should promote economy and efficiency in the procurement process; and~~

~~—(c) Shall not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition.~~

D. Form of communications

4. Proposed revisions to article 9 of the Model Law

“Article 9. Form of communications

[new paragraph (1)] Documents, notifications, decisions and other communications [referred to in this Law] between suppliers or contractors and the procuring entity shall be provided, submitted or effected by the means of communication

specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, provided that the procuring entity shall in each case comply with the [provisions of/accessibility standards set out in] article [4 ter].

~~——(1)-(2)~~ Subject to other provisions of this Law ~~and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications [referred to in this Law] to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication and is accessible so as to be usable for subsequent reference.~~

~~——(1) bis. The procuring entity may stipulate in the solicitation documents the form that all communications with suppliers or contractors shall take, provided that the means of communication chosen by the procuring entity shall comply with the accessibility standards contained in [article 4 bis or 5 bis].~~

~~——(1) ter. The procuring entity may stipulate in the solicitation documents that tenders submitted under article 30 must be submitted in electronic form [, provided that the means of submission chosen by the procuring entity shall comply with the accessibility standards contained in article [article 4 bis or 5 bis].~~

~~——(1) quater. Without prejudice to the right of a procuring entity to stipulate the form of communications in the solicitation documents, the procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.~~

~~——(2)-(3)~~ Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1) [update for revisions to Model Law] may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation and is accessible so as to be usable for subsequent reference.

~~——(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.~~

~~——(1) quinquies-(4)~~ The procurement regulations ~~may shall~~ establish measures to ensure accessibility of communications and non-discrimination among suppliers or contractors so as to give effect to the [provisions of/accessibility standards set out in] article [4 ter], and may establish measures to ensure the authenticity, integrity, accessibility and confidentiality of communications, and ~~to ensure~~ the interoperability of the systems used to transmit and receive them.”

5. Guide to Enactment text addressing article 9 of the Model Law

“Article 9. Form of communications

(1) Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement, subject to other provisions of the Model Law, is that a communication must be in a form that provides a record of its content.

——(1) bis [Article 4 ter] of the Model Law enables the procuring entity to select the means of communication to be used in a particular procurement, and the “accessibility

standards” (which apply equally to all means of communication, be they electronic, paper-based or other means) attach conditions to that choice, so as to safeguard the objectives of the Model Law (including that the means of communication chosen should not operate as a barrier to access). The provisions of this article require the choice as to the form of communications to be set out in the solicitation documents, and refer to a single choice of communications for each procurement (and not for each supplier or contractor). The solicitation documents may, however, provide alternative means of submission for identified documents or classes of documents that cannot be submitted in means of communication chosen (such as tender securities, complex drawings, and formal certificates of incorporation, payment of taxes, etc., which (at the time of writing) are not generally available in electronic form).

(2) Obviously, article 9 does not purport to answer all the technical and legal questions that may be raised by the use of EDI or other non-traditional methods of communication in the context of procurement proceedings, and different areas of the law would apply to ancillary questions such as the electronic issuance of a tender security and other matters that are beyond the sphere of “communications” under the Model Law.

(3) In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the confirming communication.

~~3 bis. The revised article 9 of the Model Law provides that the procuring entity may choose the method by which it will communicate with suppliers or contractors in the procurement process. The objective of this provision is to afford the procuring entity the option of insisting on a particular means of communication, such as electronic means, without having to justify its choice. However, that option is subject to two elements of control: first, that the means of communication chosen must serve the objectives of the Model Law (that is, those objectives set out in the preamble to the Model Law) and, secondly, that the means of communication do not operate as a barrier to access to procurement (the “accessibility standards” described in paragraphs ** above, which will apply to any means of communication chosen). In this regard, the revised paragraphs (1) bis, (1) ter and (3) have been included so as to strengthen the safeguards contained in the article against discriminatory or otherwise exclusionary practices by the procuring entities (A/CN.9/575, para. 33). The obligation on the procuring entity to be satisfied that the accessibility standards are met will be open to review under article 54, and the requirements of the record of the procurement proceedings to be maintained pursuant to article 11 will enable the procuring entity’s decision and how it was arrived at to be reviewed.~~

~~3 ter. Paragraphs (1) bis and (3) are also designed to ensure that suppliers and contractors do not have the right to insist on any particular means of communication with a procuring entity, that no such right can be construed (A/CN.9/575, para. 33).~~

~~3 quater. The proposed text as regards paragraph 1 ter has been inserted in order to provide for the electronic submission of tenders, currently prohibited under article 30 of the Model Law (see, further, A/CN.9/568, para. 32 and A/CN.9/WG.I/WP.34/Add.1, paras. 22-37).~~

(3) ~~quinquies-bis. The proposed~~ New paragraph (43) ~~quinquies~~ has been inserted so as to draw the attention of enacting States that:

(a) There should be appropriate procedures and systems to establish the authenticity of communications;

(b) The means used to send and receive electronic communications should be sufficient to ensure that the integrity of data is preserved;

(c) The confidentiality of information submitted by or relating to other suppliers is maintained;

(d) The tools or systems used to send and receive electronic communications are fully compatible (or interoperable);

(e) The means used to send and receive electronic communications should enable the date and, where relevant, the time of receipt of documents to be established. ~~if~~ The time of receipt is ~~significant in applying relevant for the application of~~ the rules of the procurement process (to, for example, the submission of requests to participate and tenders/proposals); and

(f) The means used to send and receive electronic communications should be secure, that is, they ensure that tenders and other significant documents cannot be accessed by the procuring entity or other persons prior to any deadline, to prevent procuring entities' passing information on other tenders to favoured suppliers and to prevent competitors from gaining access to that information themselves (~~security~~) (A/CN.9/568, para. 41).

(3) ~~sexies-ter.~~ As regards electronic communications, items (a), (b) and (c) of the preceding paragraph fall to be addressed in general electronic commerce law, and as noted in paragraph [cross refer to general guidance section] above, enacting States [may/will] wish to consider the extent to which their existing laws provide adequate controls over the communications that may be generated in the procurement process, whether further regulation is needed, and whether to make reference to the need for such controls in their procurement regulations. ~~One~~For example, ~~in domestic legislation requires the heads of~~ procuring entities ~~before using electronic commerce to~~ "should ensure that the ~~entity's~~ their systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information".

(3) ~~quater-septies.~~ Items (d), (e) and (f) require procurement-specific solutions, arising most notably in connection with the submission of tenders electronically, and are addressed in paragraphs [cross reference] below.

(3) quinquies. Enacting States may wish to permit procuring entities to charge for any proprietary systems (such as software) required for communications for a particular procurement, but should ensure that procuring entities may not use a charging facility to levy disproportionate charges or to restrict access to the procurement."

E. Legal value of procurement contracts concluded electronically

6. Proposed revisions to Guide to Enactment addressing article 36 of the Model Law

"Article 36. Acceptance of tender and entry into force of the procurement contract

(1) bis. Articles 27 (y) and 38 (u) of the Model Law refer to a "written" procurement contract, and article 36 (2)(a) and (b) provide that the solicitation documents may require

the supplier or contractor whose tender has been accepted to “sign a written procurement contract”. ~~[, which may be signed in the traditional manner, or electronically].~~ [Enacting States [may/will] wish to ensure that their existing legislation recognizes procurement contracts that are executed electronically.]

(a) Electronic contracting

(1) ~~ter. The solution provided by the UNCITRAL electronic commerce texts, found in a~~Article 11 of the Model Law on Electronic Commerce ~~does not~~ seeks to ~~interfere in the general rules of contract formation. Rather, its stated aim is~~ “to promote international trade by providing increased legal certainty as to the formation and conclusion of contracts by electronic means (even if offer and acceptance are generated by computers). ~~It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, [the provision] ... might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means. Such uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainties is inherent in the mode of communication and results from the absence of a paper document.” Article 11 itself provides that “[w]here a data message [electronic communication] is used in the formation of a contract, that contract~~ The provisions state that a contract shall not be denied validity or enforceability on the sole ground that it was concluded using electronic communications a data message [electronic communication] was used for that purpose.

(b) Electronic signatures

(1) ~~quater. In practical terms, e~~Enacting States [may/will] also wish to prescribe the manner in which the parties will sign or otherwise authenticate a procurement contract concluded electronically, in accordance with their laws on electronic commerce. Some States may have requirements for digital or other authenticated forms of electronic signatures in electronic commerce, which may be applied to procurement provided that they do not operate so as to restrict access to the procurement.

(1) ~~quinquies. The solution provided by the UNCITRAL electronic commerce texts is found in a~~Article 7 of the Model Law on Electronic Commerce and the Model Law on Electronic Signatures². The Guide to Enactment text discussing the latter article notes that ~~its aim is to promote reliance on electronic signatures for producing legal effect where such electronic signatures by providing that they are functionally equivalent to handwritten signatures. The provisions themselves address the issue of state that an electronic signature of documents using the principle of functional equivalence, by providing that: “[w]here the law will meet a requirement of law for a “signature” of a person, that requirement is met in relation to a data message if :-[the signature] is as reliable as was would be appropriate for the purpose of the relevant electronic communication in the circumstances, for which the~~

² For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).

~~data message was generated or communicated, in the light of all, including any relevant agreement.”~~

F. Requirement to maintain a record of the procurement proceedings

7. Guide to Enactment text addressing article 11 of the Model Law

“Article 11. Record of procurement proceedings

(1) One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds.

(1) bis. Article 11, however, focuses on the accessibility and availability of information forming the record, and does not contain requirements as to the form of the record, nor the conditions to be in place for a record to be maintained in any particular format, electronically (A/CN.9/575, para. 45). The “accessibility standards” set out in [article 4 bis or 5 bis ~~ter~~], however, require the procuring entity, when maintaining the record, to select a means of storage of information that will enable the information concerned to be and remain accessible until the time for review under article 52 of the Model Law has elapsed even as technologies advance, and to be non-discriminatory. Further, enacting States [may/will] wish to pass regulations that ensure that record retention systems are fully compatible (or interoperable), and that they allow each communication in the procurement process to be verified, such that the traceability (sender, recipient and time and duration) of each communication can be established (and automatic data processing or calculations can be reconstituted) ~~(traceability).~~ Further, the regulations may address whether access to the record and contract documents should be recorded and any data protection issues that would arise, to ensure the integrity and security of data, and confidentiality of communications and information, as more fully set out in [cross reference to ~~commentary appropriate paragraph of the Guide.~~] The provision in [paragraph 1(b) bis] requiring the procuring entity to record the means of communication chosen in the record of the procurement proceedings is included so as to enable the procuring entity’s decision and its compliance with the “accessibility standards” contained in [articles 4 *ter* and 9] to be reviewed under article 52 if necessary. ~~to article 9 above.]”~~

G. Electronic submission of tenders, proposals and quotations

8. Proposed revisions to the text of article 30 of the Model Law

“Article 30. Submission of tenders

(5) (a) A tender shall be submitted in the form specified in the solicitation documents, provided that the means of submission chosen by the procuring entity shall comply with [the provisions of/accessibility standards set out in] article [4 *ter*] when choosing the means of submission in writing, signed and in a sealed envelope or in any form specified in the solicitation documents;

~~(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality;~~

~~–(e) (b) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.”~~

H. Electronic opening of tenders

9. Proposed revisions to the text of article 33 of the Model Law

“Article 33. Opening of tenders

(4) Where the procurement proceedings were conducted electronically in accordance with [insert provisions dealing with electronic communications, reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders in accordance with the requirements of article 33 (2) if they are allowed to follow the opening of the tenders [simultaneously/instantaneously]/through the electronic means of communication used by the procuring entity].”

~~—(5) Where suppliers or contractors are permitted to follow the opening of the tenders through electronic means of communication used by the procuring entity in accordance with the requirements of article 33 (4), they shall be deemed to have been permitted to be present at the opening of tenders in accordance with the requirements of article 33 (2).~~

I. Electronic publication of procurement-related information

10. Proposed revisions to the text of article 5 of the Model Law

“Article 5. Public accessibility of [legal texts] [procurement-related information]

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, ~~and all amendments thereto, as well as any other documents and information required to be published [or being published under this Law]~~ and all judicial decisions on the application thereof shall be promptly made accessible to the public and systematically maintained.

~~{(2) Any further information, such as regarding forthcoming opportunities, internal controls or guidance, that an enacting State or procuring entity chooses to publish shall be promptly made accessible to the public [and systematically maintained].}~~

[possible additions]

[[An enacting State may choose to make accessible to the public additional information regarding internal controls, guidance or other information.]]

[All other documents and information that this Law requires to be published shall be promptly made accessible to the public and systematically maintained].

[The procurement regulations shall provide for the media and manner of publication of information under this Law.]”

**G. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services:
drafting materials for the use of electronic reverse auctions in
public procurement and addressing abnormally low tenders,
submitted to the Working Group on Procurement
at its ninth session**

(A/CN.9/WG.I/WP.43 and Add.1) [Original: English]

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 43 of document A/CN.9/WG.I/WP.41, which will be before the Working Group at its ninth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic communications and technologies in public procurement.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group held a preliminary exchange of views on the use of electronic reverse auctions (ERAs) in public procurement. Recognizing the reality of ERAs, it expressed its willingness to consider the appropriateness of enabling provisions for the optional use of ERAs in the Model Law. However, to make a final decision on the matter, the Working Group requested the Secretariat to prepare a study on the practical use of ERAs in the countries that had introduced them, including as regards existing approaches for handling the risk of abnormally low tenders (ALTs) (A/CN.9/568, para. 54).

3. At its seventh session (New York, 4-8 April 2005), the Working Group considered the topic of the use of ERAs in public procurement and the topic of ALTs on the basis of the studies presented by the Secretariat (A/CN.9/WG.I/WP.35 and Add.1 (concerning ERAs) and A/CN.9/WG.I/WP.36 and Corr.1 (concerning ALTs)). It concluded that the revised Model Law should contain provisions on ERAs, and new provisions should be incorporated in the Model Law enabling the identification of possible ALTs. The Working Group requested the Secretariat to prepare drafting materials addressing the topics for its eighth session (A/CN.9/575, paras. 60-62, 66 and 67 as regards ERAs, and para. 76 as regards ALTs).

4. At its eighth session (Vienna, 7-11 November 2005), the Working Group had before it the drafting materials addressing ERAs and ALTs submitted by the Secretariat pursuant to the Working Group's request at its seventh session (A/CN.9/WG.I/WP.40 and Add. 1). The Working Group requested the Secretariat to revise the drafting materials for its consideration on these topics at its ninth session (see A/CN.9/590, paras. 64-105).

5. This note is submitted for the Working Group's consideration at its ninth session pursuant to that request. It draws on, and should be read in conjunction with, the related notes by the Secretariat presented to the Working Group on the topics at its seventh and eighth sessions (A/CN.9/WG.I/WP.35 and Add.1, A/CN.9/WG.I/WP.36 and Corr.1 and A/CN.9/WG.I/WP.40 and Add.1).

II. Draft provisions to enable the use of electronic reverse auctions under the Model Law

A. General remarks

6. At its eighth session, the Working Group noted that the provisions regarding ERAs should (i) address the general conditions for use of ERAs (of which the most important was that the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified), (ii) the Guide to Enactment text should be drafted so as to ensure as wide a participation as possible,¹ and (iii) the draft should allow for the evolution of ERAs, and should not exclude any type of auction per se.²

7. The Working Group also noted at the eighth session that the following main issues were outstanding, to which the Working Group would return at its ninth session:

(a) Whether ERAs should be allowed in the revised Model Law as a procurement method or as a phase in other procurement methods;³

(b) Whether the price alone, or price and other evaluation criteria should be subject to the ERA;⁴ and

(c) Location in the Model Law of provisions on ERAs.⁵

8. The Working Group noted that it would not be possible to finalize its deliberations on the remaining provisions proposed until the resolution of those pending issues.⁶

¹ A/CN.9/590, paragraph 66.

² A/CN.9/590, paragraph 67.

³ A/CN.9/590, paragraph 65.

⁴ A/CN.9/590, paragraphs 76-78.

⁵ A/CN.9/590, paragraphs 103-105.

⁶ A/CN.9/590, paragraphs 81, 86, 87 and 102.

B. Conditions for use of electronic reverse auctions (A/CN.9/590, paragraphs 67-80, and A/CN.9/WG.I/WP.40, paragraphs 9-17)

1. Proposed new text for the Model Law: new article [19 bis]

9. The Working Group requested the draft text before it at its eighth session to be revised as follows (additional proposed text is underlined, and the text proposed to be removed is struck through):

“Article [19 bis]. Conditions for use of electronic reverse auctions

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may [engage in procurement/select the successful tender in accordance with article 34 (4) (b)] by means of an electronic reverse auction in accordance with article[s 47 bis and ter,] in the following circumstances:

(a) Where it is feasible for the procuring entity to formulate detailed and precise ~~[and accurate]~~ specifications for the goods [construction or services] ~~such that homogeneity in the procurement can be achieved;~~

(b) Where there is a competitive market of ~~at least [ten]~~ suppliers or contractors that are anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured; and

(c) The goods [, construction or services] to be procured are standardized ~~[standard products] [commodities],~~”

With the following optional additional text for subparagraph (c):

Variant A

“[such that/and] the price is the only criterion to be used in determining the successful bid”

Variant B

“[such that/and] the price and other quantifiable criteria expressed in [figures or percentages of the price/monetary terms] are the only criteria to be used in determining the successful bid”

Variant C

“and all criteria that are to be submitted and evaluated in the auction can be evaluated automatically”

Commentary

(a) Approval of use of electronic reverse auctions by third parties

10. At its eighth session, the Working Group decided that it would revisit whether the text in parentheses in subparagraph (a) “(Subject to approval by ... (the enacting State designates an organ to issue the approval),)” should be retained, notably as regards whether a third party should have such a power in this context.⁷

⁷ A/CN.9/590, paragraph 68.

(b) Ensuring effective competition

11. As regards subparagraph (b), the Working Group decided that a minimum number of suppliers should not be stipulated in the text.⁸

(c) Inclusion of construction or services in procurement through electronic reverse auctions

12. This issue is addressed in subparagraphs (a) and (c). The Working Group has decided on a preliminary basis that neither services nor construction should be excluded from the draft, pending its further decision as to which type of procurement(s) would be suitable for ERA.⁹

13. The Working Group has also noted that, for an ERA to function correctly (that is, to ensure that bidders price their bids realistically and provide their best offers), bidders will be required to know the cost structure of their bids in detail. As prime contractors in complex construction contracts will not have such knowledge as regards the subcontracted elements of their bid, such procurement may not be suitable for an ERA.¹⁰

14. Most systems regulating ERAs exclude most construction procurement, but there is some variation in the degree of prescription to be found. The Working Group may wish to consider the extent to which the article should be prescriptive or facilitative, and the level of guidance on these questions that should be included in the Guide to Enactment (for example, the issues raised in the preceding paragraph).

(d) Location of text

15. At its eighth session, the Working Group noted that the proposed article 19 bis addressed the conditions for use of ERAs, and had been proposed as a standalone provision akin to the alternative methods of procurement regulated under chapter V of the Model Law.

16. However, the Working Group has requested that the provisions be drafted at this stage so as to allow ERAs to be treated as either a separate method or a phase in other procurement methods. The Working Group may consider that including the draft text addressing conditions for use of ERAs as an article within chapter II of the Model Law ("Methods of procurement and their conditions for use") effectively implies a separate procurement method.

17. The Working Group may consider that the use of ERAs raises issues that are specific to the ERA itself, and for that reason alone, they could most efficiently be regulated as a standalone procurement method. However, the conditions for use may address the types of purchase that can be so procured (applying, for example, the conditions for use of tendering proceedings and request for quotations). See, further, the following section for a description of those procedures. In such a case, the conditions for use in the first paragraph of the draft text would need to be expanded to allow the specifications to be set during rather than at the outset of the procurement process.

⁸ A/CN.9/590, paragraph 75.

⁹ Noting that some electronic reverse auctions are conducted on the basis of lists or catalogues that set out items that may be procured through the mechanism (A/CN.9/590, paragraphs 72 and 73).

¹⁰ A/CN.9/590, paragraphs 70 and 78.

18. The Working Group has also noted that all provisions related to ERAs could be addressed in one section, through revisions to articles of the Model Law governing the relevant procedures, or through the provision of derogations from other procedures, using cross-references where necessary.¹¹ It may therefore consider that the provisions, whether to allow ERAs as a standalone method or a phase in other procurement methods, should in any event be located together, for ease of use of procuring entities. So, for example, they could be located as a section III bis within chapter III if ERAs are to be permitted as a phase in tendering proceedings, or chapter V bis if as a standalone method or if they are to be permitted in any other procurement method.

(e) Types of procurement method appropriate to include electronic reverse auctions

19. Allied to the question of location of the text, the Working Group has observed that the Guide text should note that the conditions of use for restricted tendering would normally not apply to procurement suitable for an ERA (and by implication, nor would those applying to other “alternative” methods of procurement), and therefore that the number of participants should not, in normal circumstances, be restricted.

20. In considering whether to provide for ERAs as a standalone procurement method or as an optional phase in other procurement methods, the Working Group may consider that there are two ways of providing for such auctions as an optional phase. First, and in the light of the guidance referred to in the previous paragraph, the Working Group may wish to consider whether ERAs should be permitted as a phase in tendering proceedings alone. In this regard, the Working Group may consider that the wide initial publication would be required, given the generally perceived higher risks of corruption and abuse in non-tendering proceedings. On the other hand, the use of ERAs may be more transparent and competitive than would otherwise be the case for urgent procurement.

21. The current Guide to Enactment, paragraph 16, notes as regards tendering: “Some of the key features of tendering as provided for in the Model Law include: as a general rule, unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the goods, construction or services to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract.” The Working Group may consider that these conditions are those that should apply before recourse is had to ERAs.

22. Paragraph 18 of the Guide continues that procuring entities may use other methods of procurement (two-stage tendering, request for proposals, and competitive negotiation) if it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings. This situation may arise, for example, if the procuring entity has not determined the exact manner in which to meet a particular need, and seeks proposals as to various possible solutions, or, concerning procurement of high technology items, the technical sophistication and complexity of the goods, it would be preferable for the specifications to be drawn up after negotiations with suppliers and contractors as to the exact capabilities and possible variations. The Working

¹¹ A/CN.9/590, paragraphs 103-105.

Group may wish to consider whether, once the specifications have been set following negotiation of consultation with suppliers, it would be appropriate to allow the second phase of the procurement to take place through an ERA in the case of two-stage tendering and competitive negotiation (but the conditions of use for request for proposals, and for single-source procurement, appear to preclude the use of ERAs). Similarly, another use of competitive negotiation, in cases of urgent procurement, may be more transparent and competitive if the procedure includes an ERA.

23. The Model Law also offers restricted tendering for technically complex or specialized goods, construction or services available from only a limited number of suppliers or for very low value procurement. Again, the Working Group may wish to consider whether procurement using this method would be appropriate to conclude with an ERA. Similarly, for low-value procurement of standardized goods or services, the Model Law offers the request for quotations method (also known as “shopping”).

24. To the extent that the Working Group considers that other “alternative methods of procurement” should be permitted to include an ERA to determine the successful supplier, the draft conditions of use set out above would need to be redrafted so as to allow the specifications to be set during the procurement process, to allow for the possibility that the items to be procured are not “standardized”, and to include selection of the successful supplier or contractor “in accordance with article 49 (4)” (competitive negotiations) or “the lowest-priced quotation in accordance with article 50 (3)” (request for quotations). To the extent that the use of ERAs is to be confined to tendering proceedings (including restricted and two-stage tendering), the drafting will cross-refer to the relevant existing provisions. The use of the term “bid” should also reflect the Working Group’s deliberations in this regard, in that the term “bid” may be appropriate for a standalone method, but the alternatives “tender” or “offer” would be appropriate for ERAs as a phase in other procurement methods.

25. Pending the Working Group’s decisions in this regard, the provisions addressing the procedural aspects of ERAs (articles 47 bis and ter) are presented on the basis of a standalone method or an optional phase in tendering proceedings.

(f) Price and other criteria to be subject to auction

26. As regards the criteria to be permitted to be auctioned (addressed in optional additional text of subpara. (c) in the proposed article 19 bis above), the Working Group has noted that the draft requires a decision as to whether the price alone, or price and other evaluation criteria should be subject to the ERA, and has deferred its consideration of that issue.¹²

27. The Working Group has noted that the main issue for consideration is whether the ERA should include non-price criteria that are qualitative and not quantifiable.¹³

28. There are two models of ERA that can be provided for in addressing this issue. The first (“Model 1”) addresses an ERA under which all aspects of the bids that are to be evaluated in selecting the winning supplier are to be submitted through the auction. These criteria are the price alone, or the price and price-equivalents that can be expressed as a percentage of price or in figures.

29. The second (“Model 2”) involves a pre-auction assessment of all elements of the initial bid or of those elements not to be submitted to the auction, following which

¹² A/CN.9/590, paragraphs 76 and 77.

¹³ A/CN.9/590, paragraph 86.

suppliers are ranked, and their rankings communicated to them. All evaluation criteria are then factored in a mathematical formula, which would then re-rank the bidders on the submission of each bid during the auction itself. In any event, there is no criterion that is not assessed either before or during the ERA.¹⁴

30. If Model 1 auctions alone are to be provided for, the Working Group may wish to include either the additional text Variants A or B.

31. As noted above, Model 2 ERAs envisage more complex procedures that allow criteria other than price to be subject to auction, such that the equivalent of a lowest evaluated tender approach as described in paragraph 34 (4) (b)(ii) of the current Model Law is followed. Under Model 2 auctions, a formula is to be used to quantify the non-price or non-price-equivalent elements to be presented. It is implicit in the use of a formula that the non-price or price-equivalent elements are expressed as a figure, percentage, or otherwise numerically. However, the Working Group may wish to consider whether it is realistic to make an assumption that non-price or non-price-equivalent criteria can be so expressed in a clear and transparent manner.

32. The new European Union Directives¹⁵ make provision for such non-price criteria to be subject to auction, but the Secretariat has been able to locate very limited examples of such auctions conducted in practice so as to examine their effectiveness. In those encountered, non-quantifiable criteria were assessed using a points system. For example, the technical and commercial aspects of the tender in one case were assessed out of a score of 6000, and each such point was converted using an “exchange rate” of 2500 to equate price reductions with the additional value provided by the non-price assessment points (the latter included such matters as management of subcontractor and the ability to deal with unusual incidental aspects of the contract, such as archaeological constraints). In another case, the value of risk transferred back to the procuring entity from minor tender non-compliances and caveats was weighted in cash terms (so doing is relatively straightforward if the risk can be insured, but in other cases may be difficult).

33. If Model 2 auctions are also to be provided for, the Working Group may wish to include either the additional text Variant C.

34. The Working Group may alternatively consider that the use of Model 2 ERAs in the public sector remains immature (in contrast to the use of various types of Model 3 auctions),¹⁶ and that as the techniques are being developed and refined, the Model Law should be drafted in a way so as to allow their introduction in due course (perhaps through regulations).

¹⁴ The Working Group has decided that a third type of auction, described in paragraph 33 of A/CN.9/WG.I/WP.35, and in which the close of the auction does not determine the successful bidder, should not be provided for. See, further, A/CN.9/590, paragraph 84.

¹⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

¹⁶ See endnote 14 above. The main element of this type of auctions is that when the ERA phase closes, the suppliers do not know whose tender is the best; this is established once the “non-auction” aspects of the tender have been factored in. This Model is also used under the EU public procurement directives of 31 March 2004 (see endnote 15 above) as evidenced by ERA case studies found at www.ogc.gov.uk.

2. Guide to Enactment text regarding draft article [19 bis]

35. Paragraphs 1-3 inclusive of the previous text, set out following paragraph 17 of A/CN.9/WG.I/WP.40, remain unchanged. The text proposed to be removed in accordance with the Working Group's conclusions at its eighth session is struck through).

“Article [19 bis]. Conditions for use of electronic reverse auctions

(4) In the light of the matters set out above, enacting States may wish to specify further conditions for the use of electronic reverse auctions in regulations. For example, their use may be restricted to standardized goods ~~[standard products] [commodities]~~, [and some simple types of construction and services], such as commodities (fuel, standard information technology equipment, office supplies and primary building products), and items with no or limited impact from post-acquisition costs and without services or added benefits after the initial contract is completed. Although illustrative lists may be used to identify goods [construction and services] that may be procured using electronic reverse auctions, enacting States should be aware that such lists will require periodic updating as new commodities or other appropriate items appear. It has been observed that some construction works and services (e.g. road maintenance) may be appropriately procured through electronic reverse auctions, but the requirement for detailed, precise ~~[and accurate]~~ specifications will exclude most services and construction from the use of this procurement method.

(5) In order to minimize the risk of collusive practices, including price signalling, ~~and to preserve bidders' anonymity during the electronic reverse auction, and to ensure an appropriate level of competition, enacting States may wish to specify the minimum number of suppliers or contractors in the appropriate market~~ the provisions require a sufficient number of potential suppliers anticipated to participate in the electronic reverse auction. Article 47 bis provides that the electronic reverse auction is to be withdrawn should the number of bidders drop below that level before the opening of the electronic reverse auction itself. However, enacting States may consider that suppliers should not be permitted to participate in an electronic reverse auction through a proxy and over the telephone, as such participation might give rise to a risk of abuse, and the use of the Internet ensures traceability of the proceedings, which telephone systems may not.¹⁷

Commentary

36. The changes to the draft text before the Working Group at its eighth session reflect the drafting suggestions of the Working Group. However, significant additions to the text will be necessary once the issues set out in the context of the draft Model Law article [19 bis], notably to provide guidance on the conditions set out in subparagraph (c) of the draft.

37. The Working Group has noted that there may be a risk to an effective level of competition if suppliers can withdraw their bids before the ERA itself. The Guide to Enactment text for this article may, therefore, cross-refer to those requiring the procuring

¹⁷ See, further, A/CN.9/WG.I/WP.40, paragraph 12.

entity to withdraw the ERA if effective competition cannot be ensured. See, further, paragraph 42 below.

C. Procedures in the pre-auction period (article [47 bis]) (A/CN.9/590, paragraphs 84-86, and A/CN.9/WG.I/WP.40, paragraphs 18-25)

38. The Working Group has requested the Secretariat to produce two alternative provisions addressing procedures for the pre-auction period for its consideration, to reflect Models 1 and 2 ERAs respectively.

1. Proposed new text for the Model Law: new article [47 bis]¹⁸

39. These procedures address the specific steps in preparation for an ERA, and would apply whether the auction is held as a standalone method or a phase in other procurement methods. However, as noted above, they are based on tendering proceedings pending the Working Group's decisions on the matters set out in paragraphs 15 to 18 above.

“Article [47 bis]. Conduct of electronic reverse auctions in the pre-auction period

(1) [The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.]

(2) Suppliers or contractors shall, prior to the auction, submit initial [tenders/bids] that are complete in all respects, except that the [tenders/bids] need not include the elements that are to be presented through the auction. [The procuring entity may, however, require that [tenders/bids] include such elements.]

(3) (a) The procuring entity shall carry out on an initial evaluation of the [tenders/bids] to determine responsiveness in accordance with article 34, and to assess all elements of [tenders/bids] that are not to be presented in the auction in accordance with the award criteria set;

(b) Following the evaluation referred to in paragraph (3) (a), the procuring entity shall send an invitation to participate in the auction to all suppliers or contractors except for those whose [tenders/bids] have been rejected under paragraph (3) (a);

(c) The invitation to participate shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction;

(d) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors [qualified to participate in/admitted to/that have registered to participate in] the auction [falls below [number]] [is in the opinion of the procuring entity insufficient

¹⁸ To enable the Working Group more easily to read the draft provisions and associated commentary during its deliberations, the provisions governing the procedures for the conduct of electronic reverse auctions have been separated into a draft articles 47 bis and ter, but the Working Group may consider that the final version of the revised Model Law should include all such provisions in a single article, for the ease of use of enacting States.

to ensure effective competition], the procuring entity [may/shall] withdraw the electronic reverse auction];

(e) Unless already provided to suppliers or contractors, the invitation to participate in the electronic reverse auction shall include all information necessary to enable the supplier or contractor to participate in the auction [as described in the items set out in subparagraph 4 (e)(ii)-(v) and (vii)-(xii) after paragraph 20 of A/CN.9/WG.I/WP.40, to be included in the solicitation documents].”

Commentary

(a) Provision for electronic reverse auctions as standalone method or optional phase

40. Paragraph 1 states that the provisions of chapter III (“Tendering proceedings”) will apply unless the article derogates from them, which is consistent with provision for ERAs as a standalone method or an optional phase in tendering proceedings.

41. Unless ERAs are to be permitted only as an optional phase in tendering proceedings, an introductory paragraph to replace paragraph 1 and provide cross-references to other procurement methods, or procedures for the initial publicity of the procurement and the solicitation of participation, will be required.

(b) Withdrawal of the auction in cases of insufficient competition

42. Paragraph 3 (d) of the proposed text addresses the requirement for effective competition. The Working Group may wish to consider whether the procuring entity should be enabled or required to withdraw the auction should there be insufficient competition, and the guidance that should be given should the provision be permissive.

(c) Initial evaluation of tenders

43. Paragraph 2 addresses the contents of the initial tenders. If the provisions are to be included within chapter III of the Model Law, this item may alternatively be omitted as it would be included in the ambit of article 27 (a) (contents of solicitation documents, addressing the instructions for preparing tenders). On the other hand, the Working Group may wish all ERA-specific provisions to be located together.

44. Paragraph 3 (a) addresses the evaluation of initial tenders. The Working Group may recall that not all systems regulating ERAs provide for such an initial evaluation,¹⁹ but may consider that it is an important element of the process.²⁰ The Working Group may consider that the final sentence of the paragraph could alternatively be included in the Guide to Enactment.

45. Paragraph 3 (b) requires all responsive bidders to be invited to participate in the auction. The Working Group may wish to consider whether the article should leave open the possibility of restricting the number of suppliers in other than normal circumstances,²¹ with appropriate guidance in the Guide to Enactment.²² If the Working Group decides that procuring entities should be able to restrict the numbers of participants in the auction,

¹⁹ Such as in the Brazilian system.

²⁰ There may be situations, however, where the initial tender may not be required (for example, in competitive negotiations where a best and final offer is sought through an ERA).

²¹ See the commentary set out in paragraph 24 of A/CN.9/WG.I/WP.40.

²² Other than as a result of the initial evaluation described in paragraphs 82 and 83 of A/CN.9/590.

subject to maintaining an effective level of competition, the following additional text would be required at the end of subparagraph 3 (b):

“[The procuring entity] may send an invitation to participate in the auction to [the tenderers that have received the highest ranking in accordance with the preceding paragraph/a limited number of bidders], subject to the provisions of paragraph (d) below.”

(d) Model 1 and Model 2 auctions

46. If Model 1 auctions alone are to be provided for, only price or price-equivalents will be submitted to the auction, and ranking of the bidders will not be necessary (they pass or fail the qualification and responsiveness criteria, and thereafter the price determines the successful bid).

47. If the Working Group considers that Model 2 auctions should also be provided for, it may wish to provide for weighting and ranking of the bidders prior to the auction, and include the following underlined text:

“(3) (a) The procuring entity shall carry out an initial evaluation of [tenders/bids] to determine responsiveness in accordance with article 34, and to assess all elements of [tenders/bids] [that are not to be presented in the auction in accordance] with the award criteria set and with the weighting fixed for them. The procuring entity shall rank the [tenders/bids] on the basis of the elements of [tenders/bids] [that are to be evaluated in the selection of the successful supplier/that are not to be presented in the auction] in accordance with the award criteria.

“and

“3 (e)(i) If elements of [tenders/bids] other than price have been used in the initial evaluation, the results of the initial evaluation of the supplier or contractor’s tender; and

“(ii) If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price or non-price-equivalent elements to be presented. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender.”

48. As noted above, Model 2 ERAs envisage more complex procedures that allow criteria other than price to be subject to auction, such that the equivalent of a lowest evaluated tender approach as described in paragraph 34 (4) (b)(ii) of the current Model Law is followed, and the bidders are ranked prior to and during the auction. The Working Group may wish to consider whether either or both alternatives in the final square brackets in paragraph 3 (a) (referring to the elements of tenders “that are to be evaluated in the selection of the successful supplier” and “that are not to be presented in the auction” should be retained, so as to allow the ranking to include either all elements of the tender, or merely those that are to be auctioned (the others then being pass/fail criteria).

(e) Information to be provided to potential suppliers or contractors

49. A detailed list of information to be provided to potential suppliers or contractors as regards the holding of an ERA is set out in subparagraphs 4 (e)(ii)-(v) and (vii)-(xii), to be found in the text following paragraph 20 of A/CN.9/WG.I/WP.40. The aim of providing such information is to give potential suppliers or contractors all information necessary to enable them to decide whether to, and if so to participate in, the auction. The Working Group has indicated in the context of solicitation documents that such detailed information would be more appropriately set out in the Guide to Enactment text or in procurement regulations addressing the contents of the solicitation documents, rather than in the text of the Model Law itself.²³ The contents of the solicitation documents themselves are addressed in paragraphs 60 to 64 below.

2. Guide to Enactment text for article [47 bis]

50. The Working Group has noted that it will consider the text of the Guide to Enactment before the Working Group at its eighth session (see the text following para. 25 of A/CN.9/WG.I/WP.40) and any draft regulations once the draft text of the Model Law, as revised, has itself been addressed.²⁴

51. If Model 2 auctions are to be included in the Model Law, the Working Group may consider that detailed guidance as to their use and the use of non-price criteria in a formula will be required in paragraph (4) of the existing draft Guide to Enactment text.²⁵

52. A further issue for the Working Group's consideration is the question of pre-qualification and qualification.

53. If no change is made to the Model Law's current article 7 (other than to add a cross-reference in the text of that article to the chapter where ERAs are addressed) the procuring entity, when conducting an ERA, will not be required to engage in prequalification proceedings (but may elect to do so). The Working Group has yet to decide how to address the question of whether prequalification proceedings should be required or may be used, whether the issue should be addressed during the initial evaluation stage, or whether post-qualification may be desirable.²⁶ In summary, the aims of prequalification include certainty as to the winner at the end of the auction, and it is recalled that prequalification also enables the number of participants to be invited to the ERA to be assessed, so as to ensure effective competition. On the other hand, the procedural costs and time involved in prequalification can be avoided if there is no assessment until after the closure of the auction.

D. Procedures in the auction phase (article [47 ter]) (A/CN.9/590, paragraphs 88-93, and A/CN.9/WG.I/WP.40, paragraphs 26-35)

1. Proposed new text for the Model Law: article [47 ter]

54. As noted above for article 47 bis, these procedures address the specific steps in preparation for an ERA, and would apply whether the auction is held as a standalone method or a phase in other procurement methods. However, their location would fall to be

²³ A/CN.9/590, paragraph 97.

²⁴ A/CN.9/590, paragraph 86.

²⁵ Located following paragraph 17 of A/CN.9/WG.I/WP.40.

²⁶ Discussed in detail in paragraphs 21 and 22 of A/CN.9/WG.I/WP.40.

considered once the Working Group has decided on the manner of provision for such auctions.

55. The Working Group requested the following drafting changes to the text before it at its eighth session (paras. 1 (a) and (c), 4, 6 and 7 of the text before the Working Group at its eighth session remain unchanged and are not repeated):

“Article [47 ter]. Conduct of electronic reverse auctions during the auction itself²⁷

...

1 (b) Procuring entities must ~~[provide]~~ instantaneously communicate to ~~the lowest price submitted~~ to all bidders on a continuous basis during the auction ~~[with] sufficient information [to enable each to establish its own current ranking in the auction] [whether it has the top ranking in the auction] [to establish the changes needed to any bid to give it the top ranking in the auction]];~~

(2) The auction shall be closed in accordance with the precise method, dates and times specified in the solicitation documents or in the invitation to participate in the auction, ~~as follows:~~

— (a) ~~When the date and time specified for the close of the auction has passed; or~~

— (b) ~~When a certain period of time, as specified, has elapsed [without a valid new submission that improves on the top ranked bid] [when the procuring entity receives no more new prices or new values which meet the requirements concerning minimum differences];²⁸~~

(3) ~~(e)~~ The procuring entity [may also at any time announce the number of participants in the auction but] shall not disclose the identity of any bidder [during the auction] [until the auction has closed. Articles 33 (2) and (3) shall not apply to a procedure involving an electronic auction].²⁹

~~(3)~~(4) The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communications failures.³⁰

...

~~(5)~~(6) The successful bid shall be the bid with the lowest price ~~that is first in the ranking as determined by the automatic evaluation mechanism~~ at the time the auction closes.”

²⁷ Located following paragraph 27 of A/CN.9/WG.I/WP.40.

²⁸ The Working Group noted that these matters should be addressed in regulations. See A/CN.9/590, paragraph 89. If Model 1 auctions only are to be provided for, the Working Group may consider that subparagraph 2(b) should be amended as follows: “(2)(b) When a certain period of time, as specified, has elapsed [without a valid new submission with a lower price that improves on the top ranked bid] [when the procuring entity receives no more new prices ~~or new values~~ that meet the requirements concerning minimum differences]”.

²⁹ Paragraph re-numbered, A/CN.9/590, paragraph 90.

³⁰ A/CN.9/590, paragraph 91.

Commentary

56. The Working Group agreed at its eighth session to defer the questions of options available should the successful bidder fail to enter into a procurement contract, or fail to provide any security required to a later session.³¹ Paragraph 6 of the draft before the Working Group at the eighth session provides options for the procuring entity in such circumstances to select another bid in accordance with article 34 (7) or article 36 (5), to reopen the ERA, or to recommence the procurement. Although the provisions could allow the second-best bidder to receive the contract, if that bidder can be identified, or for negotiations with other bidders, the Working Group has noted issues of false bidding that can arise if the second-best or other bidders can be awarded the contract.³²

57. The draft text before the Working Group at its eighth session (set out following para. 27 of A/CN.9/WG.I/WP.40) contemplates Model 1 auctions. If the Working Group decides to provide for Model 2 auctions in addition, the following amendments to paragraphs 1 (b) and (6) would be required:

“1 (b) Procuring entities must instantaneously communicate to all bidders the lowest price submitted and sufficient information to enable each to establish its own current ranking in the auction on a continuous basis during the auction;

...

(6) The successful bid shall be the bid with the lowest price or that is first in the ranking as determined by the automatic evaluation mechanism at the time the auction closes.”

2. Guide to Enactment text for article 47 ter

58. The Working Group has also decided that it will be appropriate to consider the text of the Guide (and any draft regulations) once the draft text of the Model Law settled. The Working Group has also noted that the text should be drafted so as to prevent technical obsolescence so far as possible.³³

E. Requirement to maintain a record of the procurement proceedings: proposed addition to article 11 of the Model Law (A/CN.9/590, paragraph 94, and A/CN.9/WG.I/WP.40/Add.1, paragraph 3)

59. The Working Group has requested that the application of the accessibility standards be reflected by recording a decision to use ERAs in the record of the proceedings, but with the following text to replace the draft before the Working Group at its eighth session:³⁴

“Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

³¹ A/CN.9/590, paragraph 92.

³² Ibid.

³³ A/CN.9/590, paragraph 93.

³⁴ A/CN.9/590, paragraph 94.

(b) ter³⁵ “In procurement proceedings involving the use of electronic reverse auctions pursuant to [article 19 bis], a statement to that effect.”

F. Contents of the solicitation documents (A/CN.9/590, paragraph 97, and A/CN.9/WG.I/WP.40/Add.1, paragraph 7)

60. The Working Group has requested that level of detail in the proposed revisions to article 27 before it at its eighth session be reviewed, so that those provisions that do not require regulation by the Model Law should be removed to regulations or the Guide. Accordingly, it is proposed that the items struck through in the revised draft text below could be removed to regulations or the Guide, with a suitable cross reference to article [47 bis (e)], which requires information necessary for potential bidders to be supplied.

“Article 27. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

...

(n) bis Where the procurement proceedings³⁶ are to be conducted by way of an electronic reverse auction pursuant to [articles 47 bis and ter], a statement to such effect, and:

- [(i) The date and time of the opening of the electronic reverse auction;
- (ii) The website address at which the electronic reverse auction will be held, and at which the auction rules, the tender and other relevant documents will be accessible;
- ~~(iii) The requirements for registration and identification of bidders at the opening of the auction;~~
- (iv) The elements of the tender that are to be presented at the auction;
- ~~(v) The information that will be made available to bidders in the course of the auction and, where appropriate, how and when it will be made available;~~
- ~~(vi) All relevant information concerning the auction process itself, including any identification data for the procurement, technical requirements as to information technology equipment to be utilized, whether there will be only a single stage of the auction, or multiple~~

³⁵ Initially proposed as subparagraph (i)bis (see A/CN.9/WG.I/WP.40/Add.1, paragraph 3). The location of the provision is proposed to be changed to 1 (b) ter that would follow proposed subparagraph 1 (b) bis containing the requirement to record the procuring entity’s decision as to the means of communication to be used in the procurement proceedings (see A/CN.9/WG.I/WP.42, paragraph 31).

³⁶ The phrase “procurement proceedings” has replaced “tendering proceedings” in the previous draft, as requested by the Working Group (see A/CN.9/590, paragraph 96). The same change will be made to the revised article 25, and elsewhere in the text addressing electronic reverse auctions, as necessary.

~~stages (in which case, the number of stages and the duration of each stage);~~

~~(vii) The conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other elements that [will be required when bidding] [must be improved in any individual; new submission during the auction] [and the time which the procuring entity will allow to elapse after receiving the last submission before closing the auction];~~

~~(viii) All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;~~

(ix) All other information necessary to enable the supplier or contractor decide whether or not to participate in the auction;

(n) *ter* The procurement regulations may prescribe further information that is to be so provided.”

Commentary

61. The text is drafted with reference to the solicitation documents, and would apply to ERAs conducted as a part of tendering proceedings. However, if the Working Group considers that auctions should be provided for in a separate Chapter, either as a standalone method or as an optional phase in other procurement methods, the provisions would then be specified to the contents of solicitation documents as additions in that Chapter.

62. The Working Group has noted that the provisions of subparagraph (n)(i) should be included in subparagraph (q) of the current article 27.³⁷ Accordingly, the Working Group may wish to delete the former subparagraph, and revise the latter to read as follows:

“The place, date and time of the opening of tenders, in conformity with article 33 or, where an electronic reverse auction is to be held in accordance with the provisions of [articles 47 bis and ter], the start of the auction.”

63. The treatment of alternatives contained in subparagraph (g) of the current text of article 27 would apply in the context of Model 2 ERAs, but the Working Group may consider that they should not in the case of Model 1 auctions. If so, the Working Group may wish the Guide to Enactment to provide guidance in this regard.³⁸

64. If the Working Group decides to make provision for Model 2 auctions in addition to Model 1 auctions, it may wish to include in article 27 the following additional subparagraph within subparagraph (n) *bis*:

“If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price elements to be presented. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender.”

³⁷ A/CN.9/590, paragraph 97.

³⁸ Ibid.

G. Modification and withdrawal of tenders (article 31 of the Model Law, A/CN.9/590, paragraph 99, and A/CN.9/WG.I/WP.40/Add.1, paragraph 12)

65. The Working Group has observed that if suppliers can withdraw their bids before the ERA itself, the impact on the level of competition that would be required for an effective auction should be considered. The Working Group may wish, therefore, to include the following text as a new paragraph 4 bis in the Guide to Enactment text addressing article 31:

“Although suppliers and contractors may withdraw their [bids/tenders] prior to the deadline for the submission of initial [bids/tenders] in the case of an electronic reverse auction held in accordance with the provisions of [articles 47 bis and ter], the impact of such withdrawals may be that a sufficient level of competition as required by paragraph 4 (d) of [article 47 bis] cannot be ensured. In such circumstances, the procuring entity must consider whether effective competition will be in place and, if not, [is required to/may] withdraw the auction.”

66. Again, the location and phrasing of this provision would need to reflect the types of procurement method that may be completed using ERAs.

A/CN.9/WG.I/WP.43/Add.1

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement and addressing abnormally low tenders

ADDENDUM

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II. Draft provisions to enable the use of electronic reverse auctions under the Model Law

...

H. Tender securities in electronic submission of tenders and in electronic reverse auctions (article 32 of the Model Law, A/CN.9/590, paragraphs 49 and 100, and A/CN.9/WG.I/WP.40/Add.1, paragraph 13)

1. At the eighth session, it was observed that the question of tender securities might need specific provision, in the light of the experience of certain delegations and observers that tender securities remained paper-based documents, and simultaneous submission with electronic tenders might not be possible. It was noted that tenders had been rejected for failure to furnish tender securities when required in these circumstances (in practice the absence of tender securities may lead to automatic non-acceptance of tenders at an early stage of the procurement proceedings). The Secretariat was requested to provide the Working Group with further information and proposals on this question at its next session,

for example considering whether there was any practice allowing for a short period for post-tender submission of tender securities.¹

2. The results of the Secretariat study show that verifications of tender securities provided in cash (bank transfers) should not pose a problem, as a procuring entity would be able to check funds transferred to a designated account simultaneously with receipt of electronic tenders. As regards other types of tender securities, the Secretariat was informed by specialists in the banking sector that the electronic transmission of bank undertakings (e.g., letters of credit or bank guarantees), for example among banks via SWIFT is fairly routine, but public procuring entities continue to insist on receiving them in paper form.² The position, however, may change as developments in technology and in procurement practices generate more confidence in non-tangible forms of tender securities.

3. In the case of some electronic purchasing techniques, such as the type of ERAs where the price is the only award criteria and dynamic purchasing systems, requests for tender securities appear to be uncommon, as those techniques are mostly used for procurement of “off-the-shelf” products. As regards procurement of more complex products, the Working Group may wish to consider the issue in a broader context as the need may arise for not only tender securities but also other parts of tender documents to be submitted in a non-electronic form. For example, it may be problematic to transmit electronically complex drawings or have electronic access to them without appropriate software.

4. The issue could be dealt with in the context of provisions on the form of communication (current article 9) and the content of solicitation documents (current article 27). In particular, the solicitation documents may envisage exceptions for the submission of those parts of tender documents that could not be submitted in the general form specified. In fact, subparagraph 1 of article 27 and article 32 of the Model Law already provide for a special treatment in the solicitation documents of tender securities. Together with the “accessibility standards”, these provisions might provide sufficient flexibility to procuring entity and sufficient safeguards to suppliers or contractors in situations when tender securities cannot be transmitted electronically simultaneously with the electronic submission of the rest of the tender.

I. Examination, evaluation and comparison of tenders (article 34 of the Model Law, A/CN.9/590, paragraph 101, and A/CN.9/WG.I/WP.40/Add.1, paragraphs 14-17)

5. The Working Group requested the text set out following paragraph 15 of A/CN.9/WG.I/WP.40/Add.1 to be amended as follows, so as to prevent amendments to tenders that might make a non-responsive tender subsequently responsive:

“No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted, except to those elements of the [bids/tender] that are to be presented in an electronic reverse auction under [article 47 bis and 47 ter].”

6. Again, the location and phrasing of this provision would need to reflect the types of procurement method that may contemplate using ERAs.

¹ A/CN.9/590, paragraph 49.

² This information pertains to a jurisdiction advanced in the areas of electronic commerce, electronic banking and electronic procurement.

III. Abnormally low tenders (see A/CN.9/590, paragraphs 106-111, and A/CN.9/WG.I/WP.40/Add.1, paragraphs 21-29)

7. The Working Group decided at its eighth session that minimum provisions to address abnormally low tenders should be included in the Model Law, supplemented by detailed discussion in the Guide. The main need is to address safeguards necessary to prevent arbitrary decisions and abusive practices when dealing with apparently abnormally low tender prices (that is, to avoid the rejection of tenders for being abnormally low, without justification).³

8. The Working Group also requested the following criteria to be included: (i) the procuring entity should be allowed but not required to reject abnormally low tenders; (ii) the possibility of assessing bid prices on the basis of cost rather than price should not be introduced, since cost assessment is cumbersome and complicated; (iii) only the procuring entity, and not a third party, should be able to take measures where an abnormally low tender was suspected, and the assessment of the tender concerned must be carried out on a purely objective basis; and (iv) it was important to address possible abnormally low tenders before the relevant contract had been concluded, as measures thereafter might lead to even higher prices and disruption to the procurement concerned.

A. Proposed additions to article 34 of the Model Law

“Article 34. Examination, evaluation and comparison of tenders

...

(4) (a) bis If a tender price is abnormally low in relation to the goods, construction or services to be procured, and:

(i) The procuring entity has requested in writing pursuant to article 34 (1) (a) details of constituent elements of the tender or tenders that give rise to [the assessment that the tender price(s) is or are abnormally low in relation to the goods, construction or services to be procured/concerns as to the ability of the tenderer(s) to perform the contract];

(ii) The procuring entity has taken account of the information supplied but continues to [consider that the tender price(s) is or are abnormally low/ hold those concerns]; and

(iii) The procuring entity has included in the record of the procurement proceedings that it is required to maintain under article 11 the [assessment that a tender price is abnormally low/concerns as to the ability of the tenderer(s) to perform the contract] and the reasons therefor, and all communications between the procuring entity and the tenderer(s) regarding the issue;

the procuring entity may, prior to the determination of the successful tender in accordance with article 34 (4) (b), reject abnormally low-priced tenders.”

³ A/CN.9/590, paragraphs 107 and 109.

Commentary

9. The above draft has been revised so as to take account of the Working Group's instructions that the question of qualification should not be confused with the evaluation of tenders,⁴ and that the text should provide that before a procuring entity could reject a tender on the basis that its price was abnormally low, the procuring entity had to follow a price investigation procedure.

10. The Working Group may also wish to consider whether the tenders concerned are to be rejected as non-responsive (in which case the provisions should be part of article 34 (3), and it would be mandatory to reject an abnormally low tender), whether the tenders are accepted in that they are responsive but rejected subsequently as being abnormally low (in which case the provisions should be part of article 34 (4) as provided above), or whether some flexibility is warranted (for example, by including a new paragraph, article 34 (3) bis).

11. The Working Group has also requested the phrase that the chapeau of the draft text before the Working Group at its eighth session, which introduced the price justification procedure as follows:

“If the tender price is abnormally low in relation to the goods, construction or services to be procured, and raises concerns as to the ability of the tenderer to perform the contract,”

should be amended so as to remove the second element, “and raises concerns as to the ability of the tenderer to perform the contract”.⁵

12. This phrase also appears in the remainder of the revised draft text, and the Working Group may wish to consider whether it should remain at all.⁶ In addressing that question, the Working Group may recall its observations that “the root of the issue [is the] performance risk,”⁷ and “a low price per se would not necessarily indicate a performance risk,”⁸ and may therefore consider whether the performance risk should be stated expressly as the issue to be addressed.

⁴ In this regard, the addition to article 34 (4) (b) considered by the Working Group at its eighth session (A/CN.9/WG.I/WP.40/Add.1, paragraph 23) has been deleted. See A/CN.9/590, paragraph 110.

⁵ A/CN.9/590, paragraph 110.

⁶ At its seventh session, the Working Group requested the provisions to address the issue using the following approach: “if a tender price were abnormally low and raised justified concerns as to the ability of the tenderer to perform the contract, the procuring entity should be authorized to reject the tender. It was noted that any rejection in such cases would be subject to two qualifications: first, that the tenderer had been given an opportunity to explain its prices through a price justification procedure and, second, that justification for the rejection should be included in the record of the procurement proceedings, such that any challenge to the rejection could be considered in the light of that justification.” See A/CN.9/575, paragraph 79.

⁷ A/CN.9/575, paragraph 68.

⁸ A/CN.9/575, paragraph 69.

B. Proposed additions to the Guide to Enactment text addressing article 34 of the Model Law

13. As regards the proposed text for the Guide to Enactment, the Working Group may wish to consider the following additions to the draft before the Working Group at the eighth session, so as to reflect the concerns expressed at that session:⁹

“(1) bis A clarification request under paragraph [1 (a)] may be made, inter alia, if a procuring entity suspects that an abnormally low priced tender has been submitted, possibly arising from a misunderstanding of the solicitation documents, or other error. A tender price is assumed to be abnormally low if it seems to be unrealistic, that is, the price appears to be below cost, or if it may not be feasible to perform the contract at the price submitted and to make a normal level of profit. From the perspective of the procuring entity, an abnormally low tender involves a risk that the contract cannot be performed, or performed at the price tendered, and additional costs and delays to the project may therefore ensue. The procuring entity should therefore take steps to avoid running such a performance risk. It is important to note that a tender price may be low, but not abnormally low, especially in international procurement, in that an abnormally low price in one country may be perfectly normal in another, and selling old stock below cost or below cost pricing to keep the workforce occupied may be legitimate. Furthermore, the submission of an abnormally low tender may involve criminal acts (e.g., money-laundering) or illegal practices (e.g., non-compliance with minimum wage or social security obligations).

...

(1) quater The procuring entity should take account of the response supplied in evaluating the tenders. Enacting States [may/will] wish to ensure transparency and clarity, that proper procedures and safeguards are in place to prevent arbitrary decisions and abusive practices, and that the assessment of the procuring entity where abnormally low tenders are concerned is entirely objective. It is important to note that it is the realism of the price that is to be assessed (using such factors as pre-tender estimates, market prices and previous contracts where available), and not the underlying costs that will have been used by suppliers and contractors to determine the price itself. The reason for assessing prices and not costs is that cost assessment can be cumbersome and complicated, and is also not possible in all cases.”

[the remainder of the draft text in A/CN.9/WG.I/WP.40/Add.1, paragraph 28 remains unchanged]

⁹ A/CN.9/590, paragraphs 106-108, commenting on the draft text in A/CN.9/WG.I/WP.40/Add.1, paragraph 28.

**H. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services:
the use of framework agreements in public procurement,
submitted to the Working Group on Procurement
at its ninth session**

(A/CN.9/WG.I/WP.44 and Add.1) [Original: English]

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 43 of document A/CN.9/WG.I/WP.41, which will be before the Working Group at its ninth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group requested the Secretariat to prepare a note on the use of framework agreements, including guidance materials where appropriate (A/CN.9/568, para. 78). The Working Group decided at its seventh session (New York, 4-8 April 2005), time permitting, to take up the topic of framework agreements at its next session (A/CN.9/575, para. 9), but, for reasons of time, subsequently deferred its consideration of the topic to its ninth session (A/CN.9/590, para. 10). This note has been prepared in response to the Working Group’s request at its sixth session, draws upon information provided to the Secretariat, and is submitted to the Working Group for consideration at its ninth session.

II. Background information

A. Description

3. Framework agreements can be described as transactions to secure the supply of a product or service over a period of time, which involve:

(a) An invitation to potential suppliers to participate in a procurement (using the method of procurement appropriate for the goods, construction or services concerned, for example by way of publication of an invitation to tender);

(b) The selection of one or more suppliers on the basis of their responses to the invitation in accordance with the procurement method chosen (the “first phase” of the award process), following which the supplier(s) enter into a framework agreement with the procuring entity; and

(c) The subsequent placing of periodic orders with the supplier(s) chosen as particular requirements arise (the “second phase” of the award process).

4. Framework agreements are most commonly used for goods, services or construction for which a procuring entity has a repeat need, such as stationery, spare parts, information technology supplies and maintenance, but for which delivery times and quantities are not known at the time of the initial invitation. Other uses include the purchase of items from more than one source, such as electricity and medicines, and centralized purchasing for several procuring entities.

5. Framework agreements have become an increasingly popular procurement tool, particularly with the rise of electronic procurement. For example, it is estimated that by 2003, framework agreements accounted for nearly 30 per cent of federal contracting in the United States.¹

¹ As a percentage of U.S. federal government-wide procurement dollars obligated, 1997 to 2002. See United States Government Accountability Office, Civilian Agency Compliance with Task and Delivery Order Contracts, GAO Rep. No. 03-983, at 6 (August 2003).

6. Framework agreements can be concluded with one supplier (single-supplier agreements), or with more than one supplier (multi-supplier agreements), and may or may not take the form of a binding contract. Both types of agreements may enhance the security of supply, either through agreements under which a supplier is bound to fulfil orders placed, and additionally in the case of multi-supplier agreements in that a procuring entity even with non-binding agreements with several purchasers is likely to be able to find a supplier or suppliers that can fulfil orders. Certain types of multi-supplier agreements allow a procuring entity flexibility in the selection of a supplier for a specific order by allowing the specification in the framework agreement to be tailored to the precise needs of the procuring entity for a particular purchase order.²

B. Terminology

7. The term “framework agreement” is used for the type of arrangement discussed above in some systems (including the United Kingdom and countries in Africa and Asia that follow the British legal system), and in the 2004 European Union procurement directives.³

8. Other terms used to cover one or more of this type of arrangement include indefinite-delivery/indefinite quantity (IDIQ) or task-order contracts in the United States, and, more generally, umbrella contracts.⁴

9. Given that using any of the above terms outside their home system in the UNCITRAL context may lead to some confusion as to the nature of the arrangement concerned, an initial issue for the Working Group to consider is how to refer to such agreements. If the Working Group considers that the Model Law should adopt a system close to that under another regime, it may wish to use the term from that regime. Alternatively, terms that are not closely identified with any particular system include “periodic purchase arrangement”, “recurrent purchase arrangement”, “periodic requirements arrangement” or “periodic supply vehicle”. For the purposes of this note, and consistent with earlier documents presented to the Working Group on the topic, however, the term “framework agreement” will be used.

² The supplier offering the best value for money may therefore vary according to the nature of the purchase order, taking into account any or price reductions on the basis of the purchase order, the availability of suppliers’ personnel to carry out particular work, developments in a supplier’s products between the conclusion of the framework agreement and the placing of the purchase order, or other factors.

³ Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004: Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, respectively (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 1 and 114 et seq, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm). Directive 2004/17/EC permits framework agreements in its article 14. Directive 2004/18/EC contains more detailed provisions on framework agreements in its article 32, and this note will have regard to the latter provisions when considering the use of framework agreements in the European Union and its member states.

⁴ In French, for example, they are called variously *accords-cadres*, *marchés de clientèle*, *marchés à commande* and *marchés fractionnés*, and in Spanish *acuerdos marco*, *acuerdos de suministro* and *contratos con fecha de entrega indefinida o de suministro cuantitativo indefinido*.

C. Relationship with other procurement tools

10. Framework agreements are related to lists of suppliers drawn up in anticipation of procurements. Both identify suppliers for future awards of procurement contracts, and although they have been described from a commercial point of view as shades on a single spectrum,⁵ there are significant differences between the two.⁶ They can be distinguished in that in the case of a framework agreement, but not in the case of a suppliers' list:

(a) There is an initial invitation to tender or other invitation to participate in a procurement;⁷

(b) The invitation contains:

(i) A specification of the goods, construction or services to be procured and other requirements for the procurement; and

(ii) The terms and conditions upon which the various suppliers will supply the goods, construction or services (such as price and delivery charges and times).

D. Main benefits and concerns arising in the use of framework agreements

11. The main purposes of framework agreements include the reduction of transaction costs and transaction times, and assuring the security of supply. As in framework agreements the suppliers are identified, their qualifications assessed and the specification, terms and conditions of the future procurement established before an order is placed, recurrent costs can be avoided and purchases can be made with lower overall transaction costs and shorter delivery times than would be the case were each purchase procured separately. The types of framework agreement in which all competition takes place in the first phase of the award process are straightforward to operate in the second award phase, and thus the potential for savings in transaction costs and times is significant. Empirical evidence suggests that the advantage is highest where individual purchase orders under the framework agreement are made electronically.⁸ In addition, observers have commented that framework agreements can also lower inventory costs (as supplies are ordered only when needed), and allow the procuring entity greater flexibility in scheduling requirements, both in terms of timing and quantity.⁹

⁵ Arrowsmith S., "Framework purchasing and qualification lists under the European Procurement Directives: Part I", (1999) 8 P.P.L.R., 115.

⁶ It is true, however, that some types of framework agreement and some types of suppliers' lists can be difficult to classify. Document A/CN.9/WG.I/WP.45 and Add.1 discusses the use of suppliers' lists.

⁷ In the United States, "[t]o become a [General Services Administration ("GSA")] Schedule contractor [to hold an equivalent to a framework agreement], a vendor must first submit an offer in response to the applicable GSA Schedule solicitation. GSA awards contracts to responsible companies that offer commercial items falling within the generic descriptions in the GSA Schedule solicitations". See, further, <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%2Fep%2Fchannel%2FgsaOverview.jsp&channelId=-13464>.

⁸ Observers have commented that a second-phase award can be made, using electronic technologies, in hours, rather than the several weeks or months required for other procurement methods.

⁹ Framework agreements are considered by some commentators to be better than suppliers' lists

12. Framework agreements may be useful to ensure rapid and secure supply of items to be procured (for example, the agreement may require the supplier to fulfil all orders placed and to keep a permanent stock of a product available even on the procuring entity's premises),¹⁰ and where a close long-term relationship between procuring entity and supplier(s) is beneficial (for example, joint research and development programmes).

13. It has also been observed that one of the benefits of the use of framework agreements in the procurement process is that successive competitive phases in the process may lead to better value for money. Framework agreements should allow a procuring entity to realize "the benefits of an ongoing competitive environment throughout the duration of the contract,"¹¹ and to seek price reductions through the anticipated volume of orders.

14. Framework agreements thus have the potential to enhance the objectives of the Model Law as set out in its preamble, including maximizing economy and efficiency in procurement.

15. Observers also have commented that framework agreements can provide enhanced access to government work for smaller suppliers and small- and medium-sized entities, though this view is contradicted by others who state that larger-scale contracting that tends to arise through the use of framework agreements favours larger suppliers.¹²

16. However, other observers have commented that framework agreements may pose a risk to effective competition, in that in exempting the placing of individual purchase orders from full and open competition requirements, they may exclude potential suppliers from the procurement concerned, because the competition at the individual purchase order stage may not be adequate, because there may be a risk of collusion between suppliers, and because there may be no effective oversight of the operation of framework agreements in practice.

17. Further, a framework agreement may be of long duration and wide in coverage, closing off markets from the periodic competition contemplated by the procurement regulations (for example, effectively securing the market for a national supplier). To this extent, framework agreements could compromise the Model Law's stated objectives of fair and equitable treatment, integrity and public confidence in the procurement system if their operation is not appropriately regulated and overseen.

for urgent procurement in cases such as utilities (which might otherwise be conducted using the Model Law's request for quotations method, also known as "shopping"). However, particularly so far as utilities are concerned, other commentators stress the quality risks that arise in such outsourcing.

¹⁰ The security may be enhanced if the agreement gives some expectation of future orders to the supplier(s), such that they are more likely to invest in the requisite plant and machinery, particularly where a bespoke product is concerned. A maximum quantity may be stipulated in the agreement, so as to allow for unforeseen high demand – either to protect suppliers from unanticipated order levels, or to allow procuring entities to seek more advantageous sources of supply with a larger operator.

¹¹ U.S. Office of Management & Budget, Office of Federal Procurement Policy, "Best Practices for Multiple Task and Delivery Contracting", 7 (Washington, D.C.: July 1997), available at www.acqnet.gov/Library/OFPP/BestPractices/BestPMAT.html.

¹² Framework agreements of this type could theoretically be used for purchases that could conveniently be made in a single lot, but which the procuring entity separates into lots to enable the participation of SMEs. However, information provided to the Secretariat has shown no instances of their being used in practice for this purpose.

18. The benefits and potential risks in the use of framework agreements are discussed in more detail in chapter V of A/CN.9/WG.I/WP.44/Add.1.

III. Extent of regulation and use

A. Framework agreements

19. Observers have commented that framework agreements can be operated under many existing procurement regimes, at both the international and national level. Some states in the civil law tradition that have procurement laws provide expressly for framework agreements, generally through enabling provisions,¹³ but with more detailed legislation in some cases.¹⁴

20. Framework agreements are also in use even in the absence of specific regulation. Although there is no express provision in the World Trade Organization (WTO) Agreement on Government Procurement (GPA)¹⁵ and North American Free Trade Agreement (NAFTA), commentators consider that the GPA and NAFTA recognize the possibility of award procedures that have more than one phase, and thus framework agreements can be operated in systems subject to those agreements. In those countries that do not have a tradition of procurement regulation per se (such as those following the British legal system), framework agreements have also been operated for many years without specific regulation. However, recent procurement legislation in many systems demonstrates a trend towards making provision for framework agreements. The Model Law does not currently make provision for framework agreements, and its current provisions that may prevent their use are noted in the discussion of their operation and use, in chapter IV below and in A/CN.9/WG.I/WP.44/Add.1.

B. Africa

21. Out of the systems reviewed, over two-thirds made provision for IDIQs or framework agreements. The jurisdictions with such provision include both common law systems (such as Malawi and Tanzania) and civil law systems (such as Burkina Faso, Ethiopia, Mali, Niger and Senegal).¹⁶ In the civil law systems, the framework provisions are generally limited in scope to single-supplier framework agreements, but in common law systems, multi-supplier framework agreements are also provided for.

22. For example, in Malawi, provision is made for both “IDIQ contracts” and “framework agreements”.¹⁷ The former are concluded with one supplier, but the latter can

¹³ Such as Burkina Faso, Chile, China, Ethiopia, Mexico and Niger.

¹⁴ See, for example, Brazilian Law No. 8.666 of 21 June 1993, section V, and Decree No. 3.931 of 19 September 2001, and, in France, the Code on Public Procurement, article 71.

¹⁵ The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA) (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf), which may be amended to include a specific provision on framework agreements, though some member states consider that such a provision would not be appropriate.

¹⁶ Countries without provisions included Cameroon, Egypt, Nigeria and Sierra Leone.

¹⁷ Articles 29 and 30, respectively, of the Malawi Public Procurement Act No. 8 of 2003.

be concluded with at least three suppliers, in which case competition at the second phase is required. Ethiopia and Tanzania have outline provision for framework agreements.¹⁸

23. In Burkina Faso, the terms of IDIQs or framework agreements must specify the goods or items to be procured, their price, a minimum and maximum contract amount or quantity.¹⁹ Similar provisions apply in Niger.²⁰

24. In Senegal, a procuring entity whose future requirements are uncertain may conclude, following normal procurement procedures, a “*marché à commande*” which fixes maximum and minimum amounts (by reference to value or quantities), or a “*marché de clientèle*”, under which the types of goods are specified, but not their amount or quantity, with a market-determined formula setting the price.²¹ Similar provisions are found in Algeria,²² Mali,²³ Morocco,²⁴ Tunisia,²⁵ and the West African Economic and Monetary Union system.²⁶

C. Asia

25. Chinese legislation provides for both single- and multi-supplier framework agreements, following an initial open competition. As regards multi-supplier agreements, negotiations with suppliers are permitted if the subsequent purchase order is relatively large, or further quotations can be requested. Details of the suppliers and their offers are posted on the Ministry of Finance government procurement website. Single-supplier agreements are permitted, in limited circumstances, for services procurement. The regulation concerned does not address the details of operation of the agreements.²⁷ In Hong Kong Special Administrative Region,²⁸ framework agreements have operated in the absence of specific provision.

26. No provisions were found in Indonesia, Lao People’s Democratic Republic, Papua New Guinea, Syria and Viet Nam.²⁹ Singapore,³⁰ like Hong Kong, has long used framework agreements in the absence of specific provision.

¹⁸ Article 5.2 of Ethiopia’s Public Procurement Law, and article 57 of Tanzanian Procurement Regulations, 2005, passed under the Public Procurement Act (No. 3 of 2001).

¹⁹ *Decret N°2003-269/Pres/Pm/Mfb*.

²⁰ *Code des marchés publics*, article 65.

²¹ See *Code des marchés publics, décret n°2002-550*, July 2002, Chapter 6 - *Marchés de clientèle ou à commande*, article 26.

²² *Décret présidentiel n° 02-250 du 13 Joumada El Oula 1423 correspondant au 24 juillet 2002 portant réglementation des marchés publics*.

²³ *Décret n° 95-401/p-rmportant code des marches publics*.

²⁴ *Décret n° 2-98-482, fixant les conditions et les formes de passation des marchés de l’Etat ainsi que certaines dispositions relatives à leur contrôle et à leur gestion*, article 5.

²⁵ *Article 8, Décret n° 2002-3158 portant Réglementation des Marchés Publics*, December 2002.

²⁶ *Projet de Directive*, articles 7, 36 and 37.

²⁷ Ministry of Finance Regulations, “Government Procurement Management Implementation for Central Agencies”, clauses 31 and 32.

²⁸ Information provided to the Secretariat from Hong Kong Special Administrative Region Government, China.

²⁹ See paragraph 45 for provisions in Mongolia and Thailand.

³⁰ Information on this practice is provided to the Secretariat. The “Terms and Conditions for Use of the Government Electronic Business (GeBIZ)”, which operates a system in which suppliers register for conducting business with government electronically, refers specifically to the

D. Europe

27. The recent European Union procurement directives include explicit provisions on framework agreements.³¹ The Directives provide that the member states “may” make provision for the use of framework agreements (that is, there is no obligation to do so), and that the Directives set out the minimum standards for their operation. Accordingly, individual member states may enact legislation that is more restrictive than the Directives themselves, and pre-existing legislation that is also more restrictive than the provisions of the Directives may also be encountered.

28. The new EU Directives came into force following consultations with member states, and are not dissimilar to provisions or practices that have been in operation in certain member states, such as France,³² Sweden,³³ and the United Kingdom (which has operated framework agreements in the absence of specific regulation).³⁴ (These countries are updating their legislation in order to take account of the provisions of the new Directives.) Under EU Directive 2004/18/EC, a procuring entity may conclude a framework agreement (after having followed the provisions of the Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders), and then issue individual purchase orders for each purchase.³⁵

possibility of using framework agreements, including those involving quotations from suppliers (clause 12 and Definition of Framework Agreements).

³¹ See, in particular, article 32 of Directive 2004/18/EC.

³² *Code des marches publics, Decret No.2004-15* of 7 January 2004, articles 70 and 71, currently being updated to take account of the new EU procurement directives. Practice under the current Code is as follows. The provisions distinguish between two types of framework agreements, which can be when the timetable or scope of work cannot be fully regulated in the contract. First, those with purchase orders, under which the procuring entity is bound to purchase a minimum amount stipulated, and all of its requirements for the relevant goods, construction or services from the supplier concerned, up to a maximum amount. This type of agreement is generally concluded as a single-supplier agreement, though a multi-supplier agreement is permitted if it is impossible for all the work to be done by one supplier or when a multi-supplier arrangement is needed for security of supply. (The second type of framework agreement operates using conditional purchase orders, under which the procuring entity is bound to purchase only a certain quantity, with an option to purchase more.) Competition is required in the first phase on the basis of the estimated maximum value of the anticipated procurements.

³³ The Procurement Act (SFS 1992:1528), as amended, available at <http://www.nou.se/pdf/louenglish.pdf>.

³⁴ The British Government’s Office of Government Commerce considers that framework agreements were not incompatible with the former EU procurement Directives, in that the conclusion of the framework agreement could be made either in accordance with the Directives if the agreement were a binding contract with purchase obligations, or the agreements fell outside those directives as there were no obligations on the procuring entity to make any purchase at all. The purchases made under the framework agreement were contracts to which the Directives applied, and the European Commission was concerned that they were not awarded in compliance with the Directives if there were changes to the specifications at that phase. The position has now been addressed with the passing of the new EU procurement directives. See, further, Office of Government Commerce Information Note, February 2003, available at http://www.ogc.gov.uk/embedded_object.asp?docid=1000330, and Arrowsmith S., “Case Comment: Framework Agreements under the UK Procurement Regulations: the Denfleet Case,” 2005 PUB. PROC. L. REV. NA86.

³⁵ The individual purchase orders can be issued either by applying the terms set out in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by holding a further competition between the parties to the framework agreement.

29. Other European Union countries that have passed legislation specifically providing for framework agreements in a manner consistent with the Directives include Denmark, Estonia,³⁶ Finland,³⁷ Poland³⁸ and Slovakia.³⁹ Among non-EU states reviewed, Norway⁴⁰ and the former Yugoslav Republic of Macedonia⁴¹ have made provision for the operation of framework agreements.

30. In Armenia, a list of goods, works and services that are to be procured by “Regular Competitions” is prepared and approved by the Ministry of Finance and Economy, and the procuring entities thereafter set specifications and conduct a normal procurement procedure for the items concerned.

E. Latin America

31. The use of IDIQs is common in this region, often operated through a central procurement entity (such as Chile’s *Dirección de Compras y Contratación Pública*)⁴² or by one entity on behalf of several procuring entities (such as in Peru).⁴³ In Mexico, IDIQ contracts are permitted with minimum and maximum quantities, and timing of purchases.⁴⁴

32. In Brazil, the rules on framework agreements⁴⁵ make limited provision for multi-supplier framework agreements, showing a preference towards single-supplier agreements where recurrent purchases are concerned. Multi-supplier agreements are generally used only if a requirement cannot be covered by a single supplier, in which case the other suppliers are usually required to lower their prices to that of the winning supplier.⁴⁶ The requirement can be waived only in exceptional situations. Framework agreements are also

The Directives provide that the reopening of competition should comply with certain rules the aim of which is to guarantee flexibility and respect for the Directive’s general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not normally exceed four years.

³⁶ See the Public Procurement Act, of 19 October 2000, (RT I 2000, 84, 534; consolidated text RT I 2001, 40, 224), entered into force 1 April 2001, as amended, available at http://www.rha.gov.ee/eng/?nav_PeaLink=Oigusaktid&id=15.

³⁷ See <http://www.hansel.fi/index.php?id=286&action=empty>.

³⁸ Act of 29 January 2004, the Public Procurement Law, available at <http://www.uzp.gov.pl/>.

³⁹ See Act No. 523/2003 of 24 October 2003, available at <http://www.uvo.gov.sk/english/stat02a/stat02a.htm>.

⁴⁰ Norway operates a procurement regime consistent with that of the European Economic Area, following two sets of regulations pursuant to Act No. 69 of 16 July 1999 (as amended), available at <http://www.dep.no/odin/english/norway/foreign/032091-991532/dok-bn.html>. The European Free Trade Surveillance Authority noted in 2003, however, that Norway had allowed certain framework agreements to be concluded without applying the then prevailing EU Directives (see <http://www.eftasurv.int/information/annualreports/dbaFile4066.pdf>).

⁴¹ See the Law on Public Procurement of the former Yugoslav Republic of Macedonia, March 2004, available at http://www.sigmaweb.org/PDF/Laws_PUP/FYROM_PPL_Mar_2004.pdf.

⁴² Operating under *Ley de compras 19.886, Capítulo VI, artículo 30, d*.

⁴³ See Law No. 26850 of 9 July 1997 (the state procurement law), and the regulations issued thereunder, particularly articles 88-96.

⁴⁴ See the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*), article 47.

⁴⁵ Law No.8666 of 21 June 1993, section V, and Decree No.3.931 of 19 September 2001.

⁴⁶ Decree No.3.931 of 19 September 2001.

limited to one year for goods and normally one year, but with a possible extension of up to one year, for services.⁴⁷

F. North America

33. In the United States, framework agreements are generally referred to as task-and-delivery order or multiple-award IDIQ contracts, permitted under two items of procurement legislation (the Federal Acquisition Streamlining Act of 1994 (FASA), and the Federal Acquisition Regulation (FAR)). The FAR requires all task-and-delivery order contracts to specify the period of the contract, the maximum quantity of goods or services to be purchased, and a statement of the work to be performed.⁴⁸

34. The majority of IDIQ contracts are operated by the General Services Administration (GSA)'s Federal Supply Service (FSS), and are known as "Multiple Award Schedules" (MAS) contracts, for which the FAR specifies minimum competition requirements (but which are not regulated by the FASA).⁴⁹

35. Also in the United States, procuring entities may use MAS contracts as an alternative to standard competitive award procedures.⁵⁰ Any interested supplier, at any time, may submit a tender to become an MAS contract supplier.⁵¹ Other IDIQ contracts offered are open for tender only for a limited period.

G. Systems with features comparable to framework agreements

36. Australia makes no provision for framework agreements, but an analogous system, "panel arrangements", is operated. Under such arrangements, a procuring entity may enter into multi-supplier "deeds of standing offer" for the provision of identified property or

⁴⁷ Law No.8666 of 21 June 1993, article 57, and Decree No.3.931 of 19 September 2001, article 2.4.

⁴⁸ FAR 16.504, available at www.arnet.gov/far.

⁴⁹ The GSA awards three types of contracts: Single Award Schedule (SAS), Multiple Award Schedule (MAS) and the Maintenance and Repair Schedule. Under the SAS, there is one supplier, the items are manufactured under Federal Military Specifications or as commercial items, the purchases are for a specific geographic area, and are awarded as a result of sealed bidding. Under the MAS, there are multiple suppliers, with no guarantee of sales, the suppliers are holders of an indefinite delivery indefinite quantity (IDIQ) contract, and pricing is based on discounts from commercial price lists.

⁵⁰ FAR 8.404, under which, orders placed against a multiple award schedule using the procedures set out are considered to be issued using full and open competition.

⁵¹ MAS contract solicitations, which are largely standardized across different product classes, are accessible through the GSA online database at www.gsaelibrary.gsa.gov. GSA generally will accept any supplier offering reasonable prices.

⁵² Pricing on the MAS contracts is based on the vendor's commercial pricing; under a most favoured customer clause, the vendor commits to drop its MAS prices if the vendor drops its prices to a class of commercial customers that GSA and the vendor have accepted as the vendor's benchmark class of customers. See Price Reductions clause, GSAAR 552.238-75, 48 C.F.R. § 552.238-75 (September 1999); U.S. General Services Administration, Office of Inspector General, "Special Report – MAS Pricing Practices: Is FSS Observing Regulatory Provisions Regarding Pricing?" (24 October 2001) (available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/masrpt_R2E-c7B_0Z5RDZ-i34K-pR.pdf).

services. Suppliers are selected under open or restrictive tendering proceedings and the panel arrangements must contain the minimum requirements for the procurement, including an indicative or set price or rate for the procurement. There are no specific provisions regulating the conclusion of a panel arrangement although the normal procedural and substantive requirements (including ethics, transparency and non-discrimination) apply to its conclusion. There is no obligation on the procuring entity to accept any standing offer and the standing offer can be withdrawn at any time prior to acceptance.

37. The details of the deed of standing offers or contracts may vary between panel members. When effecting purchases through a panel arrangement, a procuring entity must assess the value for money of any competing standing offers. A further competition within a panel arrangement may be held where so doing would provide value for money, but only if the initial approach to the market indicated that the panel might be utilized in this way.⁵³

38. Canada also uses an analogous non-binding system, including supply arrangements (a method of supply where procuring entities, under the arrangement, may solicit bids from a pool of pre-screened vendors)⁵⁴ and standing offers (an offer made by a supplier for the provision of certain goods and/or services at prearranged prices or a prearranged pricing basis, under set terms and conditions, that is open for acceptance during a specified period).⁵⁵ These arrangements are regulated by the Public Works and Government Services Canada (PWGSC),⁵⁶ under two main policy instruments: the Supply Manual, which is a policy manual,⁵⁷ and the Standard Acquisition Clauses and Conditions manual.⁵⁸ However, neither supply arrangements nor standing offers are considered to be a direct equivalent to European framework agreements (they may be closer in some respects to suppliers' lists, as a list of qualified suppliers is generated without fully defining the scope of work and the terms and conditions, and the second phase of the procurement would be completed in accordance with the rules on selective tendering).⁵⁹

⁵³ Sections 8.67 and 8.68 of the Commonwealth Procurement Guidelines (CPGs), made under Regulation 7 of the Financial Management and Accountability Regulations 1997.

⁵⁴ These contracts have been defined as "an agreement that includes both an offer from a potential contractor and acceptance of that offer by government to enter into a future contract in accordance with terms and conditions prescribed in the standing agreement. With a standing agreement, there is an obligation on the part of government to access the services negotiated within the specified time period." Government of British Columbia, Canada, Ministry of Finance, Office of the Comptroller General, Core Policy and Procedures Manual Glossary, available at <http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/Glossary.htm>.

⁵⁵ Canadian agencies may use a standing offer when a Vendor of Record (VOR) is utilized directly for procuring goods and services. A Vendor of Record is "a procurement process where the municipality/local board seeks out bids or proposals from a select group of vendors with which it has already established a satisfactory business relationship. The goal of using a VOR is to have "a qualified, reliable, cost effective provider available when the need arises without facing the administrative costs of obtaining several quotes." Government of Ontario, Canada, Ministry of Municipal Affairs & Housing, a Guide to Developing Procurement Bylaws, Meeting the Requirements of the Municipal Act, 2001, at 24 (July 2003), available at http://www.mah.gov.on.ca/userfiles/HTML/nts_1_11349_1.html.

⁵⁶ See PWGSC, Supply Manual, section 9J, especially 9J1, available at <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>.

⁵⁷ Available at <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>

⁵⁸ Available at <http://sacc.pwgsc.gc.ca/sacc/index-e.jsp>

⁵⁹ Further detail on Standing Offers and Supply Arrangements can be found in Chapter 5 of the Supply Manual, starting at 5.153.

There may be a number of different variations on both standing offers and supply arrangements in practice.

39. In India,⁶⁰ the Central Purchase Organisation (CPO) may conclude “rate contracts” with registered suppliers, for goods and items of standard types (common use items, needed on recurring basis by various Central Government Ministries). The CPO publishes and updates all relevant details on its website. Suppliers must apply periodically for renewal of registration. New supplier(s) may also be considered for registration at any time, provided they fulfil all the required conditions. The performance of all suppliers is monitored, and blacklisting is a possibility.

IV. General conditions for use of framework agreements

A. Scope of framework agreements

40. A procuring entity may or may not be bound to place any orders at all under the agreement.⁶¹ ⁶² A European Commission guidance paper on the operation of framework agreements under EU Directive 2004/18/EC notes that whether or not the procuring entity is bound to place orders under the framework agreement, and the supplier to fulfil them, is a matter of national law.⁶³ Where the terms of framework agreements do not oblige the procuring entity make purchases under the framework agreement, the entity can purchase outside the agreement if more favourable terms are available elsewhere.⁶⁴ The procuring entity may consequently need to pay a retainer in return for the supplier’s making itself available, or if there is uncertainty as to the likelihood or extent of anticipated orders.⁶⁵ However, there will be a balance to be drawn in each case between ensuring security of supply, receiving price discounts for firm or anticipated orders, and retaining the flexibility to purchase elsewhere.

⁶⁰ Further information, notably as regards e-procurement to automate the tendering and rate contract process, available on the website of the Directorate General of Supplies and Disposals (DGS&D) (www.dgsnd.gov.in).

⁶¹ The agreement will be a binding contract in most systems provided that each party undertakes some obligation under it. In France, for example, the framework agreement is a contract binding on both parties, because both types of framework agreement contemplated by the code involve a binding minimum purchase obligation on the procuring entity. If the agreement has no minimum purchasing obligation on the procuring entity, legal steps may be taken in some systems to render the agreement nonetheless a binding contract, such as a deed in English law, or it may be left as a non-binding arrangement.

⁶² A framework agreement that does not commit a supplier to supply orders placed under it is unlikely to be of benefit to the procuring entity, and so it is unlikely to be encountered in practice. Non-binding arrangements do not ensure any security of supply, and so alternative sources of supply are important, and they are not suitable for critical products. The uncertain nature of the arrangement is also unlikely to maximise the possible costs and time savings of a binding agreement. However, there may be savings to procuring entities in concluding this type of arrangement, if there are realistic expectation of business, even in the absence of strict legal obligations.

⁶³ European Commission Directorate General Internal Market and Services Public Procurement Policy, CC/2005/03_rev 1 of 14.7.2005, page 3.

⁶⁴ An example of a system where purchase outside the framework agreement are not permitted is found in the current Code on Public Procurement of France, articles 70 and 71.

⁶⁵ Retainers are more commonly encountered in single-supplier frameworks and in contracts for professional services.

41. Many systems require framework agreements to set minimum and maximum quantities or values of purchases under the framework, and to this extent, the framework agreements are binding on the procuring entity. These include Burkina Faso, Mexico, and Senegal. In the United States, the FAR requires all task-and-delivery order contracts to specify the period of the contract, the maximum quantity of goods or services to be purchased, and although the agreement must also stipulate a minimum monetary value that will be purchased under the agreement, the amount is typically low and of little real significance.

42. The Model Law's provisions define "the successful tender" (article 34 (4)(b)) and state that that tender "shall be accepted" (article 36 (1)). As article 27 (d) of the Model Law also requires the solicitation documents to state the quantity of goods to be procured,⁶⁶ the Working Group may consider that the Model Law would not permit a non-binding framework agreement.⁶⁷

B. Restrictions on the type of items to be procured

43. Restrictions on the types of goods or services that can be procured under a framework agreement are rarely encountered in practice. It is more common for provisions to set out the circumstances in which procurement using framework agreements are appropriate. Provisions in France, for example, have specified the circumstances in which framework agreements, both single- and multi-supplier, can be used—essentially, when the timetable or scope of work cannot be fully provided for in the procurement contract.⁶⁸ In the United States, IDIQ contracts can be used for all types of goods and services. However, they have most commonly been used for commercial items.⁶⁹

44. The World Bank's Consultant Guidelines, restrict the use of framework agreements to single-supplier consultancy services, as follows:

"Indefinite Delivery Contract (Price Agreement). These contracts are used when Borrowers need to have 'on call' specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance. These are commonly used to retain 'advisers' for implementation of complex projects (for example, dam panel), expert adjudicators for dispute resolution panels, institutional reforms, procurement advice, technical troubleshooting, and so forth, normally for a period of a year or more. The borrower and the firm agree on the unit rates to be paid for the experts, and payments are made on the basis of the time actually used."⁷⁰

⁶⁶ There are equivalent provisions for restricted tendering proceedings and the procurement of services.

⁶⁷ Some commentators consider that the quantity could, however, be interpreted to include an estimate.

⁶⁸ Supra, note 32.

⁶⁹ The term "commercial item" is broadly defined at FAR 2.101, 48 C.F.R. § 2.101, to include goods and services that are generally commercially available, and items related to those broadly available. While regulations of "commercial items" are streamlined (see FAR Part 12, 48 C.F.R. Part 12), US regulators recently proposed reducing legal requirements even further for commercial items that are broadly and immediately available, known as "commercial off-the-shelf" items, including both supplies and services. 69 Fed. Reg. 2447 (15 January 2004).

⁷⁰ "Guidelines: Selection and Employment of Consultants by World Bank Borrowers," May 2004, paragraph 4.5, available at <http://web.worldbank.org/WSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266,00.html>.

45. The guidelines do not otherwise address framework agreements specifically. National systems with similar provisions include Mongolia⁷¹ and Thailand.

C. Duration of framework agreements

46. In many systems reviewed, provisions set a maximum duration for framework agreements, the most common of one year, or ranging from three to five years. In Malawi, for example, the duration of the framework agreement is limited to one-year in normal circumstances, and a maximum of five years with justification.⁷² In Burkina Faso, the framework agreement must be limited by reference to budgetary periods and in any event cannot exceed three years.⁷³ In Senegal, framework agreements are concluded for an initial period of one year, but they can be renewed to a maximum of three years' total duration.⁷⁴ Similar provisions are found in Morocco,⁷⁵ Algeria⁷⁶ and Tunisia.⁷⁷

47. EU Directive 2004/18/EC, in article 32 (2), provides that "[t]he term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement." In France, the duration is fixed under article 71.I of the Code on Public Procurement at four years apart from exceptional and justified cases,⁷⁸ and in Armenia, their duration is limited to three years.⁷⁹

48. The United States provisions, on the other hand, do not limit the duration of task-and-order or IDIQ contracts.

D. Financial thresholds and other rules determining the application of procurement rules and regulations

49. Financial thresholds may determine whether or not certain procurement rules and regulations apply,⁸⁰ and in the context of framework agreements, whether individual purchases under the framework are added together, or aggregated, for threshold purposes becomes an important consideration in this regard.

50. Certain systems, for example, have rules requiring aggregation of all purchases made by an entity in a particular time period, purchases made under the same framework, even if the purchases are made under separate contracts, and prohibiting entities from splitting up

⁷¹ See the Public Procurement Law of Mongolia, 14 April 2000, Ulaanbaatar, available at http://www.wto.org/english/tratop_e/gproc_e/monlaw_2000.doc.

⁷² Public Procurement Act No. 8 of 2003.

⁷³ Article 9 of *Décret No 2003-369/PRES/PM/MFB*.

⁷⁴ Articles 26 and 27 of *Code des marchés publics*, note 21, *supra*.

⁷⁵ *Décret n° 2-98-482*, article 5, note 24, *supra*.

⁷⁶ *Décret présidentiel n° 02-250 du 13 Joumada El Oula 1423 correspondant au 24 juillet 2002 portant réglementation des marchés publics*, note 22, *supra*.

⁷⁷ Article 8 *Décret n° 2002-3158*, note 25, *supra*.

⁷⁸ However, it is not excluded that an individual purchase order under the framework agreement could exceed the maximum four-year term of the framework agreement itself.

⁷⁹ In Armenia, the duration is limited to July 1 of the year following that in which the contract is concluded, or a maximum of three years.

⁸⁰ For example, the threshold in the EU for its procurement Directives to apply is, generally, EUR 249,000 (EUR 499,000 for most supply and service contracts and EUR 624,000 in the case of construction contracts) (article 16 of Directive 2004/17/EC and article 7 of Directive 2004/18/EC).

purchases in order to avoid financial thresholds. For example, under article 9 (9) of EU Directive 2004/18/EC, the estimated value to be taken into consideration in assessing whether the framework agreement falls within the thresholds is the maximum estimated value of all the contracts envisaged for the total term of the agreement or system.

51. If financial thresholds for formal competitive procedures depend simply on the value of each contract and there are no special rules for frameworks, procurement under framework agreements may fall outside the procurement regime. For example, a non-binding framework agreement may not involve a procurement proceeding or contract, and individual purchase orders may fall below financial thresholds (where each order placed under a framework is the only purchase contract).⁸¹

E. Advertising and publication requirements

52. The advertising and publication requirements under some procurement regimes do not apply to framework agreements, or in some cases to parts of the award procedures, such as the publication of notices of contract awards under article 14 of the Model Law (which permits the enacting State to set a minimum threshold below which such notices are not required).

53. For example, if the first award phase of framework agreements is advertised and awarded in accordance with the provisions of EU Directive 2004/18/EC, individual purchase orders (“call-offs”) made pursuant to the framework agreement need not be further advertised.

54. In the United States, requirements for individual purchase orders made under framework agreements need not be published. A list of inter-agency framework agreements is required to be published but, however, is not currently available.⁸²

55. Under the GPA, the standard requirement for a procuring entity to publish a notice of each award in theory could require purchasers to publish a notice for every order placed under a framework agreement.⁸³ However, the WTO has held that second phase awards are exempt from the GPA’s advertising and publicity requirements.⁸⁴

56. Commentators have observed that publishing notices of orders placed or contracts awarded is of significant value in relation to framework agreements, providing for the possibility of some control over whether single-supplier frameworks are being operated in accordance with the rules, and over the way in which orders are placed in the second award phase of multi-supplier frameworks. It has been observed that providing for the aggregation of contract amounts under a framework agreement for publicity purposes may ensure a more transparent procedure than may otherwise exist for small purchases, because

⁸¹ For example, the Model Law’s tendering procedure also does not contemplate arrangements that involve entering into a binding contract only when orders are placed. In particular, article 36(4) provides that a “procurement” contract arises when a tender is accepted.

⁸² See FAR, subpart 5.6. However, a notice on the website that should contain a list of interagency framework agreements referred to, <http://www.contractdirectory.gov>, states that “Interagency Contract Directory functionality temporarily suspended”.

⁸³ GPA, article XVIII.1.

⁸⁴ World Trade Organization, Committee on Government Procurement, “Review of National Implementing Legislation: United States,” Sec. V (GPA/50 (01-2999) (15 June 2001)), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/50.doc>.

the framework agreement itself must be advertised, even if individual purchase orders need not.⁸⁵

F. Review

57. Many systems provide that the second award phase is exempt from a review mechanism such as that contemplated in chapter VI of the Model Law.

58. For example, the WTO has also held that second phase awards are exempt from the GPA's review mechanism procedures.⁸⁶ Similarly, EU Directive 2004/18/EC provides that, once a framework agreement is in place, "call-offs" under that framework agreement will not be subject to review mechanisms. Accordingly, observers have commented that there may be risks to meaningful competition in the second phase.

59. In the United States, the Government Accountability Office (GAO) undertakes the federal review function (termed "bid protests"). Suppliers may not, in most cases, seek review of individual purchase orders placed under a framework agreement because the review is exercised over the framework agreement itself.⁸⁷

⁸⁵ The scale of a framework agreement may also justify the costs of advertising that would otherwise be prohibitive for small purchases.

⁸⁶ World Trade Organization, Committee on Government Procurement, "Review of National Implementing Legislation: United States," Sec. V (GPA/50 (01-2999) (15 June 2001)), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/50.doc>.

⁸⁷ With limited exceptions.

A/CN.9/WG.I/WP.44/Add.1**Possible revisions to the UNCITRAL Model Law on Procurement
of Goods, Construction and Services – the use of framework
agreements in public procurement****ADDENDUM****CONTENTS**

[Chapters I to IV are published in A/CN.9/WG.I/WP.44]

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V. The operation of framework agreements

A. Procedures for concluding framework agreements

1. Further details of issues arising in the use and operation of framework agreements are set out below. However, research indicates that these matters are addressed in many cases by regulation and other delegated legislation, which in many cases is not publicly available. This review therefore focuses on those systems for which the main detail and commentary are publicly available.
2. If framework agreements are concluded under general procurement legislation, the procurement method to select the suppliers for admission to the framework agreement will be chosen in accordance with the normal rules governing the award of procurement contracts. Provisions can also be made in a procurement system for framework agreements as a separate procurement method, as is the case, for example, in the United States.⁸⁸
3. It is likely, however, the types of recurrent purchases for which framework agreements are commonly used will dictate the use of an open and competitive procurement method (that is, under the Model Law, tendering proceedings or the main method for the procurement of services). The conditions for restricted tendering proceedings may sometimes apply, but those for the other methods of procurement set out in the Model Law (two-stage tendering, request for proposals, and competitive negotiation, or their equivalents in other regimes in either case) may be less likely to do so, since they are designed for situations in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings.
4. Following the conclusion of the procurement proceedings, the procuring entity and supplier(s) enter into a framework agreement with one or more suppliers. The agreement may take the form of a contract divided into lots. There may be one contract concluded with all suppliers, or individual agreements between the procuring entity and each supplier (the latter case would allow for different terms, such as prices, among the suppliers).
5. Although there is competition in most systems to be admitted to the framework agreement, the extent of the competition (in the sense of how much competition) varies from system to system.
6. Similarly, whether or not there is competition when subsequent purchase orders are placed also varies from none to the equivalent of a tendering proceeding. Framework agreements fall into two main categories: those that involve a competitive selection of suppliers in the first phase but not in the second phase of the award process, and those that involve some degree of competitive selection of suppliers in both phases.
7. Further differences arise in the extent to which the various regimes in existence permit (a) amendments to the terms, conditions and specifications set out in the invitation to tender, and (b) the admittance of further suppliers to the framework agreement during its term.

⁸⁸ Under the Federal Acquisition Regulation (FAR subpart 8.4) (available at www.arnet.gov/far).

B. Single-supplier agreements

1. Phase one of the award process

8. The simplest form of a framework agreement is one that is concluded with one supplier following tendering proceedings, and orders are subsequently placed in accordance with the terms and conditions laid down in the framework agreement. The framework agreement therefore resembles a normal procurement contract, except that there will be an interval between the awarding of the framework itself and the placing of orders for the goods, works or services under it. This type of framework is close to the definition of an IDIQ.

9. The selection of the supplier will therefore be made using the normal criteria in accordance with the relevant procurement procedure. This requirement is found in many of the jurisdictions in Africa, Asia and the Americas described in section III of A/CN.9/WG.I/WP.44, and in article 32 (2) of EU Directive 2004/18/EC, which provides that the first phase award under a framework agreement must be effected using the award criteria required under the provisions of article 53 of the Directive.

2. Phase two of the award process

10. Article 32 (3) of EU Directive 2004/18/EC continues that the second phase award should be made “within the limits of the terms laid down in the framework agreement” without reopening competition, but that the procuring entity “may consult” the supplier in writing, “requesting it to supplement its tender as necessary” at phase two of the award process. This provision seeks to enable more precise terms for a particular purchase order to be established—for example, the deadline for completing a consultancy project, or the methodology to be used.⁸⁹ This type of agreement may include a framework agreement that provides for revision of tender prices according to a pre-established mechanism or formula, but which does not involve discretion on the part of the supplier, for example where prices can be revised by the amount of inflation or other external benchmark.

11. The Directive expressly adds, however, that particularly in this circumstance, “[w]hen awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement”. Any such amendments must therefore be based on the original specification (which might, in the above examples, refer to a requirement to complete in a reasonable time, or to the need for the procuring entity’s approval of the supplier’s proposed methodology).⁹⁰ In other systems (including that in Burkina Faso, for example), orders placed under the framework agreement may refine specifications as necessary.

3. Issues arising in single-supplier agreements

12. Concerns expressed relating to single-supplier agreements include the potentially anti-competitive effect of excluding the procurement that is covered by the framework agreement from further competition during the course of the agreement, and that the security of supply may not be assured.

⁸⁹ An equivalent provision is also found in article 71 of the Code on Public Procurement of France.

⁹⁰ The need to supplement tenders in this way does not generally arise between the phases of choosing the winner and concluding the contract in non-framework procedures.

13. The flexibility given to amend specifications in the second award phase could also be at risk of abuse.

14. These issues, which also arise in the context of multi-supplier agreements, are discussed in paragraphs 36 to 43 below.

C. Multi-supplier agreements

1. Introduction

15. Multi-supplier agreements may be closed (that is, no further suppliers may be admitted to the framework agreement after phase one of the award process, which is the position in the EU), or open (that is, further suppliers may be admitted to the framework agreement after phase one of the award process, which is the position in the United States). In the case of closed framework agreements, phase two of the award process may or may not be competitive.

16. The initial invitation to tender in such multi-supplier framework agreements may include a request for a concrete proposal for anticipated orders, the assessment of which will form part of the evaluation of the tenders or responses concerned.

2. Phase one of the award process

17. Procurement regimes making provision for multi-supplier framework agreements vary widely as regards the selection of suppliers at this first phase of the award process. The main difference is whether all or merely some qualified suppliers should or may be admitted to the framework agreement.

18. In the EU, for example, article 32 (2) of Directive 2004/18/EC provides procuring entities “shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.”

19. This provision implies that the procuring entity may not admit all compliant suppliers to the framework, regardless of the number, but must make a selection based on the award criteria. It then continues in article 32 (4) that at least three suppliers must be admitted to the framework, where there are sufficient suppliers that satisfy the selection criteria and/or sufficient “admissible tenders which meet the award criteria”. Similar provisions are also found in other systems (such as in Malawi). This type of framework agreement is closed after the framework agreement is concluded.

20. In the United States, on the other hand, there is a statutory preference for multi-supplier framework agreements, awarded following a competition under the FAR or general federal procurement system. Tenders are assessed in terms of price, quality and the qualifications of tenderers when the framework agreement is awarded, but the legislative regime seeks to maximize competition for individual purchase orders (known as task and delivery orders) that are issued under IDIQs.⁹¹

⁹¹ 41 U.S.C. § 253h; FAR 16.504 (c), 48 C.F.R. § 16.504 (c); *WinStar Communications, Inc. v. United States*, 41 Fed. Cl. 748, 750-51 (1998).

3. Phase two of the award process

(a) General remarks

21. It is common under more complex framework agreements with several components or variables that the identity of the supplier whose offer will turn out to be the lowest-priced or lowest evaluated when a purchase order is placed not to be known at the time the framework agreement is concluded. For example, where the framework agreement covers more than one product (for example, a range of computer equipment), not all suppliers are able to offer all products, and the best price for each product may be offered by different suppliers. Further, in the case of last-minute services such as travel services, speed of delivery can be vital. For practical reasons, it may also be desirable to allow suppliers to revise their prices and other terms of their tenders, and to allow the procuring entity to refine the specification to provide details that were not known at the time the framework agreement was made (such as the time of completion of a consultancy project), or to accommodate changing requirements. There will, in such circumstances, be a review of offer components or a second phase competition to identify the best supplier when the individual purchase order is made.

(b) Award of purchase orders without second phase competition

22. Article 32 (4) of EU Directive 2004/18/EC envisages two alternative procedures for the call-off of suppliers for a multi-supplier framework agreement. Under the first alternative, it is provided that the call-off is made “by application of the terms laid down in the framework agreement without reopening competition.”⁹² (The second alternative involves second phase competition, and is examined in the next section, below.) As is the case with single-supplier agreements set out above, the procuring entity may allow the supplier to supplement its tender in writing.

23. In the United States, under the MAS, suppliers are selected from those admitted to framework agreements using either competitive approaches (discussed in paras. 29 and 30 below), or one of two main non-competitive approaches for purchases under certain thresholds:⁹³

(a) For very small purchases—those under US\$2,500—“micro-purchase” orders may be placed with any vendor admitted to the framework agreement.⁹⁴ Although the rules call for agencies to use MAS vendors when making purchases under \$2,500, in principle buying agencies can use any supplier, whether or not admitted to the framework agreements, as these “micro-purchases” generally fall outside almost all regulatory requirements;⁹⁵

(b) For orders above the micro-purchase threshold noted above, purchasing entities must choose the framework agreement supplier offering the best value, per a very broad set of

⁹² Observers have commented that if the supplier offering the best tender in accordance with the award criteria cannot or will not deliver the order, it is likely that the procuring entity can then select the next best tender, but there is no provision to such effect in the text of the Directives.

⁹³ Purchasing techniques may vary widely for different IDIQ vehicles; the discussion here focuses on procedures for the General Services Administration MAS contracts, which are more regularized.

⁹⁴ FAR 8.404 (b)(1).

⁹⁵ FAR, subpart 13.2.

evaluation criteria.⁹⁶ For MAS purchases, generally entities must review the prices of at least three schedule suppliers—chosen by the procuring entity—or may review the General Services Administration’s electronic catalogue (see, further, para. 34 below).

24. Other systems for the selection of suppliers without second-phase competition include rotation of suppliers and unspecified means. A further system is a cascade system, an example of which is found in Brazil, where purchases must be made from the original winning supplier unless that supplier cannot supply the requirement.⁹⁷ These means of selection may involve risks to competition and transparency, particularly if the second-phase selection method is not required to be set out in the solicitation documents.

(c) Award of purchase orders with second phase competition—systems not permitting ongoing revision of offers and the changing of specifications

25. EU Directive 2004/18/EC, in article 32 (4), provides for competition in the second phase, “where not all the terms are laid down in the framework agreement”.⁹⁸ It has been observed that it is possible that such terms might even include the price: under the EU Directive 2004/18/EC the price need not necessarily be established in the framework agreement itself.⁹⁹

26. The parties admitted to the framework agreement are invited to compete for the purchase order concerned “on the basis of the [terms laid down in the framework agreement] and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement”.¹⁰⁰ Although all those suppliers within the framework agreement “capable of performing the contract” are to be invited in writing to participate (article 32 (4)(a)), procuring entities are not obliged to include all those admitted to the framework agreement—for example, if particular suppliers cannot supply the precise products at issue or in the time-frame envisaged. (The suppliers’ offers in response are also to be presented in writing, unless the procuring entity decides to hold the second phase competition using an electronic reverse auction, as envisaged under article 54 (4)).

⁹⁶ FAR 8.404 (b).

⁹⁷ In Sweden, until approximately 2003, the procuring entity was able to select the supplier of his choice when placing individual purchase orders under the framework agreement. Thereafter, case law established that the individual purchase orders under a multi-supplier framework should be placed with the first-ranking supplier, and only with the next-ranking supplier if the first were not able to perform. This case law is disputed and is not universally applied.

⁹⁸ Observers have commented that this provision should be interpreted to mean that a second phase competition should be held only where it is not possible simply to apply the terms of the framework agreement.

⁹⁹ Although article 1 (5) of the Directive may seem to imply that the price is to be fixed in the framework agreement, as it provides that “[a] ‘framework agreement’ is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged”, the price does not necessarily have to be established in the form of a fixed amount—it is possible to set it by reference to a price index or other benchmark.

¹⁰⁰ The procuring entity in such cases must “fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders” (article 32 (4)(b)).

27. Whatever the method of conducting the second phase of the award process under the Directive, the basic terms of the framework agreement cannot be renegotiated, and nor can the specifications used in setting up the framework be substantively changed. What is permitted is to supplement or refine the basic terms or specification to reflect particular purchase orders.¹⁰¹ Importantly, procuring entities must “award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement” (emphasis added), and not on the basis of the revised specifications (article 32 (4)(d)). How the award criteria are to be applied to the refined specifications is not specified.¹⁰²

28. In France, multi-supplier frameworks with competition in the second phase have been used where necessary because of volatile product prices, rapid obsolescence of products, certain cases of urgency and certain cases involving research.¹⁰³ In general, these frameworks have been operated in accordance with the usual rules of the Code on Public Procurement (and the then current EU Directives). It was specified that entities might limit the number of suppliers selected at the first phase. For individual purchase orders that fell outside the relevant EU thresholds (applying the aggregation rules, or arrangements intended generally only for occasional or very low-value purchases), procuring entities could select from between the suppliers without second phase competition. It is not clear whether these provisions will be retained when France implements the new EU Directives.

29. In the United States, when U.S. Defence Department agencies purchase services worth over \$100,000 under IDIQ contracts, they must follow more extensive competitive rules. For General Services Administration MAS contracts, for example, purchasing

¹⁰¹ Examples given by the OGC include “particular delivery timescales; particular invoicing arrangements and payment profiles; additional security needs; incidental charges; particular associated services, e.g. installation, maintenance and training; particular mixes of quality systems and rates; particular mixes of rates and quality; where the terms include a price mechanism; individual special terms (e.g. specific to the particular products/services that will be provided to meet a particular requirement under the framework)” (see, Office of Government Commerce Information Note, February 2003, available at http://www.ogc.gov.uk/embedded_object.asp?docid=1000330).

¹⁰² However, a UK Government paper notes that “[t]he EC has produced an interpretation that the award of an individual contract (under the umbrella of a framework arrangement) can only be made on the basis of the terms and conditions (including the pricing mechanism) established in the framework arrangement itself. No negotiation of price or the pricing mechanism already established in framework arrangements can take place at call-off (including S-CAT, G-CAT and other framework arrangements available for Government Departments and Agencies to use). Where, in either framework arrangements or framework contracts, there are multiple suppliers and it is intended to mount a mini-competition between two or more of them, it follows that the mini-competition must not involve negotiation on the prices and pricing mechanism already established in the framework arrangement or framework contract. The award criteria for these mini-competitions should be a combination of (i) quality/methodology and (ii) resources/costs. During the mini-competition suppliers will have the opportunity to state the type of resources they would deploy and the daily rate or fixed price that they would charge to undertake the proposed task. The quoted price must relate to the rates in the relevant framework but may take into account any price mechanism (e.g. discounts) established within it. Negotiation on price outside these parameters is not permitted, even if offered by suppliers.” See, further, <http://www.dti.gov.uk/about/procurement/procue8-8.htm>. On the other hand, in Sweden, for example, a second round of tenders, or the use of mini-tenders, has historically not been permitted under the Procurement Act (SFS 1992:1528), as amended, available at <http://www.nou.se/pdf/louenglish.pdf>.

¹⁰³ Under the current Code on Public Procurement.

entities must gather at least three quotations before selecting a vendor—simply reviewing three competitors' price lists is not sufficient.¹⁰⁴

30. The procuring entity in the United States may alternatively hold a “mini-tender” competition among framework contract holders (on both MAS and other IDIQ contracts); if so, the suppliers admitted to the framework agreement must be afforded a fair opportunity to compete.¹⁰⁵ Alternatively, the acquiring agency may simply demand deeper discounts or other concessions from the likely vendor. For orders above a certain level (the level varies by contract), procuring entities must generally seek offers and deeper discounts from additional suppliers. The procuring entities must then negotiate with the supplier that appears from the mini-tender to offer the best value.¹⁰⁶ There is no equivalent to the European Union's prohibition on significant changes to the terms or conditions or specifications in the initial tender, and so the system is also close to that described in the next section.

(d) Award of purchase orders with second phase competition—systems permitting ongoing revision of offers and the changing of specifications

31. Under such framework agreements, which are in essence a refinement of the type set out in the previous section, suppliers may revise their tenders at any time (without a new tender phase), and the procuring entity chooses the best offer existing at the time of a particular order, possibly refining the specification as it does so.¹⁰⁷ Observers have noted the advantages of such systems, including that the costs of full re-tendering in such circumstances might be disproportionate and the use of frameworks consequently could be seen to be cost-effective. It is also common that this type of system is open, such that new suppliers can be admitted to the framework agreement at any time, similar to the regime under the MAS in the United States.

32. This type of system may take the form of an electronic catalogue, or a electronic purchasing system, in which procuring entities can search for suppliers' current prices. Such facilities enable prices to be changed regularly, and their increasing use (which also help reduce the transaction costs involved in changing suppliers) has provided more impetus for the use of framework agreements generally. Electronic catalogues therefore allow procuring entities to select goods and services swiftly, while still exerting competition.¹⁰⁸

33. Such systems may also be useful in the procurement of commodities, for which the price is determined by the level of demand, such as electricity, and for information technology products, which constantly change and for which improvements are frequently brought out. In these circumstances, the best value for money can be obtained by assessing

¹⁰⁴ 67 Fed. Reg. 65,505 (Oct. 25, 2002) (final rule implementing additional competition requirements imposed by Section 803 of the National Defence Authorization Act for Fiscal Year 2002 (Public Law No. 107-107)).

¹⁰⁵ FAR 16.505(b) (“fair opportunity” requirement for IDIQ contracts); Digital Systems Group, Inc., Comp. Gen. Nos. B-286,931, B-286,931.2, 2001 CPD ¶ 50 (2001) (if competition under MAS structured like negotiated procurement, each offer or must be afforded fair opportunity).

¹⁰⁶ FAR 8.404.

¹⁰⁷ In Sweden, for example, a procuring entity may accept an offer from the supplier to lower the prices previously offered, but procuring entities cannot request or require prices to be revised during the operation of a framework agreement.

¹⁰⁸ See United States Office of Management and Budget, Office of Federal Procurement Policy, “Best Practices or Multiple Task and Delivery Contracting 7”, (Washington, D.C., July 1997, available at www.acqnet.gov/Library/OFPP/Best_practices/BestPMAT.html).

the current prices of different suppliers at regular intervals, without the costs of full-scale competition for each purchase order. Similarly, these systems may be useful for urgent purchase orders, as a preferential method to competitive negotiation or single-source procurement, and one that may ensure security of supply (such as accommodating “back-up” suppliers for urgent needs).

34. An online electronic catalogue known as GSAA advantage operates in the United States, and is also used for some MAS contracts.¹⁰⁹ Suppliers are admitted to the system on the basis of generic specifications at any time, and thereafter procuring entities can compare features, prices, and delivery options for the items to be procured, configure products and add accessories. Suppliers are required to upload their schedules pricelist and their discounts from those prices for GSA purchases to the system, and can lower their contract prices at any time.

35. EU Directive 2004/18/EC also makes provision for what are referred to as “dynamic purchasing systems”,¹¹⁰ which must be operated through electronic means, for commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority.¹¹¹ These systems differ from classical framework agreements under the Directives in that they permit a system that is ongoing (subject to a four-year duration in normal circumstances), open to all qualified suppliers, and to which new suppliers can be added (which means that the systems is not binding as between the procuring entity and the initial suppliers). The rules provide that tenders can be altered at any time, and that there must be a second phase competition for each specific contract. Also, unlike in framework agreements, before issuing the invitation to tender, a procuring entity must publish a simplified contract notice inviting all interested suppliers to submit an indicative tender and a procuring entity may not proceed with tendering until it has completed evaluation of all the indicative tenders received within a fixed time limit. Only then a procuring entity may invite all tenderers admitted to the system to submit a tender. The dynamic purchasing system is a recent introduction, and is in the process of implementation, so that its operation in practice has not yet been tested. However, initial comments have indicated that the transparency advantages of the procedural requirements for the second phase of the award process may operate as a disincentive to their use.¹¹²

4. Issues arising in the operation of multi-supplier framework agreements

36. As regards framework agreements without second phase competition, observers have commented that although these types of frameworks are efficient, as they involve the application of the terms of the framework agreement in the second phase without further competition (or further formality, such as advertising under many regimes), risks to competition do arise. Specifically, competition and the number of suppliers are artificially restricted and there is a risk that prices are kept artificially high and inflexible, and there are risks to transparency as set out above.¹¹³

¹⁰⁹ See the catalogue at www.gsaadvantage.gov.

¹¹⁰ See article 1 (6) (definitions) and article 33 of Directive 2004/18/EC. Similar provisions are found in Directive 2004/17/EC, article 1(5) (definitions) and article 15.

¹¹¹ As with framework agreements, its use is not confined to specific goods or services.

¹¹² Some commentators have suggested that the requirements for advertising and a mini-tender phase may operate as a disincentive to use this system. Its novelty is such that there is as yet no evidence to confirm or disprove that opinion.

¹¹³ In Canada, it was observed that a “comparison of the ... standing agreement prices for the same or very similar equipment available from other sources indicated that the standing agreement

37. As regards framework agreements with second phase competition, regulations do not provide for how to ensure competition in the second phase of the award both under the EU Directives and in the US system. The EU Directives do not make detailed provision for procedures to award of individual purchase orders, though there is a general duty on procuring entities to treat suppliers equally and without discrimination.¹¹⁴ In the United States, regulations simply state that suppliers at the second phase must be afforded a “fair opportunity” to compete.¹¹⁵

38. Under the EU Directives, no minimum time limit for seeking offers from suppliers admitted to the framework is specified. The text states that this time limit must be “sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders” (article 32 (4)(b)).

39. In Armenia, for example, regulations address the procedural aspects of the second phase: the period for each stage are set in numbers of days, under which the procuring entity places order electronically or using traditional means of communication, and supplier responds with a confirmation of the order, which is then effected.¹¹⁶

40. Also, assessing the lowest-priced or evaluated offer may be complex. Under the EU Directives, flexibility is provided such that the award is made “on the basis of the award criteria set out in the specifications of the framework agreement.” EU guidance on the interpretation of this provision notes that award criteria do not have to be the same as those used for the conclusion of the framework agreement itself.¹¹⁷

41. Observers have therefore commented that the theoretical advantages of second-phase competition are not always present in practice and, indeed, that second-phase competition may be inadequate. For example, an audit conducted in the United States in 1999, found that 53 per cent of purchase orders were awarded without competition and only 12 per cent of those orders would justify a lack of competition.¹¹⁸ A further report found that efforts to provide a fair opportunity to compete at the second phase of the award process as the system requires varied considerably across six organizations reviewed (with single source awards being made in nearly two-thirds of cases by volume and one-fifth by value in one case, and a recommended or suggested supplier being nominated in others, with the result that only that supplier presented an offer). Observers have cited various reasons for such

prices were often not the most economical available” and that “in most cases considerable savings could have been achieved if purchases had been made from sources other than those of the ... standing agreements,” (Government of British Columbia, Canada, Ministry of Finance, Office of the Comptroller General, Core Policy And Procedures Manual, available at http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm#1).

¹¹⁴ The award of procurement contracts in general is, however, subject to overall treaty obligations and to article 2 of the Directive, which “states as regards the principles of awarding contracts, “Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way”. The “cascade” method, selecting suppliers according to their ranking and availability, would comply with those obligations.

¹¹⁵ FAR 16.505 (b)(1). See, further, paragraph 30.

¹¹⁶ Procedure of Functioning of the State Procurement Agency (decree implementing the Procurement Law of Armenia, passed in June 2000).

¹¹⁷ Article 32 (4)(d) of Directive 2004/18/EC, as explained in European Commission Directorate General Internal Market and Services Public Procurement Policy, CC/2005/03_rev 1 of 14.7.2005.

¹¹⁸ A subsequent audit in 2001 found that non-competitive awards had increased to 72 per cent of awards.

non-competitive second-phase awards, including continuity of supplier (initial low-value awards being followed by others of greater value), practical considerations such as timing and lack of adequate notice favouring incumbent contractors, collusion, biased or inadequate technical specifications and inadequate assessment of prices submitted.¹¹⁹

42. Further, where a few suppliers participate in the second phase of the award process, there is a risk of collusion that has been observed to take effect as suppliers “taking their turn” to compete or not compete.

43. Observers have also commented that the ability to vary specifications increases the risks of improprieties. They have also cited instances of purchases made beyond the scope of the framework agreements as specifications change, and also in that rendering outline terms of a specification more precise may in fact involve a substantive amendment to the original terms. In either case, the Working Group may consider that a new procurement with full competition should be conducted, but under current systems that allow amendments to specifications, there is no provision setting out the circumstances in which a new procurement would be required. Exempting the second-phase award from the publicity requirements and the review mechanism is often considered as compounding such issues.

D. Framework agreements operated by centralized purchasing agencies

44. Commentators have noted that framework agreements also enable a central procuring entity or an external purchasing body to undertake procurement on behalf of or for a number of entities. Such aggregated purchasing can lead to bulk purchase discounts, enhancing value for money in accordance with the Model Law’s objectives, and offering freedom of choice for end-users where contracts are entered into with several suppliers with differing products.

45. However, some commentators have expressed concerns about such arrangements—an external body may have an interest in keeping its fee earnings high by keeping prices high, over-specification, making purchases up to budget allocation without strict needs assessment, and placing orders that go beyond needs generally or favouring particular suppliers so as to please end-users. It has also been observed that the separation of the end-user and the procuring entity increases such risks, as there is generally inadequate oversight of needs assessment and application of flexible procedures.

46. A central or external purchasing body may accommodate customer agencies by reducing competition, and that may, in turn, mean using competitive techniques, or technical requirements, or prequalification requirements,¹²⁰ which favour a specific firm and which unreasonably restrict competition, and may lead to suppliers gaining effective monopolies.¹²¹

¹¹⁹ U.S. General Accounting Office, “Contract Management: Not Following Procedures Undermines Best Pricing Under GSA’s Schedule” Report No. GAO-01-125 (Nov.28, 2000); Benjamin, “Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies,” 31 Pub. Cont. L. J. 429 (2002).

¹²⁰ See GPA, article VIII (limits on restrictive prequalification requirements).

¹²¹ It should be noted that certain systems, such as the EU under Directive 2004/18/EC, do not permit contracts between entities other than parties to the initial framework agreement (article 32 (2)), and therefore *ad hoc* centralised purchasing is not possible. However, in the United States, for example, many government agencies permit other organizations to place orders on their multiple-award contracts.

VI. Provision for framework agreements in the Model Law

47. If the Working Group considers that the potential benefits of framework agreements are such that provision should be made in the Model Law to allow for their operation, the Working Group may wish to address the type of system or systems and the extent of regulation that is appropriate.

48. In summary, the higher the number and importance of qualitative criteria in selection or suppliers and bid, offer or tender evaluation, the greater the degree of professional judgement required to interpret and resolve the technical specifications and terms of reference, the greater the complexity of the procurement and the risk of abuse in the proceedings. To the extent that framework agreements do not necessarily set prices or other important terms and conditions at the first phase of the award process, the second award phase has been observed to be potentially complex, non-transparent and open to abuse, and the Working Group may therefore consider that detailed guidance as to the operation of such framework agreements is appropriate.

49. However, it has been observed that the time and cost advantages of framework agreements may be lost if regulation itself is excessive (for example, where the first award phase operates by tendering proceedings, and then further publication, lengthy response times and full competition are also required in the second phase).

50. Accordingly, the Working Group may consider that provision in the Model Law may be required to address the conditions for use of framework agreements, the method(s) of conducting the first phase, procedures for, and any use of discretion in the selection of suppliers in, the second phase, advertising and publicity requirements, and review, but that detailed procedures to ensure effective transparency and oversight should be addressed in other texts.

A. Types of framework agreement for which the Model Law may make provision

51. The Working Group may consider that some or all of the following types of framework agreement procedure could be specifically provided for in the Model Law:

(a) Single-supplier agreements under which all terms and conditions are specified in the first phase (with all competition at the first phase, operating effectively as a contract in lots). The Working Group may consider that such arrangements can be concluded under the current Model Law, as a contract divided into lots (as contemplated in article 27 (h) of the Model Law), though the lots are awarded at different times. However, specific provision to clarify any such ambiguity regarding the use of estimated rather than precise quantities of items to be procured may be of assistance.

(b) Multi-supplier agreements, under which all terms and conditions are specified at the first phase (with all competition in the first phase). (Although these arrangements may appear to be possible under the current Model Law, as a contract in lots, the Working Group may consider that the requirement to select “the successful tender” or its equivalent under other procurement methods means that a multi-supplier agreement is not permitted under the Model Law.) The terms of the framework would then be applied at the second phase. One way of making the second phase award would be to provide that the best-ranking supplier is offered individual purchase orders, and other suppliers subsequently

only if the first-ranking cannot fulfil the order, or the Working Group may wish to consider other ways, such as those set out in paragraph 24 above; and

(c) Multi-supplier agreements, under which not all conditions are specified in the first phase, and price and other terms and conditions are variable to some degree in the second phase, which is competitive. The Working Group may consider that such arrangements are not possible under the Model Law's tendering procedure, which envisages only one round of tenders (they might be possible under the principal method for procurement of services under article 43 or article 44, though such provisions were obviously not designed with frameworks in mind). They are also not possible if the procuring entity cannot set the exact specification at the outset, and wishes to seek technical proposals from suppliers for each task that arises (as the Model Law does not make provision for on-going alteration of tenders or proposals). (A variation of this type of agreement would be a dynamic system, using an electronic or similarly cost-efficient and transparent system, which may be used for some products, such as those referred to in article 1 (6) of EU Directive 2004/18/EC ("commonly used purchases, characteristics of which, as generally available on the market, meet the requirements of the contracting authority"), but which may be less suitable where security of supply is a significant consideration. The Working Group may also consider that this type of system should be "open" such that new suppliers can be admitted.)

52. Issues arising from the above types of agreement that the Working Group may consider should be included in the text of the Model Law, model regulations or Guide to Enactment, are set out in the following sections, together with possible regulatory solutions and drawbacks that those possible solutions may themselves involve.

B. General conditions for use

53. The Working Group may wish to consider:

(a) Whether framework agreements should be permitted for all procurements, or whether a minimum threshold based on estimated aggregate value should be set so as to ensure cost-effectiveness, and whether they should be permitted only for recurrent purchases for which individual purchase orders will be issued over a period of time. Alternatively, the Working Group may consider that very small and repeated purchases, and urgent purchases, could efficiently be made through framework agreements;

(b) Whether the type of item that can be purchased under a framework agreement should be restricted, so as, for example, to exclude certain services and construction, for which specifications may not endure. For example, the Working Group may consider that "intellectual services" and complex construction procurement would be less suitable for framework agreements than measurable services such as janitorial services and maintenance contracts;

(c) How purchases under frameworks should be aggregated so as to ensure they are regulated;

(d) Whether the duration of framework agreements should be restricted;

(e) How to address advertising and publicity requirements, particularly as regards the second phase of the award process. For example, the quantity of orders placed with each supplier periodically could be subject to publication. Further, the Working Group may wish to consider whether a procuring entity should be obligated to notify other

potential suppliers when an order is to be placed, and to publicize any amendments to specifications during the course of a framework agreement;

(f) Whether both phases of the procurement should be subject to review (even if only ex post facto);

(g) Whether framework agreements should be permitted only in circumstances in which the specification is precisely drafted at the outset, and the extent to which specifications may be modified. A subsidiary issue then arising is the extent to which an amendment to specifications should necessitate a new procurement, and whether generic specifications may be considered, with guidance as to the extent of amendment or refinement permissible;

(h) Whether aspects of the procurement contract (setting out maximum or minimum quantities or amounts, whether one agreement on identical terms with all suppliers should be required) should be addressed in some form.¹²²

C. First phase of the award process

54. The Working Group may wish to consider whether:

(a) Tender proceedings should be required at the first award phase for all framework agreements, or whether other methods of procurement should be permitted (two-stage tendering, request for quotations, and competitive negotiation may be used, for example if it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, or for urgent procurement). The Working Group may wish to consider whether the competitive and transparency advantages of a dynamic system that remains “open” to new suppliers may be suitable for procurement of such types, but it would be inconsistent with the alternative procurement methods under the current Model Law;

(b) Whether the number of suppliers admitted to the framework agreement at the first stage could be restricted. If there are to be restrictions, provision may be needed to govern how the ranking is to be made, and whether the criteria are to be disclosed; and

(c) That even if a framework agreement is not a binding contract, the proceeding at the first award phase should be subject to the normal procedural requirements, including publicity and review.

D. Second phase of the award process

1. Single- and multi-supplier frameworks without second phase competition

55. The Working Group may wish to consider the following possible manners of ensuring that prices under this type of framework remain current:

(a) Whether to limit the duration of the framework agreement, so as to allow new competition periodically;

(b) Whether to allow the procuring entity to purchase outside the framework agreement even for items identical to those under the framework agreement. In this regard,

¹²² The Working Group may wish to consider in this regard that the Model Law currently does not address the terms of the procurement contract itself.

procuring entities could be required to conduct an element of market research and to make contact with supplier(s) to permit them to reduce their prices, on a periodic basis or as individual purchase orders are placed. The World Bank Guidelines referred to in paragraph 44 of A/CN.9/WG.I/WP.44 commonly include a price adjustment mechanism in the relevant contract, so as to ensure that the price remains competitive. However, although procuring entities may in some systems make individual purchases outside the framework agreement, empirical evidence suggests that in many cases, they fail to assess price and quality sufficiently when placing a particular order, as it is easier simply to apply the existing framework agreement than to tender or to reopen tendering for the purchase order concerned;

(c) Whether to set ceiling prices in the framework agreement, so as to allow for volume discounts in the second phase (in Armenia, for example, the framework with the suppliers sets out a maximum (but not a minimum) price). The advantages of so doing would be clarity as to price, and transparency as to its constituent elements - units, time, and any index or formula applied. Alternatively, or in addition, the possibility of first phase bid prices being set as percentage discounts from commercial prices could be considered. However, it has been observed that the ability to bid downwards may undermine the basic discipline of tendering and risks that the best price may never be achieved.¹²³

2. Single- and multi-supplier frameworks with second phase competition

56. The main issue arising is the observed lack of meaningful competition in the second phase, either because of closed framework agreements or the practical difficulties in ensuring new suppliers can join open agreements in a time-effective manner.

57. The Working Group may wish to consider the following possible ways to improve second-phase competition:

(a) Setting procedures to regulate the second phase competition (for example, adapting the competitive negotiations or request for quotations procedures, and setting out minimum requirements in terms of numbers of suppliers to be invited and time limits);

(b) Ensuring that the second phase of the award process is subject to appropriate publicity and review procedures, even if only *ex post facto*;

(c) Reducing the risk of collusion by binding the suppliers under the framework agreement to supply individual purchase orders placed under the framework agreement. However, there may be a cost of so doing, such as higher prices and the need to pay a retainer;

(d) Providing incentives to improve levels of participation, such as an optional minimum purchase commitment under the framework agreement, so as to provide suppliers with some certainty as to future orders. Suppliers could also be committed to a percentage of the anticipated total contract value only, so as to reflect their realistic ability to supply.

58. Although full second-phase competition may eliminate the competitive advantage of a framework agreement, it may be needed in case of frameworks for items whose prices or specifications are likely to change (such as technologically advancing products). The

¹²³ The Working Group may consider that this issue also arises in the context of electronic reverse auctions. For the latter, see documents A/CN.9/WG.I/WP.35 and Add.1, A/CN.9/WG.I/WP.36 and Corr.1, A/CN.9/WG.I/WP.40 and Add.1 and A/CN.9/WG.I/WP.43 and Add.1.

Working Group may therefore wish to consider whether amendments to specifications, or the use of generic specifications which can be supplemented, should be permitted only under a dynamic system that allows the admittance of new suppliers at any time, so as to avoid the risks of abuse described above.

59. Alternatively, the Working Group may wish to consider whether specifications may be modified in all types of framework agreements if there is a combination of regulation as regards the extent of such a possibility, and rigorous publicity and review mechanisms. At the more general level, for example, provisions could state that procuring entities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.¹²⁴ More detailed provisions or regulations could address the degree of specification and detail of prices required in the first award stage, and could limit second-phase modifications to the specifications to those that are consistent with the initial specifications (so that the modifications are aimed at precision, not expanding the types of items to be procured).

60. In addition, framework agreements could include core and variable components, so that the main terms and conditions can be set out in the first phase, and some can be refined in the second. In this regard, the Working Group may consider that suppliers should not be able to change prices or other terms and conditions other than to the advantage of the procuring entity and only, as in France, for example, when they are responding to inquiry.

61. A further practical issue arises in that, if the specification is not sufficiently precise and prices are variable, it may be difficult to compare suppliers in the first award phase, and so to select those that should be admitted to the framework. In such cases, as in the MAS in the United States, for example, the end result may be a framework agreement that is more akin to a suppliers' list, and full second-phase competition would then be required.¹²⁵

62. Possible solutions to these issues could include allowing new suppliers to be admitted to the framework agreement at any time, and the ongoing revision of offers whether or not specifications are modified, but providing that the lead time for phase two of the award process would be suited to the original suppliers, not newcomers.

63. As regards admission of suppliers to the framework agreement after the conclusion of the first award phase, regulations may be needed to ensure that the original suppliers are not placed at any disadvantage vis-à-vis the newcomers, and the newcomers are subject to qualification requirements identical to those applied to the original suppliers, such that all suppliers have an equal opportunity to participate, and so as to avoid a long-term disincentive to suppliers to enter the market.

¹²⁴ Such a provision is found in EU Directive 2004/18/EC, article 32 (2), and Malawi's provisions.

¹²⁵ Indeed, such an arrangement could operate as a mandatory pre-qualification requirement under article 7 of Model Law.

**I. Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services:
issues arising from the use of suppliers' lists, submitted to the
Working Group on Procurement at its ninth session
(A/CN.9/WG.I/WP.45 and Add.1) [Original: English]**

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter “the Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5-43 of document A/CN.9/WG.I/WP.41 that will be before the Working Group at its ninth session.
2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group held a preliminary exchange of views on the treatment of suppliers’ lists in the revised Model Law or Guide to Enactment. It agreed that in the revision of the Model Law it would be appropriate to acknowledge the existence and use of suppliers’ lists. The Working Group deferred a detailed consideration of the subject to a future session (A/CN.9/568, paras. 61 and 67). At its eighth session (Vienna, 7-11 November 2005), the Working Group decided to take up the subject of suppliers’ lists at its next session, time permitting (A/CN.9/590, para. 10).
3. The present note and addendum thereto have been prepared with a view to facilitating further consideration of the subject by the Working Group. The present note provides background information on the use of suppliers’ lists, reviewing types of lists, their use in procurement proceedings, concerns arising from the use of lists, extent of regulation at domestic and international levels and controls imposed on their use. The addendum describes position with respect to suppliers’ lists under the Model Law, including the relevant drafting history, provides a summary of the Working Group’s consideration of the subject at its sixth session in 2004, examines various reform options that the Working Group may wish to consider for addressing the use of suppliers’ lists in the revised Model Law and/or the Guide and contains drafting materials on the subject.

II. Background information

A. Scope of the subject

4. The suppliers’ lists under review are those established for use as a pool of readily available information about listed suppliers in more than one procurement. In paper or electronic form, they are employed around the globe for various purposes. Electronic procurement systems and techniques have expanded and diversified the recourse to them for procurement and non-procurement purposes, and made their maintenance and operation more efficient and less costly for both procuring entities and suppliers.
5. Excluded from review are: (i) various types of professional and trade registers functioning for certifying and licensing companies for business activity generally or in a particular sector, as are lists of products that have been certified as meeting required standards and requirements (and thus deemed eligible for acquisition by public purchasers) and similar lists. Although linked to the operation of suppliers’ lists and to procurement processes,¹ these lists are not created for and do not operate specifically for procurement purposes; (ii) procurement registries intended to record procurement activities of public

¹ Evidence of general business registration or professional licensing may be required of suppliers to prove their eligibility to be included on a suppliers’ list. See, e.g., § 32(1), read together with §§ 36-37, of the Public Procurement Act of Estonia (19 October 2000, amended as at 19 November 2003), and article 41 (2) 1, read together with article 92, of the Public Procurement Act (ZJN-1) of Slovenia (5 May 2000).

entities during certain period of time. Although some of them may have entries about participating suppliers, information therein is not primarily intended for the use in future procurements; (iii) prequalification and qualification lists generated in the course of a specific procurement. Criteria for inclusion on these lists will be more specific to the advertised procurement and needs of the procuring entity than in the case of suppliers' lists. They are also not to be used, as is the case with the suppliers' lists, in future procurement proceedings, rather only in the specific procurement proceedings for which and during which they are specifically compiled; and (iv) lists employed in some flexible contract award procedures, such as multi-supplier framework agreements or dynamic purchasing systems (see A/CN.9/WG.I/WP.44 and Add.1).

6. The dividing line between suppliers' lists and the latter type of lists may be fine, especially if the terms of the arrangement between a procuring entity and a supplier or contractor are not substantially defined and binding on either party.² Nevertheless, in all these flexible contract award procedures, procuring entity would establish at least the minimum standard specification and terms for future purchases of a similar nature and the parties would reach an agreement at least over the minimum contract terms. In addition, through such procedures, the procuring entity is closer to the contract award stage than it is by establishing a suppliers' list. In most regulations reviewed (see paras. 40-46 below), the suppliers' lists and these award procedures are treated as distinct procurement arrangements, each subject to its own rules and controls. Prohibition on using procurement award procedures to operate suppliers' lists is effectively provided in some instruments reviewed, aiming to ensure that the express controls on suppliers' lists, most notably their publicity and continuous access to them by new suppliers (see paras. 47-49 below), are not undermined.³

B. Types of lists

7. Suppliers' lists differ one from the other in a variety of key aspects, most importantly in the impact that registration on them has on the eligibility of suppliers to participate in procurement. This aspect as well as the purpose for which the lists operate in turn significantly influence the formality and procedural aspects of the operation of the lists.

² E.g., in the United States, some standing "framework" agreements, known as "multiple award schedule contracts", are becoming, in essence, suppliers' lists: they are awarded to numerous contractors with no real competition at the time of award (any new contractor may always join) to provide a diverse range of goods and services. Gaining a schedule contract entitles the successful vendor to only a small guaranteed minimum order; in reality, under the schedule contract, mini-competitions among schedule holders are held when customer agencies publicize new requirements. Information provided to the Secretariat by a consultant. See also Nash R.C., Schooner S.L., and O'Brien K.R. "The Government Contracts Reference Book", 428, 2nd edition, 1998. See also document A/CN.9/WG.I/WP.44 and Add.1 for further discussion of US system and systems operational in Australia, India and Canada.

³ These controls, however, are blurred under some systems in the operation of suppliers' lists advertised in lieu of advertisement of all individual procurements covered by the list since in these instances suppliers' lists work more as mandatory closed arrangements, i.e., a procuring entity is obliged to procure from suppliers on the list (see para. 49). For the discussion of the differences between suppliers' lists and these flexible contract award procedures, see Arrowsmith S, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part II", *Public Procurement Law Review*, 1999, No. 8, starting from p. 161, see in particular pp. 172-180.

1. By effect of registration

8. Depending on how registration on the list affects the eligibility of suppliers to participate in a procurement, lists may be mandatory or optional.

9. Lists are mandatory when registration on them is required for participation in procurement covered by the list. Where the absence of registration on the list does not affect the right of suppliers to participate in procurement proceedings covered by the list, lists are optional.

10. In some systems, while the absence of registration cannot affect the eligibility of suppliers to participate in procurement proceedings covered by the list in general, a registration on the list may be specified in solicitation documents by a procuring entity as a condition for participation in a specific procurement.⁴ Procuring entities may also require registration on the list for the award of a contract.⁵

11. In the case of mandatory lists, procuring entities may be permitted or required by law or by agreement with registered suppliers not to advertise procurement to non-listed suppliers or accept their participation. Under other systems, registration may be mandatory for participation in procurement but procuring entities have to advertise the lists and accept participation of other suppliers, not on the list, subject to some conditions, for example, if new suppliers can reasonably be registered on the list in time.⁶ Under some circumstances, suppliers may be exempted from the requirement to register.⁷

12. Various types of lists may operate in any given jurisdiction. Mandatory listing is usual for participation in procurement (i) in certain sectors, most often construction,⁸ (ii) of certain categories of goods, works and services,⁹ (iii) when certain procurement

⁴ See, e.g., in Australia, Financial Management Guidance No. 13 on the Mandatory Procurement Procedures, January 2005, appendix A, p. 58, available at http://www.finance.gov.au/ctc/mandatory_procurement_procedur.html.

⁵ E.g., in Chile (under article 16 of Law 19.886 on Public Procurement, http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html).

⁶ See, in particular, articles VIII (c) and X (3) of the Government Procurement Agreement of the World Trade Organization (GPA) (Annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf): the number of additional suppliers permitted to participate must be limited only by the efficient operation of the procurement process.

⁷ E.g., in Colombia, under article 42 of Law 598, an exemption from the registration requirement is granted in cases of urgency. In Malaysia, an exemption may be granted under some exceptional circumstances, but is subject to deposit of security. In Morocco, decrees regulating systems of qualification and classification for certain types of works and services exempt non-domestic suppliers from the requirement to register (article 18 of Decree No. 2-94-222 of 16 June 1994, and article 19 of Decree No. 2-98-984 of 22 March 1999).

⁸ See, e.g., article 22 of the Statutory Act on Public Administration Contracting of Colombia (http://www.secretariassenado.gov.co/leyes/L0080_93.HTM, also known as *Ley 80 de 1993*), and article 37 (2) of the Public Procurement Law of Mongolia (14 April 2000).

⁹ See, e.g., Australia, where inscription of bidders in the Endorsed Supplier Arrangement (ESA) is mandatory as regards Commonwealth procurement of IT and major office machines. See Financial Management Guidance No. 13, p. 27, "An Example of a Multi-Use List: Endorsed Supplier Agreement".

methods/techniques, most commonly electronic bidding,¹⁰ are used, (iv) above certain value, and/or (v) by certain procuring entities.

13. In practice, the difference between the optional and mandatory lists is often blurred. Even those supposed to be optional could easily become compulsory in practice, if invitations to participate would be sent only to those on the list. In some systems, for example, restricted bidding based on shortlists developed from lists of registered suppliers, even optional, is the preferred procurement method, with the effect that in practice a supplier must be on the list to do business with the public sector.¹¹

2. By purpose

14. At the one end of the spectrum are lists that often operate as mailing lists, and registration on which does not involve any assessment of eligibility of suppliers to participate in procurement: all those suppliers with an interest in the contracts covered by the list are included in the list and qualification are checked in the context of specific procurements. Especially in the electronic domain, the use of some type of registration lists is to some extent indispensable for the operation, safety and security of electronic systems (e.g., so that the system can identify and register potential suppliers, provide them with access rights to the electronic procurement portal, differentiate those rights, communicate with suppliers by sending information to and/or validating the information received from them).

15. At the other end of spectrum are suppliers' lists which main purpose is to screen potential suppliers for future procurements. The degree of screening may vary from an initial assessment of minimum information on the eligibility of suppliers to participate in procurement generally,¹² to prequalification of all or some criteria that potential suppliers have to meet for participation in procurements covered by the list.¹³ These types of lists are often referred to as "qualified suppliers' lists" or "lists of approved or qualified suppliers".

¹⁰ Our understanding is that, for example, in Chile and Mexico, a supplier or contractor has to be on a specifically designated list for participating in electronic bidding in general through ChileCompra and Compranet (<http://www.compranet.gob.mx/>), respectively.

¹¹ See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, para. 130.

¹² E.g., Compranet registration requirements in Mexico (<http://www.compranet.gob.mx/>), and CCR registration requirements in the United States (<http://www.ccr.gov/handbook.asp#info>). Requirements to provide minimum information for listing are also found, for example, in Argentina and in article 92 of the Public Procurement Act of the Slovak Republic (Act No. 523/2003 of 24 October 2003 on Public Procurement and on Amendment of Act. No. 575/2001 Coll. on the Organisation of Activities of the Government and on the Organization of Central State Administration, as amended). The information in these systems is usually limited to basic data about suppliers (e.g., identification information, legal form, goods supplied, contact information).

¹³ Requirements to provide more detailed information are found, for example, in Brazil (article 35 of Law No. 8.666 of 21 June 1993), China (article 5 of Interim Measures of the Public Procurement Centre for Central Government Authorities Regarding Registration of Suppliers' Qualifications), Chile (article 94 of Law 19.886), Costa Rica (article 59.2 of the Presidential Decree, of 6 March 1996, "*Decretos N° 25038-H, Reglamento General de Contratación Administrativa*", available at <http://www1.hacienda.go.cr/proveeduria-financiera/reg%20gral%20de%20contratacion%20adva.html>). Criteria for listing in those systems may extend to experience, technical, managerial and financial capacity, organization and availability of equipment, staff and skills.

16. In the electronic domain, the distinction between qualified suppliers' lists and simple registration lists may not necessarily be clear. For instance, some electronic registration lists, initially operating as a "yellow pages business catalogue" where suppliers were listed and identified by their basic data, such as name, address and types of goods and services offered, have evolved into more complex systems. Some of them are being linked to trade, professional or other registries and systems (in particular, tax and social security payment systems), which allows registration on the list with simultaneous automatic assessment of at least basic data.¹⁴ With more technology possibilities, other more complex functionalities may be integrated into electronic suppliers' lists, allowing for automatic evaluation of other qualification elements, such as checking performance history and ranking suppliers accordingly.¹⁵

3. By degree of formality

17. Inclusion on lists may involve formal application for registration by potential suppliers, evaluation of their applications by authorized agencies, and approval for registration of those potential suppliers who have satisfied, and agreed with, the conditions for inclusion on the list (for example, in electronic procurement systems, suppliers are usually required to agree with certain terms of communication, ownership, use, confidentiality and security of information, and disclaimers of liability on the part of the registering authority¹⁶).

18. In contrast, some lists do not involve any formal application by potential suppliers. Such lists may be compiled informally by procuring entities on the basis of information on suppliers that participated in procurement proceedings held by the procuring entity or on the basis of responses to questionnaires submitted by potential suppliers or contractors.

4. By level of centralization and integration

19. Lists may be maintained in a centralized or decentralized manner. In centralized systems, a list is maintained by one designated authority and for procurements at all levels of government, central and local. In decentralized systems, a list maintained by a central government body may apply to only central government procurement while municipalities and other procuring entities may maintain lists for their own procurement purposes¹⁷ and

¹⁴ E.g., SICAF in Brazil. A benefit of using lists for statistical purposes and improving, by way of financial check, collection of tax, social security and other state dues is cited by the Department of Public Works and Highways (DPWH) in the Philippines (FAQ's specific to DPWH, http://www.procurementwatch.org.ph/rules_related/related7.htm).

¹⁵ E.g., the Government Electronic Procurement System in the Philippines (GEPS, <http://www.procurementservice.net>), which operates on the basis of a registry of suppliers, includes a "performance tracking" mechanism (IRR-A, section 9.1.5). In Brazil, as well, under article 36 § 2 of Law No. 8.666, the supplier's conduct in the performance of its obligations shall be mentioned in the respective registry. Similarly, in Hong Kong, the Environment, Transport and Works Bureau, which maintains a list of approved contractors, also maintains a contractor performance report system.

¹⁶ See, e.g., a supplier agreement as an integral part of registration with the Philippines GEPS, found at http://www.procurementservice.net/English/SUPPLIER_Tc.asp?L=1.

¹⁷ E.g., in Brazil, SICAF is a central suppliers' registry for federal procurement; local authorities and procuring entities are authorized to maintain their own lists. In Chile as well, other registries may be maintained, in electronic or paper form, by procuring entities, or dealing with some types of goods or services. In China, certification of suppliers at the central level is carried out by the Public Procurement Centre for State Authorities of China, and at local levels by various finance authorities.

may or may not require registration on a central registry. In other decentralized systems, no single central registry may exist. Lists may be maintained by several ministries at a central level as well as local authorities and various procurement entities. Suppliers' lists may be maintained by entities outside the public administration structure, for example, chambers of commerce.¹⁸

20. A list may be established for use by more than one agency. The requirement is often found that in such case this fact and the names of the agencies that may use the list must be disclosed.¹⁹ Procuring entities that do not maintain their own lists may be given a choice as to which list to choose among those in existence.²⁰ This type of system is criticized on the ground that the use of lists chosen arbitrarily often leads to favouritism and other abuses in procurement proceedings.

21. Lists may cover all types of procurement in all sectors of the economy²¹ or may be limited to a particular sector (e.g., construction, services) or to a type of goods, works or services.²² When limited to certain sectors, registration on the suppliers' lists is often seen as repetitive and duplicative of the registration and certification activities of sector/industry-specific regulatory bodies.²³

22. With the introduction of electronic procurement systems, more jurisdictions have transferred from decentralized and non-integrated to centralized and integrated registration systems.²⁴ The latter approach to maintaining suppliers' lists is also recommended by

¹⁸ See, e.g., in Colombia, article 22 of *Ley 80 de 1993*, under which the classification and qualification of all potential bidders is done by local chambers of commerce and may be verified by the national government. See also article 92 of the Public Procurement Act of Slovenia.

¹⁹ See, e.g., in Australia, Financial Management Guidance No. 13, pp. 57-59; and article 28 (3) of the Public Procurement Act of the Slovak Republic.

²⁰ See, e.g., in Costa Rica, where law allows the use of the different registries by procuring entities that due to procurement volume or capacity do not have their own lists (article 59.4 of *Decretos N° 25038-H, Reglamento General de Contratación Administrativa*). § 37 (4) of the Public Procurement Act of Estonia permits a procuring entity to utilize a list compiled by another entity to the extent that the system used for compiling the list is in accord with the requirements of the procuring entity seeking to utilize the list and with the provisions of the Act. Article 22 (2) of the Public Procurement Act of Slovenia authorizes procuring entities in the utilities sector to use lists of qualified bidders of other procuring entities. In Uganda, lists are maintained by the Ministry of Work and the Ministry of Education and procuring entities may choose which to use for their purpose (see the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, para. 137).

²¹ See, e.g., SICAF in Brazil as per Law No. 8.666.

²² E.g., in Singapore, central registration is carried out by the EPPU (general goods and services), the Pharmaceutical Department of the Ministry of Health (medical supplies and healthcare-related goods and services), and the Construction Industry Development Board (construction and construction services).

²³ E.g., in the Philippines, the Registry of Civil Works Contractors is maintained by the Department of Public Works and Highways (DPWH), and a separate list is maintained by the Construction Industry Development Board (PCAB) handling licensing process (FAQ's specific to DPWH, http://www.procurementwatch.org.ph/rules_related/related7.htm).

²⁴ E.g., in the Philippines, the IRR-A (section 8.5.1) call for the integration of existing electronic registries maintained by procuring entities with the electronic registry set up to support the Government Electronic Procurement System. In the Republic of Korea, multiple registration requirements have been consolidated by "single-window" registration by way of registration through the Government Electronic Procurement System (GePS) "to ensure efficiency and transparency in the public procurement sector by utilising the Government Electronic Procurement System (GePS)" (information submitted by the Republic of Korea to the APEC

multilateral development banks (MDBs) as conducive to saving costs, avoiding overlap and achieving consistency between lists operating in any given jurisdiction²⁵ and alleviating suppliers' concerns about the need for them to undergo repetitive and duplicative registrations.²⁶

C. The use of suppliers' lists in procurement proceedings

1. Procurement planning

23. Suppliers' lists may be indicative of market conditions and as such may be used in the procurement planning, for instance in the selection of a procurement method. The lists, for example, may clearly indicate at the outset of procurement that only one supplier or a limited number of suppliers has the proprietary rights to goods or services being procured (e.g., the procurement involving the protection of patents, copyrights or other exclusive rights or for other technical or artistic considerations), which would justify recourse to restricted or non-competitive procurement methods.

2. Basis for the selection of suppliers

24. As a general rule, in tendering proceedings, suppliers' lists can be used as mailing lists additional to other means of solicitation. At least one jurisdiction allows the solicitation documents to require registration on a suppliers' list as a pre-requisite for participation in open tendering proceeding.²⁷

25. In non-open procurement proceedings, lists may be used as an additional or sole source for the selection of contractors or suppliers to participate in procurement proceedings.²⁸ In addition, where a professional license is essential to carrying out a procurement contract, procurement most likely will be conducted on the basis of a list of licensed (approved) suppliers.²⁹

Government Procurement Experts Group, Phuket, Thailand, 15-16 August 2003, APEC document 2003/SOM111/GPEG/009, agenda item 7a).

²⁵ This is especially true in decentralized systems but also the case in centralized systems, since consistency must be ensured and duplication avoided between the suppliers' lists and various professional and licensing registries.

²⁶ See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Chile, August 2004, in particular paras. 23, 37, 75 and 76 (available at http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2004/11/19/000012009_20041119095309/Rendered/INDEX/289140CL.txt).

²⁷ See, e.g., in Australia, Financial Management Guidance No. 13, p. 58. This is listed as an option if a procuring entity wants to benefit from both the competitive advantages of an open process and take advantage of assessment work already undertaken during the prequalification for inclusion on the list.

²⁸ In a limited market or in case of emergency, for example, suppliers' lists may be the only or the quick source from which to choose parties to bid or negotiate contracts without public advertisement. In some jurisdictions, they are also used as the source for the selection of suppliers for small value purchases to save costs that are involved in more formal tendering proceedings. E.g., in Singapore, under Contracts and Purchasing Procedures, paragraph 120, the Government Electronic Business (GeBIZ) is used to identify and solicit quotations for contracts below \$50,000 (for which formal open or selective tendering is not required) without posting the quotation openly on the GeBIZ website.

²⁹ See, e.g., in Australia, Financial Management Guidance No. 13, section 5-3, p. 24, and p.27 "An Example of a Multi-Use List: Endorsed Supplier Agreement".

3. Qualification of suppliers

26. The fact of registration may be invoked in qualification for a specific procurement to prove that a registered supplier meets one or more of the qualification requirements imposed upon registration on the list.³⁰ Thus registration on suppliers' lists may eliminate the need to ascertain some or all of the suppliers' qualifications in a specific procurement and consequently be additional to or replace qualification, prequalification or post-qualification in a specific procurement proceeding. This is often cited as a main advantage of qualified suppliers' lists, which would depend, however, on whether suppliers participating in a specific procurement have been registered on the list, since with optional lists this advantage is present only with respect to suppliers who choose to register, on the degree of assessment of suppliers' qualification upon registration on the list and on the relevance of that assessment to a specific procurement.

27. Registration on suppliers' lists may be sufficient to ascertain qualifications for participation in routine procurement of simple goods. In some procurement systems, it replaces prequalification on a case-by-case basis also for large and complex projects.³¹ In other cases, the general type of qualification information that may be required from applicants for registration might not adequately demonstrate their qualifications or capacity to perform a particular procurement contract. If the participation in a contract depends on a fact the establishment of which was not a condition for registration on the list, a procuring entity may require proof of the additional requirement. Qualification in the context of a specific procurement proceeding may also be required for updating information that was provided for registration on the list.

28. In some jurisdictions, a sworn statement that a supplier holds currently valid registration is sufficient to prove registration and to certify the facts on which the registration has depended.³² In most cases, a valid certificate of registration establishes the fact of registration and specifies the information given to the authority to enable the provider to be registered on the list and any classification given.³³

³⁰ For the relevant discussion, see the European Court of Justice, joined cases 27-29/86 ("CEI" and "Bellini"), 9 July 1987, [1987] ECR 3347; [1989] 2 CMLR 224. See, also e.g., § 36 (2) of the Public Procurement Act of Estonia and article 91 of the Public Procurement Act of the Slovak Republic, providing the presumption of qualification of a supplier for a particular procurement contract established by registration on the list.

³¹ For example, the World Bank's country procurement surveys of some countries indicates that prequalification, although prescribed in the regulations, rarely employed in practice, as the lists of registered suppliers, although not regulated, effectively perform such a function. See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, paras. 129 and 139 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617)

³² See, e.g., in Argentina, Ministerial resolution No. 5 of 30 January 2004, available at http://www.onc.mecon.gov.ar/paginas/inicio/downloads/Resolucion_5_2004.doc.

³³ See, e.g., § 36 (1) of the Public Procurement Act of Estonia. Certificates could be generated automatically by electronic system, or granted by registration authorities. The validity of certificates may vary from several days (usually if automatically generated) to months and years. A certificate may be required to be renewed every time the registration is updated. See, e.g., in Brazil, article 36.1 of Law No. 8.666.

D. Concerns over the use of suppliers' lists

1. Exclusionary practices

29. The operation of suppliers' lists may substantially restrict access to procurement and reduce competition by excluding from the procurement suppliers who are not registered. These concerns are expressed mostly about the operation of mandatory lists. However, they are also present with optional lists since, as was noted above (see para. 13), the difference between mandatory and optional lists is often blurred.

30. Depending on the registration rules and discretion given to registering authorities, not necessarily all applicants qualified for the sort of contracts covered by the list may be included on the list. Rather registration may be restricted to the best suppliers or those favoured by a registering authority. This could be either those which perform relatively better than others in relation to the general qualification criteria (for example, those with the most experience), or those which are likely to put forward the best offers (for example, those which consistently submit competitive bids). The latter criterion for inclusion on the list is quite common as lists are often compiled on the basis of the performance history of suppliers, resulting in exclusion of suppliers who are deemed to have poor past performance records.

31. Substantial discretion may also be given to a registering authority with respect to penalizing, including de-listing or blacklisting, those suppliers with deficient contract performance or involved in different types of improprieties (such as bribery or fraud). Under some regimes, de-listed companies are prohibited from reapplying for the list during substantial period of time. Such sanctions may also be applied for failure to comply with other obligations such as payment of social security taxes, workman's compensation, and income tax.³⁴ Often no adequate control and detailed conditions are imposed, resulting in excessive sanctions, discrimination among suppliers and other abuses.

32. Some exclusionary practices may also be employed when suppliers or contractors are selected for particular procurement. Not all suppliers on the list may be solicited in any given procurement proceeding and more stringent qualification criteria, standards or procedural requirements may apply to suppliers that are not on a list than to those who have qualified for the contract in question through registration on a list.

2. Non-transparent practices

33. The greatest risks for transparency and competition in procurement arise with the lists that operate in a disguised non-transparent manner. Concerns are often expressed that not all essential elements in the operation of suppliers' lists are disclosed to the public in general or to the suppliers concerned.

34. For instance, conditions for delisting and blacklisting are rarely set out in detail. In addition, under procurement regimes that authorize some but not all suppliers on the list to be solicited in any given procurement proceeding, systems employed for the selection from the lists (rotation, chronological order of registration on the list or other systems) are also rarely made public, leading to uneven distribution of procurement opportunities contradictory to the principles of transparency, equality and non-discrimination among potential suppliers. In other instances, no selection system may be in place but procuring

³⁴ E.g., in Malaysia, where possible sanctions include warnings, suspension of registration with the Construction Industry Development Board (CIDB) for up to five years, and blacklisting (see Terms of Registration, available at <http://www.cidb.gov.my/main.php?cid=166>).

entities may be required, for example, to vary the suppliers as frequently as possible, which effectively leaves it to the discretion of procuring entities to decide whom to consider for a particular procurement.³⁵

3. Market segmentation

35. The operation of qualified suppliers' lists as the basis for the selection of contractors or suppliers for a specific procurement may also cause market segmentation, as a result of which contracts of a given value may always be awarded to bidders with a corresponding classification level on the list. In qualified suppliers' lists, suppliers are often classified according to their contracting capacity, minimum threshold interest, goods and services offered and other information. Classification employed in some lists goes even further and allows categorization of suppliers according to their technical and economic qualification, timelines, quality, quantity and cost of performance, form of payment and other criteria.³⁶ As different evaluation process may apply for inclusion on the list under various classifications,³⁷ subsequent certification of the fact of listing is held according to a classification scheme used in listing and serves to prove that registered suppliers are deemed qualified to be awarded procurement contracts as per their classification on the list. In some systems, suppliers registered under one classification cannot participate in procurement under other classifications.³⁸

36. In addition, market segmentation may be increased by various State socio-economic and related market segmentation policies connected with the operation of lists (e.g., set-aside programmes), which may aim: (i) to identify target groups in need of assistance or for which preferences have been established and enable these groups to determine for which of assistance or other measures they may be eligible; (ii) to facilitate the allocation of contracts on regional basis; and (iii) to promote the rectification of negative patterns of distribution of resources and discrimination. For instance, under set-aside policies aimed at

³⁵ See, e.g., the World Bank Country Assessment Procurement Reports (CPAR) of some jurisdictions (such as Uganda, Malawi, Tanzania) at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617.

³⁶ See, e.g., in Brazil, under article 36 of Law No. 8.666, registered suppliers shall be ranked in various categories having regard to their specialization, each category being subdivided in groups according to the technical and economic qualification of the suppliers; in Colombia, under article 79 of *Ley 80 de 1993* and Decree 856 of 1994, chambers of commerce must keep records, classified according to specialization, groups or types of goods or services offered, of contracts awarded and sums allocated; in Costa Rica, under article 2 of *Decretos n° 25113-h "Reglamento para la Utilización del Registro de Proveedores"* (<http://www1.hacienda.go.cr/proveeduria-financiera/reg%20registro%20proveedores.html>), the registry includes detailed information on the goods and services each supplier has to offer, minimum thresholds of interest of suppliers and form of payment, among others; and in Malaysia there are seven grades for each of three registration categories (civil engineering construction, building construction and mechanical and electrical) in the registry maintained by the Construction Industry Development Board (CIDB) (<http://www.cidb.gov.my/content.php?cid=166&11=0>).

³⁷ E.g., in Chile, under article 85 of Law 19.886, each supplier is registered under a specific category or area, and the evaluation process depends on the specific category or area requested. Under article 88 of the same Law, renewal of registration is held in accordance with the requirements for each particular category or area.

³⁸ See, e.g., article 8.5.1 of the Government Procurement Reform Act of the Philippines, stating that a supplier duly registered with the Government Electronic Procurement System may participate in a procurement undertaken by any procuring entity provided that the said supplier's registration is proper and relevant to the particular type of procurement.

promoting small-business development, procuring entities may be required to include in the procurement procedure small and medium size companies to the extent possible. Access to smaller contracts by companies with a higher classification level for such purpose may be restricted so that to prevent larger companies from routinely outbidding smaller companies, thus depriving them of procurement opportunities.³⁹

4. Difficulties with maintaining lists

37. Concerns are also raised that qualified suppliers' lists are difficult to maintain in practice. In particular, it has been argued that a status record reflected in the list will have problems of obsolescence⁴⁰ and be a target of appeals; and rules applicable to the operation of the list will be found to be either highly restrictive (and therefore limit access, competition and transparency) or difficult to implement and maintain.⁴¹

38. Lists can also involve unnecessary administrative costs, which in some cases may be high,⁴² for both suppliers and procuring entities when suppliers that are not likely to win contracts register or seek to register. For example, combining open access to lists with screening that requires maintaining an ongoing status review for a long list of suppliers when only a few will be qualified for a specific procurement may be expensive. However, if such an ongoing review is not in place, the value of information on the list or submitted for registration on the list would be questionable as it would not reflect changes in capacity achieved by potential suppliers and in other data on which registration had relied. As a result, contracts could be awarded to bidders without adequate qualifications or qualified bidders could be excluded, particularly in the context of market segmentation.⁴³

³⁹ See, e.g., small business set-aside programmes in the United States: procurement falling within one or more monetary-value categories is designated for award only to firms classified at designated size levels. Set-aside approach may involve the designation of specific types of product for purchase exclusively from groups targeted for assistance. For example, in India, there are provisions for procurement of various items only from the Khadi and Village Industries Commission, which acts as a selling agent on behalf of producers from those communities. Similar programmes are found in South Africa and Indonesia (with respect to registered cooperatives). Information provided to the Secretariat by consultants.

⁴⁰ Dissatisfaction with the reliability and relevance of qualification emanating from a registration system in Indonesia has led to removal in the new procurement rules (*Keppres 80/2003*) of references to, and reliance on, registration and certification formalities that were prominent in the preceding instrument (*Keppres 18/2000*). Information provided to the Secretariat by a consultant. See also, e.g., the World Bank Country Assessment Procurement Report (CPAR): Paraguay, January 2003, para. 22 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617)

⁴¹ See "Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems," OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, p. 3.

⁴² See, e.g., in China, an advancement of RMB ¥ 10,000 (around 1,239 USD at the conversion rate on 13 January 2006) is required as goodwill security by suppliers wishing to be included in the suppliers' database. Information provided to the Secretariat by a consultant. See, also, the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. I, Executive Summary, June 2004, para. 17.

⁴³ See "Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems," OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, p. 3. See also, e.g., the World Bank Country Assessment Procurement Report (CPAR), India, December 2003, para. 5.9, and Indonesia, March 2001 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=

39. Some jurisdictions also face difficulties in monitoring the effectiveness of various State socio-economic and related market regulatory policies connected with the operation of lists, and in scaling back or withdrawing such policies and programmes if they prove to be ineffective.

E. Extent of regulation

1. Regulation at domestic and international levels

40. Provisions regulating the use of suppliers' lists are found in both domestic and international instruments. Due to the potential discriminatory effect that the operation of suppliers' lists may have for foreign bidders,⁴⁴ a number of bilateral and multilateral free trade agreements that inter alia promote opening and integration of procurement markets address the subject.

41. The possibility of using mandatory or optional suppliers' lists in selective tendering procedures is recognised in the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO) that refers in this context to the "permanent lists of qualified suppliers".⁴⁵ The GPA imposes a number of controls on their operation. For limited tendering procedures, used when competition is not appropriate (such as for cases of urgency), the GPA rules on lists do not apply.⁴⁶

42. The North America Free Trade Agreement (NAFTA) allows for use of lists under rules and controls very similar to those of the GPA.⁴⁷ The Asia-Pacific Economic

[results&dt=540617](#)). Among problems noted in this context by the World Bank are over-reliance on submitted documents without proper verification, lack of sanctions in cases of misrepresentation of facts, and registration under several names and different size firms to enhance the chances to be selected.

⁴⁴ In the domestic regulations reviewed, a number of requirements have been found amounting to non-tariff barriers to international trade, such as requirements of domestic tax clearances, domestic bank guarantees, local legal personality or local physical presence, reciprocal arrangements or language barriers. The Secretariat was informed by consultants that, for example, in Brazil it would not be possible for foreign companies to register on the suppliers' list without a local address and legal presence. The maintenance of the registry only in the Portuguese language also hinders access to the registration system. In the United States, foreign vendors have complained informally that some of the required data for the CCR (the Dun & Bradstreet identifying number, or the CAGE code assigned defence suppliers) can, in practice, be difficult for foreign firms to gather. The requirements of local legal personality and of physical presence are found in China (the Rules of Beijing Municipality Regarding Minimum Standards for Qualified Suppliers in Public Procurement, for example, provide that suppliers who fail to appear at the Public Procurement Centre of Beijing for the annual review of their listing are deemed to be automatically disqualified for participation in the public procurement activities in Beijing). The requirement of reciprocal treatment is found, for example, in China, article 7 of Interim Measures of Guangxi Zhuang Autonomous Region for Suppliers' Access into the Realm of Public Procurement, and in article 92 (1) of the Public Procurement Act of Slovenia.

⁴⁵ See annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. The references to the lists are found in articles VIII-XI.

⁴⁶ It is suggested that procuring entities may use mandatory or optional lists for these award procedures without any controls. For a detailed analysis see Arrowsmith S., "Government Procurement in the WTO," 2002, pp.237-241.

⁴⁷ See, in particular, article 1011 (2) of NAFTA allowing the use of lists to select suppliers in

Cooperation (APEC) non-binding Principles on Government Procurement have little explicit on the subject but envisage a possibility for establishing “a register of suitable suppliers” subject to some specific control and the general principles of transparency, value for money, effective competition, fair dealing, accountability, due process and non-discrimination.⁴⁸

43. A dual regime exists under the European Union (EU) procurement directives, with a more stringent regime applicable to public procuring entities than to the entities operating in the utilities sector. The latter, including those that are part of the state or publicly owned, are permitted under the EU procurement directive applicable to them (directive 2004/17/EC) to use optional and mandatory qualification lists (the directive refers in this context to the “qualification systems”), subject to controls similar to those of the GPA.⁴⁹ The other EU procurement directive (directive 2004/18/EC), applicable to public procuring entities, allows member States to introduce only optional “official lists of approved economic operators” and “certification”. It regulates access to public procurement in a member State maintaining such a list or certification by suppliers from another member States who are not on the list or uncertified.⁵⁰

44. A number of bilateral free trade agreements explicitly address the lists.⁵¹ All of them subject the operation of the lists to the general principles of transparency, objectivity and non-discrimination and impose a number of explicit controls on their operation similar to those contained in the GPA. Some of them by reference make applicable to the parties the relevant provisions of the GPA or regional instruments (e.g., NAFTA).⁵²

45. The MDBs do not accept requirements for registration on a suppliers’ list in international competitive bidding procedures. There is general agreement among them and other international institutions dealing with public procurement reforms in countries of their operation, such as the Organization for Economic Cooperation and Development (OECD),⁵³ that registration of bidders as a condition for bidding is not a good practice. In those countries where registration system exists, they recommend that it should be

restricted procedures and article 1009 (2) (containing controls).

⁴⁸ See, in particular, para. 27 of the Non-binding Principles, available at

http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

⁴⁹ See article 53 of directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 1, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

⁵⁰ See article 52 of directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

⁵¹ See, e.g., chapter 15, article 15.7 (4 and 5), of the Free Trade Agreement between Australia and USA; chapter 9, article 9.8 (3) of the Dominican Republic-Central America-United States Free Trade Agreement; article 57 of the Free Trade Agreement between the EFTA (European Free Trade Association) States and Chile; articles 144-147 of the Association Agreement Between the European Union and Chile; and article 15.7 of the Free Trade Agreement between the Republic of Korea and Chile. All available at <http://www.sice.oas.org/Trade>.

⁵² See, e.g., part three, chapter six, article 6.1, of the Free Trade Agreement between Canada and Israel; article 13.3 of the Free Trade Agreement between the United States and Singapore; and article 61 and annex XVIII of the Free Trade Agreement between EFTA States and Mexico. All available at <http://www.sice.oas.org/Trade>.

⁵³ For OECD’s activities in the public procurement sector, see “Public Governance and Management” section of their website http://www.oecd.org/topic/0,2686,en_2649_37405_1_1_1_37405_00.html.

de-linked from all aspects of pre-selecting suppliers for procurement. The best practice, according to them, is when prequalification is employed on a contract-by-contract basis where necessary for very large or complex contracts as usually it is expensive, burdensome and time-consuming process for both procuring entities and suppliers; otherwise post-qualification should be used to ascertain a winning supplier's eligibility and suitability to undertake a particular contract. These and other principles for the operation of suppliers' lists have been reflected in the OECD—World Bank international benchmarks and standards for public procurement systems in countries of their operation (the “OECD—World Bank international procurement benchmarks and standards”).⁵⁴

46. Domestic regulations on suppliers' lists reviewed for the present study are those from Africa (Morocco, South Africa, Tanzania and Uganda), Asia (China, India, Indonesia, Malaysia, Mongolia, Philippines, Republic of Korea and Singapore), Australia, Canada, Latin America (Argentina, Brazil, Chile, Colombia, Costa Rica and Mexico), Eastern Europe (Bulgaria and Serbia and Montenegro), some EU countries (Austria, Estonia, Slovak Republic and the United Kingdom) and the United States.

2. Controls imposed on the operation of suppliers' lists

47. Most of the regulations reviewed aim at mitigating concerns arising from the use of the lists, in particular, their potential anti-competitive effect and risks of corruption and collusion of suppliers and of protectionism and favouritism. Some of the regulations reviewed subject the operation of lists to such general principles as transparency, non-discrimination and non-restriction of competition, while some others, in addition, to a number of procedural controls. The degree of control may depend on such factors as an entity using the suppliers' lists⁵⁵ and the type of lists (mandatory lists being subject to more explicit and stricter controls than optional lists).

48. Commonly found controls specify conditions for the use of suppliers' lists⁵⁶ and require: (i) open approach to market for the establishment of a list; (ii) continuous publicity of lists, rules regulating their operation, criteria for listing and delisting and amendments thereto; (iii) objective, non-discriminate, transparent and proportionate criteria for listing that are assessed in objective manner; (iv) open access to lists at any time; (v) regular updating, including by limiting validity of entries on the list; and (vi) due process (proper

⁵⁴ See “Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems. Requirements for Local Procurement in Borrowing Countries” p. 3, OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, available at <http://www.oecd.org>.

⁵⁵ For example, under GPA, the use of the lists by central government agencies listed in Appendix I, annex 1 is subject to more stringent controls than the use of the same by sub-central government entities listed in annex 2.

⁵⁶ In some jurisdictions, the recourse to qualified suppliers' lists is allowed only in exceptional cases, and must be justified and approved. E.g., in the United States, under FAR 9.202, if the qualification lists are used, the contracting activity must have a written justification by the head of the contracting activity. In Hong Kong as well, approval for establishment of lists, of qualification criteria applicable to the lists and revisions thereof are issued by various central agencies, such as by the Permanent Secretary for the Environment, Transport and Works (Works). Entities applying for such approval must provide justifications and information on the source of prospective applicants, qualification criteria and assessment panel and method of assessment. Regulations often limit the entities that might use the mandatory lists. See, e.g., GPA and the EU procurement directives. In some jurisdictions, the use of lists is restricted to certain sectors, types or methods of procurement.

notifications of decisions related to listing, debriefing, reasonable timeframe for taking decisions and availability of appropriate challenge mechanisms).⁵⁷

49. Some regimes allow a notice on the existence of the suppliers' list to serve as the notice of all procurements covered by the list. In such cases, it is usually required that the notice on the establishment of the list must explicitly state this fact.⁵⁸ The GPA allows this for entities listed in its Appendix I, annexes 2 and 3 (mainly local and provincial entities and utilities) but not for those listed in annex 1 (most central/federal entities, except for some involved in utility activities and some state enterprises in other areas) that are required to advertise each procurement contract separately. Similarly, NAFTA allows this for entities listed in its annexes 1001.1a-2 and 1001.1a-3 (covering state enterprises and provincial and local entities) but not for central/federal government entities.⁵⁹ In contrast to the EU public procurement directive (2004/18/EC) that does not allow such use of lists for any entities covered by the directive, the EU utilities procurement directive (2004/17/EC) allows utilities sector entities advertising a qualification system in lieu of advertising specific contracts covered by the system and provides that the selection of suppliers for a particular procurement in such cases must be limited to those on the list.⁶⁰ The OECD—World Bank international procurement benchmarks and standards state that advertisement of a list should not be sufficient for open competition, which may imply that this is acceptable for non-open procedures.

⁵⁷ Some or all of these requirements are provided for in, e.g., articles VIII to X of GPA; in Australia, Financial Management Guidance No. 13, pp. 56-57; in Austria, § 129 (8) of the Purchase Contracts Award Act 2002; in Brazil, article 34 § 1 of Law No. 8.666; in Chile, article 97 of the Executive Guidelines to Law 19.886 (http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html); in China, article 12 of the Interim Measures of the Public Procurement Centre for Central Government Authorities Regarding Registration of Suppliers' Qualifications; in Colombia, under Law 598; in Costa Rica, article 59, section 3, of *Decretos N° 25038-H, Reglamento General de Contratación Administrativa*; in the Czech Republic, articles 76 (2) and 77 of the Public Procurement Law; in Hong Kong, Tender Procedures for Government Procurement (Chapter III of the Stores and Procurement Regulations, section 320 (c)); EU directive 2004/17/EC, articles 41 (3), 49 (5) and 53 and annex XIV, and EU directive 2004/18/EC, article 52 (6); in Latvia, article 7 (5) 1 of the Public Procurement Law; in Mongolia, article 37 of the Public Procurement Law; in Serbia, article 53 of the Public Procurement Law; in the Slovak Republic, article 28 of the Public Procurement Act; and in the United States, FAR 9.202 (a)(2), 9.204 (a), (c) and (d), and 205.

⁵⁸ See, e.g., article IX (e) of GPA, and annex XIV, para. 6, of EU directive 2004/17/EC.

⁵⁹ See, e.g., article 53 (9) of EU directive 2004/17/EC.

⁶⁰ See, e.g., article 53 (9) of EU directive 2004/17/EC.

A/CN.9/WG.I/WP.45/Add.1**Possible revisions to the UNCITRAL Model Law on Procurement
of Goods, Construction and Services – issues
arising from the use of suppliers' lists****ADDENDUM****CONTENTS**

[Chapters I and II are published in document A/CN.9/WG.I/WP.45]

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III. Possible revisions to the Model Law and the Guide to Enactment as regards the use of suppliers' lists: reform options

A. Position under the Model Law with respect to suppliers' lists

1. Drafting history

1. The Model Law contains nothing explicit on the use of suppliers' lists. When it was drafted, the then Working Group agreed that eligibility requirements that excluded certain types of enterprises from participating in tender proceedings should be kept to a minimum and that a procuring entity should be able to apply only those requirements that were specifically set forth in the model procurement law. The then Working Group also agreed

to keep to a minimum the procedures and formalities by which a procuring entity would establish the eligibility of suppliers or contractors to participate in procurement proceedings.¹

2. The Secretariat's first draft included a provision on the use of suppliers' lists (article 13).² The draft article read as follows:

"Article 13 Lists of approved contractors and suppliers"

The procuring entity may use a list of approved contractors and suppliers as its source for the selection of contractors and suppliers from which to solicit tenders pursuant to article 12 (2) only if:

(a) requests to be entered on the list are receivable at any time from any interested contractor or supplier and are acted upon within a reasonable period of time;

(b) entry on the list is subject to no eligibility criterion more stringent than those set forth in article 8 (1)(a) and is subject to no qualification criterion more stringent than those established pursuant to article 15;

(c) the existence of the list, the conditions to be satisfied by contractors and suppliers in order to be entered on the list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and for renewal of the entry have been generally publicized in a manner designed to bring them to the attention of contractors and suppliers;

(d) the conditions, methods, procedures and other matters referred to in subparagraph (c) do not discriminate against foreign contractors and suppliers with respect to entry on a list used for the solicitation of tenders in international tendering proceedings or with respect to their opportunity to participate in such proceedings; and

(e) the selection by the procuring entity from the list allows all contractors or suppliers on the list equitable opportunities to be selected."³

3. As was explained in the commentary to that article: (i) the article concerned the use of lists as the source for the selection of contractors and suppliers to participate in

¹ See A/CN.9/315, paras. 36-37, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.

² The text was included in the first draft following the controversial consideration of the subject at the tenth session of the then Working Group (Vienna, 17-25 October 1988). At that session, on the one hand, it was stated that the model procurement law should not deal with lists of approved contractors and suppliers, as such lists were used in practice only in connection with domestic procurement and were sometimes used abusively to exclude certain contractors or suppliers or those from certain countries. On the other hand, the prevailing view was that the lists were used in the international procurement and that they should be dealt with in the model procurement law. It was noted that the lists could be beneficial to procuring entities by enabling them to identify reputable and competitor contractors and suppliers. In response to that point, it was observed that there existed other, less potentially abusive, means by which a procuring entity could identify such contractors or suppliers. See A/CN.9/315, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.

³ See A/CN.9/WG.V/WP.24, article 13, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, B.

restricted tendering proceedings; (ii) a number of conditions were imposed with the aim to ensure that the procuring entity has a sufficiently broad field from which to make its selection in order to improve its chances of finding the most suitable contractor or supplier for the procurement and to ensure that the use of the list does not inhibit effective competition or unfairly exclude contractors and suppliers; and (iii) the article was not made applicable in respect of open tendering proceedings where lists could be used as only one of additional means to widespread publication of procurement opportunities and therefore they did not present the same risks as did the use of lists in restricted tendering proceedings.⁴

4. At the then Working Group's eleventh session (New York, 5-16 February 1990), the only time when the draft article was considered, the necessity and usefulness of draft article 13 was questioned if the list did not have to be used, or if tenders could be solicited from contractors and suppliers that were not on the list, the points left open under the draft article. At that session, views were expressed that the use of lists of contractors and suppliers for the solicitation of tenders was diminishing and, in any event, should not be encouraged because the lists could be used in a manner that would unfairly discriminate against particular contractors and suppliers. In favour of retaining the article, it was argued that the article could serve to eliminate uncertainty as to whether or not a procuring entity could employ such lists, and could contribute to fairness and transparency in connection with the use of the lists.⁵

5. The draft article was deleted in the preparation of the second draft of the Model Law. The decision by the Working Group not to provide for the suppliers' lists in the Model Law was subsequently questioned by some States and procurement specialists, which expressed concern about the lack of provisions regarding suppliers' lists in the Model Law.⁶

2. Situation under the Model Law

6. The criteria, requirements and procedures for the ascertainment by the procuring entity of the qualifications that suppliers or contractors must meet in order to participate in procurement proceedings are set in article 6 of the Model Law.⁷ Article 6 (3) prohibits

⁴ See A/CN.9/WG.V/WP.25, para. 1 of the commentary to article 13, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.

⁵ See A/CN.9/331, para. 62, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.

⁶ See A/CN.9/WP.376, comments by Australia. Reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, D. Also, Arrowsmith S., "Harmonization of Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard", *International and Comparative Law Quarterly*, 2004, vol. 53, No. 1, pp. 17-46.

⁷ The article was originally two articles, articles 8 and 9, dealing with pure eligibility of suppliers (basic legal requirements) and qualification for a particular procurement. It was decided to merge the two as both dealt with essentially the same matter: the assessment by the procuring entity of suitability of contractors to perform the contract. For the drafting history of article 6, see A/CN.9/315, paras. 35-41, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A; A/CN.9/331, paras. 45-54 and 66-71, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 93-110, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; A/CN.9/359, paras. 55-63, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United

procuring entities from imposing any “criterion, requirement or procedure” for participation in procurement other than those in article 6.

7. Since article 6 does not refer to registration on a list as a requirement that suppliers or contractors must meet in order to participate in procurement proceedings, mandatory suppliers’ lists are prohibited under the Model Law. In contrast, nothing prevents procuring entities from using optional lists. Their establishment and operation are implied in procurement proceedings with direct solicitation.

8. Direct solicitation is possible under the Model Law, apart from competitive negotiation (article 49), request for quotations (article 50) and single-source procurement (article 51), in requests for proposals, including for services (under articles 37 (3) and 48 (2)), where the requirement for public advertisement can be dispensed with in the interests of economy and efficiency. The use of lists, both mandatory and optional, for the selection of suppliers or contractors in these procurement methods in practice is common and in some cases may indeed be useful and necessary to ensure transparency and fairness in the selection of suppliers for a particular procurement. When no public advertisement of procurement is required and no controls are imposed on the operation of lists, using lists to identify suppliers for these procedures in practice may result in the de facto exclusion of non-registered suppliers even if registration cannot be a formal condition of participation under article 6. Thus, although formally optional, lists have an effect of mandatory lists, as potential suppliers or contractors would have to be on the list to be considered for procurements for which lists are used.

9. As regards advertising invitations to apply for inclusion on the list as an alternative to advertising specific procurements (see A/CN.9/WG.I/WP.45, para. 49), such a mechanism under the Model Law would not be allowed where advertising of each procurement is required, which is the case in open and two-stage tendering (under article 24 and article 46 (1) by reference to article 24, entities are required to publish invitations to tender or invitations to prequalify for each procurement) and in restricted tendering (under article 47 (2), procuring entities are required to publish a notice of each restricted tendering proceeding). In other procurement methods, where direct solicitation is possible, procuring entities are free to advertise the existence of the lists in lieu of advertisement of separate procurement contracts covered by the list as in those cases no publicity requirement to advertise a separate procurement contract applies.

B. Consideration of the subject at the Working Group’s sixth session (Vienna, 30 August-3 September 2004)

10. The subject of suppliers’ lists was before the Working Group at its sixth session (Vienna, 30 August-3 September 2004). At that session, the Working Group recognized that, whether or not they were viewed as consistent with the aims and objectives of the Model Law, suppliers’ lists were in use in various States. The Working Group agreed that it would be appropriate to acknowledge their existence and use, and to subject their operation to minimum standards of transparency. The aims would be to put in place regulation that would ensure fairer and more transparent access of suppliers to the lists and to achieve some degree of harmonization in the regulation of the lists with other regional

Nations publication, Sales No. E.94.V.7), part two, III, C; A/CN.9/371, paras. 54-62, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, A; A/CN.9/389, paras. 28-29 and 84-89, reproduced in the *UNCITRAL Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part two, I, A; and A/CN.9/392, paras. 32-37, reproduced *ibid.*, C.

and international procurement regimes that address the subject. As a separate consideration, it was agreed that regulating suppliers' lists could provide a transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there was no control over the selection of suppliers in the Model Law (A/CN.9/568, para. 61).

11. The Working Group did not reach agreement on reform options including the extent to which the provisions on the subject should be included in the Model Law itself, or in the Guide to Enactment (or in some cases left to implementing regulations in individual States), and deferred the consideration of the matter to a future session. Nevertheless, there was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists and the Working Group agreed that all suppliers should be given an opportunity to (i) become aware of the lists, (ii) apply for qualification at any time, (iii) be included on the list within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and (iv) be notified of any decisions to terminate a list or remove them from it. It was agreed that the requirement for the publication of the existence of lists would add a significant element of control over the use of lists and therefore the existence of lists should be advertised with reasonable frequency or on an ongoing basis. Additionally, the Working Group agreed that the further consideration of the subject would cover all manners of registration that operated *de facto* as a suppliers' list (including registrations with third parties) (A/CN.9/568, paras. 62-67).

C. Reform options

1. General considerations

(a) Mandatory or optional lists or both

12. Noting that any specific reference to suppliers' lists in the Model Law may indicate endorsement of their use beyond that which the Working Group would wish to express, the Working Group may decide to leave the use of suppliers' lists under the Model Law, as a general rule, optional, while not excluding the mandatory recourse to them under certain circumstances. For example, the balance of costs and benefits may favour the use of mandatory lists in the procurement methods with direct solicitation. Requiring a procuring entity to use lists in those procurement methods, subject to adequate controls and a possibility for new suppliers to join the list at any time, may add transparency to the selection of suppliers or contractors in these procurement methods, which under the current provisions of the Model Law is left to the discretion of procuring entities. If the recourse to lists remains optional, the discretion of procuring entities in choosing methods to select suppliers or contractors in those procurement methods will remain unlimited. A mandatory recourse to lists may also be justified and even necessary in other cases, for example, in electronic bidding.

13. As a separate consideration, some States may use mandatory lists regardless of recognition in the Model Law, and it may thus be useful to provide at least guidance on operating them in the Guide to Enactment.

(b) Advertisement of lists in lieu of advertisement of specific contracts

14. Related to the issue of mandatory lists is the issue of whether advertising the existence of a list rather than specific procurements covered by the list should be permitted in a revised Model Law and whether in such case, access to procurements must be restricted to registered suppliers only, or open to all. At its sixth session, the Working

Group agreed to revisit that issue at a later date (A/CN.9/568, para. 65). In considering the subject further, the Working Group may wish to note a substantive degree of overlap between the operation of suppliers' lists advertised in lieu of advertisement of specific contracts covered by the list and framework agreements (for discussion of the latter, see A/CN.9/WG.I/WP.44 and Add.1).

15. For some procurement methods for which advertisement of each procurement contract is important, the method of advertising a list instead of separate contracts is not suitable and should not be allowed. In other cases, for instance, with respect to requests for proposals, requiring advertising through a list would make it more difficult to dispense with an advertisement requirement altogether, which, for example, is currently possible under article 48 (2) of the Model Law for reasons of efficiency and economy. Where no requirement on advertisement of a separate contract exists, such method may strengthen the system by ensuring more transparency and competition in procurement processes, at the same time saving time and costs and preserving flexibility necessary in those procurement methods.

(c) Controls over the use of lists

16. Regardless of the options pursued by the Working Group (mandatory or optional lists or both), provisions containing at least minimum controls on the use of suppliers' lists may be warranted in any case, either in the Model Law or the Guide to Enactment, to secure competition and transparency in the operation of the lists in those procurement proceedings where the use of suppliers' lists is implied and in fact may be necessary and useful (see para. 8 above). The GPA rules could be used as a model and could be transposed to the Model Law or the Guide, as applicable, for such purpose and to harmonize the two instruments, taking into account any proposed revisions to GPA on the subject. The substantially same controls should be imposed on the use of any suppliers' lists since the differences in practice between various types of lists are often blurred (see paras. 13 and 16 of A/CN.9/WG.I/WP.45).

17. The Working Group may decide that a general control to the effect that procuring entities may not use lists in violation of the objectives of the Model Law would be sufficient, leaving details to the Guide and implementing regulations of an enacting State. Alternatively, more detailed controls may be incorporated in the Model Law. To avoid inclusion of a separate article on suppliers' lists and repetitions of the same controls in all articles where the use of suppliers' lists is implied, the relevant provisions may be consolidated, consistently with the approach in bilateral and multilateral free trade agreements (see paras. 41, 42 and 44 of A/CN.9/WG.I/WP.45), in the Model Law's articles dealing with qualification and prequalification.

2. Drafting suggestions

(a) Model Law

18. If the use of mandatory lists is made mandatory in certain cases, the Working Group may decide to amend article 6 of the Model Law by adding the requirement of "registrations on the list of approved suppliers" to the criteria, requirement or procedure that suppliers or contractors must meet to be deemed qualified to participate in procurement proceedings. The phrase "as may be prescribed in procurement regulations" may be added to make it clear that such mandatory registration may be prescribed only in cases stipulated in procurement regulations. Thus, the phrase reading "registrations on the list of approved suppliers as may be prescribed in procurement regulations" may be added in the list contained in article 6 (b) (i). This would satisfy the provision of article 6 (3) that

“a procuring entity shall impose no criterion, requirement or procedure with respect to the qualification of suppliers or contractors other than those provided for in this article.” Controls on the use of lists may be included in a separate provision.

19. Alternatively, the Working Group may decide to deal with the suppliers’ lists in article 7 (Prequalification proceedings), which currently allows a procuring entity to hold prequalification on a case-by-case basis to identify qualified suppliers or contractors under any procurement methods envisaged under the Model Law. With some amendments, article 7 may be expanded to deal with standing prequalification and the use of suppliers’ lists by procuring entities. Such approach may be justified to avoid repetitions in drafting since criteria, requirement and procedures contained in article 7 and by cross-reference in article 6 of the Model Law would apply to a large degree to the operation of suppliers’ lists.

20. Pending the decisions of the Working Group on a number of issues related to the treatment of suppliers’ lists and the related issue of advertisement of lists in lieu of advertisement of specific contracts in the revised Model Law or the Guide to Enactment, the following drafting suggestions focus mostly on the controls over the use of suppliers’ lists. They were prepared as amendments to article 7 in the light of the considerations listed in the preceding paragraph (the text of article 7 is restated below in normal font while changes are underlined):

“Article 7. Prequalification proceedings

- (1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.
- (2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.
- (3) The prequalification documents shall include, at a minimum:
 - (a) The following information:
 - (i) Instructions for preparing and submitting prequalification applications;
 - (ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, unless prequalification is for the sole purpose of compiling or maintaining a standing list of prequalified suppliers or contractors for future procurements;
 - (iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
 - (iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(v) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(b) (i) In proceedings under chapter III, the information required to be specified in the invitation to tender by article 25 (1) (a) to (e), (h) and, if already known, (j);

(ii) In proceedings under chapter IV, the information referred to in article 38 (a), (c), if already known, (g), (p) and (s); and

(c) If prequalification is intended for a standing list of prequalified suppliers or contractors for future procurements, in addition to what is in subparagraph (a) above, as applicable, a statement to that effect, the purpose of the list, types of procurement covered by the list, the conditions to be satisfied by suppliers or contractors in order to be entered on the list, the methods according to which satisfaction of each of these conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and renewal of the entry.

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and, without prejudice to paragraph 9 of this article, shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Without prejudice to paragraph 9 of this article, only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

(9) Lists of prequalified suppliers or contractors compiled in accordance with this article [may] [shall] [may and in the cases specified in the procurement regulations promulgated pursuant to article 4 of this Law shall] be used by a procuring entity for the selection of suppliers or contractors in future procurement proceedings [conducted pursuant to articles 47 and 49 to 51, in direct solicitation proceedings pursuant to articles 37 (3) and 48 (2), and in other cases as may be prescribed by procurement regulations], provided that such use shall be in compliance with the objectives of the Model Law, and:

(a) The list and an invitation to prequalify for inclusion on the list, containing at a minimum information in paragraph 3 (c) above, shall be publicized [at least [annually]] [at regular intervals] [on an ongoing basis];

(b) Inclusion on the list shall be open to any interested supplier or contractor at any time and shall be carried out within a reasonably short period of time;

(c) All suppliers or contractors included in the list shall be notified of the termination of the list or of their removal from it, and upon request of a supplier or contractor concerned of the ground for the removal;

(d) Suppliers or contractors requesting to participate in particular procurement proceedings shall be permitted to participate and be considered. [When the registration on the list is required for participation in procurement, non-listed suppliers or contractors shall be allowed to participate in procurement, provided there is sufficient time to complete the qualification procedure or a possibility to postpone it at a later stage of the procurement proceedings]. The number of additional suppliers or contractors permitted to participate shall be limited only by the efficient operation of the procurement system;

(e) [When an invitation to prequalify for inclusion on the list constitutes an invitation to participate in procurement proceedings covered by a list, suppliers or contractors shall be selected from among those on the list. The invitation for inclusion on the list shall contain the statement to that effect as well as that it constitutes an invitation to participate in all procurement proceedings covered by the list. The operation of the list in such cases shall not exceed [one] year].”

21. Proposed changes in paragraphs preceding new paragraph 9 are made to explicitly address in article 7 prequalification proceedings in the context of suppliers' lists. Prequalification proceedings in this context may be initiated for the purposes solely related to suppliers' lists (establishment of lists and updating them, including addition of new suppliers), or for the purpose of prequalifying for a specific procurement with simultaneous establishment or update of suppliers' lists. Proposed amendments to paragraph 3 (a) (ii) reflect that the level of detail in prequalification documents under those two scenarios would be different.

22. The first proposed amendment to paragraph 6 is made in the light of the different publicity requirements applicable to suppliers' lists, as contained in proposed new paragraph 9. The second amendment is made to exclude the application to suppliers' lists of that part of the paragraph under which only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings making prequalification mandatory. The Working Group's decision is pending on whether the use of standing suppliers' lists should remain optional or be made mandatory under some conditions, such as those that justify the recourse to non-competitive procurement methods (see, for example, articles 19 (2), 20 and 22 of the Model Law) or as may be prescribed in procurement regulations (to cover in addition the cases of the use of mandatory lists of

approved suppliers in electronic bidding). As currently drafted in proposed subparagraphs 9 (d) and (e), in the context of suppliers' lists, the eligibility of suppliers or contractors to participate in future procurements is regulated differently than in current paragraph 6 of article 7 of the Model Law.

23. Suggested paragraph 9 provides controls on the operation of lists, such as the requirement of their publicity and accessibility by all interested suppliers or contractors at any time. The wording in the square brackets in the chapeau of suggested paragraph 9 will depend on the Working Group's decision on whether a procuring entity shall be authorized to use lists or may also be required to do so in some cases.

24. The wording in proposed subparagraphs (a) to (e) draw from the applicable provisions of GPA and regional and bilateral free trade instruments. Proposed subparagraph (d) provides an important safeguard against favouritism, exclusivity and discrimination in the operation of the lists. The text in the square brackets of that subparagraph intends to cover the operation of mandatory lists. It provides safeguards for those not on the lists, in particular non-domestic suppliers, who are interested in participating in the procurement proceedings for which the registration on the list is required.

25. The Working Group may also wish to consider whether subparagraph (d) should in addition provide for equitable opportunity to all suppliers on the list to be selected for participation in a particular procurement, akin to the provisions contained in subparagraph (e) of the old draft article dealing with suppliers' lists proposed in 1989 (see para. 2 above). Alternatively, the Working Group may decide that this control is already sufficiently reflected by reference to the Model Law's objectives in the chapeau of the proposed draft article 9.

26. Proposed subparagraph (e) covers situations when a notice of the list serves as a notice of all separate procurements covered by the list. It is linked to the text in square brackets in proposed subparagraph (d) as such a mechanism would be possible only with mandatory lists. The procurement methods to be affected by proposed changes are primarily those in which no advertisement of separate procurements is required. It is up to procuring entities to advertise them separately or by way of advertising lists. Proposed subparagraph (e) does not change anything in this respect except, as an alternative to not advertising anything at all, it requires advertising lists and therefore adds more transparency in the process. It provides some important safeguards specific to such a mechanism. The first safeguard relates to the content of the notice of the list which in addition to all other information required to be included in such a notice pursuant to proposed subparagraph (a) has also specifically stated that (i) the notice constitutes an invitation to participate in all procurement proceedings covered by the list and (ii) the selection of suppliers or contractors for a specific procurement covered by the list will be made exclusively from among those on the list. The second safeguard relates to the duration of the list. Due to its exclusive nature, imposing a time limit in the operation of this type of list is more important than of the lists covered by proposed subparagraph (d) as access to future procurements under the latter by non-listed suppliers or contractors is not or less restricted. The duration of the lists should be considered in conjunction with the publicity requirements in subparagraph (a).

27. Proposed paragraph 9 intends also to cover the use by a procuring entity of suppliers' lists compiled and maintained by third parties, such as by another procuring entity or a designated authority in a centralized system. The use of these lists would be authorized under the proposed paragraph if their establishment and maintenance complies with the controls imposed by proposed paragraph 9. The Working Group may wish to consider

whether additional controls should be imposed in such cases, for example, a procuring entity may be required to disclose the fact that other agencies will use the list and the names of these agencies (see A/CN.9/WG.I/WP.45, para. 20).

28. If provisions on suppliers' lists appear in article 7, as suggested, amendments will be required to be made in article 6 of the Model Law that according to article 7 (1) applies to prequalification proceedings. Such amendments, in particular in paragraphs 1 (a), 1 (b) (chapeau provisions) and 2 of article 6, would aim to expand the application of article 6 from qualification and prequalification on a procurement-by-procurement basis to a standing prequalification. That could be achieved by inserting, where appropriate, the references to a standing list of prequalified suppliers or contractors.

(b) Guide to Enactment

29. The text of the Guide may read as follows:

"1. Various types of lists containing information on suppliers or contractors for the use in more than one procurement (often referred to as "lists of 'qualified' or 'approved' suppliers", "rosters or registers of suppliers") are used in a variety of jurisdictions for a variety of purposes. Most commonly, they are used to prequalify suppliers or contractors for participation in procurements covered by the list. Electronic means of communication and electronic procurement have increased and diversified their use and value.

2. The operation of suppliers' lists, while bringing some benefits, such as reducing costs and time for qualification of suppliers in a specific procurement, and being to some degree indispensable in some procurement techniques, can be deeply anticompetitive, and should be carefully structured and monitored, in particular to be subject to controls to secure competition and transparency. Enacting States should be aware that lists are often a target of appeals as rules applicable to the operation of the list are found to be either highly restrictive (and therefore limit access, competition and transparency) or difficult to implement and maintain. A commonly encountered problem with maintaining lists is obsolescence of information on the list that does not necessarily always reflect changes in capacity achieved by potential suppliers and in other data on which registration on the list had relied. As a result, contracts could be awarded to suppliers or contractors without adequate qualifications or qualified suppliers or contractors could be excluded. Such a risk is mitigated by an ongoing status review of suppliers on the list. However, for a long list of suppliers when only a few will be qualified for a specific procurement, such a review could be expensive for both suppliers and procuring entities. Enacting States should also be aware of possible market segmentation effect of suppliers' lists, such as contracts of a given value may always be awarded to bidders with a corresponding classification level on the list, elevated by various State social-economic and related policies (e.g., set aside programmes) applicable to the operation of the list.

3. The balance of costs and benefits in the use of lists is affected by many different factors, such as the nature of markets, purchases involved, the training and skills of procurement personnel and the degree of transparency in public administration in any given jurisdiction in general. It will vary for different enacting States, and also for different procuring entities and types of procurement. Costs of lists generally outweigh the benefits when lists have the effect of excluding suppliers or contractors from contracts that are subject to competitive tendering following an advertisement. The objectives underlying the introduction of a suppliers' lists may also be more efficiently and economically achieved by other means, for example, by

prequalification on a contract-by-contract basis for large or complex contracts, by post-qualification of a winning supplier in other cases or by framework arrangements. On the other hand, for small value procurement, having an efficient and transparent system of suppliers' lists may be beneficial as it avoids the need to qualify the suppliers for every small purchase. In some cases, suppliers' lists may be indispensable, for example, for the operation, safety and security of electronic procurement or when they serve as a platform for such electronic purchasing techniques as electronic catalogues or dynamic purchasing systems.

4. Providing effective and wide dissemination of information about the existence and functioning of suppliers' lists is essential to ensure that they do not impact negatively on the level of competition and are operated in a transparent and non-discriminatory manner. Keeping lists open for access by new suppliers and ensuring that the new applications are processed promptly avoids exclusivity in the operation of lists. In the specific context of suppliers' lists, registration on which is mandatory for suppliers to participate in procurement, it is important that non-registered suppliers be considered if there is sufficient time to complete the registration process or postpone registration to the pre-award stage. Such safeguards are especially important in the context of cross-border procurements. Regular updates of lists, by ascertaining in particular that information remains up to date and that registrants that are no longer qualified are deleted, ensures effectiveness in the operation of lists.

5. Consequently, a number of regional and international instruments impose controls on the operation of lists. They include the requirements that all suppliers should be given an opportunity to: (i) become aware of the lists and the criteria, rules and procedures applicable to them, (ii) apply for registration at any time, (iii) be registered within a reasonably short period, (iv) be notified of any decisions about their listing, to terminate a list or remove them from it, and (v) be selected for participation in procurements covered by the list on an equitable basis. In addition, they require that the requirements for listing should be objective, non-discriminatory, transparent and proportionate and be assessed in an objective manner, and there should be a mechanism in place for review and formal challenge of applicable requirements and procedures.

6. The controls contained in those instruments should be seen as the minimum required to be incorporated by an enacting State in its procurement regulations. They should apply to all types of lists (optional or mandatory, maintained formally or informally) since in practice the difference between various types of lists is often blurred: what is supposed to be optional could easily become a compulsory register, what is supposed to serve for information purposes or as a mailing list could be used for prequalification of suppliers. The most danger exists in the use of informal lists operating in a disguised manner for prequalification or pre-selection of potential suppliers or contractors.

7. With electronic procurement, ensuring that suppliers' lists operate according to the internationally acceptable standards is becoming easier. More information is made available to the public in general contributing to transparency in the operation of the lists. The lists are made more accessible by suppliers, including across the borders, reducing anti-competition risks and exclusionary practices. Fast and easy updating information on the list, including by self-registration, -classification, or -certification by suppliers themselves and through links to other registries (allowing to check compliance with fiscal, licensing and other obligations), ensures ongoing less costly review and accuracy of existing entries on the list and addition of new suppliers. Nevertheless, adequate controls as described above are also required for

the suppliers' lists operating in the electronic domain. Furthermore, if overloaded with requirements, the electronic lists as well could become deterrent for participation and would thereby limit competition.

8. In open tendering proceedings, only optional lists could be used as an additional means for solicitation of tenders or as a source of information about suppliers in a qualification stage. [Additional remarks and the level of detail would depend on the Working Group's decision on the treatment of suppliers' lists in the Model Law and the related issue of advertising a notice of the list as an invitation to participate in procurement proceedings covered by the list.]”

IV. TRANSPORT LAW

A. Report of the Working Group III (Transport Law) on the work of its sixteenth session

(A/CN.9/591) [Original: English]

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative convention on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.¹ The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.48.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its sixteenth session in Vienna from 28 November to 9 December 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Brazil, Cameroon, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Cuba, Denmark, Dominican Republic, Finland, Greece, Indonesia, Iraq, Kuwait, Latvia, the

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

Netherlands, New Zealand, Norway, Panama, Peru, Philippines, Romania and Senegal.

4. The session was also attended by observers from the following international organizations:

(a) United Nations system: United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe (UNECE);

(b) Intergovernmental organizations invited by the Commission: Council of the European Union, European Commission (EC), Hague Conference on Private International Law (HCCH), Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) International non-governmental organizations invited by the Commission: Association of American Railroads (AAR), Comité International des Transports Ferroviaires (CIT), Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), The Baltic and International Maritime Council (BIMCO), and The European Law Students' Association International (ELSA).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.48);

(b) A note prepared by the Secretariat containing a second revision of the draft convention (A/CN.9/WG.III/WP.56);

(c) Information on jurisdiction and arbitration presented by the Danish delegation at its fifteenth session (A/CN.9/WG.III/WP.49) and a note on the information on scope of application and freedom of contract presented by the Finnish delegation at its fifteenth session (A/CN.9/WG.III/WP.51);

(d) Information on right of control introduced on behalf of the Norwegian delegation at its fifteenth session (A/CN.9/WG.III/WP.50/Rev.1);

(e) Information on transfer of rights introduced by the Swiss delegation at its fifteenth session (A/CN.9/WG.III/WP.52);

(f) A comparative table on limitation levels of carrier liability (A/CN.9/WG.III/WP.53);

(g) A proposal by the Netherlands on arbitration (A/CN.9/WG.III/WP.54);

(h) Information on shipper's obligations presented by the Swedish delegation (A/CN.9/WG.III/WP.55);

(i) Information on delivery of goods presented by the Dutch delegation (A/CN.9/WG.III/WP.57);

(j) A proposal by the United States of America regarding the inclusion of "ports" in draft article 75 of the draft convention in the chapter on jurisdiction (A/CN.9/WG.III/WP.58);

(k) Comments by the United Kingdom of Great Britain and Northern Ireland

regarding arbitration (A/CN.9/WG.III/WP.59).

7. The Working Group adopted the following agenda:
 1. Election of officers;
 2. Adoption of the agenda;
 3. Preparation of a draft convention on the carriage of goods [wholly or partly][by sea];
 4. Other business;
 5. Adoption of the report.

I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ('the draft convention') on the basis of the text contained in the annexes to a note by the Secretariat (A/CN.9/WG.III/WP.56) and discussed various proposals, including the proposal by the Netherlands on arbitration (A/CN.9/WG.III/WP.54) and the proposal by the United States of America regarding the inclusion of "ports" in draft article 75 of the draft convention in the chapter on jurisdiction (A/CN.9/WG.III/WP.58). The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

II. Preparation of a draft convention on the carriage of goods [wholly or partly][by sea]

Jurisdiction—Chapter 16

9. The Working Group was reminded that it had first considered the chapter of the draft convention concerning jurisdiction at its fourteenth session (see A/CN.9/572, paras. 110-150) and most recently at its fifteenth session (see A/CN.9/576, paras. 110-175). The discussion of the provisions on jurisdiction was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

Draft article 75. Actions against the carrier

Inclusion of the text in paragraph (c) regarding "ports"

10. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction in actions against the carrier under draft article 75 (see A/CN.9/572, para. 128; A/CN.9/576, para. 121 and A/CN.9/WG.III/WP.58).

11. General support was expressed for a proposal to remove the square brackets around draft paragraph 75 (c) and to retain the text. It was suggested that the inclusion of the port where goods were initially loaded and finally discharged from a ship as additional bases of jurisdiction was particularly important in the context of door-to-door contracts of carriage, since it provided benefits to both the carrier and the cargo claimant. It was suggested that the carrier would generally prefer to be sued at one of the ports through which the goods passed, rather than at the inland location at which an agent collected or delivered the cargo,

while the claimant would have the option to initiate an action against the carrier at the specific port where, for example, damage took place, if it considered it beneficial to do so. It was clarified that whereas including ports on the list of places where judicial proceedings against a carrier could be brought did not guarantee that suit would be filed at the port, excluding them would make a suit at the port impossible.

12. Several advantages were given in support of the proposal to include ports as a basis for jurisdiction pursuant to draft article 75. One advantage was said to be that since damage or loss was more likely to occur in a port because that was where the cargo was being handled, it would be more convenient to have the claim heard at the port where the loss or damage had occurred, since access to witnesses and other evidence would be more readily available to all parties. Another advantage was said to be that, pursuant to draft article 77, the port might be the only place that the cargo claimant could bring a single action against both the carrier and the performing party, thereby potentially avoiding a multiplicity of actions. In addition, draft paragraph 75 (c) was said to enable a carrier that had been sued to claim contribution or indemnity from a negligent performing party in the same action. Further, litigation at a port was said to provide an attractive forum for litigants because lawyers who practised and judges who presided over courts close to ports were more likely to have maritime expertise, particularly when compared to those of inland courts. Additionally, it was suggested that in some jurisdictions, the exclusion of the ability to litigate at a port could interfere with a court's ability to manage its own docket, for example, in allowing for easier consolidation of actions in major casualty cases.

13. A smaller number of delegations expressed the view that inclusion of a clause on ports would unnecessarily broaden the number of jurisdictions open to the claimant taking action. Some delegations reiterated the view expressed in earlier sessions of the Working Group that the chapter on jurisdiction was unnecessary as a whole, with some suggesting that merchant parties had equal bargaining power and would simply subrogate any claims to their insurers. In response, it was suggested that draft article 75 was intended to be a default rule, and that later discussions in the Working Group on freedom of contract would include a discussion of forum selection in situations where parties had equal bargaining power. Other views were expressed that including ports in draft paragraph 75 (c) detracted from the certainty of the jurisdiction provisions in the draft convention.

Actual or contractual port of loading or discharge, and ports of refuge

14. The Working Group considered the general question of whether "ports" in draft paragraph 75 (c) should refer to ports where actual loading and discharge of the goods took place, or whether the term should refer to the contractual ports. There was strong support for the view that the draft article should refer to the actual ports of loading and discharge. It was noted that although the contractual and actual ports of loading and discharge might often be the same, there would be instances, when, for example, in the case of a port of refuge, the contractual place of discharge was different from the actual port of discharge. Another example was the practice in multimodal transport where, for operational reasons, a carrier might prefer to use a port other than the contractual port of discharge in order to take advantage of an alternative means of transport that would deliver the goods to the consignee more quickly or more cheaply. In addition, the view was expressed that the contract of carriage might only provide for delivery to a port in a particular area only, or not specify any port at all, and that the contractual port of discharge would thus not provide the desired certainty with respect to possible bases of jurisdiction.

15. Some drafting suggestions were made to enhance the clarity of the draft paragraph regarding ports. One suggestion was for the use of terms such as "initial loading" and "final discharge" to be consistent with the terms used in draft article 11 (6). Further, a note

of caution was sounded against including terminology mixing contractual and actual ports and thus possibly causing confusion, as, for example with respect to the article 2 (1) scope of application provisions of the Hamburg Rules.

Other aspects of draft article 75

16. Two other aspects of draft article 75 were considered by the Working Group. The first issue was whether the Working Group was in a position to make a decision between the alternate text in square brackets set out in draft paragraph 75 (d). After some initial views were aired expressing a preference for the term “designated” as being less prone to uncertainty than “agreed upon”, it was agreed that a decision on this alternative text would have to await the Working Group’s discussion regarding choice of court agreements. Secondly, caution was raised regarding the definition of the term “domicile” in draft paragraph 1 (aa), since, in the national law of some States, “registered office” could be either the central office or a branch office.

Conclusions reached by the Working Group regarding draft article 75

17. After discussion, the Working Group decided that:

- The square brackets in draft article 75 (c) should be removed and the text retained;
- The Secretariat should be requested to improve the wording of paragraph (c), with reference to consistency with other relevant provisions such as draft article 11 (6), to make clear its reference to actual ports of loading and discharge, and to possibly expressly exclude ports of refuge; and
- The Secretariat should be requested to make the adjustments necessary to the definition of domicile in draft paragraph 1 (aa) so as to provide certainty with respect to the term “registered office”.

Presentation of Hague Conference Choice of Court Convention

18. The Working Group heard a presentation from the Hague Conference on Private International Law on the main provisions of the recently-concluded Convention on Choice of Court Agreements, 2005 (the Choice of Court Convention). The Working Group was reminded that the Choice of Court Convention contained rules on jurisdiction arising from exclusive choice of court agreements and on recognition and enforcement of judgments relating to those agreements. One of the provisions highlighted was article 22, which allows Contracting States to opt in to the Choice of Court Convention on a reciprocal basis for the recognition and enforcement of judgments granted by a court designated in a non-exclusive choice of court agreement. While no position was advocated by the Hague Conference, it was mentioned that, while the carriage of passengers and goods was excluded from the scope of application of the Convention under article 2 (2)(f), a suggestion had been made to consider linking the draft convention with the Choice of Court Convention. It was also recalled that even without a formal link, states remained free to agree on a bilateral basis to enforce judgments given by a chosen court under the rules of the Choice of Court Convention.

Draft article 76. Exclusive jurisdiction agreements

General discussion

19. The Working Group was reminded that it had considered exclusive jurisdiction clauses at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 130 to 133, and

A/CN.9/576, paras. 156 to 168). The Working Group heard that draft article 76 in annexes I and II of A/CN.9/WG.III/WP.56 had been prepared by the Secretariat, bearing in mind those discussions.

Inclusion of a provision on exclusive jurisdiction

20. The Working Group continued its discussions on the basis of the following proposed draft text, based on the drafting suggestions received from some delegations:

“Article 76. Choice of court agreements

“1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction, provided that the agreement conferring it is concluded or documented

“(a) in writing; or

“(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

“2. The jurisdiction of a court or courts chosen in accordance with paragraph 1 is exclusive if the agreement conferring such jurisdiction is contained in a volume contract and this agreement

“(a) clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and

“(b) either

“(i) this agreement is individually negotiated; or

“(ii) the volume contract contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract.

“3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if the relevant applicable law so provides [, that person is given adequate notice of the place where the action can be brought and the forum is in one of the places designated in article 75 (a), (b) or (c)].

“[4. This article does not prevent a Contracting State from giving effect to a choice of court agreement under less strict conditions than those laid down in paragraph 2 provided that it makes a corresponding declaration upon signature or ratification. Nothing in this paragraph prevents a court specified in article 75 (a), (b) or (c) from exercising its jurisdiction.]”

21. It was explained that the proposed text of draft article 76 aimed at reaching a compromise between those delegations that advocated that no exclusive choice of court clauses should be recognized, and those that advocated that all exclusive choice of court clauses should be recognized. The proposal aimed at providing common minimum standards for the validity of choice of court agreements and by allowing a wider recognition of such agreements by States willing to do so. The Working Group heard that the compromise represented by the proposal was intended to allow for the draft convention to be ratified as broadly as possible.

22. The intended operation of the proposal was described. It was observed that proposed article 76 was intended to broaden the treatment of exclusive jurisdiction agreements to include choice of court agreements in general. Proposed paragraph 76 (1) set out the requirements for validity of choice of court agreements, while proposed paragraph 76 (2) made it clear that exclusive choice of court clauses could be effectively concluded only in volume contracts that met the listed minimum standards. It was further explained that proposed paragraph 76 (3) extended an exclusive choice of court agreement that met the paragraph 2 requirements to third parties to the volume contract only when the applicable law allowed and when the additional bracketed conditions intended to safeguard those parties were met. In addition, the function of proposed paragraph 76 (4) was described as allowing Contracting States to give effect to choice of court agreements under less strict conditions than those set out in proposed paragraph 2, provided that a declaration to that effect was made upon signature or ratification of the draft convention. Finally, it was explained that the last sentence in proposed paragraph 4 was intended to allow a court designated by draft paragraphs 75 (a), (b) or (c) to either accept or decline jurisdiction in the face of an exclusive choice of court agreement that did not meet the requirements of proposed paragraph 2.

General reaction to proposed regime for choice of court agreements

23. It was suggested that the draft convention should not contain a chapter dealing with jurisdiction at all, and that it should instead continue the situation under the Hague-Visby Rules where the matter was left to the freedom of the parties. In response, it was observed that contractual freedom under the Hague-Visby Rules could be affected by restrictions at the national level, and that therefore the harmonization of the law in a uniform instrument would be welcome. Support was expressed for the scheme set out in proposed article 76 to preserve the status quo regarding the acceptance of choice of court agreements, and to allow for exploration of the scheme as a starting point for potential future harmonization.

24. There was support for the view that in the interests of clarity, the validity of exclusive choice of court agreements should not be limited to volume contracts, but should be extended to all contracts of carriage. Further, it was observed that any reference to volume contracts in the chapter on jurisdiction would depend on the outcome of the discussions on volume contracts in general in draft article 95, which still contained some bracketed text. In response to these concerns, it was suggested that the proposed text's modest ambitions for harmonization regarding choice of court agreements required starting at a level on which there could be potential agreement, and it was thought best to limit the initial application to situations involving sophisticated parties of equal bargaining power, such as in the case of volume contracts. It was also clarified that States that wished to extend the validity of exclusive choice of court agreements to contracts of carriage beyond volume contracts were free to do so under proposed paragraph 76 (4).

25. Other concerns were raised that the scheme for choice of court agreements in proposed article 76 required a potential claimant to enter into too many different levels of inquiry to establish appropriate jurisdiction, thus costing the claimant both time and certainty. In addition, it was observed that the proposal did not solve the problem of geographically remote shippers potentially having to bear the costs of litigating in other States.

Proposed paragraph 76 (1)

26. It was observed that proposed paragraph 76 (1) set the conditions for the validity of all choice of court agreements. It was further observed that the requirements in proposed paragraph 76 (1) had been inspired by article 3 of the Choice of Court Convention.

Concern was expressed that failure to mention the competence of a court in this paragraph could result in inadvertently overriding domestic procedural rules by providing a basis for a court to claim jurisdiction when it had none. It was noted that proposed paragraph 76 (1) should refer to the competence according to national law of the court chosen in the choice of court agreement, in keeping with similar references in the chapeau of both draft articles 75 and 77.

Proposed paragraph 76 (2)

27. It was observed that proposed paragraph 76 (2) set out the conditions for the validity of exclusive choice of court agreements, which were parallel to those required for the validity of volume contracts in draft paragraph 95 (1). In addition to the conditions of either individual negotiation or a prominent statement of the existence and location of the exclusive choice of court agreement in the volume contract, a valid exclusive choice of court agreement also required the name and location of the chosen court and the names and addresses of the parties.

28. Suggestions were made regarding the specific drafting of paragraph 2. The view was expressed that to be accurate, proposed subparagraph 76 (2)(b)(i) should refer to individually negotiated volume contracts rather than to individual clauses of the contract, such as choice of court clauses. It was suggested that this paragraph should also refer to the competence according to national law of the court chosen in the choice of court agreement, as referred to above with respect to paragraph 1.

Proposed paragraph 76 (3)

29. It was indicated that proposed paragraph 76 (3) set out the requirements to extend paragraph 2 exclusive choice of court agreements to third parties to the volume contract. In particular, it was observed that the exclusive choice of court agreement must be valid between the parties to the volume contract, and the court chosen must be located in one of the jurisdictions designated by draft paragraph 75 (a), (b) or (c). In addition, it was required that third parties have adequate notice of the place where the action could be brought and that the relevant applicable law allowed third parties to be so bound.

30. It was observed that the reference to “relevant applicable law” should be interpreted as a reference to the national law of the court seized, including its private international law rules. It was suggested that this interpretation should be made explicit in the text for the sake of clarity. A question was raised regarding whether the requirement of “adequate notice” would be decided on the basis of applicable national law.

31. It was explained that the bracketed text at the end of proposed paragraph 76 (3) intended to provide a minimum standard under the draft convention to make exclusive choice of court agreements binding on third parties to a volume contract, but that a court could, through its national law, require more stringent standards for such agreements to be binding on third parties. Further, it was observed that deletion of the bracketed text would leave the matter entirely to applicable law. In this regard, it was suggested that the bracketed text should be deleted so as not to cause confusion regarding whether the notice requirement was intended to change national law that required the consent of third parties to be bound instead of mere notice. An alternative suggestion was made to replace the bracketed text with the words “and such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record].” However, the view was also expressed that the square brackets in proposed paragraph 3 should be deleted and the text inside retained in order to include minimum requirements to protect third parties. In addition, it was noted that, in business practice, the need for

protection of third parties to the volume contract was limited since these third parties were often actually subsidiaries of the shipper, related corporate entities, or they were freight forwarders.

32. Another view was expressed that in order to better protect third parties to the volume contract, consent should replace notice as a requirement to bind them to exclusive choice of court agreements. Reference in this respect was made to draft subparagraph 95 (6)(b), which required consent to bind third parties to the terms of volume contracts. In response, it was suggested that proposed paragraph 76 (3) dealt with forum selection matters, seen as procedural in certain jurisdictions, while draft subparagraph 95 (6)(b) directly affected substantive rights and obligations and therefore required greater caution and a higher standard of protection. An additional view was expressed that requiring the consent of third parties to be bound by exclusive choice of court agreements would unreasonably burden current business practice, which often saw long strings of sales of the transported goods.

Proposed paragraph 76 (4)

33. It was explained that proposed paragraph 76 (4) intended to permit choice of court agreements based on requirements less strict than those set out in proposed paragraphs 76 (1) and (2), provided that the Contracting State had given the required notice. By way of example, it was indicated that a court located in a State recognizing choice of court agreements under proposed paragraph 76 (4) and otherwise competent under draft article 75 of the draft convention could decline jurisdiction in the presence of a valid choice of court agreement that did not meet the requirements of paragraph 2.

34. By way of further example, it was observed that, if a carrier was located in a State that recognized exclusive jurisdiction clauses and the shipper was in a State that did not do so, the carrier could seek a non-declaratory judgment or, where available, an anti-suit injunction, in a court of its State, and the shipper would be unable to obtain withdrawal of the action under proposed paragraph 80 (2). It was added that, in this example, the shipper could sue the carrier in a draft article 75 court in the shipper's own State, but because of proposed paragraph 76 (4), the shipper could not demand that the carrier withdraw its non-declaratory judgment action under proposed paragraph 80 (2). However, it was added, that the carrier who obtained a non-declaratory judgment or an anti-suit injunction in this example would not be able to enforce it in a State that did not recognize exclusive jurisdiction clauses.

35. By way of additional example, it was said that if the shipper in the example in the paragraph above sued in its State, where exclusive jurisdiction clauses were not accepted, and then tried to enforce its judgment in the State of the carrier, where exclusive jurisdiction clauses were enforced, the judgment would be refused recognition and enforcement as coming from a non-competent court.

36. It was further observed that, in the case described in paragraph 34 above, concern was expressed that the combined operation of a proposed article 81 bis and proposed paragraph 76 (4) could be that if a judgment was rendered based on paragraph 4, courts in other jurisdictions might feel they had an obligation to recognize it under proposed article 81 bis. In order to clarify that courts in other jurisdictions were allowed to recognize such a decision, but were not bound to do so, it was suggested that a sentence be added to proposed article 81 bis to indicate that that article did not require a Contracting State to recognize or enforce a decision from another Contracting State that was based on the application of the first sentence of proposed paragraph 76 (4).

37. It was suggested that, for the sake of precision, proposed paragraph 76 (4) should refer to choice of court agreements that “did not meet the requirements of proposed paragraphs 76 (1) and (2)”, instead of referring to “less strict conditions than those laid down in paragraph 2”. Alternative text was suggested in this regard as follows, “This article does not prevent a contracting State from giving effect to a choice of court agreement which does not meet the requirements in paragraph 1 or 2”, and then continuing on with the existing text, “provided that it ...”. It was further observed that this drafting suggestion would permit a Contracting State to give effect to an exclusive choice of court agreement between the parties of the contract as well as with respect to third parties since the validity of the agreement against third parties was not covered in proposed paragraphs 1 and 2. A further observation was made that proposed paragraph 4 was not intended to authorize anti-suit injunctions, nor had that approach been suggested by other delegations.

38. The view was expressed that the operation of proposed paragraph 76 (4) might lead to multiple proceedings. It was indicated in response that the proposed scheme would also reduce the number of proceedings in at least two circumstances: in cases in which proposed paragraph 80 (2) operated to allow a request for withdrawal, and the situation in which otherwise competent courts would recognize exclusive choice of court agreements and decline jurisdiction.

39. It was suggested that the requirement of a formal declaration by a Contracting State to give effect to choice of court agreements on conditions less strict than those set out in proposed paragraph 2 should be substituted with a less formal mechanism. However, it was observed that any substitute mechanism should fulfil the two intended purposes of ensuring that governments and not individual courts make the decision to apply less strict conditions, and of facilitating access to information regarding the conditions necessary for the validity of exclusive choice of court clauses in other Contracting States.

Conclusions reached by the Working Group regarding proposed article 76:

40. After discussion, the Working Group decided that:

- Proposed article 76 should be revised in light of the observations of the Working Group expressed above.

Draft article 77. Actions against the maritime performing party

General discussion and “[initially]” and “[ultimately]”

41. The Working Group was reminded that draft article 77 had been inserted into the draft convention in response to a decision taken during its fourteenth session (see A/CN.9/572, paras. 116-117) to create a separate provision with respect to establishing jurisdiction for actions against a maritime performing party. It was recalled that two types of maritime performing party were thought to be relevant in this regard: the more stationary parties, such as stevedores and terminal operators, and the ocean carrier that was not the contracting carrier. It was suggested that, bearing in mind these two groups of maritime performing parties, the “port” where the goods were “initially received” and “ultimately delivered” were appropriate jurisdictions, such that the word “port” should replace “place” and that the square brackets around the words “initially” and “ultimately” should be deleted and the text retained. There was general agreement with this proposal.

Reference to competence of “a court in a Contracting State”

42. The view was expressed that there was a problem in the chapeau of draft article 77 that was repeated from the chapeau of draft article 75 with respect to the phrase “in a court in a Contracting State that, according to the law of the State where the court is situated, is competent”. It was suggested that this phrase was unclear, since it could refer to either the national or international competence of a court. It was suggested that this phrase should be clarified in both draft articles 75 and 77.

43. Difficulty was also expressed with respect to the requirement that the court referred to in draft article 77 was required to be in a Contracting State. The view was expressed that it was conceivable that none of the locations set out in paragraphs (a) and (b) of draft article 77 would be in a Contracting State in a particular situation, and that this could result in a potential claimant under draft article 77 being without an appropriate jurisdiction in which to sue the maritime performing party. While the requirement that the court be in a Contracting State was also set out in draft article 75, it would not cause the same difficulty, since the contractual place of receipt and delivery would provide a certain jurisdiction. A related problem was said to be that paragraph (b) of draft article 77 did not restrict the port to the one in which the maritime performing party operated, and that it could cause a defendant unnecessary hardship if the claim were made in a port in which it did not operate.

Conclusions reached by the Working Group regarding draft article 77:

44. After discussion, the Working Group decided that:

- The square brackets around the words “initially” and “ultimately” would be deleted and words retained in the text;
- The word “port” in paragraph (b) should replace the word “place” in both locations; and
- The problems in the text regarding the competence and location of the court in a Contracting State, and the possibility of taking an action against a maritime performing party in a port in which it did not operate would be considered in a revised text of draft article 77.

Draft article 78. No additional bases of jurisdiction

45. The Working Group heard that an additional reference should be made in draft article 78 to draft article 76. The provision was approved with that addition.

Conclusions reached by the Working Group regarding draft article 78:

46. After discussion, the Working Group decided to approve the text of draft article 78, with the addition of a reference to article 76.

Draft article 79. Arrest and provisional or protective measures*General discussion*

47. The Working Group was reminded that it had considered draft provisions on arrest and provisional or protective measures during its fourteenth (see A/CN.9/572, paras. 137 to 139) and fifteenth sessions (see A/CN.9/576, paras. 129 to 142).

Paragraph 1

48. It was suggested that the goal of ensuring that jurisdiction with regard to provisional and protective measures would not be affected by the jurisdiction provisions in the draft convention could be achieved and draft paragraph 79 (1) could be simplified by deleting subparagraph (a) and by adding the phrase “including arrest” to the end of subparagraph (b). However, there was support for the view that this proposal would not fully address the relationship between the draft convention and the existing international instruments dealing with arrest, i.e. the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on the Arrest of Ships, 1999 (the Arrest Conventions). It was observed that these instruments contained provisions not only regarding jurisdiction for arrest as a provisional or protective measure, but also with regard to jurisdiction on the merits of the case under the Arrest Conventions. There was support for the view that, whatever the treatment given to jurisdiction under the Arrest Conventions, it should not result in a broadening of the list of general bases for jurisdiction in actions against the carrier contained in draft article 75. It was suggested that the issue of jurisdiction regarding the merits of the arrest case should be considered as a matter of conflict of conventions and would be better dealt with in the chapter of the draft convention on final clauses.

49. The view was also expressed that the text of draft paragraph 79 (1) contained in A/CN.9/WG.III/WP.56 would adequately address matters relating to the relationship between jurisdiction for the draft convention and for arrest as a provisional or protective measure. It was also suggested that article 21 (2) of the Hamburg Rules could be considered in terms of an alternative approach, or that the matter could be entirely left to national law. Another view was expressed that draft article 79 could be moved in its entirety to the chapter on final clauses in the draft convention.

Conclusions reached by the Working Group regarding draft paragraph 79 (1):

50. After discussion, the Working Group decided that:

- The text of draft paragraph 79 (1) should be revised by deleting subparagraph (a) and by adding the phrase “including arrest” to the end of subparagraph (b); and
- A separate provision on conflict of conventions should take into account the issue of the merits of the arrest case and should be placed in the chapter on final clauses in the draft convention.

Paragraph 2

51. It was observed that, in light of the differences among the various national laws, drafting an exhaustive list of provisional or protective measures would be a challenging task of uncertain result. It was therefore suggested that draft paragraph 79 (2), containing such a list, should be deleted and that the definition of provisional or protective measures should be left to national law.

Conclusions reached by the Working Group regarding draft paragraph 79 (2):

52. After discussion, the Working Group decided that:

- The text of draft paragraph 79 (2) should be deleted.

Draft article 80. Consolidation and removal of actions

General discussion

53. The Working Group was reminded that it had previously considered a provision on consolidation and removal of actions at its fifteenth session (see A/CN.9/576, paras. 147 to 152). The Working Group heard that Variant C of draft paragraph 80 (1) was the text agreed for further discussion in paragraph 149 of A/CN.9/576, and that Variants A and B of draft paragraph 80 (1) set out two alternative texts from which the Working Group could choose. The text of draft article 80 proposed for consideration by the Working Group was a combination of Variants A and B of paragraph 1, and a modification of draft paragraph 80 (2) as follows:

“Article 80. Consolidation and removal of actions

“[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. [If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]]

“2. If the carrier or maritime performing party institutes an action that directly or indirectly reduces the rights of a person to select the forum under Articles 75 or 77, then the carrier or maritime performing party, at the request of the defendant, must withdraw the action and recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant.”

Paragraph 1

54. The view was expressed that the square brackets around the whole of paragraph 1 should be deleted and the text of the paragraph retained. It was thought that the first sentence of paragraph 1 was uncontroversial since it was logical that if a claimant wished to sue a contracting carrier and a maritime performing party in a single action, that it would be required to do so in a court that had jurisdiction for both actions. There was general agreement in that regard.

55. It was felt that the second sentence of paragraph 1 that appeared in square brackets was more controversial, since it allowed an action against both a contracting carrier and a maritime performing party to take place in a jurisdiction designated only by draft article 77 when a single place could not be designated under both draft articles 75 and 77. A view was expressed that, in such a case, it was more important to protect the maritime performing party, and it was proposed that the square brackets around the second sentence should also be removed and the text retained. However, some doubt was expressed both with respect to subjecting the contracting carrier to the heads of jurisdiction under draft article 77 in this manner, and with respect to the interaction between draft articles 76 and 80 (1). For example, concern was expressed that it might be possible to circumvent an otherwise enforceable exclusive jurisdiction clause by suing both the contracting carrier and the maritime performing party in a draft article 77 jurisdiction.

Conclusions reached by the Working Group regarding draft paragraph 80(1):

56. After discussion, the Working Group decided that:

- The concerns raised with respect to the second sentence of draft paragraph 80 (1) and the interaction of the entire paragraph with draft article 76 would be further considered in a subsequent draft of the provision.

Paragraph 2

57. The view was expressed that draft paragraph 80 (2) was intended to provide a solution for those situations when a carrier instituted an action in an attempt to evade the heads of jurisdiction set out in draft articles 75 and 77. It was agreed that the intent of this provision was not to interfere with legitimate actions against the shipper, such as, for example, actions for freight or for damage caused to a ship by cargo. However, some doubt was expressed regarding the suggestion that draft paragraph 80 (2) should be focussed solely on actions for declaratory relief intended to circumvent the heads of jurisdiction in draft articles 75 and 77. The view was expressed that draft paragraph 80 (2) should also cover anti-suit injunctions sought in another forum in order to reduce a party's choice regarding where to bring suit. It was also suggested that the provision should confine itself to requiring the abusive action to be stayed or withdrawn, and that it might not be possible to require that it be recommenced in a draft article 75 or 77 jurisdiction, particularly if that recommencement were time-barred. In response to this potential problem, it was suggested that the claimant required to recommence an action pursuant to draft paragraph 80 (2) could be granted additional time when faced with a time bar, but that this issue should be considered with respect to chapter 15 on time for suit.

58. A drafting suggestion was made to clarify the provision by deleting the phrase "that directly or indirectly reduces" and inserting the phrase "that merely aims at reducing", or similar language, in its stead.

Conclusions reached by the Working Group regarding draft paragraph 80 (2):

59. After discussion, the Working Group decided that:

- The concerns raised above with respect to draft paragraph 80 (2) would be further considered in a subsequent draft of the provision.

Draft article 81. Agreement after dispute has arisen*General discussion*

60. The Working Group was reminded that it had most recently considered a provision on agreement on jurisdiction arising after the dispute had arisen at its fifteenth session (see A/CN.9/576, paras. 169 to 171). There was general support for the text of this provision, provided that its text was reviewed for consistency in light of changes anticipated to other provisions in the chapter on jurisdiction.

Form requirements

61. A question was raised regarding whether the agreement made by the parties should be subject to form requirements similar to those set out in draft paragraph 76 (1), where an agreement on choice of court was required to be evidenced in writing or by electronic means. Two views were expressed. One view was that the draft article should be amended to include form requirements similar to those in draft paragraph 76 (1) on the basis that evidence of an agreement was necessary to protect the parties. It was suggested that where an agreement was concluded orally and a subsequent dispute arose as to whether a court had jurisdiction to hear the case, the lack of evidence as to what was agreed could further complicate the dispute between the parties.

62. The other view expressed was that form requirements should not be included since this would unnecessarily impede negotiations that often take place between the parties once a dispute has arisen. It was stated that in practice, negotiations were often entered into

between the parties prior to commencing an action, and when negotiations were unsuccessful, parties might orally or informally agree where to litigate. It was also noted that such agreement could also be arrived at implicitly, through a party simply appearing in a court to defend an action. In addition, it was noted that even article 21 (5) of the Hamburg Rules, which generally provide strong protection for parties, did not stipulate form requirements for agreements on jurisdiction after the dispute has arisen.

Additional clarifications

63. In response to a question raised, it was generally agreed that the draft article did not confer jurisdiction on a court where that court did not have jurisdiction in the first place. It was also clarified that the meaning of the words “after the dispute had arisen” referred to the period following a voyage when the damage had already occurred, but a court had not yet been seized with the claim.

Conclusions reached by the Working Group regarding draft article 81:

64. After discussion, the Working Group decided that:

- The text of draft article 81 should be retained as satisfactory and no form requirement should be added.

Proposed new draft paragraph 81 (2)

65. It was proposed that the draft article 81 should become draft paragraph 81 (1), and that the following text be incorporated into the draft convention as draft paragraph 81 (2):

“Notwithstanding the preceding articles of this chapter, a court of a Contracting State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.”

General discussion

66. With respect to proposed draft paragraph 81 (2), general support was expressed for the text. The view was expressed that draft paragraph 81 (2) was necessary because it was important for a defendant to be able to enter an appearance only for purposes of contesting the jurisdiction of the court. Moreover, it was thought to be logical for this paragraph to be placed as the second paragraph in the same draft article as draft article 81, so that it would make clear that the first paragraph, or former draft article 81, dealt with agreements on jurisdiction after the dispute had arisen but before a court was seized, and that the second paragraph dealt with disputes once a court was seized with the claim. The view was expressed that it was not obvious that where a defendant entered an appearance to contest jurisdiction, all courts would view the appearance in the same manner, but that the insertion of this paragraph could have a beneficial harmonizing effect in this regard.

67. The view was also expressed, however, that the draft article might be seen to interfere with local procedural law, and it was agreed that the draft paragraph should incorporate wording such as “in accordance with the law of”, or similar text that referred to local law, so as to ensure that local procedural law was respected. In response to a question, another clarification was made that it was intended that the court before which an appearance was entered was under no obligation to accept jurisdiction.

68. In response to a concern raised, it was clarified that the words “entered to contest the jurisdiction” did not prevent a defendant who was contesting jurisdiction of a court from also contesting the claim on its merits. Further, on the question of whether a court could

assert jurisdiction once an appearance was entered even where it fell outside the scope of draft articles 75, 76 and 77, it was clarified that the answer would depend on local procedural rules.

Conclusions reached by the Working Group regarding proposed draft paragraph 81 (2):

69. After discussion, the Working Group decided that:

- Draft article 81 should be renumbered as draft paragraph 81 (1) and its title revised;
- The text of draft paragraph 81 (2) set out above should be inserted into the draft convention; and
- Regard should be had in a future draft to the concerns raised regarding local procedural law.

Proposed new draft article 81 bis. Recognition and enforcement

70. It was proposed that the following text of a new draft article 81 bis be incorporated into the draft convention as draft paragraph 81 (2):

“Article 81 bis. Recognition and enforcement

“1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is entitled to recognition and enforcement in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

“2. This article does not require a Contracting State to recognize or enforce a decision from another Contracting State which is based on the application of the first sentence of article 76 (4).”

General discussion

71. It was suggested that draft paragraph 2 was necessary since, in its absence, it was felt that draft paragraph 1 could be interpreted to mean that a court must enforce a judgment even though it might be contrary to local procedural rules. It was explained that the second paragraph was intended to clarify that a State was not required by this provision to recognize or enforce a judgment that would not otherwise be enforceable under its national law.

Conclusions reached by the Working Group regarding proposed draft article 81 bis

72. After discussion, the Working Group decided that:

- Draft article 81 bis should be included in the draft convention as a basis for future discussion, subject to adjustments to the text necessary to accommodate drafting changes to the chapter on jurisdiction as a whole.

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the

following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

“Article 1 (xx) “Competent court”

““Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over a matter.

“Article 75. Actions against the carrier

“Unless the contract of carriage contains an exclusive choice of court agreement that is valid under article 76, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier in a competent court within the jurisdiction of which is situated one of the following places:

- “(a) The domicile of the defendant; or
- “(b) The contractual place of receipt or the contractual place of delivery; or
- “(c) The port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or
- “(d) Any place designated for that purpose in accordance with article 76 (1).

“Article 76. Choice of court agreements

“1. If the shipper and the carrier agree that a competent court has jurisdiction to decide disputes that may arise under this Convention, then that court has non-exclusive jurisdiction, provided that the agreement conferring it is concluded or documented

“(a) in writing;² or

“(b) by any other means of communication that renders information accessible so as to be usable for subsequent reference.

“2. The jurisdiction of a court chosen in accordance with paragraph 1 is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction

“(a) is contained in a volume contract that clearly states the names and addresses of the parties and either

“(i) is individually negotiated; or

“(ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract; and

“(b) clearly states the name and location of the chosen court.

“3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if this is consistent with applicable law as determined by the [international private law] [conflict of law rules] of the court seized and:

² The form requirement will be treated under article 3.

“(a) That person is given adequate notice of the court where the action can be brought;

“(b) The forum is in one of the places designated in article 75 [(a), (b) or (c)].

“4. Subject to paragraph 5, this article does not prevent a Contracting State from giving effect to a choice of court agreement that does not meet the requirements of paragraphs 1, 2, or 3. Such Contracting State must give corresponding notice [to _____].

“5. Nothing in paragraph 4 or in a choice of court agreement effective under paragraph 4 prevents a court specified in article 75 [(a), (b), (c) or (d)] and situated in a different Contracting State from exercising its jurisdiction over the dispute and deciding the dispute according to this Convention. No choice of court agreement is exclusive with respect to an action [against a carrier] under this Convention except as provided by this article.

“Article 77. Actions against the maritime performing party

“In judicial proceedings under this Convention against the maritime performing party, the plaintiff, at its option, may institute an action in a competent court within the jurisdiction of which is situated one of the following places:

“(a) The domicile of the maritime performing party; or

“(b) The port where the goods are initially received by the maritime performing party or the port where the goods are finally delivered by the maritime performing party.

“Article 78. No additional bases of jurisdiction

“Subject to articles 80 and 81, no judicial proceedings under this Convention against the carrier may be instituted in a court not designated under articles 75, 76 or 77.

“Article 79. Provisional or protective measures

“Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. [A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless

“(a) the requirements of this chapter are fulfilled; or

“(b) an international convention that according to its rules of application applies in that State so provides.]

“Article 80. Consolidation and removal of actions

“1. Except when there is an exclusive choice of court agreement that is valid under article 76, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, then the action may be instituted only in a court designated under both articles 75 and 77. If no such court is available, the action must be instituted in a court designated under article 77 (b) if such court is available.

“2. Except when there is an exclusive choice of court agreement that is valid under article 76, a carrier or a maritime performing party that institutes an action that

[would affect] [merely aims at affecting] the rights of a person to select the forum under articles 75 or 77, must at the request of the defendant, withdraw that action and may recommence it in one of the courts designated under articles 75 or 77, whichever is applicable, as chosen by the defendant.³

“Article 81. Agreements after the dispute has arisen and jurisdiction when the defendant has entered an appearance

“Notwithstanding the preceding articles of this chapter:

“(a) After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

“(b) A competent court before which a defendant appears, without contesting the jurisdiction in accordance with the rules of that court, has jurisdiction over the parties.

“Article 81 bis. Recognition and enforcement

“1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is to be recognized and enforced in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

“2. This article does not apply to a decision rendered in another Contracting State that has jurisdiction under article 76 (4).

“Article XX. Participation by Regional Economic Integration Organizations

“1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.

“2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

“3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.”

³ It might be necessary to arrange the provisions of time for suit for such cases when the original action was brought within the time period but the recommencement was not.

74. The Working Group heard a brief report from the delegations proposing the revised text for the chapter on jurisdiction. It was reported that against a background of divergent interests and views in the Working Group regarding the draft provisions on jurisdiction, a delicate compromise had been achieved and that it was reflected in the revised text. It was observed that although total harmonization of the jurisdiction provisions was not possible, it was thought that the compromise achieved could be acceptable to the Working Group, because it was seen to be preferable to the alternative, which was to exclude jurisdiction from the draft convention.

75. There was general support expressed for the proposed compromise set out in the revised articles, particularly given the complexity of the issues, and the view was expressed that a careful balancing of interests had been achieved. The view was expressed that deletion or revisions in substance of the draft compromise could destroy the compromise accomplished.

76. In response to a request for clarification of draft article 76 (4), it was observed that the intention of the notice requirement was to indicate that a policy decision had been made regarding paragraph 4 by a Contracting State rather than by individual courts within that State deciding whether or not they would choose to apply paragraph 4. It was further clarified that it was not intended that such a notification would necessarily require a change to the law in the Contracting State but rather that it required a Contracting State to inform the rest of the world whether it would give effect to exclusive choice of court agreements on less strict conditions than those set out in paragraph 2.

77. In further reference to the notice requirement under draft article 76 (4), it was observed that receiving the content of national law might not be appropriate for a depositary, and it was thought that notices of the nature contemplated could be extensive, even consisting of case law, and that they could require translation to other languages, a matter that could raise administrative issues with the depositary, and that could create a hurdle for the adoption of the draft convention. In response to those concerns, several views were expressed that such notices could consist of very simple statements regarding whether or not a Contracting State would apply paragraph 4, or that they could be sent to organizations other than the depositary for collection and dissemination. There was general agreement that this matter should be discussed further at a later stage.

78. A concern was raised with respect to the structure of the chapter on jurisdiction, since draft article 75 was concerned only with claims against the carrier, followed by draft article 76, which regulated actions against both the shipper and the carrier, but that it seemed that other than draft article 76, actions by the carrier against the shipper were not treated in the subsequent provisions. The view was expressed that this was not an oversight in regard to draft article 75, since the compromise achieved by the entire chapter was intended to enable cargo interests to have access to a reasonable forum to resolve disputes notwithstanding the existence of an exclusive jurisdiction clause which may have been placed in the contract of carriage by the carrier. In that regard, it was suggested that the brackets around the words “against a carrier” in draft article 76 (5) should be deleted so as to bind a carrier to an exclusive jurisdiction forum that it had selected. However, in terms of the observation regarding the overall structure of the chapter, it was observed that article 81 bis had indeed been intended to be applicable to decisions in legitimate actions by the carrier against the shipper, and that if that was not the case, adjustments should be made to the text of draft article 81 bis.

79. Concerns were also raised regarding the clarity of the text with respect to the intention of draft article 81 bis. The view was expressed that that provision meant that a State that gave notice under draft article 76 (4) would not be required by draft article 81 bis

to recognize a judgment from a State that did not recognize the exclusiveness of the jurisdiction clause. It was agreed that, if necessary, the text of draft article 81 bis should be clarified to reflect this position.

80. A further concern was raised regarding the relationship between paragraphs 4 and 5 of draft article 76. Since draft article 76 (4) was thought to be the core of the compromise on this chapter, it was said to be important to establish why its opening phrase made it subject to paragraph 5. In particular, it was thought that paragraph 4 should not be made subject to the second sentence of paragraph 5, and that it should be made a separate paragraph under draft article 76.

81. A number of views were also expressed reiterating the position that no articles on jurisdiction should be included in the draft instrument. It was also suggested that while the spirit of the compromise was appreciated, the revised articles did not go far enough in promoting uniformity but instead would lead to forum shopping and the filing of a multiplicity of suits thereby reducing certainty and increasing costs to litigants. A further view was reiterated that exclusive jurisdiction clauses should be given full effect in the draft instrument and that the view that such an approach would be unfair to third parties was untenable because insurance could be obtained and third parties could always obtain the information regarding the jurisdiction from public sources or from the carriers themselves.

82. A number of drafting suggestions were made. One suggestion agreed upon was the inclusion of the word “and” between the draft article 76 (a) and (b). Other drafting suggestions were to replace the words “in accordance with the law of the Contracting State” in draft article 81 bis (1) with the words “subject to the conditions laid down in the law of the Contracting State” to enhance the clarity of the draft article. The view was also expressed that the wording of draft article 81 bis could be a little stringent and might imply that a court operating under draft article 76 (4) might not recognize a judgment of another court operating under the same draft article. It was also suggested that the earlier version of draft paragraph 81 bis (2) set out in paragraph 70 above was preferable as it allowed States that required draft paragraph 81 bis (1) as a legal basis for the recognition of judgments generally, to recognize decisions made pursuant to draft paragraph 76 (4). A suggestion was also made that draft article 76 (3) should contain a clear conflict of law rule to determine the law governing third parties.

83. Draft article XX, relating to the participation of regional economic integration organizations, was not discussed.

Conclusions reached by the Working Group on proposed jurisdiction chapter:

84. After discussion, the Working Group decided that:

- The compromise contained in the proposed draft text for chapter 16 was both acceptable and accepted, with some reservations regarding the notice given to third parties under draft article 76 (3);
- The word “and” should be included between draft paragraphs 76 (a) and (b); and
- Further drafting suggestions and clarifications should be considered in light of the comments expressed in the paragraphs above.

Arbitration—Chapter 17

General discussion

85. The Working Group was reminded that it had considered the chapter on arbitration during its fourteenth (see A/CN.9/572, paras. 151 to 157) and fifteenth sessions (see A/CN.9/576, paras. 176 to 179). It was recalled that during those sessions of the Working Group, two strong views were expressed. One view was that the principle of freedom of arbitration was deeply rooted and that existing arbitration instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration provided an adequate framework for arbitration, thus obviating the need for such a chapter in the draft convention. Another view was that arbitration should be available to the parties to a dispute, but that it should not be capable of being used by parties in order to circumvent the bases of jurisdiction set out in draft article 75 of the draft convention.

86. The substance of the proposal contained in A/CN.9/WG.III/WP.54 was explained to the Working Group. It was said that the proposal was intended as an effort to reach a compromise between the views expressed on arbitration during the fourteenth and fifteenth sessions. The main aspects of that compromise were said to be the deletion of the entire chapter on arbitration (see A/CN.9/WG.III/WP.54, para. 5 (e)), and the addition in the draft convention of draft paragraph 78 (2) (see A/CN.9/WG.III/WP.54, para. 5 (b)), intended to ensure that the rules in the draft convention on jurisdiction could not be circumvented. An additional aspect of the proposal was to include a reference in draft article 81 to make effective any agreement made by the parties to refer a dispute that had arisen to arbitration. Finally, it was explained that the intention of the compromise was to preserve the status quo with respect to the use of arbitration in the maritime transport industry by providing minimal arbitration rules with respect to the liner industry, but providing for freedom of arbitration in the non-liner industry through the addition of draft article 81 bis ((see A/CN.9/WG.III/WP.54, para. 5 (e)).

87. In addition, the comments expressed in A/CN.9/WG.III/WP.59 were explained by reference to the final paragraph of that document, which suggested that, in light of widespread reliance on arbitration by the maritime industry in general, the most appropriate solution in the draft convention would be the inclusion of a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification.

Unqualified freedom to arbitrate

88. There was support for the view that the draft convention should permit the untrammelled enforceability of arbitration agreements in contracts of carriage. It was stated that arbitration was an extremely popular form of dispute resolution throughout the world for disputes regarding contracts of carriage. Scepticism was expressed regarding whether it was necessary to safeguard the jurisdiction regime set out in the draft convention by reducing the freedom to arbitrate in the liner industry, which had never made broad use of arbitration, and, it was suggested, was unlikely to do so to thwart jurisdiction. In addition, caution was raised with respect to the possibility of over-regulating arbitration, thus affecting its effectiveness.

Arbitration provisions in the Hamburg Rules

89. The view was also expressed that the Working Group should consider the adoption of arbitration rules similar to those found in article 22 of the Hamburg Rules, and already included for consideration in the arbitration chapter in A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.56. One advantage of those rules was said to be that they were already the product of a compromise that took place during their negotiation. There was some support for this view. However, one difficulty with the approach in the Hamburg Rules was said to be that they reduced commercial certainty by allowing the arbitration to take place in one of a number of different possible locations. An advantage of the proposal in A/CN.9/WG.III/WP.54 was thought to be that it allowed for the resolution of the dispute either through arbitration at the specific location cited in the arbitration provision, or in a court in a location designated pursuant to draft article 75. However, it was also observed that the variety of potential locations for arbitration could be seen as an advantage of the Hamburg Rules in terms of promoting the development of arbitration by providing for it in different locations, but with reference to the same set of rules.

The compromise proposal in A/CN.9/WG.III/WP.54

90. A number of delegations made clear that their starting position when arbitration had first been discussed during the fourteenth session of the Working Group had been in favour of unqualified freedom to arbitrate. However, these delegations had, in the spirit of compromise, come to support the proposal in A/CN.9/WG.III/WP.54, particularly due to its deference to the existing international arbitration regime, and to its maintenance of the status quo in regard to arbitration practices in the maritime transport industry. Some reservations were raised regarding whether the compromise proposal might in fact limit the development of arbitration in the liner trade, since commercial enterprises would not be likely to include an arbitration provision in a contract unless they could be certain of where the arbitration would take place, and that might not be possible if that choice were subject to the draft article 75 list. Ultimately, while a number of delegations suggested that further refinements in the drafting of the proposal were necessary, not the least in the face of the new provisions considered for the jurisdiction chapter, there was support for the proposal as a compromise intended to further the efforts of the Working Group and as a basis for future discussions.

Clarifications of the intended effect of the compromise proposal

91. A question was raised with respect to the interaction of draft subparagraphs 78 (2)(a) and (b), and whether the claimant should be required to provide a short time period in which the carrier would have to decide whether to transfer the proceedings from the place in the arbitration clause to a place designated by draft article 75. In response to a question regarding which parties could be asserting a claim against the carrier under draft article 78 (2)(a), it was suggested that this and other answers might best be addressed during the Working Group's consideration of the chapter on rights of suit, and perhaps the chapter on time for suit, both anticipated at its next session.

Suggested modifications to the compromise proposal

92. In addition to general adjustments to the proposal made necessary in light of changes under consideration for the jurisdiction provisions in the draft instrument, certain specific modifications to the proposal were suggested. In light of the thrust of the discussions in the Working Group with respect to jurisdiction and choice of court clauses under draft article 76, the view was expressed that exclusive arbitration clauses should be permissible and should be enforced on the same grounds as exclusive choice of court clauses. There

was some support for the suggestion that the effect of an arbitration agreement on third parties to the contract of carriage should be made clear and should be harmonized, rather than being left to national law as in draft article 81 bis. A model for this approach was suggested to be draft article 83 of the draft convention. In response, concern was raised that creating rules regarding third parties could amount to impinging on the domain of the New York Convention regarding the enforceability of arbitration agreements. In addition, there was some support for the inclusion of a provision along the lines of draft article 85 of the current chapter on arbitration requiring an arbitrator to apply the rules of the draft convention. It was suggested in response that such a rule was unnecessary, since an arbitrator would look to the contract of carriage to decide which rules to apply, and that inquiry would either lead the arbitrator to the draft convention or it would not.

93. Some specific drafting changes were suggested to the text. There was support for the view that the word “solely” in proposed draft article 81 bis should be placed in square brackets or be eliminated. A suggestion was also made that the bracketed text “[a jurisdiction or]” should be deleted in its entirety from draft article 81 bis, since jurisdiction clauses were not common in the non-liner industry, and the intention of the proposal was to preserve the status quo. Other views were expressed in favour of keeping the text and deleting only the square brackets. Support was expressed for the following alternate text intended to replace and clarify draft paragraph 78 (2)(b):

“The carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if the person asserting the claim against a carrier institutes court proceedings in a place specified in the arbitration agreement.”

Conclusions reached by the Working Group regarding provisions on arbitration:

94. After discussion, the Working Group decided that:

- There was broad consensus for the compromise proposal presented in A/CN.9/WG.III/WP.54; and
- The proposal should form the basis for future work following modification in light of the discussion in the Working Group as noted above, and with respect to the anticipated revision of draft article 76 on jurisdiction.

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

“Article 83. Arbitration agreements

“Subject to article 85, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

- “(a) The person asserting a claim against the carrier has the option of either:
 - “(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or
 - “(ii) instituting court proceedings in any other place, provided such place is specified in article 75 (a), (b) or (c);

“(b) If a person asserts a claim against a carrier, then the carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if that person institutes court proceedings in

“(i) a place specified in the arbitration agreement, or

“(ii) a court that would give effect under article 76 to an exclusive choice of court agreement specifying the place named in the arbitration agreement that is exclusive with respect to the action against the carrier.

“Article 84. Arbitration agreement in non-liner transportation

“Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply by reason of:

“(a) the application of article 10,⁴ or

“(b) the parties’ voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.”

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83 (b)(ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5 (c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

⁴ The reference might be modified depending on the future revision of draft article 10 of the draft convention.

New draft subparagraph 83 (b)(ii)

99. It was indicated that there was a parallelism between exclusive choice of court agreements, on the one hand, and arbitration agreements, on the other hand, and that therefore the two should be accorded similar treatment in the draft convention with respect to freedom of contract. Accordingly, it was indicated that the goal of the draft subparagraph 83 (b)(ii) was to allow for arbitration agreements in those cases where an exclusive jurisdiction clause would be recognized under draft article 76 of the draft convention, relating to the recognition of exclusive choice of court clauses. It was observed that the effect of draft subparagraph 83 (b)(ii) would be a further expansion of freedom of arbitration in the liner industry. Upon request for clarification, it was explained that draft subparagraph 83 (b)(ii) required the existence of an arbitration agreement for its operation, and, in response, it was suggested that the text should be amended to specifically indicate so. It was further observed that draft subparagraph 83 (b)(ii) applied only to claims against the carrier, while claims brought by the carrier were outside its scope.

100. Some hesitation was expressed regarding draft subparagraph 83 (b)(ii), however, in light of another view that exclusive choice of court clauses and arbitration agreements had different natures and consequences, and that their treatment under the draft convention should reflect such differences. In particular, the link with draft article 76 was seen to be problematic in that it linked arbitration agreements with a State's decision whether or not to enforce exclusive choice of court agreements. An additional concern was expressed that draft subparagraph 83 (b)(ii) might deprive the shipper of a reasonable place to protect its interests, especially in light of the higher costs of arbitration compared to court litigation. It was therefore suggested that subparagraph 83 (b)(ii) should be deleted.

New York Convention and draft subparagraph 83

101. It was indicated that the effect of draft subparagraph 83 would be to allow courts, under certain conditions, to declare that, despite an arbitration agreement entered into in good faith, the arbitration agreement would not be binding on the parties. It was added that such outcome was not only unusual in modern trade law, but also contrary to basic arbitration principles as contained in a number of widely accepted texts such as the New York Convention, and in particular its article II (3), and the UNCITRAL Arbitration Model Law. It was added that, while the principle of respect of the arbitration agreement might tolerate certain deviations, such as in article 22 (3) of the Hamburg Rules, these could not extend to preventing access to arbitration as envisaged under new draft article 83 without fundamentally affecting that principle. It was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (on arbitration) on the provisions of the draft convention relating to arbitration. 102. In response, it was indicated that for a number of reasons, the proposed text was not inconsistent with the New York Convention. It was further explained that the basic principle of the New York Convention did not require general recognition of all arbitration agreements, but only non-discrimination of arbitration agreements vis-à-vis jurisdiction clauses. It was added that, since arbitration agreements were allowed in the draft proposal exactly in the same cases where exclusive jurisdiction clauses would be recognized, that basic principle of the New York Convention was not affected by the proposed text. Furthermore, it was indicated that a restriction on the effectiveness of arbitration agreements was a consequence of maritime trade practice, which saw restrictions of freedom of arbitration in certain circumstances and trades.

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83 (b)(ii) of the draft convention should be placed in square brackets pending its next reading.

Obligations of the shipper—Chapter 8

General discussion

104. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations during its thirteenth session (see A/CN.9/552, paras. 118 to 161).

105. It was observed that this chapter on the obligations of the shipper represented a break from previous practice in the field of maritime transport, since other international maritime instruments did not have such extensive provisions relating to shippers' obligations. It was noted that the Hague-Visby Rules had only one provision relating to shippers' liability (art. 4 (3)), while the Hamburg Rules had two such rules (arts. 12 and 13). Some transport conventions did have similar provisions, such as the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (the CMNI Convention), but it was observed that the draft convention created a new and, some suggested, onerous liability regime for shippers.

106. Some doubt was expressed as to whether the chapter was in fact needed at all. The view was expressed that the chapter placed a heavy responsibility on shippers, and it was suggested that small shippers, particularly those from developing countries, could find it difficult to meet the requirements of the draft convention. Concern was also expressed with respect to the provisions of the chapter regarding the shipper's burden of proof and the basis of the shipper's liability, which are discussed in further detail in paragraphs 136 to 153 below.

107. There was general support expressed for including the chapter on shippers' obligations in the draft convention as it reflected the current context in which the contract of carriage required the shipper and carrier to cooperate to prevent loss of or damage to the goods or to the vessel. The view was expressed that obligations in the contract of carriage had evolved over the years beyond mere acceptance to carry goods and payment for such carriage. It was said that this cooperation between the shipper and the carrier should be reflected in the draft convention.

108. Although support was expressed for the inclusion of a chapter on shippers' obligations in the draft instrument, it was suggested that the current draft articles contained in the chapter went too far beyond the scope of the relationship in the contract of carriage. As such, it was felt that aspects of the provisions that went beyond the contractual

relationship and related to third parties, such as consignees, should be removed from this chapter. Against this background, it was noted that there was a need to strike an overall balance in the draft convention between obligations of the shipper and the carrier, and the view was expressed that it was not inappropriate for the draft convention to contain obligations on shippers. However, caution was expressed that unnecessarily detailed shippers' obligations could result in creating hurdles for the ratification of the draft convention. Significant support was however expressed for including the chapter in the draft convention in view of the current trends already alluded to in the paragraph above.

Draft article 28. Delivery for carriage

General discussion

109. The Working Group was reminded that it had last considered draft article 28 at its thirteenth session (see A/CN.9/552, paras. 118 to 125). The Working Group considered the text of draft article 28 as contained in annexes I and II of document A/CN.9/WG.III/WP.56.

First sentence

110. General support was expressed for the text of the first sentence. In addition, it was proposed and generally agreed that the words "unless otherwise agreed" in the middle of the first sentence be moved to the beginning of the sentence. This was because if left in the middle of the sentence, the reading of the sentence would suggest that readiness of the goods for carriage was not something that the parties could agree on, and there could be cases where the shipper and the carrier agreed to carry goods that were not ready for carriage due to insufficient time. In response to concerns raised, there was support for the view that moving the words to the beginning of the sentence was not seen to mean that parties could agree to contract out of securely and safely packing or stowing the goods, as those obligations would be subject to other provisions, as for example, with respect to dangerous goods. A contrary view was expressed, however, that the shipper should not be able to contract out of the obligations placed on it by the first sentence of the draft article.

Second sentence

111. There was some support for the view that the second sentence could be deleted altogether as it was superfluous and did not add anything not already covered by the first sentence. Its retention, it was thought, would only add ambiguity and interpretation problems to the draft article as a whole.

112. There was strong support for the view that the second sentence should be retained as having at least practical value in reminding the shipper of the importance of stowing and securing the goods to withstand the voyage. It was noted that the incidence of damage and injury as a result of poorly secured cargo was growing and there was need to emphasize the importance of properly securing goods to withstand the intended carriage.

113. Notwithstanding its decision to retain it, the Working Group heard that the second sentence was too detailed and too repetitive, and a suggestion was made for the second sentence to be simplified and essential aspects of it incorporated into the first sentence. There was support for the alternative view that the second sentence should be replaced by the text set out in footnotes 116 and 435 of A/CN.9/WG.III/WP.56.

114. A drafting suggestion was made that the shipper should have freedom to contract out of the obligation in the second sentence, and that the second sentence should also begin with the words "unless otherwise agreed in the contract of carriage". Contrary views were

expressed, including the suggestion that the second sentence should begin with the words “without prejudice to the foregoing” in order to clearly indicate its relationship with the first sentence.

115. Other drafting suggestions made were that the second sentence should become a separate paragraph because when translated into some other languages, the phrase “unless otherwise agreed in the contract of carriage” would relate to both the first and the second sentences. It was observed that the words “container” and “trailer” used in the second sentence, could be harmonized with text used elsewhere in the draft convention, such as in draft article 64 (3), which referred to “articles of transport”.

Drafting suggestions for draft article as a whole

116. A number of general drafting suggestions were made with respect to the text of the draft article as a whole. There was support for the suggestion to revise the title of the chapter to better reflect its scope by indicating that it contained “Obligations of the shipper to the carrier”. It was also suggested that the text of the draft article itself should make clear to whom the shipper was liable, particularly in light of the possible breadth of the provisions in chapter 14 on rights of suit under the draft convention.

117. There was general support for the observation that the words “intended carriage” in both sentences was understood to cover all legs of the carriage. To clarify this understanding a suggestion was made that text such as “all transport legs of” be inserted before the words “the intended carriage” in both sentences.

118. Additional suggestions were that simpler language, such as “loading” and “unloading” could be used in both sentences instead of the listed obligations involved in stowing and securing the goods. It was also felt that listing these methods might be misleading if one method was left out, and as an alternative, it was suggested that the words “ready for carriage” could be used to replace the list. The list was also said to create redundancy and overlap of some terms when translated to other languages.

Use of the word “injury”

119. The view was expressed that the use of the word “injury” in the draft article was inappropriate since it could be seen to extend the scope of the provision outside of the contract of carriage between the shipper and carrier to third parties. It was felt that the word “injury” should be replaced with the word “loss”, in order to convey the intention that where, for example, goods improperly packed by a shipper caused injury to an employee of a carrier, the carrier would be entitled to seek compensation from the shipper for the loss suffered in compensating the employee. The view was also expressed that the word “loss” should replace the entire phrase “injury or damage” in the draft article. However another view was that while the provision should not establish any independent liability of the shipper for injury to a third party, but that the use of the term should be readdressed after the Working Group had considered draft article 31 on the basis of the shipper’s liability. Another drafting suggestion to limit the application of this provision to the parties to the contract of carriage was to add the words “for which the carrier is liable” at the end of the phrase “injury or damage”.

Conclusions reached by the Working Group regarding draft article 28

120. After discussion, the Working Group decided that:

- The title of the chapter should make reference to the shipper’s obligations to the carrier;

- Moving the phrase “unless otherwise agreed” should be one of the modifications to the text of the first sentence considered by the Secretariat in addition to other modifications suggested in the course of discussion;
- The second sentence should be retained, but its text should be simplified by the Secretariat, taking into account the text in footnotes 116 and 435 of A/CN.9/WG.III/WP.56, as well as the comments and suggestions made during the course of discussion in the Working Group; and
- The use of the term “injury” should be clarified, possibly placed in square brackets as alternative text, and reconsidered by the Secretariat in a future draft in light of the Working Group’s consideration of draft article 31.

Draft article 29. Carrier’s obligation to provide information and instructions

General discussion

121. The Working Group was reminded that it had last considered draft article 29 at its thirteenth session (see A/CN.9/552, paras. 124 to 129).

122. It was observed that this provision reflected the duty of cooperation between the parties with respect to the exchange of information necessary for the performance of the contract of carriage. Reference was also made in this respect to the principle of good faith in contractual relations. Differing views were expressed regarding whether draft article 29 was intended to define the carrier’s duty to assist the shipper with its draft article 30 obligation to provide information, instructions and documents to the carrier, or with its draft article 28 obligation to deliver the goods ready for carriage. There was support for the view that the purpose of draft article 29 was not to establish independent liability of the carrier for its failure to provide the shipper with necessary information, but rather to deny the carrier the ability to rely on its failure in defending a cargo claim.

123. There was support for the view that draft article 29 should be deleted. It was suggested that the obligations of the carrier contained therein were already covered, at least implicitly, in draft chapter 5 on the obligations of the carrier. The view was also expressed that draft article 29 was too broad and too subjective to be of any additional benefit to the existing implied obligation of the carrier. There was support for the suggestion that draft article 29 should be substituted by a general provision on the duty of the parties to cooperate in the exchange of information in furtherance of the performance of the contract of carriage. In addition to deleting draft article 29, it was suggested that draft article 18 setting out the carrier’s liability for loss or damage resulting from its breach of draft article 29 should also be deleted.

124. However, the contrary view was also held that draft article 29 should be retained. There was support for the view that this provision could be particularly important in multimodal transport if the carrier was not required to choose the modes of transport prior to performance of the contract of carriage, yet where those modes could affect the shipper’s fulfilment of its draft article 28 obligations to deliver the goods ready for carriage. In response to this, it was noted that the carrier might not actually know in advance which modes of transport it would use. In additional support of retaining draft article 29, it was suggested that it was useful to make explicit the obligations of the carrier and that the provision could also be seen to balance the parties’ obligations with respect to the provision of information. In this regard, a view was expressed that the words “on its request” should be deleted from draft article 29, since there was no similar qualification to the shipper’s obligation to provide information in draft article 30.

125. The suggestion was made that the Working Group's decision on draft article 29 should be deferred until after the discussion of the basis of the shipper's liability in draft article 31 to fully appreciate the interplay of the two provisions.

126. By way of specific drafting suggestions, the view was expressed that the bracketed phrase "and in a timely manner" and the last bracketed sentence of draft article 29 should be deleted, since the obligation to provide accurate and complete information and instructions in a timely manner was said to be implicit in the general obligation under draft article 29. Further, it was suggested that the retention of the last bracketed sentence of draft article 29 requiring accuracy and completeness would require the adoption of the same language in similar provisions requiring the provision of information, such as, for example, draft article 59. The contrary view was expressed that the phrase "in a timely manner" should be retained and the brackets around it deleted, since, it was suggested, the obligation of timeliness was separate and not implicit in the general obligation to provide information.

Conclusions reached by the Working Group regarding draft article 29:

127. After discussion, the Working Group decided that:

- Draft article 29 should be retained, but placed in square brackets pending the Working Group's discussion on draft article 31;
- In preparing a revised version of draft article 29, consideration should be given to deleting the existing text in favour of a more general provision focussing on the cooperation of the shipper and carrier in the provision of information; and
- Revisions made to the text of draft article 29 should take into account draft article 18.

Draft article 30. Shipper's obligation to provide information, instructions and documents

General discussion

128. The Working Group was reminded that it had last considered draft article 30 at its thirteenth session (see A/CN.9/552, paras. 130 to 137).

129. It was observed that this provision was thought to be especially important in light of the contemporary transport practice, in which a carrier seldom saw the goods it was transporting, even when they are non-containerized goods. In this context, the flow of reliable information between the shipper and the carrier was said to be of utmost importance for the successful completion of a contract of carriage, particularly with respect to dangerous goods. It was said that while there were some drafting problems in paragraph (b) that required attention, the Working Group should be encouraged in the course of its deliberations to bear in mind the importance of the shippers' obligations set out in this provision. As a preliminary observation, it was suggested that the phrase in the chapeau "[in a timely manner, such accurate and complete]" should be dealt with in the same fashion as similar text found in draft article 29.

Objective and subjective tests

130. It was indicated that the words "reasonably necessary for" in the chapeau of draft article 30 introduced an objective test on the necessity of the information to be provided by the shipper, while the words "may reasonably assume" in paragraphs (a) and (c) of draft article 30 represented a subjective test of the shipper's assumption regarding the carrier's

knowledge. It was suggested that the presence of both tests could be a source of some confusion. In addition, it was observed that if paragraphs (a) or (c) were ultimately subject to a fault-based liability scheme pursuant to draft article 31, there would be no need of the phrase “reasonably assume”, and it could be deleted.

Paragraph (b)

131. The view was expressed that the current text of draft paragraph 30 (b) was extremely broad and could lead to problems in its application, particularly since it could subject the shipper to strict liability pursuant to article 31. One example of the difficulty posed by this article was, for instance with regard to responsibility for the different customs requirements in the event that the mode of transport changed en route during multimodal transport.

132. In response, it was indicated that the broad language of draft paragraph 30 (b) reflected the difficulties in providing a complete and detailed list of all the documents necessary in connection with the carriage. It was suggested that the adoption of a fault-based liability regime for this obligation could address a number of concerns relating to this provision, and that a strict liability regime could be limited to the violation of mandatory regulations.

Delay

133. It was observed that the inclusion in draft article 31 of a bracketed reference to delay as a basis of liability of the shipper compounded the difficulties noted with respect to draft paragraph (b). For example, if the shipper of a single container on a large container ship failed to provide a necessary document for customs authorities under paragraph (b), and was therefore responsible for the delay not just of the carrier, but with respect to every other shipper on the vessel, that shipper would be exposed to unforeseeable and potentially enormous losses for that one oversight. Further compounding the problem was said to be the fact that the draft convention currently contained no limitation on the shipper’s liability. This problem was discussed in greater detail with respect to draft article 31 (see below, para. 147).

Paragraph (c)

134. It was suggested that draft paragraph 30 (c) should include a reference to draft subparagraph 38 (1)(a), and thereby include the accuracy of the description of the goods in the list of obligations for which the shipper was strictly liable pursuant to draft article 31. However, the Working Group was reminded that article 3 (5) of the Hague-Visby Rules referred only to accuracy of the description of the goods at the time of the shipment, but that draft paragraph (c) was much broader in its scope and would apply for the duration of the voyage. It was cautioned that, like draft paragraph (b), when the breadth of this provision was coupled with the potential strict liability provision in draft article 31, this provision could bring potentially severe consequences for the shipper. It was noted that, if variant B of draft paragraph 31 (2) were adopted, the liability of the shipper would be limited to the information on the goods actually provided by the shipper and that this would relieve the shipper from some of the harsher aspects of the strict liability regime under variant A.

Conclusions reached by the Working Group regarding draft article 30:

135. After discussion, the Working Group decided that:

- The phrase in the chapeau “[in a timely manner, such accurate and complete]” should be considered in the same fashion as similar text in draft article 29;
- Paragraph (b) should be placed in square brackets, pending the Working Group’s consideration of draft article 31;
- Drafting improvements made to this draft article should bear in mind A/CN.9/WG.III/WP.55, as well as international instruments such as the CMNI Convention and suggestions made by delegations;
- The discussion of the Working Group with respect to the basis of the shipper’s liability in draft article 31 should be taken into consideration in future drafts of draft article 30; and
- The reference to draft article 38 (1)(b) and (c) in draft paragraph 30 (c) should be extended to draft article 38 (1)(a).

Draft article 31. Basis of shipper’s liability*General discussion*

136. The Working Group was reminded that it had last considered draft article 31 on the basis of the shipper’s liability at its thirteenth session (see A/CN.9/552, paras. 138 to 148). The text of draft article 31 considered by the Working Group was that set out in annexes I and II of A/CN.9/WG.III/WP.56.

137. There was agreement with the general observation that draft article 31 was of particular concern with respect to the inclusion of more extensive shipper’s obligations in a chapter of the draft convention in comparison with existing maritime transport regimes. It was thought that the introduction in this provision of a fairly extensive strict liability regime on the shipper, without any right to limit its liability, was quite problematic, as was the introduction of a presumed fault concept in paragraph 1. There was support for the suggestion that the general approach of draft article 31 should be more in keeping with that of article 12 of the Hamburg Rules, with some possible adjustments.

Presumed fault and the burden of proof

138. Concerns were raised regarding the inclusion in draft paragraph 1 of the concept of presumed fault on the part of the shipper. It was observed that presumed fault amounted to a reversal of the burden of proof onto the shipper that had no parallel in existing maritime transport regimes. Generally, the carrier had the burden of proving that the loss or damage was caused by a breach of obligation or negligence of the shipper, such as a failure to provide necessary information. Once the carrier had proved the cause of the loss or damage, it was open to the shipper to prove that the loss or damage did not arise as a result of its fault. This general regime was thought to reflect the fact that the carrier was usually in a better position to establish what had occurred during the carriage, since it was in possession of the goods. There was general support for the view that the traditional approach to fault-based liability as set out in article 12 of the Hamburg Rules and article 4 (3) of the Hague-Visby Rules should be preserved as the general regime, with strict liability only in certain situations, as discussed below.

139. There was some support for the alternate view that the text in paragraph 1 was appropriate and that the approach taken in the Hamburg Rules was not necessarily fair to

the carrier, since most containers in modern transport were packed by shippers, thus making it difficult for the carrier to prove the cause of the loss. It was also pointed out that article 12 of the Hamburg Rules did not set out the burden of proof, and that draft article 31 merely made explicit the logical conclusion that a court would reach that the shipper in defending a claim for loss arising from draft articles 28 and 30 (a) would seek to prove its lack of fault.

Shipper's liability to whom

140. There was general agreement that the basis of liability of the shipper should apply only in the context of the contractual relationship between the carrier and shipper, possibly also extending to maritime performing parties who could be said to be sufficiently proximate to the contractual relationship. It was suggested that the title and text of the article should make clear that this provision was confined to the shipper's liability to the carrier, and that draft article 31 (3) referring to liability to a consignee or a controlling party should be deleted, and its contents treated elsewhere in the draft convention.

Loss, damage or injury

141. There was support for the suggestion that "injury" should be deleted from draft paragraph 31 (1), again in order to clarify that it did not intend to create a claim for third parties, as discussed earlier with respect to the inclusion of "injury" in draft article 28 (see above, paragraphs. 119). It was further suggested that "damage" should also be deleted and that reference should be made only to "loss" in draft paragraph 1. The proposal for the deletion of "injury" met with approval in the Working Group. There was support for the suggestion that despite this deletion, the draft convention should ensure that if a carrier paid out a claim as a result of injury caused by negligence of the shipper, the carrier should be able to claim compensation from the shipper as a loss suffered by the carrier. It was suggested that this could be achieved by referring to "loss sustained by the carrier" in draft paragraph 1. The Working Group was reminded that care should be taken regarding the use of the term "loss" on its own, as it could include not only physical loss, but consequential loss as well.

142. It was observed that article 12 of the Hamburg Rules included damage sustained by the ship in the shipper's liability. The question was raised whether damage occasioned to the ship should also be included in draft article 31, and the view was expressed that "loss" included damage to the ship. It was observed that the shipper's liability could become very broad in such cases.

Delay

143. There was support for the view that "delay" was particularly problematic as a basis for the shipper's liability, since it could expose the shipper to enormous and potentially uninsurable liability. For example, a shipper who failed to provide a necessary customs document could cause the ship to be delayed, and could be liable not only for the loss payable to the carrier, which could include enormous consequential damages, but also for the losses of all of the other shippers with containers on the ship. As a consequence, the suggestion was made that the shipper's liability for "delay" should be deleted from the draft text. It was also observed that if "delay" was retained in the text, a reasonable limitation should be placed on the liability of the shipper.

144. A contrary view regarding deletion of "delay" was also expressed. It was stated that the liability of the shipper and of the carrier for delay was an important aspect of the draft convention. It was observed that deleting "delay" called into question the rationale for

creating strict liability for submitting incorrect information, since inaccurate information was the most common cause for delay.

145. There was some support for the view that, while problematic, delay should not too easily be discarded as a basis of liability, and it was suggested that it could be considered as a separate basis of liability, whether caused by the shipper or the carrier. It was noted that loss due to delay could not only be enormous, as noted above, but that it could have multiple causes.

146. The Working Group was reminded that the basis of liability of the carrier in the draft convention also included “delay”, and it was suggested that if delay was removed as a basis for the shipper’s liability, a corresponding change should be made to the carrier’s liability. It was explained that this was not simply a matter of balancing the overall rights and obligations of the shipper and the carrier in the draft convention, but that it would not be fair to hold the carrier liable for a delay for which it might not be responsible, and for which it could not claim compensation from the shipper who was responsible. There was support for that view.

Limitation of liability

147. There was some support for the suggestion that a limit should be placed on the shipper’s liability, if “delay” was retained as a basis for the shipper’s liability in draft article 31, given the large and potentially uninsurable liability that could be covered. The suggestion was also made that such a limitation on the liability of the shipper for consequential losses should exist in any event, as, for example, the shipper could be held responsible for broad, but likely insurable, liability for damage to the ship. However, the difficulties associated with arriving at a reasonable means of determining such a limitation on liability were also outlined. There was general agreement that such a limitation should be at a high enough level so as to provide a strong enough incentive for the shipper to provide accurate information to the carrier, but that it should be foreseeable and low enough so that the potential liability would be insurable. It was suggested that the language of article 31 (2) variant B, i.e. “the shipper must indemnify the carrier against”, or reference to the value of the shipper’s goods, could be useful starting points for further discussion in this regard.

Strict liability

148. The Working Group next considered which of the shipper’s obligations should be subject to a strict liability regime such as that set out in draft paragraph 31 (2). There was general support for the view that the shipper should be held strictly liable for the accuracy of information provided by the shipper to the carrier under article 30 (c) unless the inaccuracy was caused by the carrier. It was also suggested that a separate provision could be created for such a strict liability obligation, along the lines of the special treatment given to dangerous goods in draft article 33. There was support for the creation of such a separate provision, as it was said that it would clarify the structure of the chapter and allow for the deletion of draft paragraphs 30 (c) and 31 (2). Further, there was some support for the view that strict liability should be limited to the accuracy of the information actually provided by the shipper for insertion in the transport documents. It was further observed that strict liability should not extend to misjudgement of the shipper of the necessity of the information required, and that the inclusion of draft paragraph 30 (b) in the strict liability regime would depend upon the texts following their reformulation.

149. There was support for the view that if separate provisions were created for liability of the shipper based on fault and liability based on strict liability, there would be less need

for a provision such as draft article 29, and the Working Group could consider deleting it. However, the view was also expressed that it might nonetheless be preferable to include an explicit obligation for the carrier to provide necessary information on the intended voyage to the shipper, so as to enable the shipper to fulfil its draft article 28 obligations.

150. It was also suggested that in addition to the provision of inaccurate information to the carrier and with respect to dangerous goods, there was a third category of obligations for which there should be strict liability on the part of the shipper. That third category was said to be security-related, and should apply to those goods that are prohibited due to their potential relationship with weapons of mass destruction or similar uses. It was said that in these situations, the carrier could be subject to major losses and penalties as a result of the shipper's breach, and that the shipper's liability in these circumstances should be strict. Some interest was expressed in this proposal, but the contrary view was also expressed that strict liability should not apply to carriage of extremely dangerous goods, military or similar goods.

Draft paragraph 31 (3)

151. A proposal was made to keep the text of draft paragraph 3 but to add the following to the end of the final sentence: "to the extent that each of them is responsible for any such loss or damage. Where the extent of individual fault cannot be attributed, each party shall be liable for one-half of the loss or damage". However, there was strong support for the view that paragraph 3 should be deleted in light of the agreement in the Working Group that draft article 31 should focus on the contractual relationship between the shipper and the carrier, and that a draft article on concurring causes should be included elsewhere in the draft convention to deal with the allocation of liability between the carrier and the shipper in cases where several causes had combined to produce the loss.

General drafting suggestions

152. In terms of preparing revised text to replace draft article 31, it was suggested that reference should be had to the texts appearing in paragraph 26 of A/CN.9/WG.III/WP.55 and draft paragraph 31 (1) and variant B of paragraph (2) of A/CN.9/WG.III/WP.56, in addition to the approach in article 12 of the Hamburg Rules and in general, to article 4 (3) of the Hague-Visby Rules. More specific suggestions were also made, such as deletion of the reference to "timeliness" and "completeness" in variant B of paragraph 2, in order to render the provision more in keeping with the approach set out in the Hague-Visby and Hamburg Rules. Another drafting suggestion to remedy some of the problems in the first paragraph was proposed as follows: "The shipper is liable for loss or damage resulting from the breach of its obligations under article 28 and article 30 (a) unless ..." followed by the rest of draft paragraph 1 continuing from the word "unless", but it was suggested that this text might still preserve the reversed burden of proof onto the shipper.

Conclusions reached by the Working Group regarding draft article 31

153. After discussion the Working Group decided that:

- The title and text of draft article 31 should be adjusted to reflect that it concerned the relationships in the contract of carriage;
- A fault-based regime should be adopted as the general regime for the basis of a shipper's liability for breach of its obligations under draft articles 28 and 30;

- Strict liability should be the basis of shipper's liability in respect of dangerous goods under draft article 33 (see below) and for providing inaccurate information under article 30 (c);
- The new formulation of draft article 31 should take into account the texts in A/CN.9/WG.III/WP.56 and in paragraph 26 of A/CN.9/WG.III/WP.55, as well as the regime in the Hamburg Rules, and the views of the Working Group as expressed above;
- The word "injury" should be deleted from the new formulation of draft article 31 (1);
- In preparing the new formulation of draft article 31, regard should be had to the views expressed regarding the deletion of delay as a basis of liability of both the shipper and the carrier, and for the possibility of creation a limitation on the shipper's liability; and
- The reformulation of draft article 31 should take into account the discussion of the Working Group regarding draft article 29, and make the necessary adjustments to achieve consistency, including possible deletion or revision of draft article 29.

Draft article 32. Material misstatement by shipper

General discussion

154. The Working Group was reminded that it had last considered draft article 32 at its thirteenth session (see A/CN.9/552, paras. 149 to 153).

155. It was indicated that draft article 32 relating to knowing and material misstatement by the shipper regarding the nature or value of the goods was inspired by article 4 (5)(h) of the Hague-Visby Rules. It was observed that the provision was seen to be problematic, since no causation was required between the shipper's misstatement and the loss, damage or delay. Further, it was thought that the obligation in this draft provision was already sufficiently covered by draft article 17 on the carrier's liability. A contrary view was expressed that draft paragraph 17 (3) related to cases of acts of omissions, but not material misstatements, and that draft article 32 was helpful in that regard.

Conclusions reached by the Working Group regarding draft article 32:

156. After discussion, the Working Group decided that:

- Draft article 32 should be deleted from the text of the draft convention.

Draft article 33. Special rules on dangerous goods

General discussion

157. The Working Group was reminded that it had last considered draft article 29 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

Paragraph 1

Definition of dangerous goods

158. There was support for the view that, while existing maritime transport instruments did not contain a definition of dangerous goods, the general definition expressed in draft paragraph 1 was an appropriate starting point for discussion. Another view was expressed that the definition should instead refer to other existing international instruments relating

to dangerous goods, such as the International Maritime Dangerous Goods Code (IMDG Code) or the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). It was observed that the problem with tying the definition of dangerous goods to other instruments such as those suggested was that those definitions were created for public interest purposes and they were extremely technical and could risk becoming quickly obsolete. It was suggested that a definition of dangerous goods should also clarify if illegal cargo, such as contraband, would fall under this category.

“or become” and “reasonably appear likely to become”

159. It was suggested that draft paragraph 33 (1) did not adequately address the case of goods that were safe at the moment of shipment and later developed dangerous properties, and it was suggested that the words “, or become” should be added before the words “or reasonably appear likely to become,” to provide for such instances. However, concern was expressed regarding how that addition might affect the shipper’s marking, labelling and information obligations as set out in draft paragraphs 2 and 3. Further, a suggestion to delete the phrase “reasonably appear likely to become” was not supported, as the phrase was seen to be helpful to the overall definition.

“illegal or unacceptable danger to the environment”

160. There was support for the proposal that the words “or an illegal or unacceptable danger” should be deleted from draft paragraph 33 (1) since they failed to add meaning to the term “danger to the environment”. It was also observed that the same changes should be made to similar text in variant A of draft article 15.

Conclusions reached by the Working Group regarding draft paragraph 33 (1):

161. After discussion, the Working Group decided that:

- The words “, or become” should be added in square brackets before the words “or reasonably appear likely to become,” for further consideration by the Working Group; and
- The words “or an illegal or unacceptable danger” should be deleted.

Paragraph 2

162. It was indicated that draft paragraph 33 (2) established strict liability with respect to the shipper’s obligation to mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities applicable during any stage of the intended carriage of the goods. The view was expressed that given the harsh burden of strict liability, this provision should be refined to cover only those cases in which the shipper failed to comply with mandatory regulations regarding marking or labelling. It was also proposed that packaging should be added to the shipper’s obligations referred to in this draft paragraph. Further, it was suggested that draft paragraph 33 (2) should not impose strict liability on the shipper when the carrier was aware of the dangerous nature of the goods. There was support for the proposal that appropriate language inspired by article 13 (3) of the Hamburg Rules should be inserted in draft paragraph 33 (2) to refer to the carrier’s lack of knowledge.

The intended carriage

163. It was further indicated that, like draft articles 28 and 29 (see above, para. 124), the provision could place an excessive burden on the shipper, who might not be aware of the actual route of the goods, and might have difficulty determining all of the relevant regulations, particularly the “requirements of authorities”, which might not be publicly available. It was suggested that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its paragraph 2 obligations.

Proposed modifications to the text

164. The view was expressed that article 13 (1) of the Hamburg Rules could provide an alternative text for the draft provision, but some doubts were raised whether the text was adequate in the modern context of the transport of dangerous goods.

165. There was support for the suggestion that the reference to the performing party should be deleted given the Working Group’s agreement that draft chapter 8 of the draft convention should focus on the contractual relationship between the shipper and the carrier. Support was also expressed for the suggestion that the references to “delay” and “loss” in draft paragraph 2 should be adjusted to be consistent with the modification of the same phrase in draft article 31. It was suggested that the words “directly or indirectly” could interfere with issues of causation, and should be deleted. There was support for this proposal.

Conclusions reached by the Working Group regarding draft paragraph 33 (2):

166. After discussion, the Working Group decided that:

- The reference to the performing parties should be eliminated from the provision;
- The words “directly or indirectly” should be deleted;
- The provision should be revised so as to treat “delay” and “loss” consistently in draft articles 33 (2) and 31; and
- Consideration should be given to adding a reference to the carrier’s lack of knowledge of the dangerous nature of the goods.

*Paragraph 3**Strict liability to inform the carrier*

167. It was indicated that draft paragraph 33 (3) established strict liability for the shipper’s obligation to inform the carrier of the dangerous nature or character of the goods in a timely manner before their delivery to the carrier. With respect to draft paragraph 2, it was suggested that given the harsh nature of the strict liability rules, this obligation should be limited to the shipper’s failure to comply with mandatory regulations.

“such shipment”

168. It was indicated that the shipper’s obligation set out in draft paragraph 33 (3) was similar to the one set out in article 13 (2)(a) of the Hamburg Rules. It was suggested that the phrase “such shipment” should be replaced with the phrase “such failure to inform”, since it was thought that the possible breadth of the strict liability was too wide if it was tied to all losses arising from the shipment, and not limited to those attributable to the failure to inform. However, it was clarified that the Hamburg Rules contained similar text,

and that the potential of being held liable for all losses in connection with the shipment was thought to be an adequate reflection of the serious nature of this obligation. In response, the view was expressed that the regime of strict liability for the shipper's failure to provide information already provided an adequate incentive for the shipper to comply, and that the draft convention should not contain penalty rules. It was suggested that a possible compromise approach might be to require there to be a causal link between the dangerous goods and the loss.

Proposed modifications to the text

169. As a general observation it was suggested that the references to the performing party and to the phrase "directly or indirectly" should be deleted from this provision for the same reasons indicated above for draft paragraph 33 (2). In addition, it was suggested that "delay" and "loss" should be modified in the same fashion as those terms in paragraph 2 and in draft article 31.

Conclusions reached by the Working Group regarding draft paragraph 33 (3):

170. After discussion, the Working Group decided that:

- The words "directly or indirectly" should be deleted as in paragraph 2;
- The provision should be revised so as to treat 'delay' and 'loss' consistently in draft articles 33 (2), 33 (3) and 31;
- The words "such shipment" should be placed in square brackets for further consideration by the Working Group;
- The words "such failure to inform" should be added in square brackets after the words "such shipment" for further consideration by the Working Group.

Draft article 34. Assumption of shipper's rights and obligations

General discussion

171. The Working Group was reminded that it had last considered draft article 34 at its thirteenth session (see A/CN.9/552, paras. 154 to 158).

172. It was indicated that draft article 34 was intended to deal with the situation of the FOB seller who was named as the shipper in the transport document, and the assumption by that documentary shipper of the contractual shipper's rights and obligations by virtue of the acceptance or receipt of the transport document. There was support for the view that the documentary shipper should be required to accept that identity before it could be held accountable, and it was suggested that the term "accepts" should be retained and the brackets and other possible terms deleted, as "accepts" best conveyed the intended requirement. It was also suggested that the words "that its name appears on the transport document or the electronic transport record as the shipper" should be inserted after the word "accepts", in order to narrow the interpretation of the draft provision. There was also support for this suggestion, although some concern was expressed that a requirement for acceptance by the documentary shipper could lead to abuses in situations where a party would attempt to avoid its liability by refusing to accept the document.

173. It was also suggested that the application of draft article 34 should be limited to cases where the carrier did not know the identity of the contractual shipper. However, some doubt was expressed regarding how often that would arise in practice, and it was

observed that draft paragraph 37 (b) required the instruction of the contractual shipper to include a person other than the contractual shipper in the transport document.

174. There was support for the suggestion that draft article 34 should clearly indicate that the provision did not relieve the contractual shipper from its obligations, as expressed in draft paragraph 34 (2) contained in paragraph 39 of A/CN.9/WG.III/WP.55. Support was also expressed for a proposal to insert the bracketed text in A/CN.9/WG.III/WP.56 “subject to the responsibilities and liabilities” and to delete the brackets. There was agreement that the text as it appeared in A/CN.9/WG.III/WP.55 reflected these amendments and should be included in the draft convention.

Conclusions reached by the Working Group regarding draft article 34:

175. After discussion, the Working Group decided that:

- The text of draft article 34 contained in paragraph 39 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The phrase “receives the transport document or the electronic record” in draft paragraph 34 (1) of the text in A/CN.9/WG.III/WP.55 should be substituted with the words “accepts that its name appears on the transport document or the electronic transport record as the shipper”.

Draft article 35. Vicarious liability of the shipper

General discussion

176. The Working Group was reminded that it had last considered draft article 35 at its thirteenth session (see A/CN.9/552, paras. 159 to 161).

177. It was recalled that draft article 35 was intended to duplicate with respect to the shipper the provisions in draft article 19 relating to the liability of the carrier for its agents, employees, and servants. However, the view was expressed that this provision could cause problems of interpretation in various provisions of the draft convention where, for example in draft subparagraph 17 (3)(i), reference was made to “the shipper or any person referred to in article 35, the controlling party or the consignee”. It was observed that this construction could be interpreted to mean that the employees and agents of the shipper were included, but not the employees or agents of the controlling party or the consignee. Unlike draft article 35, draft article 19 with respect to the carrier’s employees and agents was a core provision of the draft convention and did not pose the same interpretation problems as the carrier was not often referred to in the same phrase as other parties so as to cause confusion. Given this difficulty, it was suggested that draft article 35 should be deleted.

178. However, general support was expressed for the inclusion of a provision such as draft article 35, notwithstanding the possible difficulties in interpretation given its current use in the draft instrument. It was further observed that if consideration were to be given to including in the draft instrument a provision on the limitation of liability of the shipper, a provision such as draft article 35 would be important to include agents, employees and servants who would receive the benefit of that limitation on liability. There was support for the proposal that the alternative draft contained in paragraph 41 of A/CN.9/WG.III/WP.55 be included in the draft convention as more clearly expressing the same principles as the text in A/CN.9/WG.III/WP.56.

179. It was suggested that the phrase “on the carrier’s side” in draft article 35 (2) in the text in A/CN.9/WG.III/WP.55 was unnecessary since “performing party” was defined in

the draft convention as persons acting on behalf of the carrier. It was further observed that draft article 35 might need further consideration in light of draft paragraph 14 (2), when under “free in and out (stowed)” (FIO(S)) clauses, the carrier contracted out certain of its obligations to the shipper, and should not be liable for the actions of the shipper’s employees or agents in carrying out those obligations.

Conclusions reached by the Working Group regarding draft article 35:

180. After discussion, the Working Group decided that:

- The text of draft article 35 contained in paragraph 41 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The Secretariat should be requested to verify and harmonize the references to draft article 35 in other articles of the draft convention;
- The title of the article should be revised to ensure linguistic uniformity in the various languages.

Draft article 36. Cessation of shipper’s liability

General discussion

181. The Working Group was reminded that it had last considered draft article 36 at its thirteenth session (see A/CN.9/552, paras. 162 to 164), when it was decided to delete draft chapter 9 of the draft convention on freight, but to retain draft article 36 for further consideration.

182. There was support expressed for draft article 36, which would render invalid cesser clauses, in which the liability of the shipper would cease upon a certain event. It was also indicated that draft article 36 was related to draft article 94 (2) of the draft convention, which voided any provision that excluded or limited the obligations of the shipper, and that any decision on draft article 94 (2) would affect the deliberations of the Working Group on draft article 36. However, the view was also expressed that draft article 36 was related to but distinct from draft paragraph 94 (2), at least insofar as draft article 36 dealt with the payment of freight.

Conclusions reached by the Working Group regarding draft article 36:

183. After discussion, the Working Group decided that:

- The brackets around draft article 36 should be removed and its text should be retained; and
- Draft article 36 should be reconsidered in light of the decision taken with respect to draft article 94 (2).

Draft article 18. Carrier’s liability for failure to provide information and instructions

General discussion

184. The Working Group next discussed draft article 18, which was closely related to the obligations of the shipper, and, in particular, to draft article 29. The Working Group was reminded that it had last considered draft article 18 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

185. Wide support was expressed for the deletion of draft article 18, regardless of the disposition of draft article 29. It was indicated that draft article 18 could create confusion regarding whether or not it was intended to create a separate cause of action in addition to draft article 17, as well as with respect to its interaction with draft article 17 (4) on concurring causes of liability. It was further indicated that since a fault-based liability regime was applicable to draft article 29, and that a breach of that obligation that caused loss or damage or delay would be covered by draft article 17 of the draft convention, draft article 18 was considered superfluous.

186. A contrary view was expressed that draft article 18 should be retained to keep the contractual balance between the parties of the contract of carriage. A few delegations expressed their desire to defer the consideration of draft article 18 to a later session of the Working Group pending consultations.

Conclusions reached by the Working Group regarding draft article 18:

187. After discussion, the Working Group decided that:

- Draft article 18 should be placed in square brackets for final disposition at the next session, pending the instructions of a few delegations but debate on the issue should not be reopened.

Delivery of goods—Chapter 10, including period of responsibility of the carrier (draft article 11) and draft article 14 (2)

General discussion

188. The Working Group was reminded that it had last considered draft chapter 10 at its eleventh session (see A/CN.9/526, paras. 62 to 99), and that it had last considered the period of responsibility of the carrier and draft article 14 (2) at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43).

189. The Working Group heard that A/CN.9/WG.III/WP.57 had been prepared with a view to facilitating the discussions of the Working Group regarding the delivery of goods, the period of responsibility of the carrier, and issues in draft article 14 (2) concerning the period of responsibility. Informal consultations took place regarding those issues on the basis of that document.

Draft article 11. Period of responsibility of the carrier

General discussion

190. The Working Group was reminded that it had last considered the period of responsibility of the carrier and draft article 14 (2) regarding FIO(S) clauses at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43). The Working Group considered the text of these provisions as found in annexes I and II of A/CN.9/WG.III/WP.56.

191. The Working Group heard that, in the responses to the informal questionnaire in A/CN.9/WG.III/WP.57, most of the respondents approved of the general approach taken by draft paragraphs 11 (1), (2) and (4).

Draft paragraph 11 (1)

192. General satisfaction was expressed with the text and the approach taken in draft paragraph 11 (1). As a general comment, it was observed that care should be taken that

consistent terminology was used throughout the draft convention, particularly in respect of terms such as “place of delivery”, “time and location of delivery”, “place of receipt”, and the like. A suggestion was made to delete the closing phrase “to the consignee” as unnecessary and potentially confusing in light of the fact that the carrier sometimes effected delivery by delivering the goods to an authority, such as a port authority, rather than to the consignee. There was some support for this suggestion. However, contrary views were also expressed that deletion of the phrase could be problematic, since draft article 13 stated that delivery to the consignee was a core obligation of the carrier, and it was suggested that special cases such as delivery to authorities or to persons other than the consignee should be included in draft paragraphs 11 (3) and (5). Support was expressed for the suggestion that the text of draft paragraph 1 should remain unchanged and that concerns raised regarding parties to whom the carrier could deliver other than the consignee could be considered with respect to draft paragraph 11 (5).

193. It was observed that draft article 46, concerning the carrier’s duty of care in looking after goods left in its custody could be seen as related to draft paragraph 1, and the question was raised whether draft paragraph 1 should be made subject to both draft articles 12 and 46. In response, the view was expressed that the draft convention was structured in such a way that draft article 11 concerned the period of responsibility of the carrier pursuant to the contract of carriage. By way of contrast, it was noted that draft article 46 dealt with the period before the carrier was able to make delivery, but that it was focussed on a time at which the carrier no longer had any responsibilities pursuant to the contract of carriage. It was suggested that this distinction should be made clearer, and that it could be further discussed when the Working Group considered draft article 46.

Conclusions reached by the Working Group regarding draft paragraph 11 (1):

194. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (1) would be maintained, but the decision whether to delete the phrase “to the consignee” would be taken only after the Working Group had considered draft paragraph 11 (5).

Draft paragraph 11 (2)

195. The Working Group expressed its general satisfaction with draft paragraph 11 (2). It was suggested that some minor drafting changes could be made to improve the clarity of the paragraph, such as the inclusion of the phrase “the carrier’s” after the phrase “time and location of” in the second sentence.

Conclusions reached by the Working Group regarding draft paragraph 11 (2):

196. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (2) should be maintained, but that detailed drafting changes to improve the clarity of the paragraph should be considered by the Secretariat.

Draft paragraph 11 (4)

197. It was observed that while draft paragraphs 11 (2) and 11 (4) both contained default rules for identifying the time and location of receipt and delivery, respectively, the second sentences of those paragraphs differed. While the second sentence of draft paragraph 11 (2) referred to a precise moment when receipt of the goods occurred, it was observed that there was no equally precise moment established in the second sentence of

draft paragraph 11 (4) for the delivery of the goods. Some support was expressed for the view that drafting should be included in paragraph 4 to make the moment of the delivery as precise as the moment of receipt in paragraph 2.

198. It was also noted that draft paragraphs 11 (2) and 11 (4) differed in that draft paragraph 4 did not refer to an identifiable location. A suggestion was made that draft paragraph 11 (4) should refer to the location of discharge as a reasonable one. There was some support for this suggestion. However, a doubt was raised regarding how it would be decided when and where the goods were delivered if the goods were discharged in an unreasonable place, or whether that decision would be left to a court. It was also pointed out that there would be no default rule regarding the time and location of delivery when the goods were delivered in an unreasonable place, if the suggestions were adopted.

199. By way of explanation of the differences between draft paragraphs 11 (2) and 11 (4), it was noted that in port-to-port carriage, goods were seldom delivered all at once, and that there was usually a time period between the actual delivery of the goods to the carrier and their loading. The view was expressed that in such circumstances, it was reasonable to expect that this period would be within the carrier's period of responsibility. It was further explained that it would be rare in the case of a port-to-port carriage that resort would be had to the default rule in the final sentence of draft paragraph 4, since most ports had customs or practices, but that in such exceptional cases, it was decided to use the rule that the period of responsibility should end when and where the carriage ended.

200. There was support for the view that the Secretariat should be requested to make adjustments to the text of draft paragraph 11 (4) in order to reflect the concerns expressed in the Working Group and to ensure its consistency with draft paragraphs 1 and 2. Caution was voiced, however, that in that exercise, regard should be had to the possible interpretation of the final phrase of the paragraph to mean that delivery took place when and where the container was unpacked.

Conclusions reached by the Working Group regarding draft paragraph 11 (4):

201. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (4) should be maintained, but that drafting changes to ensure the consistency of the paragraph with the rest of the draft article should be considered by the Secretariat, in addition to consideration of whether a requirement of 'reasonableness' should be added to the location of delivery.

Draft paragraphs 11 (3) and (5)

202. General satisfaction was expressed with the text and the approach taken in draft paragraphs 11 (3) and (5). One suggestion was made to clarify the final phrase of draft paragraph 5 with text such as "the time and location of such handing over is the time and location of the delivery of the goods", but it was thought that general drafting would accomplish that goal. Further, it was thought that the suggested deletion of the phrase "to the consignee" in reference to draft paragraph 11 (1) (see above, para. 192) was no longer necessary in light of revisions to be considered with respect to draft paragraphs 11 (2) and (4).

Conclusions reached by the Working Group regarding draft paragraphs 11 (3) and (5):

203. After discussion, the Working Group decided that:

- The text of draft paragraphs 11 (3) and (5) would be maintained, with any necessary drafting adjustments for greater precision and consistency.

Draft paragraph 11 (6) and draft paragraph 14 (2): FIO(S) clauses

204. It was observed that draft paragraph 11 (6) was intended to operate in concert with draft paragraph 14 (2) in an effort to provide a solution for the treatment of FIO(S) clauses, which, in some States, determined the period of the responsibility of the carrier. There was support for the view that draft paragraph 6 would not be acceptable if draft paragraph 14 (2) was deleted, but that read together with draft paragraph 14 (2), the two provisions established an acceptable approach to FIO(S) clauses. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage.

205. In addition, it was observed that the current text of draft paragraph 14 (2) restricted the obligations that could be contracted out by the carrier to the shipper or other parties to those listed in draft paragraph 14 (2). Further, the view was expressed that draft paragraph 11 (6) was helpful since it made clear that loading and discharging took place during the period of responsibility of the carrier.

206. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft article 10. A concern was expressed that allowing for FIO(S) clauses in the draft convention would lead to their spread from the non-liner to the liner trade, and increase the potential for their abuse, but it was suggested that commercial realities made this unlikely. In this context, it was suggested that, as a matter of drafting, the reliance on FIO(S) clauses could be restricted to the non-liner trade. Other concerns were raised that the operation of draft paragraphs 11 (6) and 14 (2) could limit the parties' current freedom of contract regarding FIO(S) clauses in the non-liner trade, particularly with respect to the allocation of risk. In light of this possibility, it was suggested that the FIO(S) clause should define the period of responsibility of the carrier.

207. Some drafting modifications were proposed. It was suggested that the phrase "and shall be the responsibility of" be inserted after the phrase "performed by" in first sentence of draft paragraph 14 (2). It was also suggested that the word "initial" should be added before the word "loading", and that the word "final" should be added before the word "discharging" in draft paragraph 14 (2) in order to make it consistent with draft paragraph 11 (6) and to exclude intermediate ports. However, it was emphasized that the focus in the current discussion should be on the overall approach established by the combined operation of draft paragraphs 11 (6) and 14 (2) to establish a compromise solution for FIO(S) clauses. In that spirit, there was support for the suggestion that the square brackets around draft paragraph 14 (2) be removed, and the text retained for further discussion. It was further observed that, in light of the Working Group's approval of the approach outlined in draft paragraphs 11 (6) and 14 (2), the square brackets around the phrase "[actually performed]" in draft subparagraph 17 (3)(i) should be removed and the text retained. It was thought that this revision to draft subparagraph 17 (3)(i) could render

unnecessary the suggestion noted above to include the phrase “and shall be the responsibility of” in draft paragraph 14 (2).

Conclusions reached by the Working Group regarding draft paragraph 11 (6):

208. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (6) should be maintained;
- The square brackets around draft paragraphs 14 (2) and 17 (3)(i) should be deleted and the text maintained; and
- Drafting changes to ensure the consistency of the paragraph with the rest of the draft article, as well as general drafting improvements should be considered by the Secretariat.

Draft article 46. Obligation to accept delivery

General discussion

209. The Working Group was reminded that it had last considered draft article 46 on the obligation to accept delivery at its eleventh session (see A/CN.9/526, paras. 65 to 72). The text of draft article 46 considered by the Working Group was as set out in annexes I and II of A/CN.9/WG.III/WP.56.

210. As a general comment, a question was raised regarding the consequences for breach of the consignee’s obligation to accept delivery under draft article 46. The view was expressed that such a breach should not automatically trigger an action for damages. In response, it was suggested that breach of the draft article 46 obligation to accept delivery fell into the category of general rights and liabilities of the shipper and the carrier that were not specifically addressed by the draft convention, and that the consequences of a breach would thus be left to national law. As a general matter, it was also observed that this draft article should be carefully coordinated with the provisions on right of control, since it was thought that the timing of the consignee’s obligation to accept delivery should accord with the transfer of the right of control. However, another view was expressed that the duty of the consignee to accept delivery should not depend on a transfer of rights, since it was a practical matter that should be regulated by the draft convention. Further, it was stated that while the content of draft article 46 was useful and should be retained, care should be taken in including provisions regulating the post-delivery period as this was outside the scope of the convention and the contract of carriage.

First sentence: the duty of the consignee

211. There was general support for the view that the duty of the consignee to accept delivery should be conditional since it was thought that there must be an action or intention expressed on the part of the consignee to trigger its obligation to accept delivery. Some expressed the view that this was best accomplished by deleting the brackets around the text in the first sentence of draft article 46 and retaining the text. However, concern was raised that the requirement that the consignee “exercise its rights under the contract of carriage” was too broad and unclear, and it was suggested that the condition should reflect a consignee’s implied or actual acceptance to be the consignee. In response, it was said that the bracketed text was the appropriate condition to attach to the consignee’s obligation to accept delivery because it was acknowledged that the obligation should extend to those who have both explicitly and implicitly accepted to be the consignee, but it was thought that the notion of “acceptance” was too narrow a condition to cover what was intended. It

was suggested that, for example, consistent with international sales law, if the consignee sampled the goods it would have exercised rights under the contract of carriage, and would have the obligation to accept delivery from the carrier. However, doubts were still expressed whether the text in square brackets was the best way to indicate the implied consent necessary to trigger the obligation of the consignee, and the view was also expressed that, while somewhat instructive, the qualifications in draft article 62 (3) were better suited to define what was not implied consent rather than what was implied consent.

212. Other views were expressed that obligation of the consignee to accept delivery should be unconditional and that the bracketed text in the first sentence of draft article 46 should be deleted. It was thought that unless the text in brackets was deleted, the consignee could elect not to exercise any rights under the contract of carriage and thus could avoid the obligation to take delivery of the goods. It was suggested that this result would not be fair to a carrier that had completed the terms of the contract of carriage, and further, that there was a need to avoid an increase in the problem of unclaimed cargo.

213. In addition, it was noted that the reference in draft article 46 was to the consignee's obligation to accept delivery of the goods at the time and location referred to in draft paragraph 11 (4). However, it was observed that the current text did not address the situation whether the consignee also had an obligation to accept the goods when they arrived late.

214. A further suggestion made was that the consignee should be notified of the arrival of the goods at destination. The view was expressed that introducing notification of the consignee as a legal obligation was not advisable, since sending a notice of readiness was already a standard practice in the industry for the benefit of both the carrier and the consignee, and there did not appear to be any legal problem with respect to such notices. It was thought that a legal requirement in this regard could give rise to unnecessary bureaucracy and could present evidentiary difficulties. Further, it was noted that in current practice, tracking the location of goods electronically was broadly available.

Second sentence: standard of care of the carrier

215. It was observed that the second sentence of draft article 46 was intended to set out the standard of care and the liability of the carrier with respect to the goods left in its custody in case of a breach of the consignee's obligation to accept delivery. There was general support for the view that the second sentence of draft article 46 should be addressed in conjunction with draft article 51 regarding the carrier's rights when the goods were undeliverable and draft article 53 with respect to the carrier's liability for undeliverable goods, and the sentence should be possibly moved from draft article 46 to be combined with draft article 53.

216. There was general support for the view that the content of the second sentence on the standard of care should be retained. However, the view was expressed that the standard of care required of the carrier and the liability arising from breach of that standard were too low as set out in the second sentence of draft article 46, while other views were that the standard of care was acceptable. The view was also expressed that the carrier's standard of care in the second sentence arose outside of the scope of the contract of carriage and that in some jurisdictions this gave rise to the concept of "agency by necessity" which placed a standard of care of "reasonableness" on an agent, but that the standard of care expressed in the second sentence was higher than that duty. A further suggestion regarding the standard of care was that an intermediate standard that the carrier should be required to treat the goods as though they were its own, such as that existing in some national legal systems, should be adopted.

217. Other views were that the standard of care of the carrier contained in the second sentence was too low considering that the reasons for non-acceptance of delivery by the consignee could be varied and outside of its control. The suggestion was also made that if an appropriate standard of care could not be agreed upon, and if the sentence were deleted, that that might not be sufficient to leave the matter to national law, and it could be necessary to include an express provision stating that the standard of care was governed by applicable law.

218. In support of deleting draft article 46 in its entirety, the view was expressed that since the draft convention already contained adequate rules regarding the right of control and the rights of the carrier in such circumstances, it would be better to delete draft article 46 than to leave any uncertainty regarding whether a breach of the consignee's obligation to accept delivery would trigger damages. In response, it was said that the duty of the consignee to accept delivery of the goods was an important one that needed to be explicit, and there was support for the view that draft article 46 should thus be retained.

Conclusions reached by the Working Group regarding draft article 46:

219. After discussion, the Working Group decided that:

- The text of draft article 46 should be maintained, with any necessary drafting adjustments, particularly following the discussion of draft articles 51 and 53.

Draft article 47. Obligation to acknowledge receipt

General discussion

220. The Working Group was in agreement that article 47 as set out in annexes I and II of A/CN.9/WG.III/WP.56 should be adopted, subject to drafting improvements.

Additional considerations under draft article 47

221. The Working Group heard the view that the consequences of a failure to acknowledge receipt of the goods pursuant to draft article 47 should be made express in the draft instrument, since such a result could be seen as a failure of the carrier's draft article 13 obligation to deliver the goods pursuant to the contract of carriage. Another aspect of this issue expressed for the future consideration of the Working Group was said to be that the draft instrument should include a provision on the right of the carrier to retain the goods in cases when the consignee failed to fulfil its obligation to provide proper identification or for non-payment of freight, since the current system of resort to national law or the use of a retention clause in the contract of carriage was thought to be unsatisfactory. Support was expressed for that proposal.

Conclusions reached by the Working Group regarding draft article 47:

222. After discussion, the Working Group decided that:

- Draft article 47 should be adopted, subject to drafting improvements; and
- Consideration should be given to drafting text as proposed in paragraph 221 above.

Draft article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued*General discussion*

223. The Working Group was reminded that it had last considered draft article 48 at its eleventh session (see A/CN.9/526, paras. 74 to 77). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

224. The Working Group was reminded that draft article 48 was intended to govern delivery when no negotiable transport document or electronic record had been issued.

Draft paragraph 48 (a)

225. It was indicated that draft paragraph 48 (a) aimed at having the controlling party provide the carrier with the consignee's name and address if they were not provided in the contract particulars so as to enable the carrier to make delivery. There was agreement with the suggestion that the text should be adjusted to accommodate the operation of some domestic regulations requiring the controlling party to provide the information earlier than the time foreseen in the draft convention. It was further indicated that the word "thereof" should be substituted with the words "name and address of consignee" to improve the clarity of the text. The view was also expressed that draft paragraph 48 (a) should be deleted as the substance of the draft provision was thought to have been dealt with in draft article 59.

Draft paragraph 48 (b)

226. It was noted that draft paragraph 48 (b) had three variants. A large number of delegations expressed support for the retention in the draft convention of variant C of the draft provision. It was indicated that variant C did not qualify the identification of the consignee as a prerequisite for the delivery of goods, thus avoiding the undesirable consequence that delivery of the goods by the carrier to the right consignee without proper identification would be held invalid. It was added that variant C would accurately reflect the notion that the identification of the consignee was a right of the carrier and not an obligation. It was further indicated that variant C would also achieve the desirable result to leave matters related to forgery of documents to national law. However, some support was also expressed in favour of variant A of draft paragraph 48 (b), as it was indicated that that variant better expressed the duty of the carrier to identify the consignee. The view was also expressed that draft paragraph 48 (b) should be deleted and that the substance of the draft provision should be dealt with in draft article 47 by adding to that article reference to identification of the consignee.

227. It was suggested that the reference to the time and location of the delivery mentioned in draft article 11 (4) in variant C of draft paragraph 48 (b) should be substituted with a reference to the time and location of the delivery agreed in the contract of carriage, since it was thought that draft article 11 (4) dealt mainly with the definition of the period of responsibility of the carrier. However, it was also observed that such a change could create problems in practice, since contracts of carriage seldom stated the time of delivery, and it was suggested that the matter required further consideration, or, alternatively, that all references to the time of delivery in the draft instrument should be reconsidered.

228. It was indicated that the matter of straight bills of lading, which could also arise in conjunction with draft paragraph 48 (b), would be the topic of a future proposal. A preliminary view was expressed that straight bills of lading would best be dealt with at a general level in the draft chapter on documents of transport of the draft convention.

Draft paragraph 48 (c)

229. It was observed that draft paragraph 48 (a) did not provide for the consequences of the failure of the controlling party to provide the name and address of the consignee, but it was added that the specification of such consequences would be better placed in draft paragraph 48 (c) by inserting the following text at the beginning of the paragraph, “If the name and address of the consignee are not known to the carrier or”. It was further suggested that draft paragraph 48 (c) should contain a reference to the notice from the carrier to the consignee, through the insertion of the phrase “after having received notice” after the phrase in the text “if the consignee”.

Conclusions reached by the Working Group regarding draft article 48:

230. After discussion, the Working Group decided that:

- Suggestions made for drafting improvements to paragraphs (a) and (b) should be considered;
- Variant C of draft paragraph 48 (b) should be retained in the draft convention; and
- The words “If the consignee” at the beginning of draft paragraph 48 (c) of the draft convention should be substituted by the words “If the name or the address of the consignee are not known to the carrier or if the consignee, after having received notice,”.

Draft article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued*General discussion*

231. The Working Group was reminded that it had last considered draft article 49 at its eleventh session (see A/CN.9/526, paras. 78 to 90). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

232. It was explained that draft article 49 aimed at reforming the system of negotiable transport documents in maritime carriage, and, especially, at eliminating the problems resulting from goods that arrived at the place of destination prior to the arrival of the bill of lading. In practice, certain techniques had been developed to deal with that problem, such as delivering the goods against the issuance of a letter of indemnity, but it was thought that these solutions remained unsatisfactory. It was suggested that the draft provision would restore the original function of the bill of lading and bring relief for the problems associated with “stale” bills of lading.

233. It was further indicated that the draft provision would have a significant impact on current banking practices, particularly by reducing the value of bills of lading in the hands of intermediary banks, and by seriously affecting the current system of documentary credit. In light of this impact on the banking industry, the view was expressed that perhaps certain modifications should be made to draft article 49 to limit its scope, such as limiting its application only to bills of lading that contained an express statement to that effect. While caution was still expressed with respect to the actual operation of draft article 49, it was observed that the changes it would bring were thought to be welcome in some sectors of the banking industry, which were also in search of clear and predictable rules in this regard, and that positive comments with respect to the proposed new regime had been received from other banking interests. There was general support in favour of the consideration of the draft article 49 regime as a basis for discussion.

Draft paragraph 49 (a)

234. It was indicated that draft paragraph 49 (a) provided that the holder of a negotiable transport document or a negotiable electronic transport record was entitled to claim delivery of the goods upon surrender of that document or record. It was observed that draft paragraph 49 (a) could have an impact on the right of stoppage in transit and that the interaction between the two needed further reflection. In response, it was indicated that the right of stoppage was a remedy available under the contract of sale, but that in practice its exercise required control of the bill of lading, and that this prevented any conflict between draft paragraph 49 (a) and the right of stoppage. In response, it was suggested that the draft convention should clarify that its provisions did not affect domestic property and bankruptcy laws.

235. A drafting suggestion was made to change the phrase “is entitled” in draft paragraph 49 (a) to “is required” in order to conform with the consignee’s obligation to accept delivery pursuant to draft article 46.

Draft paragraph 49 (b)

236. It was indicated that draft paragraph 49 (b) dealt with cases in which the cargo had arrived at destination but the holder of the negotiable transport document or negotiable electronic transport record did not claim delivery of it. It was explained that in such a case, the carrier had an obligation to advise the controlling party of the failure of the holder to claim delivery, but when the controlling party could not be identified, the carrier was entitled to ask instructions of the shipper in respect of the delivery of the goods.

237. It was suggested that the draft provision should better specify the level of diligence required of the carrier in seeking identification of the controlling party, and that the draft provision should be amended to include situations in which a person who was not the holder claimed delivery of the goods. Alternatively, it was suggested that draft paragraphs 49 (b) and (c) could be deleted, and the carrier could be referred to the remedies for undeliverable goods that it had under draft article 51. Under this proposal, it was suggested that the entitlement of the holder to the goods would remain unchanged and that the holder would be entitled to the proceeds of the sale of the goods pursuant to draft article 51. However, it was observed that the remedies of draft article 51 have been available in current practice for some time, and yet the problems outlined with respect to bills of lading had not been solved.

238. In response to an inquiry, it was observed that the requirement for the carrier to advise the controlling party of the non-appearance of the holder was considered to be an obligation of the carrier. Further, the view was expressed that, in light of trade practices, this obligation of the carrier to advise the controlling party was not thought to be onerous. In addition, it was suggested that it should be made clearer that draft paragraph 49 (b) concerned the situation when the cargo had arrived but there was no interest in claiming it, while draft paragraph 49 (d) concerned the situation when delivery was possible but there was no bill of lading, and while draft article 51 concerned a third situation when no one would claim delivery and the carrier could dispose of the cargo.

Conclusions reached by the Working Group regarding draft paragraphs 49 (a) and (b):

239. After discussion, the Working Group decided that:

- The text of draft paragraph 49 (a) should be maintained, pending the consideration of the Working Group of the remainder of the draft article;

- The text of draft paragraph 49 (b) should be maintained for further consideration of the Working Group in light of the observations expressed above; and
- The discussion of draft paragraphs 49 (c), (d) and (e) would be taken up during the Working Group's next consideration of draft chapter 10.

III. Other business

Scheduling of seventeenth and eighteenth sessions

240. The Working Group noted that its seventeenth session was scheduled to be held in New York from 3 to 13 April 2006. The Working Group took note with appreciation of the decision made by the Commission at its thirty-eighth session that two-week sessions would be allocated to the Working Group for continuation of its work (see A/60/17, para. 240).

241. It was noted that, subject to the approval of the Commission at its thirty-ninth session, the eighteenth session of the Working Group was scheduled to be held in Vienna from 6 to 17 November 2006 (see A/60/17, para. 241).

Planning of future work

242. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda, for treatment in the order indicated, for the completion of its second reading and the commencement of its third reading of the draft instrument:

Seventeenth session (New York, 3 to 13 April 2006):

- Right of control;
- Transfer of rights;
- Delivery of goods (continued);
- Scope of application and Freedom of contract;
- Shipper's obligations; and
- Transport documents.

Eighteenth session (Vienna, 6 to 17 November 2006, subject to approval):

- Remaining issues from the seventeenth session, if any;
- Rights of suit and Time for suit;
- Limitation of liability, including draft article 104 on amendment of limitation amounts;
- Final clauses;
- Jurisdiction and arbitration.

243. In light of the complexity of the issues on the agenda of the forthcoming seventeenth session of the Working Group, it was suggested by some delegations that a seminar of

study should be held to assist delegations in preparing that session. It was further suggested that the seminar might be held in London, on 23 and 24 January 2006. Although it was stressed that the seminar was not an event organized or sponsored by UNCITRAL, efforts would be made to accommodate interventions in English and French. All interested delegations were invited to participate, and the Secretariat was requested to provide the relevant information on the UNCITRAL web site.

244. Delegations noted the importance of understanding the implications of the volume contracts regime on small or unsophisticated volume shippers. It was indicated that, while accepting the reality that the notion of volume contracts was a compromise in the draft convention, that legal notion was not widely known in all domestic jurisdictions and therefore it was felt that the implications of the treatment of volume contracts in the draft convention could not be fully appreciated by all delegations. With a view to further expedite the preparation of the draft convention, wide support was expressed for the preparation of an explanatory document on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications. It was also suggested that the Comité Maritime International (CMI) should be requested to assist in the preparation of such document in light of its highly specialized technical capacity, and the CMI expressed its willingness to assist in that regard.

**B. Transport Law: Preparation of a draft instrument
on the carriage of goods [wholly or partly] [by sea]**

**Jurisdiction and Arbitration: Information presented by the
Danish delegation at the fifteenth session**

(A/CN.9/WG.III/WP.49) [Original: English]

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the table attached hereto as an annex was distributed informally by the Danish delegation during the discussion of the jurisdiction and arbitration chapters of the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Danish delegation informed the Working Group that the text was intended to facilitate consideration of the topics of jurisdiction and arbitration in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group. In addition to some individual comments which were received by the Danish delegation, the following delegations provided comments which are reflected in the annex: China, Japan, New Zealand, Norway, Republic of Korea, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The Working Group was advised that the first column of the table in the annex consisted of the text of the relevant provision from A/CN.9/WG.III/WP.32, as amended by the Working Group during its fourteenth session from 29 November to 10 December 2004 in Vienna. Further, the Working Group was informed that the second column of the table contained proposed alternative text to that contained in the first column, and that the third column contained a summary of the comments of delegations on the text in the first and second columns.

The table in the annex is reproduced in the form in which it was received by the Secretariat.

Annex

Jurisdiction and arbitration

<i>Chapter 15 as amended by the Working Group in Vienna 2004</i>	<i>April 2005</i>	<i>Comments—Summary</i>
<p>Jurisdiction</p>	<p>Jurisdiction</p> <p>Article 1 (xx) [Unless otherwise provided in the Instrument] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.</p>	<p>Some delegations that commented remain concerned as to the inclusion of rules on jurisdiction and arbitration. It is believed that the provisions of jurisdiction and arbitration could become an obstacle for wide ratification of the new convention, because the issues are sensitive and controversial. It has also been stated that the inclusion of jurisdiction provisions, and in place of directing all claims to a single forum with a single set of rules, the ability of cargo interests to bring a case in any one of a number of diverse fora, will detract from the efficiency of the current system which is acknowledged to work well.</p> <p>Another angle is that rules on jurisdiction without corresponding rules on recognition and enforcement may create deadlock situations. It is pointed out that the Convention as it now stands contains jurisdiction clauses that oblige the shipper or other cargo interests to institute an action in certain courts, and thereby limiting the claimant’s choice of forum. Usually assets will be in one of these places, but there is no such guarantee. Without a corresponding duty for other States parties to recognize and enforce the judgement made under the Convention, it may be impossible for the claimant in practice to actually enforce the judgement.</p> <p>In order to clarify that the place of receipt/place of delivery are the agreed places rather than the actual places it has been suggested to introduce definitions (see comment to article 72, letters b and c). It is necessary to determine whether the “time/place of receipt/delivery” is also used as the “contractual” time/place of receipt/delivery of the goods. If not, those provisions which intend a different meaning should be individually clarified. If the term “contractual” is the one used in every place, the bracketed words can be deleted.</p> <p>If definitions of “place of receipt” and “place of delivery” are added, paragraphs (b) and (c) can be replaced by:</p> <p>“Article 72 (b) the place of the receipt or the place of delivery; or”.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>Article 72.</p> <p>In judicial proceedings relating to carriage of goods under this instrument the plaintiff [cargo claimant], at his option, may institute an action in a court <u>in a Contracting State</u> which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:</p>	<p>Article 1 (xxx)</p> <p>[Unless otherwise provided in the Instrument,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.</p> <p>Article 72.</p> <p>In judicial proceedings by the shipper or other cargo interest against the carrier relating to carriage of goods under this instrument, the cargo claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:</p>	<p>See comment above.</p> <p>This provision has been limited to apply to situations where the cargo interest claims under the instrument against the contracting carrier. This formula prevents a carrier from bringing under the instrument actions for a declaration of non-liability in order to circumvent the cargo claimant’s choice of forum. However, the view has been expressed that carrier claimants and cargo claimants should be bound by the same rules.</p> <p>Note that the provision is subject to article 74 ter. Note also that actions by the carrier and maritime performing parties is not entirely left out of the draft, but is regulated in article 74 ter, paragraph 2. It has been suggested to merge article 74 ter into this article in order to minimize the number of articles.</p> <p>The term “cargo claimant” has been applied. In this way there does not seem to be a need for a definition in that the term differs from “claimant”.</p> <p>In the proposal the requirement that the place designated must be in a State party has been adopted.</p> <p>In accordance with the Vienna Convention on the Law of Treaties, the term “contracting State” is replaced by “State party”.</p> <p>A majority of delegations that commented were in favour of having separate provisions for connecting factors in suits against the contracting carrier on the one hand and the maritime performing parties on the other, and generally supported the text in the form proposed. It was suggested, however, to replace the words “the shipper or other cargo interest” with the words “the holder of a transport document”; and the words “cargo claimant” with the words “such holder”. Another correspondent pointed out that a final decision on the terminology would have to await the outcome of the discussion on chapter 13 (Right of Suit).</p>

<i>Chapter 15 as amended by the Working Group in Vienna 2004</i>	<i>April 2005</i>	<i>Comments—Summary</i>
<p>(a) The [principal place of business] or, in the absence thereof, the habitual residence of the defendant [or domicile]; or</p> <p>Alt. 1: (a) The principal place of business or [, in the absence thereof], the domicile of the defendant; or</p> <p>Alt. 2: (a) The principal place of business or [, in the absence thereof], the ordinary residence of the defendant; or</p> <p>[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]</p> <p>(c) The [actual/contractual] place of receipt or the [actual/contractual] place of delivery; or</p> <p>[(d) the port where the goods are initially loaded on an ocean vessel; or</p> <p>(e) the port where the goods are finally discharged from an ocean vessel; or]</p> <p>[(d) Any additional place designated for that purpose in the transport document or electronic record.]</p>	<p>(a) The principal place of business or[, in the absence thereof,] the habitual residence of the defendant; or [the branch through which the contract was made]; or</p> <p>Alt. 1: (a) The principal place of business or [, in the absence thereof], the domicile of the defendant; or</p> <p>Alt. 2: (a) The principal place of business or [, in the absence thereof], the ordinary residence of the defendant; or</p> <p>(b) the place where the goods are initially received by the carrier or a performing party from the consignor [pursuant to article 7(2)],</p> <p>(c) the place where the goods are ultimately delivered by the carrier or a performing party [pursuant to article 7(3) or 7(4)]; or</p> <p>(d) Any additional place designated for that purpose in the transport document or electronic record.</p> <p><u>Alt.: (d) the place specified in the contract of carriage or other agreement.</u></p>	<p>This provision reflects the general rule of jurisdiction. There is general support for a provision of this kind. There are, however, a number of suggestions as to how it should be drafted.</p> <p>Some support was expressed for the deletion of the square brackets introducing two connecting factors in the same provision. On the other side other delegations are against extending the number of connecting factors.</p> <p>Various suggestions have been made as to the actual drafting. As to the introduction of “domicile” it has been suggested that it should replace rather than be added to “habitual residence”. The term “ordinary residence of the defendant” which is used in CMR and in the Warsaw Convention 1929 was also proposed.</p> <p>Although some support was expressed for including ‘the branch [of the defendant] through which the contract was made’, most correspondents were in favour of a deletion.</p> <p>Notwithstanding that this provision still is supported by some delegations, most delegations that commented supported the decision made at the fourteenth session of the Working Group to delete it.</p> <p>A majority of those delegates who addressed the issue were in favour of specifying that the place of receipt and delivery referred to in this provision should be the agreed places rather than the actual places of receipt and delivery. It is pointed out that the contractual place is more predictable by the parties. The actual place of delivery could, for example, be a port of refuge which is not predictable by the contracting parties.</p> <p>Note the proposed insertions of definitions in article 1 above.</p> <p>The comments made in this respect do not prejudice the basic discussion as to whether jurisdiction clauses should be exclusive or not.</p> <p>Some support was expressed for the alternative text. It was held that any agreed jurisdiction regardless of in which form or document it is stated should be valid. However, a majority of delegations that commented preferred a clearer and narrower provision along the lines of the original text.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>[Article 73. Notwithstanding article 72, an action may be any instituted in the courts of port or place in a State party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article <u>the previous Articles of this chapter</u> for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.]</p>	<p>Article 72 bis. In judicial proceedings by the shipper or other cargo interest against the maritime performing party relating to carriage of goods under this instrument, the claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:</p> <p>(a) the principal place of business or [, in the absence thereof,] the [habitual/permanent] residence of the defendant; or</p> <p>(b) the place where the goods are [initially] received by the maritime performing party; or</p> <p>(c) the place where the goods are [ultimately] delivered by the maritime performing party; or</p> <p>[Article 73. Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at its choice, to one of the jurisdictions referred to in the previous Articles of this chapter for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.]</p>	<p>Notwithstanding that some concern was expressed, the delegations that commented generally accepted the idea of separate connecting factors for the maritime performing parties. Many of the drafting comments made to article 72 are relevant in this connection too.</p> <p>Also in relation to the proposed connecting factors there was general support, subject to the comments made in relation to article 72. However, the point was made that it would be more suitable if the places of receipt and delivery were to be the actual place, rather than the contractual place in suits against a maritime performing party. Since it, in contrast to suits against the contracting carrier, is the actual performance that creates the link between the claimant and the defendant and not the contract. It was also pointed out that the words “initially” and “ultimately” did not seem appropriate in relation to maritime performing parties performing their services in one jurisdiction only, e.g. stevedores and terminal operators.</p> <p>Almost all delegations that commented were against the introduction of an additional arrest jurisdiction in this instrument. Some wished a mere deletion of the provision, but others were in favour of a provision indicating that the rules of the Instrument respected existing national and international rules on arrest. It was pointed out that not addressing the issue in the Instrument would create uncertainty as to the interrelation between the two sets of rules. Several comprehensive contributions were made in this respect explaining the problems incurred by the proposed article 73 and if the provision was merely to be deleted. The most favoured way was to include a provision along the lines of the alternative—subject to drafting.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>Article 74. No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73. This article does not constitute an obstacle to the jurisdiction of the States parties for provisional or protective measures.</p>	<p>Alt.: Nothing in this Chapter shall affect jurisdiction with regard to arrest [pursuant to applicable rules of the law of the state or of international law].</p> <p>Article 73 bis. 1. The parties can agree that actions can be instituted only at one or more of the places listed in the previous Articles. 2. Notwithstanding paragraph 1, an agreement that only actions can be instituted only at the principal place of business or [, in the absence thereof,] the [habitual/permanent] residence of the defendant does not preclude the cargo claimant from instituting actions at one of the other available fora.</p> <p>Article 74. No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72, 72 bis or 73. This article does not constitute an obstacle to the jurisdiction of the States parties for provisional or protective measures. [2. For the purpose of this article ‘provisional or protective measures’ means: (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or</p>	<p>This proposed provision addresses the matter of exclusivity of jurisdiction clauses. The responses of delegations fairly represent the various views expressed in the Working Group from a support for non-exclusivity over a limited exclusivity to unlimited exclusivity.</p> <p>In favour of non-exclusivity it is held that a cargo owner always should be vested with a right to sue in his or her own jurisdiction, otherwise the procedure costs in practice may become a hindrance for pursuing even substantial claims.</p> <p>In favour of unlimited exclusivity it is held that it otherwise can be a hindrance to bringing actions before courts that have experience in commercial disputes. It is suggested that only if the case is referred to a court with a certain maritime or commercial experience it can set aside an agreed forum.</p> <p>The majority of delegations that commented were, however, willing to consider the limited exclusivity as a possible compromise. This being said, some comments and observations were made to the form proposed in article 73 bis.</p> <p>It is noted that the reference to “the places listed in the previous Articles” should exclude article 72(d) otherwise there is no limitation to the exclusivity. Indeed the inclusion of article 72(d) depends on the decision to be made in respect of this article.</p> <p>It is proposed to place the article before article 73.</p> <p>Furthermore it was proposed that it be clarified how precise the designation were to be—a specific court or just a jurisdiction.</p> <p>Finally, a number of delegations raised concerns in relation to the second paragraph. They preferred including article 72(a) in the list of fora in which an exclusive jurisdiction can be agreed.</p> <p>Most delegations that commented supported this provision. Some delegations proposed the words “provisional or protective measures” be clarified. It was suggested to use Article 9 of the UNCITRAL model law on arbitration as a model. This text has been inserted in square brackets as para. 2.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>[Article 75. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds</p>	<p>(b) An order securing the amount in dispute; or (c) An order appointing a receiver; or (d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or (e) An interim injunction or other interim order.]</p> <p>Article 74 bis. If an action has been instituted under this instrument by a cargo claimant in a place listed in Articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted.</p> <p>Article 74 ter. [1. If the cargo claimant institutes actions in solidum against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in Article 72 bis, where actions can be instituted against the maritime performing party.] 2. If the carrier or maritime performing party institutes an action under this instrument against the shipper or other cargo interest, then the claimant, at the petition of the defendant, must remove the action to one of the places referred to in Articles 72 or 72 bis, at the choice of the defendant.</p> <p>Article 75. 1. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds</p>	<p>Most delegations that commented expressed support in principle for a rule on concursus. However, at the same time widespread concern was expressed, mainly due to the fact that it had proven impossible to find agreement when the question arose at the Hague Conference on Private International Law.</p> <p>The point was also made that the procedure envisaged in the present draft would be unnecessarily burdensome. It was proposed to require the claimant to bring claims to the defendant's nominated jurisdiction provided that this is a reasonable jurisdiction.</p> <p>Also this provision was supported in principle, but subject to further drafting. It has been held that the system outlined is too inflexible. For example the rule should not overrule a jurisdiction clause between the carrier and the maritime performing party if the agreed jurisdiction is in a place listed in article 72 or 72 bis.</p> <p>All delegations that commented supported the deletion of this article.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.</p> <p>2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;</p> <p>3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.]</p> <p>Article 75 bis.</p> <p>Notwithstanding the preceding articles of this chapter, an agreement made by the parties, [after a claim under the contract of carriage has arisen,] which designates the place where the claimant may institute an action, is effective.</p>	<p>unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.</p> <p>2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action.</p> <p>3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.</p> <p>Article 75 bis.</p> <p>Notwithstanding the preceding articles of this chapter, an agreement made by the parties <u>to the dispute</u>, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.</p> <p>Article XX</p> <p><u>The parties to an OLSA may extend an agreement on jurisdiction to a third party only if:</u></p> <p><u>(i) the parties to the OLSA expressly agree in the OLSA to extend the forum selected to a subsequent party;</u></p> <p><u>(ii) the subsequent party to be bound is provided written or electronic notice of the place where action can be brought;</u></p> <p><u>(iii) the place or places chosen by the OLSA parties is:</u></p> <p><u>(a) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel, or</u></p> <p><u>(b) the place where the goods are delivered by the carrier or a performing party pursuant to article 7(3) or 7(4), or the port</u></p>	<p>There was general support for this article. Some support was expressed for specifying that such agreement should be express, however, on the other side some delegations were in favour of leaving it to the court to determine whether such agreement was entered into.</p> <p>Support was expressed for “after a claim under the contract of carriage has arisen” as being the relevant point in time.</p> <p>Most delegations that commented were not prepared to comment on the OLSA issue in relation to jurisdiction only.</p> <p>The following observation was made: “It follows from the non-mandatory rules of OLSAs, if included in the Instrument, that jurisdiction clauses inter partes are acceptable. As far as the binding effect of jurisdiction clauses is concerned, this is a more general problem than one merely relating to OLSAs. There are reasonable protective rules for the benefit of a third party in Article XX. There are only restricted choices of fora that can be agreed. As the port of loading or the port of discharge should not be connecting factors in the ‘main part’ of the jurisdiction provisions, they should not be connecting factors in view of binding third parties to OLSA jurisdiction clauses either.”</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>Arbitration</p> <p>[Article 76. Subject to this chapter, the parties may provide [by agreement evidenced in writing] that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.</p> <p>Article 77. If a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration, and a negotiable transport document or a negotiable electronic record issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not</p>	<p><u>where the goods are finally discharged from an ocean vessel, or</u> <u>(c) the principal place of business or habitual residence of the defendant,</u> <u>with regard to one or more shipments moving under the relevant OLSA; and</u> <u>(iv) the place selected in the OLSA is located in a State party.</u></p> <p>[Article 76. Subject to this chapter, the parties may provide [by agreement evidenced in writing] that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.</p> <p>Article 77. If a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration, and a negotiable transport document or a negotiable electronic record issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not</p>	<p>Among those delegations who were concerned about the inclusion of rules on jurisdiction in the Instrument, it was expressed that this was the more so as to arbitration. If rules on arbitration were to be included, these should be limited to a statement that such arrangements shall be permitted; requiring arbitrators to apply the rules of the Instrument; and possibly, the validity of the incorporation of charter party arbitration clauses into bills of lading.</p> <p>Delegations that commented generally supported this article. As to the form of the provision, the comments made by the UNCITRAL secretariat in WP.45, paras. 1-9 should be considered. In para. 9 it is stated: “Working Group III may wish to consider whether it would be preferable to align the definitions of the written form requirement in the draft instrument with the most recent work of Working Group II. However, in order not to duplicate the regulation of the issue of form with the Model Law (the consideration of which has not been concluded), Working Group III may wish to conclude that the purpose of the arbitration provisions in the draft instrument should be simply to provide the parties with the freedom to opt for arbitration (which in view of some national laws on the carriage of goods by sea would be beneficial), then draft article 76 could be drafted in more general terms.”</p> <p>Delegations that commented generally supported this article. Also in this respect the UNCITRAL secretariat raises that the question of incorporation by reference has been dealt with generally in Working Group II and recommends that it is considered to align this article with the conclusions from the general debate, cf. WP.45, paras. 10 and 11.</p>

Chapter 15 as amended by the Working Group in Vienna 2004	April 2005	Comments—Summary
<p>invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.</p> <p>Article 78. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places: (a) A place in a State within whose territory is situated: (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or [(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or] (iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or (b) Any other place designated for that purpose in the arbitration clause or agreement.</p> <p>[Article 79. The arbitrator or arbitration tribunal shall apply the rules of this instrument.]</p> <p>Article 80. Article 77 [and 78] shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.</p> <p>Article 80 bis. Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.</p>	<p>invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.</p> <p>Article 78. Except for contracts of carriage in the non-liner trade, it cannot be agreed that the arbitration proceedings must take place where actions cannot be instituted in accordance with chapter 15.</p> <p>Alt.: Except for contracts of carriage in the non-liner trade, the seat of arbitrations relating to the carriage of goods under this instrument must be in a place specified in Chapter 15 for the institution of actions.</p> <p>[Article 79. The arbitrator or arbitration tribunal shall apply the rules of this instrument.]</p> <p>Article 80. Article 77 [and 78] shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.</p> <p>Article 80 bis. Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.</p>	<p>Views in respect of this provision varied from on one side extending the limitation to all trades under the instrument to on the other side leaving it up to the parties in all situations. Some support was, however, expressed for a solution along the lines of the proposed article.</p> <p>As to the drafting the following observation was made: “Unlike court hearings, our understanding is that arbitration hearings may take place anywhere in the world although the formal ‘seat’ is in a specified place—provided that the parties agree or the arbitration panel so orders. Any such hearing of course proceeds in accordance with any governing rules, such as the Rules of the London Maritime Arbitrators’ Association, and in accordance with the law of the seat. Thus the right to invoke the courts of the formal seat is preserved.” It was held that the proposed alternative text possibly better reflected this.</p> <p>Note also the comments made by the UNCITRAL secretariat in WP.45, paras. 12-15. Notwithstanding that these comments for the most part refer to article 78 as it appeared in WP.32, the general comments as to how regulation of the seat is dealt with should be considered.</p> <p>Delegations that commented generally supported this article. Note, however, the comments made by the UNCITRAL secretariat in WP.45, paras. 16-19 pointing to the general rule leaving it to the parties to decide the applicable law.</p> <p>Delegations that commented generally supported this article. Note also the comments made by the UNCITRAL secretariat in WP.45, para. 20.</p> <p>Delegations that commented generally supported this article. Note also the comments made by the UNCITRAL secretariat in WP.45, para. 21.</p>

C. Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]*

Right of Control: Information presented by the Norwegian delegation

(A/CN.9/WG.III/WP.50 and Rev.1) [Original: English]

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the Working Group considered generally the issue of right of control pursuant to the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Norwegian delegation has submitted the paper attached hereto as an annex in order to facilitate consideration of the topic of right of control by compiling the views expressed by various delegations during informal consultations into a single document for discussion by the Working Group. The following delegations provided comments which are reflected in the annex: Italy, Japan, Norway, Republic of Korea, Spain, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The paper in the annex is reproduced in the form in which it was received by the Secretariat.

* Note that the provision numbers in this revised version of A/CN.9/WG.III/WP.50 have been changed to correspond with those in A/CN.9/WG.III/WP.56.

Annex

REPORT

Chapter 11, Right of Control (Karl J. Gombrii, Norway)

1. Chapter 11 of A/CN.9/WG.III/WP.32, dealing with right of control, was the subject of an informal intersessional round table meeting (seminar) in London, on 25 February 2005. An informal paper explaining the background for and contents of chapter 11 had been submitted to and was discussed at that seminar.
2. Following the London seminar, an informal questionnaire was circulated electronically on behalf of the Norwegian delegation. Replies have been received from the delegations of the Republic of Korea, Spain, Japan, Italy, Norway (indirectly, as author of this report) as well as BIMCO, ICS and the International Group of P & I Clubs (the said NGOs having submitted a joint reply).
3. On the basis of the above, the following is noted:
4. Article 53 of A/CN.9/WG.III/WP.32, now article 54 of A/CN.9/WG.III/WP.56, is seen by many of those who responded as not clearly distinguishing between the right of the controlling party to give unilateral instructions, on the one hand, and the right of the controlling party, and no other person, to agree on a variation of the contract of carriage, on the other hand.
5. As to the substance of article 54 (b), which provides that the controlling party may “demand delivery of the goods before their arrival at the place of destination”, has been a bone of contention. Some of the delegations that responded felt that such a demand would always amount to a variation of the contract and could therefore not be subject to unilateral instructions. Others felt that such a right of instruction was essential, e.g. for banks providing financing to buyers. As security, they might be required to be made by the controlling party when there is no negotiable transport record issued, and if it should appear that the buyer is unable to honour its obligations towards the bank, it should be possible to prevent the cargo from entering the jurisdiction of its defaulting customer/the buyer.
6. A majority of the replies to the informal questionnaire suggested that it was important for the controlling party to be able to demand delivery of the goods before their arrival at the place of destination and that the place of such delivery need not be en route to the original place of destination, always provided that the conditions set out in article 57 are met.
7. In view of the above, the Working Group may wish to consider the following redraft of **article 54**:

“The right of control under a contract of carriage may be exercised by the controlling party only and means the right to

- (a) agree with the carrier on any variation of the contract of carriage;**
- (b) give or modify instructions in respect of the goods which do not amount to a variation of the contract;**
- (c) replace the consignee with another person, including the controlling party itself;**

[(d) demand, subject to the conditions provided for in article 55, delivery of the goods at a place other than the original place of destination.]”

8. Article 56 decides who is the controlling party and provides for the transfer of the right of control from one controlling party to another.

9. In article 56(1), which applies when no negotiable transport record is issued, it is provided in (a) that the shipper is the controlling party unless the consignee or another person is designated as controlling party. As is indicated by the square brackets in the present text of the draft instrument in A/CN.9/WG.III/WP.32, there has been disagreement as to whether the shipper can unilaterally so designate a new controlling party, or whether the consent of the consignee is required.

10. In reply to the informal questionnaire on this point, there was a strong majority in favour of deleting the text in the square brackets so as to make it clear that the shipper can unilaterally designate a new controlling party. It was also mentioned by several that in such a case, it is important that there is a requirement to notify the carrier.

11. Judging from the responses to the informal questionnaire, therefore, **article 56(1)(a)** should read:

“The shipper is the controlling party unless it designates another party to be the controlling party and so notifies the carrier.”

12. Another question under article 56 is when the right of control shall cease when no negotiable transport record has been issued. Should it be when the goods have arrived at their destination and the consignee has requested delivery thereof, or should it be when the goods are actually delivered at their destination?

13. The views were divided at the London seminar. Some felt that the latter was the more practicable solution, since it was common for a shipper/seller to instruct the carrier to contact him on arrival at the destination immediately before delivery. The purpose of such an instruction would be to enable the shipper/seller to check that payment has been received before the cargo is delivered to the consignee/buyer. If payment has not been forthcoming, the shipper/seller as controlling party should be entitled to designate a new consignee and thereby secure its position even if the defaulting party had requested delivery.

14. Others felt that the instruction to the carrier, in such a situation, could be to contact the shipper/seller shortly before arrival at the destination and that the present wording of article 56 (d) could be preserved.

15. In reply to the informal questionnaire on this point, the majority view of those who responded was that the right of control shall cease on actual delivery of the goods at the place of destination, whereas two replies suggested the other solution. Judging from that, **article 56 (d)** ought to read:

“The right of control terminates when the goods have been delivered at the place of destination [, or any other place designated pursuant to article 53 (d) [of A/CN.9/WG.III/WP.32, now article 55(1) of A/CN.9/WG.III/WP.56].”

16. Whether or not the bracketed language is necessary, is of course dependent on the decision by the Working Group on article 53 (d) of A/CN.9/WG.III/WP.32, now article 55(1) of A/CN.9/WG.III/WP.56. If that provision is deleted, the bracketed language in article 56 (d) should obviously also be deleted.

17. Article 56(2)(d) (which has been suggested for deletion in A/CN.9/WG.III/WP.56) basically provides that the instructions given should be stated on a negotiable transport

document. There is no corresponding requirement that instructions must be given when no negotiable transport record has been issued, e.g. the designation of a new consignee should be stated on any non-negotiable transport record which may have been issued. The issue was raised in the informal questionnaire. The replies were divided as to whether such a requirement should be introduced. Three replies suggested not, whereas the same number of delegations (including Norway) were of the view that there should be such a requirement. One delegation was undecided.

18. In the introductory comments to chapter 11 of A/CN.9/WG.III/WP.21, it was noted that in many trades the use of negotiable transport documents is rapidly decreasing or has entirely disappeared and that a well-defined and transferable right of control may play a useful role in the development of e-commerce systems, where no negotiable electronic record is used. The Working Group may wish to consider whether the use of non-negotiable transport documents or records for purposes of financing and/or e-commerce may be enhanced by a requirement that instructions or the replacement of a consignee should be stated on a non-negotiable transport record, where one is issued. If so decided, the Working Group may wish to amend **article 56(1)(c)** as follows:

“When the controlling party exercises the right of control in accordance with article 54, it shall produce proper identification and any instructions given or the replacement of the consignee by the controlling party shall be stated in any no negotiable transport document or electronic record which may have been issued.”

19. In relation to article 57(4), it has been discussed whether the liability for failure by the carrier to comply with instructions given should be strict and unlimited or, whether on a true construction of the provision, the liability was a due diligence liability in the same way as liability for loss of or damage to cargo, and also limited in the same way.

20. In response to the informal questionnaire on this point, the majority of those who responded clearly favoured a due diligence liability limited in the same way as damage to or loss of cargo. The majority also felt that the provision ought to be clarified. On that basis, the Working Group may wish to consider the following as a replacement of the existing **article 57(4)**:

“The carrier shall be liable for loss of or damage to the goods as well as delay in delivery resulting from its fault or that of any person referred to in article 20(3) in complying with the instructions of the controlling party, and the liability shall be limited as per the provisions of articles 64 and 66.”

21. It is otherwise noted with respect to article 57(1) that variant A is based on the original text of the draft instrument, whereas variant B is a result of a recast by the UNCITRAL secretariat requested by the Working Group.

22. Articles 58, 59 and 60 were not touched upon at the London seminar and have also previously proved to be uncontroversial.

D. Transport law: preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

Scope of application and freedom of contract: information presented by the Finnish delegation at the fifteenth session

(A/CN.9/WG.III/WP.51) [Original: English]

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the paper attached hereto as an annex was distributed informally by the Finnish delegation during the discussion of scope of application and freedom of contract in the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Finnish delegation informed the Working Group that the text was intended to facilitate consideration of the topics of scope of application and freedom of contract in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group. In addition to some individual comments which were received by the Finnish delegation, the following delegations provided comments which are reflected in the annex: Australia, China, Denmark, Greece, Italy, Japan, the Netherlands, New Zealand, Norway, the Republic of Korea, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

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Annex

12 April 2005. "THE APRIL 2005 REPORT"

Professor Hannu Honka

UNCITRAL DRAFT INSTRUMENT. SCOPE OF APPLICATION AND FREEDOM OF CONTRACT

REPORT BASED ON DISCUSSIONS AND THE REPLIES TO THE INFORMAL QUESTIONNAIRE DATED 24 JANUARY 2005

1. During the fourteenth session (Vienna 2004) of Working Group III an informal drafting group discussed certain drafting suggestions regarding which types of transactions should fall within the mandatory scope of the draft Instrument on the carriage of goods [wholly or partly][by sea]. The informal drafting group proposed to the Working Group during its fourteenth session a series of new provisions regarding the scope of application of the draft Instrument. The proposal was called "Report of Small Drafting Group on Scope of Application". These new provisions have subsequently been reproduced by UNCITRAL in A/CN.9/WG.III/WP.44 as "scope-of-application draft articles".
2. These draft articles do not address the issue of Ocean Liner Service Agreements and will, according to what is stated in A/CN.9/WG.III/WP.44, need to be reconsidered in light of the Working Group's decision in that regard. In addition, further examination of draft articles 88 and 89 (A/CN.9/WG.III/WP.32) is necessary.
3. After the fourteenth session an informal questionnaire dated 24 January 2005 was sent by the Finnish delegation to the other delegations in order to receive further views on the new provisions proposed during the fourteenth session, and in order to receive further comments on the issue of Ocean Liner Service Agreements (OLSAs) and draft articles 88 and 89. Replies to this questionnaire have been received from Australia, Denmark, Greece, Italy, the Netherlands, New Zealand, Norway and the Republic of Korea. ICS, BIMCO and the International Group of P & I Clubs have provided a reply. Comments have been provided by UNCTAD. Also, replies have been received from Stuart Beare assisted by His Honour Anthony Diamond QC, Professor Tomotaka Fujita (Japan) and Si Yuzhuo (People's Republic of China). I am very grateful for all the constructive comments that have been included in the replies.
4. In the following, the provisions in A/CN.9/WG.III/WP.44 are repeated in *Part I*. A summary of the replies to the questionnaire of 24 January 2005 is included under each provision. The OLSA issue is reported in *Part II*, but there is new development and another proposal how to deal with this matter in a larger context. Articles 88 and 89 are dealt with in *Part III*.
5. In view of the replies and unofficial contacts and discussions, it has been thought necessary to provide a proposal which also includes a new approach where OLSAs are treated as volume contracts. This proposal is intended as a basis for discussions in the fifteenth session of the Working Group in New York. The proposal is included in *Part IV*.
6. The commentaries in A/CN.9/WG.III/WP.44 to each scope-of-application draft article have been omitted below.

PART I. SCOPE OF APPLICATION—DRAFT ARTICLES IN A/CN.9/WG.III/WP.44

7. Article 1

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

[(--) “Liner service” means a maritime transportation service that

(i) is available to the general public through publication or otherwise; and

(ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

[(--) “Non-liner service” means any maritime transportation service that is not a liner service.]

8. The majority of the replies received support the text in Article 1 (a). The definition of “contract of carriage”, on the other hand, has in one reply been thought to be too broad in view of it covering voyage charter parties and a cross reference to the exclusion set out in article 3 (1) has been suggested. Also, the exact wording is proposed to be more exact, especially by emphasizing the mutuality of the shipper’s and carrier’s obligations and using the word “contract” rather than “undertaking” in the second sentence (see *Part IV* article 1). The requirement of internationality is considered to have been lost by splitting the sea leg provision into two separate articles (1 and 2). The word “international” has been suggested as an addition before the words “carriage by sea” (see *Part IV* article 1). Certain other drafting proposals have also been made.

9. The sentence in 1 (a) within square brackets, however, is controversial. Views supporting the maintaining of the text and deleting the square brackets have been, for example, argued with the fact that the wording will clarify “must provide for carriage by sea” in the previous sentence. Also, it has been stated that, should the text within square brackets not be included, national law would apply in two situations: when the contract contains options as to the mode of carriage and when nothing is said in the contract about the mode of transport. The majority of the comments received support the maintaining in the Instrument of the text within square brackets.

10. The argument speaking for deletion of the whole text within square brackets has been mentioned that as a mere interpretation of the previous part of the provision it is superfluous. The wording might also be confusing, as any actual carriage by sea should not be allowed as the basis for applying the Instrument. Instead, each convention should have its own contract in order to avoid overlaps with other conventions.

11. The proposed definitions of “liner service” and “non-liner service” are largely found to be in order in principle, but there are views expressing the need to further clarify and specify these definitions. For example, it has been found that the definition should be broader than in A/CN.9/WG.III/WP.44. The term “liner carriage” has also been suggested as well as “liner trade”. Also, a refined wording for the whole definition has been suggested (*Part IV*, article 1, alternatives 2 and 3). There is some concern that the definition would not be precise enough in view of the scope of application of the Instrument. There might, according to one opinion, be a risk of confusion between these definitions and article 3 (2).

12. There is one comment in which clear opposition is expressed to including the definitions of “liner service” and “non-liner service”. The view is related to the approach taken in article 3.

13. **Article 2**

1. Subject to Articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract. [References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

[2. This Instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.]

14. The requirement of both the sea leg and the overall carriage being international has the support in the majority of the comments received, but there is an opinion saying that the present drafting in A/CN.9/WG.III/WP.44 does not achieve this. It has also been suggested that for the purpose of the parties informally changing the place of receipt or the place of delivery from the contractual arrangement, the Instrument should apply if the new place is in a Contracting State. In this respect, see the wording in *Part IV*, article 2, paragraph 1. There are, however, also views according to which it should suffice for application of the Instrument that only the overall carriage is international. And, there is an opinion according to which only the sea leg needs to be international, as an overall carriage would in most such cases also be international and as the Instrument is mainly maritime by nature.

15. In one comment it has been maintained that the word “all” should be added before “contracts of carriage”.

16. It has generally been accepted in the comments received that the word “contractual” is necessary, but it has been questioned whether such reference is needed elsewhere than in the chapeau or in the last sentence of paragraph 1. It has also been considered that the word “contractual” is not necessary in the reference to the place of receipt, as it is not possible to envisage such a place without an agreement between the parties. Also, “port of loading” and “port of discharge” might be unnecessary as they are embraced by “place of receipt/delivery”. It has also been stated that 2.1 (c) might be unnecessary in view of the 2(1)(b) and that 2(1)(c) should be deleted. According to one opinion the contractual place/port of trans-shipment might be added in order to broaden the scope of application of the Instrument. A reservation has been expressed as to 2(1)(d) due to the provision making it possible for the contracting parties to choose procedural rules.

17. Paragraph 2 has been considered unnecessary in many replies received, but that view is not argued further. In support of maintaining paragraph 2, reference has been made to Article X(c) of the Hague-Visby Rules. The latter Article is intended to ensure that any Contracting State shall apply the rules as part of statute law of all contracting states, irrespective of the proper law. Also, the maintaining of paragraph 2 is necessary to show that no change in comparison with the Hague-Visby Rules has been intended. The comments, where a corresponding provision is still found of relevance, mean that paragraph 2 should be maintained in the Instrument.

18. **Article 3**

1. This Instrument does not apply to

(a) subject to Article 5, charter parties, whether used in connection with liner services or not; and

(b) subject to Article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

(c) subject to paragraph 2, other contracts in non-liner services.

2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier's or a performing party's receipt of the goods; and

(b) evidences or contains the contract of carriage, except in the relationship between the parties to a charter party or similar agreement.

19. The contractual and trade approach, and as a matter of fact, the documentary approach (charter parties) in paragraph 1, has clear support in the comments received, but some reservations have been expressed and views on details vary. There is opposition to the system in article 3 in two replies, according to which a contractual approach would sufficiently tackle the issues.

20. As far as reservations in the drafting are concerned, for example, one optional wording in 1 (a) would be "charter parties even if used in connection with liner services" (see *Part IV*, article 3(1)(a)). A mere reference to "charter parties" has also been considered to be sufficient. No requirements of defining charter parties have been put forward. However, in one reply a contract of carriage is said to contain voyage charters. Thus, voyage charters should explicitly be specified and excluded.

21. There is some support in the comments received for the present wording in 1(b). The terminology is, however, in some replies found to be problematic concerning the meaning of "volume contracts". The term "contract of affreightment" is in one of the replies understood to be synonymous to "volume contracts". A "contract of affreightment" is also understood to refer to bills of lading and/or to charter parties. It has been stated that volume contracts would need a definition if OLSAs become part of the general provisions on scope of application, as they should. The reference to "in liner services or not" in 1 (b) has in one reply been considered unnecessary.

22. The negative non-liner reference in 1 (c) has been considered problematic in one reply and a positive definition should be found (cf. article 1).

23. There is emphasis in one reply on the fact that one specific form of carriage might cause problems in view of applying or not applying the Instrument, meaning one-off

shipments and often concerning large or specialized items, such as transformers, boilers and large pleasure craft. It has been admitted, however, that such forms of carriage might fall under article 89.

24. In *Part IV* the concerns relating to 3(1) (a) to (c) in view of drafting have been taken into consideration to the extent considered reasonably possible.

25. In many replies received, article 3(2) is found acceptable as covering the “gap” that might arise due to the exclusions in article 3(1). In other words, article 3(2) is accepted to catch the situations that need to be within the scope of application of the Instrument. On the other hand, it has been mentioned that Articles 3, 4 and 5 are overly complex and somewhat confusing. For example, the references in Article 3(1) (b) and Article 4 are unclear read together. The intended coverage in article 3(2) of a certain type of common carriage has also been said to be unclear, especially outside the United States. For these reasons, an alternative solution has been suggested (see *Part IV*, alternative 2, for articles 3, 4 and 5 (at the end)). On the other hand, it has been expressed by a non-US source that, for example, pure car carriage would fall under article 3(2). Also, in one reply it has been said that article 3(2) has no independent meaning. Article 3(2) is said to be unnecessary should a contractual approach be accepted and not a mix of contractual and trade (and documentary) approaches.

26. **Article 4**

If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in Articles 2, 3(1)(a), 3(1)(c) and 3(2).

27. Individual voyages under a framework contract fall or do not fall under the Instrument in accordance with what is stated in Article 4. This has generally been accepted in the comments received, even if clarifications in the exact wording have been suggested, such as “The application of the Instrument to each shipment is governed by the provisions of articles 2, 3 (1) (a)” etc.

28. However, it should be added that if volume contracts are defined and OLSAs become part of volume contracts, article 4 needs redrafting.

29. **Article 5**

If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3(1)(c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under Article 3(1)(c).

30. There is consensus among the comments received in providing for protection of the third party (not a charterer or a party to the contract under Article 3(1) (c)) by the mandatory provisions of the Instrument even when the Instrument is not applicable due to the provisions of exclusion relating to the original contract and the original contracting parties.

31. There are still varying views on how this protection should be regulated. The wording in A/CN.9/WG.III/WP.44 has been accepted in most of the replies, but considered unsatisfactory in some others. For example, the reference to the time factor (“... from the moment ...” etc.) has been considered not to be acceptable for a non-negotiable document.

Also, “persons entitled to rights ...” has been considered too vague, as well as the reference to “party to a contract ...”. It has also been suggested that the time factor should be deleted as unnecessary, when the wording would become acceptable. According to one opinion the wording “such transport document or electronic record shall comply with the terms of this Instrument” is superfluous. Also, the third party should be specified to consignors, consignees, controlling parties, holders and persons referred to in article 31.

32. The above-mentioned views have been further looked into in *Part IV*, article 5, the document alternative.

33. During the fourteenth session of the Working Group in Vienna in 2004, the option of a transport document or an electronic record not being required for the mandatory protection of the third party was discussed, but did not receive clear majority support. Consequently, article 5 was included in the proposal as now repeated in A/CN.9/WG.III/WP.44. Another alternative has again been expressed in one of the replies whereby protection of the third party should be related to specifying that third party rather than providing the requirement of a transport document or an electronic record. This alternative of no transport document or electronic record will still be upheld (see *Part IV*, article 5, the non-document alternative).

PART II. THE OLSA ISSUE

34. The drafting of the OLSA provision is found in the proposal by the United States in A/CN.9/WG.III/WP.42.

35. Most replies received are carefully in support of an OLSA kind of provision in the Instrument. It is emphasized, however, that the provisions of the Instrument should prevent any misuse by entering into an OLSA type of contract with the result that the Instrument would be non-mandatory between the immediate contracting parties. In one opinion it is noted that a substantial part of a particular trade might be based on service agreements. A non-mandatory approach would be no problem between parties with equal bargaining power, but it would be a problem in relation to small shippers. In this opinion it is thought that should an approach as found in A/CN.9/WG.III/WP.34 be accepted, small shippers would not be properly protected. In general, the scope of application provisions are closely linked with the substantive provisions.

36. Most replies received support a stand-alone provision for OLSAs, but there are also views according to which OLSAs really are volume contracts and should, therefore, be regulated as part of the general provisions on scope of application. This latter approach will cause changes in the drafting included in A/CN.9/WG.III/WP.44. The drafting in A/CN.9/WG.III/WP.44 is reconsidered under *Part IV* below.

37. The OLSA definition in A/CN.9/WG.III/WP.42 is generally accepted, but there are views according to which certain aspects of the definition are still not clear enough (reference has been made to “not otherwise mandatorily required by this Instrument”).

38. Reservations have been expressed in the comments received as to third-party consent. It has also been mentioned that an OLSA definition is simply not acceptable, but the issues should be approached on the basis of a volume contract. Also, once a stand-alone option is omitted and OLSAs become part of the volume contract provisions as amended, the question of a precise definition will probably lose its relevance.

39. A stand-alone OLSA provision is accepted in the comments received to have on overriding effect in relation to the more general provisions dealing with volume contracts.

But, it is emphasized that should such a conflict occur it would be a sign of unsuccessful drafting.

40. The position of a third party should be coordinated so that Article 5 in A/CN.9/WG.III/WP.44 and the specific OLSA provision concerning the position of the third party are the same (except where there is third party consent as expressed in A/CN.9/WG.III/WP.42).

PART III. ARTICLES 88 AND 89 (REFERRING TO THE NUMBERING IN A/CN.9/WG.III/WP.32)

41. There are divided views in the comments received on the technical placing of Articles 88 and 89. Some replies support the idea of moving these articles to become part of the scope of application provisions, some express the view that the placing is in order as it stands in A/CN.9/WG.III/WP.32 and some do not find this issue of any particular importance.

42. The one-way mandatory nature of Article 88 has the support of the majority of comments received, but the view is also expressed of a two-way mandatory nature supported in some of the replies.

43. In a one-way approach it should, according to one reply, be seen to that an agreed increase of liability of one party must not lead to a decrease of the mandatory level of liability of another party. The drafting according to one opinion is not satisfactory in article 88 (see another proposal: *Part IV*, article 88, alternative 2).

44. The argument for the two-way mandatory approach is that the market situation since the Hague and the Hague-Visby Rules has radically changed. Shippers today are claimed to have equal commercial power with carriers to influence carriage arrangements and sometimes greater influence than carriers.

45. The two different views have been maintained in *Part IV* as in article 88 in A/CN.9/WG.III/WP.32 in form of square brackets.

46. The specification of whose liability can be increased has not been touched at all in many of the replies, but there is the suggestion that the increase of liability should not cover a performing party as found in paragraph 2 (A/CN.9/WG.III/WP.32). There is a further specification by the statement that article 88 should not cover non-maritime performing parties (see *Part IV*, article 88). It is further expressed that the modification of the carrier's obligation, not only his liability, should be regulated. It is stated that article 88.1 should not contain references to the shipper, the controlling party or the consignee. For these persons, the mandatory nature should be clarified on an article-by-article basis. Article 88.2 is, according to one opinion, unnecessary.

47. Article 89 in A/CN.9/WG.III/WP.32 has generally been considered acceptable in the comments received, but some changes have been suggested. In one opinion it is stated that the present text is simply unreasonable and that for live animals the Hamburg Rules, article 5.5, is more acceptable and that the provision on special cargo should both be specified and removed to the place of "scope of application". The exception to the exclusion of liability where the loss or damage results from recklessness should be moved to the chapeau so that it applies to both live animals and special goods. Also, preference has in one reply been expressed for the wider exclusions permitted under the Hague-Visby Rules.

PART IV. TEXT PROPOSAL AS BASIS FOR FURTHER DISCUSSIONS

48. There is no consensus in the replies received in view of a number of issues concerning scope of application and freedom of contract. The differences on many points are, however, rather related to drafting than substance. In order to develop the issues, a proposal is put forward below. It is intended to provide a basis for discussions in the fifteenth session of the Working Group.

49. To the extent the proposal below differs from the scope-of-application draft articles in A/CN.9/WG.III/WP.44, the text below has been highlighted *in italics*. Different alternatives are proposed based on discussions and the replies that were received and which provided constructive text proposals. Only additional comments are included. The comments in A/CN.9/WG.III/WP.44 are not repeated.

50. Article 1

(a) **“Contract of carriage” means a contract in which a carrier, against [*an undertaking for*] the payment of freight, undertakes to carry goods from one place to another. This [*undertaking*] [*contract*] must provide for [*international*] carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]**

(x) ***“Volume contract” means a contract that provides for the carriage of a specified [minimum] quantity of cargo [by sea] in a series of shipments during an agreed period of time.***

51. Comment: Some alternatives for the drafting have been included in 1 (a) partly based on the replies received. In order to avoid the confusion in Article 3 in A/CN.9/WG.III/WP.44 concerning references to different types of contract and in order to accommodate service contracts (OLSAs) into the general provisions on scope of application, it has been felt necessary to add a definition of “volume contracts” in Article 1. This definition will clarify Article 3.

52. Alternative 1—A/CN.9/WG.III/WP.44:

(xx) **“Liner service” means a maritime transportation service that**

- (i) **is available to the general public through publication or otherwise; and**
- (ii) **is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.**

[(xxx) **“Non-liner service” means any maritime transportation service that is not a liner service.**]

Alternative 2:

(xx) **“Liner Service” means a transportation service subject to the Instrument that**

- (i) **is offered to the public through publication or similar means; and**
- (ii) **includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates**

(xxx) “Non-liner service” means any transportation service that is not a liner service.

Alternative 3:

(xx) “Liner service” mean a transportation service subject to the Instrument that

- (i) is available to and advertised to the public; and
- (ii) operates on a regular basis between specified ports in accordance with published schedules or sailing dates.

53. Comment: The trade approach has made it necessary to consider definitions of “liner service” (“liner trade”, “liner carriage”). Alternatives 2 and 3 repeat drafting proposals included in the replies or expressed otherwise. The definition of non-liner service might not be needed. Deletion might mean certain drafting adjustments in the wording at least in article 3.

54. Article 2

1. Subject to Articles 3 to 5, this Instrument applies to *[all]* contracts of carriage in which the *[contractual]* place of receipt and the *[contractual]* place of delivery are in different States, and the *[contractual]* port of loading and the *[contractual]* port of discharge are in different States, if

(a) the *[contractual]* place of receipt *[or [contractual] port of loading]* is located in a Contracting State, or

(b) the *[contractual]* place of delivery *[or [contractual] port of discharge]* is located in a Contracting State, or

(c) *[the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]*

(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract. *[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.] [References to contractual places and ports mean places and ports provided under the contract of carriage or in the contract particulars or otherwise agreed between the parties to the contract].*

2. This Instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

55. Comment: The addition of “all” is based on one proposal made and it is included to see whether there is support for this addition. The alternative wording (in italics) at the end of paragraph 1 is based on one of the replies received and is intended to cover any subsequent changes by the parties of the originally agreed places or ports. The square brackets have been removed in paragraph 2 and, thus, the text shall be included in the Instrument.

56. **Alternative 1 for articles 3, 4 and 5:****Article 3****1. This Instrument does not apply to**

(a) subject to Article 5, charter parties, [*even if used in connection with liner services*] [*and agreements between vessel owners or operators concerning the use of all or part of the vessel*];

(b) subject to Articles 4 and 5, volume contracts; or

(c) subject to paragraph 2, other contracts [*in non-liner services*] [*when not intended for liner services*].

2. [Notwithstanding paragraph 1 (c),] [T]his Instrument applies to contracts of carriage [*in non-liner services*] [*when not intended for liner services*] under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier's or a performing party's receipt of the goods; and

(b) evidences or contains the contract of carriage, except in the relationship between the parties to a charter party or similar agreement.

57. For alternative 2 for articles 3, 4 and 5, see after article 89, in paragraph 85 below.

58. Comment: The structure in A/CN.9/WG.III/WP.44 has been maintained, but, in view of including service contracts in the general provisions of the scope of application and in view of abolishing unclear concepts, such as "contracts of affreightment" and "similar contracts" a further effort of clarification has been made. In 3(1)(a) there is a reference to charter parties with a new drafting concerning specifications. The wording within square brackets has been suggested as an addition, but references to owners and operators might be confusing, as such concepts do not necessarily have a common international understanding.

59. Due to the definition of volume contracts in article 1, there is no need to have any other references in 3(1)(b).

60. Should the definition of "non-liner service" be deleted as unnecessary, the wording in 3(1)(c) and 3(2) might have to be adjusted.

61. Article 3(2) is important in the relationship between the shipper and the carrier, as third party mandatory protection arises in any case under article 5. Concern has been expressed on the relationship between 3(1) and 3(2). Consequently, a clarification effort has been made by 3(2) excepting paragraph 1(c). In 3(2) the reference at the end is within square brackets in A/CN.9/WG.III/WP.44 but the square brackets could be removed and the text retained. It would make it clear that paragraph 2 does not reintroduce the application of the Instrument in cases where its application is originally excluded between the original contracting parties. The wording "similar agreement" might have to be specified.

62. **Alternative A:****Article 4 (in view of including volume/service contracts)**

1. Subject to Article 88a, this Instrument applies to each shipment under a volume contract in accordance with the rules provided in Articles 2, 3.1(a) and (c), 3.2, and 5.

2. Subject to Article 88a and notwithstanding article 3.1 (b), this Instrument applies to a volume contract to the extent that it applies to the individual shipments under the volume contract.

Alternative B:

Article 4 (in view of including volume/service contracts) [Subject to article 88a,] [T]his instrument applies to volume contracts in liner service to the extent that the individual shipments thereunder are subject to this Instrument in accordance with article 2.

Alternative C:

Article 4 (in view of including volume/service contracts) [1.] [Subject to article 88a,] [I]f a volume contract covers individual shipments in liner services [only], this Instrument applies to the volume contract and to each individual shipment in liner services under that volume contract [in accordance with article 2].

[2. If a contract provides for the future carriage of goods in a series of shipments, and provided that an individual shipment does not fall under paragraph 1, this Instrument applies to each individual shipment in accordance with the rules provided for in Articles 2, 3(1)(a), 3(1)(c), and 3(2).]

Comment on Alternatives A, B and C:

Background

63. In previous formal and informal discussions and in developing the issue of the status of service contracts in general it has become obvious that both the coordination of a stand-alone OLSA provision with the rest of the scope of application provisions and the definition of OLSAs present problems. In spite of sympathy for a stand-alone provision of OLSAs, it now seems a better option to accept the fact that an OLSA is nothing more or less than a type of volume contract which should be regulated as part of general scope of application provisions. Volume contracts are defined in article 1. Volume contracts are excluded from the Instrument in article 3.1 (b) as far as the framework contract is concerned, but subject to article 4.

Alternative A

64. Rather than specifying the status of a framework contract in liner trade, article 4(1) first takes a standpoint on when individual shipments fall under the Instrument and when not. The references should make it clear that the position of individual shipments is dependent on whether they are arranged through liner services, by chartering etc. According to paragraph 2, the status of the framework contract is dependent on the position of individual shipments. Thus, if the individual shipments fall under the Instrument, then also the framework contract falls under the Instrument.

Alternative B

65. Alternative B has been proposed during the discussions preparing for New York. It is an effort to simplify the drafting, but maintaining the same structural idea as in alternatives A and C.

Alternative C

66. Article 4(1) is the first part of the provision relating to volume contracts. As the general rule is included in article 3(1), but subject to article 4, there is a possibility of specifying the position of volume contracts intended for liner trade in article 4(1). It might be necessary to clarify application by reference to article 2 in the same way as in alternative B. The liner service reference for the framework volume contracts is the key in alternative C, while in alternative A the position of individual shipments is decisive on the basis of which the position of the framework volume contract is decided.

67. It should be noted that article 4(2) in alternative C, which has been included already in the previous version of the Instrument in A/CN.9/WG.III/WP.32, is taken from the Hamburg Rules, article 2(4), but the Hamburg Rules also refer to “an agreed period”, which is not used in the Instrument.

68. The word “only” in article 4(1) indicates the possible need to exclude from the Instrument mixed framework volume contracts where individual shipments might be fixed in liner service or be based on voyage chartering, etc. This problem is perhaps merely theoretical. If this mixed framework contract is not a concern, it might be that 4(2) is unnecessary in alternative C.

The non-mandatory scope of article 4

69. Article 88a derogates in view of article 4 from the mandatory nature of the Instrument found in article 88. Article 88a makes the Instrument non-mandatory for individual shipments that fall under the Instrument and that are under a volume contract provided that the preconditions set out in article 88a have been fulfilled. The framework volume contract is also under the Instrument on a non-mandatory basis.

70. Some provisions in the Instrument are of such fundamental importance that they cannot be derogated from even when article 88a as such is applicable. The carrier’s seaworthiness obligation and many of the shipper’s obligations could thus be mandatory even when article 88a otherwise is applicable. Such absolute mandatory provisions need to be discussed in further detail.

71. Article 5/the document alternative

If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3(1)(c), then [such transport document or electronic record shall comply with the terms of this Instrument and] the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record [from the moment at which it regulates] *[in]* the relationship between the carrier and [the person entitled to rights under the contract of carriage] *[the consignor, consignee, controlling party, holder or person referred to in article 31]*, provided that such person is not [a] *[the]* charterer or [a] *[the]* party to the contract under Article 3(1)(c).

72. Comment: The use of square brackets is intended to show the critical points mentioned in the replies, i.e. the time factor and the persons to be protected and a detailed clarification.

73. Article 5/the non-document alternative

Notwithstanding article 3, paragraph 1, the provisions of this Instrument apply between the carrier and the consignor, consignee, controlling party, holder, person referred to in article 31 or notify party, provided the latter persons are

not the shipper or have not otherwise agreed to the terms of a contract in article 3, paragraph 1.

74. Comment: This is the alternative that was discussed during the fourteenth session of the Working Group in Vienna and referred to in one of the replies to the informal questionnaire of 24 January, 2005.

75. Alternative 1 (article 88)

Article 88

1. Unless otherwise specified in this Instrument, any contractual stipulation that derogates from this Instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier or a [maritime] performing party [, the shipper, the controlling party, or the consignee under this Instrument].

[2. Notwithstanding paragraph 1, the carrier or a [maritime] performing party may increase its responsibilities and its obligations under this Instrument.]

3. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.

76. Comment: There is a majority, but not a unanimous, view in the replies received that the Instrument shall include a one-way mandatory system meaning that it is contractually acceptable to increase the liability of any of the persons mentioned in article 88.1. The two-way mandatory system has some support. Square brackets have been introduced concerning which persons article 88 is to cover. The clarification of maritime performing party has also been proposed.

77. Alternative 2 (article 88)

Article 88

Unless otherwise specified in this Instrument, any provision in a contract of carriage shall be null and void if:

(a) it directly or indirectly lessens or relieves from the obligations, liabilities that the carrier or the maritime performing party assumes under this Instrument; or

(b) it directly or indirectly increases the obligations, liabilities that the cargo interests assumes under this Instrument; or

(c) it assigns the benefit of insurance of the goods in favour of the carrier or a performing party. The cargo interests referred to in the preceding paragraph include the shipper, the consignor, the controlling party, the holder of a transport document and the consignee.

78. Comment: Alternative 2 repeats a proposal in one of the replies.

79. **Article 88a**

1. Notwithstanding article 88, a volume contract that is subject to this Instrument under article 4[1][2] may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in this Instrument provided that:

(a) The contract shall be [mutually negotiated and] agreed to in writing or electronically;

(b) The contract shall obligate the carrier to perform a specified transportation service;

(c) A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities shall be set forth in the contract and may not be incorporated by reference from another document; and

(d) The contract shall not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract. This right of derogation covers the individual shipments under a volume contract and the volume contract to the extent that they are subject to this Instrument under article 4.

2. Paragraph 1 is not applicable to duties, rights, obligations and liabilities under articles [13, 25, 26, 27, ...].

3. Paragraph 1 is applicable between the carrier and the shipper and it covers any third party who has expressly consented to be bound by the volume contract under article 4[1][2] or any contract (or any provision thereof) providing for an individual shipment under article 4[1][2].

80. Article 88a is the derogation provision. It applies to the framework volume contract and the individual shipments under that contract as specified in article 4. Article 88a(1) regulates the preconditions for when derogation is acceptable. There are also provisions establishing that certain obligations and liabilities regulated in the Instrument cannot be derogated from. There are some questions relating to 88a(1)(a) and (d) as to the substance as shown by square brackets.

81. The absolute mandatory provisions in 88a(2) have to be specified.

82. The position of the third party would follow article 5, unless there exists third-party consent in accordance with article 88a(3).

83. **Article 89**

Notwithstanding chapters 4 and 5 of this Instrument, both the carrier and any performing party may by the terms of the contract of carriage:

(a) exclude or limit their liability if the goods are live animals except where it is proved that the loss, damage or delay resulted from an action or omission of the carrier [or its servants or agents] done recklessly and with knowledge that such loss, damage or delay would probably occur, or

(b) exclude or limit their liability for loss or damage to the goods if the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable

transport document or negotiable electronic record is or is to be issued for the carriage of the goods.

84. Comment: In some of the replies received certain adjustments have been proposed. The reference to recklessness should, according to one opinion, relate to the carrier only, but not to his servants or agents. There is also a proposal of moving the reference to recklessness in 89 (a) to the chapeau so as to cover both 89 (a) and (b).

85. **Alternative 2 for articles 3, 4 and 5:**

Article 3

Subject to Articles 4 and 5 this Instrument does not apply so as to govern the relations between the parties to any of the following types of contract whether used in connection with liner services or not:

- (a) charter parties;**
- (b) contracts for the use or employment of a ship or ships or of any space thereon;**
- (c) contracts for the future carriage of goods in a series of shipments.**

86. Comment: This alternative 2 concerning article 3, as presented in one of the replies to the questionnaire, is an effort to simplify and clarify the text. It avoids “volume contracts” and “contracts of affreightment”. As such, volume contracts would be excluded by 3(c), slot charters by 3 (a) or 3 (b) and towage and heavy lift contracts by 3 (b). The OLSA part of volume contracts would be reintroduced to the scope of the Instrument by separate reference.

87. **Article 4**

If the carrier issues a transport document or an electronic record under or in connection with any of the types of contract mentioned in Article 3 and if that transport document or electronic record both

- (a) acknowledges the carrier’s or a performing party’s receipt of goods; and**
- (b) evidences or contains the terms of the contract of carriage**

then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument shall apply to the contract save that, as regards the relations between the parties to any of the types of contract referred to in Article 3, the Instrument shall only apply where it is consistent with the terms agreed in that contract and, in the case of inconsistency, the terms agreed in any such contract as is referred to in Article 3 shall prevail.

Article 5

If the carrier issues a transport document or an electronic record under or in connection with any of the types of contract mentioned in Article 3 and if that transport document or electronic record fulfils conditions (a) and (b) set out in Article 4, then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument shall apply to the contract contained in or evidenced by the transport document or electronic record (notwithstanding the terms of any of such contract as is mentioned in Article 3) from the moment at which it regulates the relationship between the carrier and any person who is not a party to any such contract.

88. Comment to articles 4 and 5 in this alternative 2: In the reply to the questionnaire, articles 4 and 5 in this alternative 2 are intended to distinguish between the situation when the transport document remains with the parties to a contract excluded by article 3 in alternative 2, in which case the terms of the excluded contract prevail, and where third parties are involved, in which case the provisions of the Instrument are mandatory. The articles in alternative 2 also provide that the transport document or electronic record from the time of issue must comply with the provisions of the Instrument, for example, relating to the acknowledgement of the particulars of the goods.

**E. Preparation of a draft instrument on the carriage of goods
[wholly or partly] [by sea]: transfer of rights: information presented
by the Swiss delegation, submitted to the Working Group on
Transport Law at its sixteenth session**

(A/CN.9/WG.III/WP.52) [Original: English]

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the Working Group considered generally the issue of transfer of rights pursuant to the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Swiss delegation has submitted the paper attached hereto as annex I in order to facilitate consideration of the topic of transfer of rights by compiling the views expressed by various delegations during informal consultations into a single document for discussion by the Working Group. The following delegations provided comments which are reflected in the annex: Italy, Japan, the Netherlands, Norway, Republic of Korea, Spain, the United States of America, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The paper in annex I is reproduced in the form in which it was received by the Secretariat.

Annex I

Paper on chapter 12: Transfer of Rights

General remarks

1. Based on informal consultation with other delegations, the Swiss delegation has collected some ideas and views and formulated some principles, which might serve as a basis for further discussions in the Working Group III at its Vienna Session in November/December 2005.
2. Chapter 12 of the draft instrument (chapter 12 of A/CN.9/WG.III/WP.32) is dealing with the essence if not core of the project. Its relevance derives from the fact that the new instrument aims since its inception at clarifying and harmonising the issues relating to transfer of rights and to a certain degree the transfer of some obligations from the contractual shipper to third parties under the contract of carriage. The prime focus is, of course, on the bill of lading, which for centuries has functioned on the basis of national law and custom as the tool to transfer rights in the cargo to third parties involved in the transaction. Particularly in the context of electronic commerce it has become urgent to clarify and to harmonise the rules relating to such transfers. Therefore, this chapter will have to meet the high expectations of the commercial world engaged in modern trade and transportation.
3. The provisions dealing with transfer of rights were initially incorporated in article 12 of document A/CN.9/WG.III/WP.21 and have been discussed for the first time by the Working Group during the New York Session of 24 March to 4 April 2003 (see the report in A/CN.9/526). As a result, the UNCITRAL Secretariat has amended the provisions of A/CN.9/WG.III/WP.21 and thereby reflected the discussion on those provisions. A/CN.9/WG.III/WP.32 is, therefore, the current basis for discussion. During the New York Session of 18 to 28 April 2005, the issue of transfer of rights had received only a very limited review, but it was decided that all further discussions of this chapter should be based on a revised draft of article 61 bis as set out in A/CN.9/WG.III/WP.47 (or any new draft produced by the UNCITRAL Secretariat, prior to the next Working Group Session, now article 63 in A/CN.9/WG.III/WP.56).
4. Based on information obtained, it is considered that the following issues might be the main points for deliberation for the next session:
5. **Article 61: Documents, that are made out simply to a named party without the words “to order”:** Should such a document be treated as a non-negotiable document for all purposes or should some of the functions of the bill of lading survive at least in the relationship between the shipper and the named consignee? Some delegations were of the opinion that at least the major features of a bill of lading (apart from the negotiability) should be maintained. Others held the view that such a document should fall under the category of sea waybills as treated in article 63.
6. **Article 62: General reference to liabilities or closed liability list:** The Working Group will have to try to find a solution on the choice of either a general provision on liabilities or a close list. One option provides flexibility, the other predictability for third party holders. It should be mentioned here that a majority of the views collected so far preferred the general provision relating to liabilities.

7. **Article 62 (3): Cases where no liabilities are transferred:** Further examination should be made of the specific rights, which should not trigger any transfer of liabilities to the holder, when exercised by such holder.
8. **Article 63 (a) and (b): Choice of law provision:** The Working Group will have to decide on the exact wording of the referral to the applicable law for questions of the transfer of rights. It was decided in New York in 2005 that delegations wish to base their discussions on the new proposal in the format of article 61 bis (A/CN.9/WG.III/WP.47), now article 63 in A/CN.9/WG.III/WP.56.
9. **Article 63 (c)(i) and (ii): Notification:** Some delegates' views request clarification of the notion of "notification", relating both to form and to substance. Others even question that such a requirement of notification is adequate and compatible with the nature of article 63.

Views and principles analysed article by article

Article 61

10. There is general support among the delegations participating in informal consultations for the language and content of article 61 (1) and (2). The consequence of this is that a closed list exists of negotiable transport documents and that, therefore, any document that does not fulfill the form requested by article 61 will be treated as a non-negotiable document.
11. Despite the clarity of this general approach, one may have to reconsider the list once a decision on the "nominative transport document" is taken, for which there seems to be a number of different views with respect to the treatment of documents which are made out to a named person, but where the words "to order" are missing. While one school of thought is that those documents should not be treated as negotiable transport documents at all, but rather merely as non-negotiable transport documents under this instrument (on the same level as sea waybills etc.), another school of thought prefers them to remain "negotiable", despite the lack of the words "to order". A middle position raised by some views proposes that while such a nominative document might lose its "negotiability", it would maintain all other features of a bill of lading in other areas (right of control, function at delivery of the cargo, etc).
12. What seems quite clear from the views collected is that all other forms of "hybrid" bills of lading, such as "not to order" / "non-negotiable" bills of lading, etc. should not be treated here and should fall under the provisions of article 63 of the instrument.

Article 62

13. The views collected show a clear preference for a general provision and that there should not be a closed list in article 62. However, some views suggest that article 62 mentions a list of liabilities, but that this list should be open.
14. Assuming that article 62 will not provide a list, the issue the inclusion of freight, dead freight, demurrage and damages for detention becomes obsolete. In case that an open list is kept in article 62, the Working Group would need to decide whether reference to freight and similar charges should be included in the list, and whether such an inclusion would be appropriate.
15. As currently drafted, the instrument does not address the issue of whether and to what extent and at what stage the third party holder is bound to the terms of the contract of

carriage. This is quite an important issue in practice and has also a close connection to the questions of the effects of jurisdiction clauses and arbitration clauses on third parties.

16. However, the general views received so far show that despite the fact that such a provision might be quite useful in practice, it would overburden the instrument if such an issue were to be incorporated. Suggestions were made that this issue might be submitted to international organisations, in particular the Comité Maritime International (CMI), with the aim to receive their views on how such issues could be further harmonized independent from the current exercise of drafting the instrument.

17. Depending on the respective choice of either a list of liabilities or an open liability provision, the views received are equally divided on the issue of liability for damages caused by cargo. Those who supported a provision without a list are of the view that it would be beneficial to clarify the position of the holder relating to damages caused by cargo. Obviously, for those delegations which prefer the closed list in article 62, such a clarification would become obsolete since, as such a liability would not be listed, the provision would sufficiently clarify that the holder would not be liable for such damages.

18. To make things clear, the question does not address the possibilities of tort claims relating to damages caused by cargo, as those would not fall under the scope of the instrument. What could, however, be an issue is the scope of the contractual liabilities of the shippers / holder for damages caused to the carrier by the cargo either directly (ship) or indirectly (recourse for cargo claims for other (innocent) cargo).

19. There seems to be general support for the position that the transfer of liabilities does not mean that the contractual shipper and prior holders are relieved from all responsibilities. Apart from this general view, some delegations have mentioned that they would not like to see any clarification of that issue in the instrument and prefer to leave all relative issues to national law.

20. General support is ascertainable for article 62 (3) of the instrument. However, some views made clear that they would like to elaborate more on that issue. In particular, they think that a list might not be sufficiently clear and that, indeed, further examples must be considered where it would not be justified to trigger liability of the holder when exercising those “rights”.

21. It was generally observed that article 62 (2) needs further consideration. What seems undisputed is the fact that any new exercise of a “right”, which should fall under article 62 (2) and, thereby, not trigger responsibility as provided for by article 62 (2) must be of “administrative” nature and may only relate to “non-substantial matters”. The list of article 62 (3) must, furthermore, be exhaustive.

Article 63

22. There is unanimous support among the views received for basing all further discussions on the issues of both articles 61 and 62 on the revised text in form of article 61 bis (A/CN.9/WG.III/WP.47), now article 63 (A/CN.9/WG.III/WP.56). This view was, again, clearly established during the last New York Session in April 2005.

23. One view suggests that article 63 (a) should, in its last sentence, read “determined” or “asserted according to”, instead of “governed by”.

24. General support among the views received is given to the fact that the requirement of a notification is adequate and this should be maintained since such a notification is essential (article 63 (c)(i) and (ii)). Some delegations suggest that the form of such a notification should also be regulated in more detail. Another point relates to the question

whether notification is only necessary if the applicable law so requests it, or whether notification should be made regardless of the applicable law. Such view stresses that by providing a notification regardless of the requirements set out in the applicable law, the instrument provides a minimum protection to the carrier, which should not be subject to any other (weaker) requirements provided by national law. Despite this general view expressed in the different replies received, one must note that some delegations think that a notification (as a matter of substantive law) is in contrast and conflict with the general principle of article 63 being only a choice of law and not a substantive law provision.

25. Relating to the wording of the choice of law provision contained in article 63 (a), concern is raised in the views received that the provision is not clear enough and, therefore, the text will require clarification.

26. One view even raises the general question whether a choice of law rule is adequate in the instrument, as the unification of the choice of law is not the purpose of our instrument and that the harmonization of substantive laws should be the only main focus.

27. It seems to be clear that there should be joint and severable liability, for the transferor and transferee (article 63 (c)(iii)). If the carrier so decides and accordingly agrees that the transferor could be released from its liability such a release should be feasible and effective. More by way of clarification, it was mentioned that a release by the carrier should not affect the liability of the transferee or the transferee's right of recourse against the transferor under the underlying agreement. A further clarification makes reference to the fact that article 63 (c)(iii) only refers to liabilities that are "connected to" the transfer of rights.

28. Most views found that for the question of transferring liabilities to third parties, such as holders, reference to the applicable law was also adequate in cases where non-negotiable transport documents are issued. However, it was mentioned that this issue should be examined more closely.

29. In the line with the views expressed in relation to article 62, views are also divided as to the necessity and advisability of a provision relating to the transfer of the binding effect of a contract to a third party. A majority of the views received, at least, seems to regard such a provision and clarification as unnecessary in the context of this instrument.

F. Note by the Secretariat on the preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: comparative table on limitation levels of carrier liability, submitted to the Working Group on Transport Law at its sixteenth session

(A/CN.9/WG.III/WP.53) [Original: English]

Note by the Secretariat

At its thirteenth session, the Working Group considered the provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] with respect to the limitation of carrier liability, and agreed that the time was not yet ripe for an exchange of views with respect to the appropriate level of limitation on liability (A/CN.9/552, paras. 39 and 44). The Working Group suggested that an analytical presentation of information be prepared of the different limitation levels in different States, and with respect to different transport regimes. The Comité Maritime International (“CMI”) offered to circulate to its members a questionnaire with respect to the limitation levels applicable to maritime claims, as well as any available information on the value of cargo claims. Member and observer States of the Working Group also agreed to submit to the Secretariat information regarding the limits of liability in their various domestic transport regimes, as well as any available statistics on claims figures.

All information received by the Secretariat appears in the comparative table attached as an annex to this Note.

Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

Comparative table on limitation levels of carrier liability

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
Argentina	<u>International:</u> Montreal Protocol 1975: 17 SDR per kilo; otherwise, Section 145 Aeronautic Code: 2 Argentinean gold pesos per gross kilo (currently US\$ 183).			<u>International:</u> Hague Rules 1924: 100 sterling pounds (US\$9,545) per package/unit; otherwise, Sect. 24 Shipping Act No. 20.094: 400 Argentinean gold pesos for package/piece (currently US\$ 7,321). <u>Delay:</u> same as above.	<u>Multimodal:</u> Localized damage: limit set by the rules specific to the mode of transport. Non localized damage: Sect. 24 Shipping Act No. 20.094: 400 Argentinean gold pesos for package/piece (currently US\$ 7,321). <u>Inland water transport:</u> no limitation.
Austria	<u>International:</u> Montreal Convention 1999: 17 SDR per kilo; otherwise, 35 Euro per kilo “for damages caused with a minor degree of fault”. <u>Domestic:</u> no limitation.	<u>International:</u> COTIF- CIM: 17 SDR per kilo. <u>Domestic:</u> carrier may fix a tariff to limit liability, not below limits fixed in international conventions.	<u>International:</u> CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Domestic:</u> general terms of contract apply.	<u>International:</u> Hamburg Rules: 835 units of account (SDR) per package/shipping unit or 2.5 units of account (SDR) per kilo of gross weight. <u>Domestic:</u> Commercial Code: 10,000 ATS per parcel/unit of value (7,031.5 Euros).	<u>Inland water transport:</u> no limitation.
Belgium	<u>International:</u> Montreal Convention 1999: 17 SDR per kilo.	<u>International:</u> COTIF- CIM: 17 SDR per kilo. <u>Domestic:</u> same as international.	<u>International:</u> CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Domestic:</u> same as international, insofar applicable.	<u>International:</u> Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Domestic:</u> same as international.	

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
Canada	<u>International:</u> Montreal Convention 1999: 17 SDR per kilo.	<u>International:</u> lesser of (1) The value of goods, including freight, if paid; or (2) The value represented in writing by the shipper; or (3) The value agreed by the carrier and shipper; or (4) The value determined in accordance with tariff classification.	<u>International:</u> CND \$4.41 per kilo for shipments under a bill of lading.	<u>International:</u> Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay:</u> no limitation.	
Chile				<u>International:</u> Hamburg Rules: 835 units of account (SDR) per package/shipping unit or 2.5 units of account (SDR) per kilo of gross weight. <u>Delay:</u> 2.5 times the freight, not exceeding total freight payable.	
China	<u>International:</u> Warsaw Convention 1929, as amended by The Hague Protocol 1955: 250 gold Francs per kilo. Otherwise: art. 129 (1)(2) Civil Aviation Law: 17 SDR per kilo. <u>Domestic:</u> art. 45 (1)(1) Rules on domestic civil aviation cargo: 20 RMB per kilo.	<u>International:</u> art. 22 SMGS: "not exceed the amount of compensation for the loss of the goods". For home appliances, the limit is 7.2 Roubles per kilo. <u>Delay:</u> art. 26 SGMS: from 6% to 30% of the freight charged, depending on the exceeding time to the transit period. <u>Domestic:</u> art. 56 (3) Rules on carriage of goods by rail: 100 RMB per ton if goods carried according to weight; 2000 RMB per ton if goods carried according to weight and package; 30 RMB per 10 Kilos for home appliances or shipments by individuals. <u>Delay:</u> from 5% to 20%	<u>International/domestic:</u> no limitation, also for delay-related damages.	<u>International:</u> Art. 56 Maritime Code reproduces Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay:</u> amount equivalent to the freight payable for the goods (Art. 57 Maritime Code). <u>Domestic:</u> no limitation.	<u>Domestic coastal and inland water:</u> no limitation.

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
		of the freight charged, depending on the exceeding time to the transit period.			
Czech Republic	<u>Domestic</u> : no limit of liability of carrier (Para. 629 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Para. 629 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Para. 629 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Para. 629 Commercial Code).	
Denmark	<u>International</u> : Montreal Convention 1999: 17 SDR per kilo. (Same for <u>delay</u> .) <u>Domestic</u> : same as international.	<u>International</u> : COTIF-CIM: 17 SDR per kilo. <u>Delay</u> : COTIF-CIM: four times the carriage charges. <u>Domestic</u> : 17 SDR per kilo; 8,33 SDR per kilo if general cargo. <u>Delay</u> : four times the carriage charges, but only carriage charges if general cargo.	<u>International</u> : CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Delay</u> : CMR: carriage charges. <u>Domestic</u> : no limitation, but limits are agreed contractually, usually along the lines of NSAB 2000 which reproduces the above (same for <u>delay</u>).	<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay</u> : 2,5 times the freight for the delayed cargo, not exceeding the total freight. <u>Domestic</u> : same as international (also for <u>delay</u>).	
Finland	<u>International</u> : Montreal Convention 1999: 17 SDR per kilo. <u>Domestic</u> : same as international, but with unlimited liability in case of wilful misconduct or gross negligence.	<u>Domestic</u> : Sec. 15 Railway Transport Act, 2000: 25 Euro per kilo plus transport expenses. Unlimited liability in case of wilful misconduct or gross negligence.	<u>Domestic</u> : Sec. 32 Act on Road Transport Agreement, 1979: 20 Euro per kilo. Unlimited liability in case of wilful misconduct or gross negligence.	<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Domestic</u> : same as international.	<u>Multimodal</u> : determined in the bill of lading, limit commonly used is 8.33 SDR except for the sea leg, in which case the relevant limit applies.

Country	Air	Rail	Road	Sea	Other
Germany	<p><u>International:</u> Montreal Convention 1999: 17 SDR per kilo.</p> <p><u>Domestic:</u> (applies also to international, insofar Convention is not applicable): 8.33 SDR per kilo (Sect. 431 (2) HGB). Parties can agree on different limits, provided they are between 2 and 40 SDR per kilo.</p> <p><u>Delay:</u> three times the freight (Sect. 431 (3) HGB).</p>	<p><u>International:</u> COTIF-CIM: 17 SDR per kilo.</p>	<p><u>International:</u> CMR as amended by 1978 Protocol: 8.33 SDR per kilo</p> <p><u>Domestic:</u> 8.33 SDR per kilo (Sect. 431 para 2 HGB). Parties can agree on different limits, provided they are between 2 and 40 SDR per kilo.</p> <p><u>Delay:</u> three times the freight (Sect. 431 (3) HGB).</p>	<p><u>International:</u> Hague Rules: loss or damage: 666,67 SDR per package/shipping unit.</p> <p><u>Delay:</u> no limitation.</p> <p><u>Domestic:</u> Commercial Code (based on Hague-Visby Rules): loss or damage: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight.</p> <p><u>Delay:</u> no limitation.</p>	<p><u>Inland navigation:</u> same as air/road./rail</p> <p><u>Multimodal:</u> if event is not localized in a specific leg of the voyage, general rules apply (same as air/road/rail). If event is localized, network system (can be replaced by the general provisions of the German Transport Law, unless such replacement is inconsistent with mandatory provisions of an international agreement binding on Germany (Sect. 452 (d) (2) and (3) HGB).</p>
Ghana				<p><u>International/domestic:</u></p> <p>Para. 414 (b) Ghana Shipping Act, n. 645 of 2003: 167,000 unit of accounts for a ship with a tonnage not exceeding 500 tons; for a ship with a tonnage exceeding 500 tons, in addition to the above:</p> <ul style="list-style-type: none"> - 167 units of account for each ton from 501 to 30,000 tons; - 125 units of account for each ton from 30,001 to 70,000; - 83 units of account for each ton in excess of 70,001. 	

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
Greece	<u>International</u> : Montreal Convention 1999: 17 SDR per kilo. <u>Domestic</u> : same as international.	<u>International</u> : COTIF- CIM: 17 SDR per kilo. <u>Domestic</u> : no limitation. <u>Delay</u> : twice the freight paid.	<u>International</u> : CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Domestic</u> : Commercial Code applies, no limitation.	<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Domestic</u> : same as international.	
Guatemala				<u>International</u> : determined on the forwarder's bill of lading. (often, Hague-Visby rules). <u>Domestic</u> : no limitation (arts. 817, 819 Commerce Code).	
Hong Kong (SAR of China)				<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay</u> : same as above, insofar applicable.	
Italy				<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay</u> : same as above.	
Japan				<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight, but carrier is not liable for "pure economic loss" or "consequential loss". <u>Delay</u> : same as above for loss of market price.	

Country	Air	Rail	Road	Sea	Other
Korea				<u>International/domestic:</u> 500 SDR (art. 789-2 Commercial Code).	
Lebanon				<u>International:</u> Hamburg Rules: 835 units of account (SDR) per package/shipping unit or 2.5 units of account (SDR) per kilo of gross weight.	
Mali			<u>International:</u> no limitation. (Insurance is mandatory for all imported goods whose value exceeds 500,000 CFA: this mechanism seems to apply to all forms of transportation of imported goods.)		
Mexico				<u>International:</u> Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay:</u> no limitation.	
Morocco			<u>International/domestic:</u> in absence of contractual provisions, the contract-type applies, which contains no limitation (decree of the Ministry of Transport n. 1744-03 of 23 September 2003).		
Netherlands				<u>International:</u> Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay:</u> same as above, but carrier may contract out.	

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
Nigeria				<u>International:</u> Hague Rules 1924: 200 Naira per package/unit. <u>Delay:</u> same as above.	
Norway	<u>International:</u> Montreal Convention 1999: 17 SDR per kilo.	<u>International:</u> COTIF- CIM: 17 SDR per kilo.	<u>International:</u> CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Domestic:</u> 17 SDR/kilo of gross weight.	<u>International:</u> Hague-Visby Rules as amended by SDR Protocol: 666.67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay:</u> same as above. <u>Domestic:</u> 17 SDR/kilo of gross weight.	
Senegal				<u>International:</u> Hamburg Rules: 835 units of account (SDR) per package/shipping unit or 2.5 units of account (SDR) per kilo of gross weight.	
Singapore				<u>International:</u> Hague-Visby Rules (unamended): Singapore \$1,563.65 per package/shipping unit or Singapore \$4.69 per kilo of gross weight. However, if there is no actual fault or privity, the limit is set to Singapore \$156.36 for each ton of the ship's tonnage (Sections 135 and 136 of the Merchant Shipping Act).	
Spain	<u>Domestic:</u> 17 SDR (per kilo). <u>Delay:</u> freight cost.	<u>Domestic:</u> 3.61 Euro per kilo. <u>Delay:</u> freight cost.	<u>Domestic:</u> 4.5 Euro per kilo. <u>Delay:</u> freight cost.	<u>Domestic:</u> no limitation, but limits are agreed contractually.	

<i>Country</i>	<i>Air</i>	<i>Rail</i>	<i>Road</i>	<i>Sea</i>	<i>Other</i>
Switzerland	<u>International</u> : Montreal Protocol 1975: 17 SDR per kilo. <u>Domestic</u> : 72.50 CHF per kilo.	<u>International</u> : COTIF- CIM: 17 SDR per kilo.	<u>International</u> : CMR as amended by 1978 Protocol: 8.33 SDR per kilo. <u>Domestic</u> : 150 CHF per kilo of gross weight. <u>Delay</u> : 2,000 CHF per car or 500 CHF per parcel.		<u>International inland water</u> : CLNI (Convention de Strasbourg sur la limitation de la responsabilité en navigation intérieure, 4 novembre 1988). <u>Domestic</u> : 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight (1 SDR per kilo if navigation is on the Rhine).
Turkey	<u>Domestic</u> : no limit of liability on carrier (Art. 762 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Art. 762 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Art. 762 Commercial Code).	<u>Domestic</u> : no limit of liability on carrier (Art. 762 Commercial Code).	
United Kingdom				<u>International</u> : Hague-Visby Rules as amended by SDR Protocol: 666,67 units of account (SDR) per package/shipping unit or 2 units of account (SDR) per kilo of gross weight. <u>Delay</u> : no specific limit, and carrier may contract out.	
USA	<u>International</u> : Montreal Convention 1999: 17 SDR per kilo. <u>Domestic</u> : set in conditions of contract, usually \$0.50 per pound (about \$1.10 per kilo).	<u>International/domestic</u> : unlimited when transported under a bill of lading, but limits can be agreed in writing or in the tariff of freight rates and conditions.	<u>International/domestic</u> : unlimited, but limits can be agreed in writing or in the tariff of freight rates and conditions.	<u>Domestic</u> : when transport is governed by bill of lading: value of vessel and freight at the end of the voyage plus freight earned on the voyage (46 USC app. 183 (a), Limitation of Liability Act).	

**G. Preparation of a draft instrument on the carriage of goods
[wholly or partly] [by sea]:proposal by the Netherlands
on arbitration, submitted to the Working Group on
Transport Law at its sixteenth session
(A/CN.9/WG.III/WP.54) [Original: English]**

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), the Government of the Netherlands submitted the text of a proposal concerning the arbitration provisions in the draft convention on the carriage of goods [wholly or partly][by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

1. In paragraphs 177 to 179 of the Report of the fifteenth session of UNCITRAL Working Group III (A/CN.9/576), reference was made to a proposal on arbitration to be submitted at a future session. This paper contains that proposal.
2. The aim of this proposal is to seek a compromise among the views that:
 - (a) The draft convention should contain provisions on jurisdiction and it should not be possible to circumvent those provisions through a possible freedom to arbitrate;
 - (b) As to the choice between arbitration and court litigation, present industry practices should not be significantly affected;
 - (c) Arbitration is the dominant method of dispute resolution in the non-liner trade, while in liner transportation arbitration agreements are exceptional;
 - (d) The current international instruments on arbitration, in particular the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, and the UNCITRAL Model Law on International Commercial Arbitration, 1985, and their underlying principles should remain unaffected (refer A/CN.9/WG.III/WP.45);
 - (e) After a dispute has arisen, the parties should be free to agree on any court or arbitral tribunal to handle their case.
3. In the view of the delegation of The Netherlands, the above aim may be achieved by:
 - (a) Restricting the possibilities of arbitration with respect to those contracts of carriage to which the draft convention applies under articles 8 and 9, by allowing arbitration only in those places where the draft convention permits court litigation;
 - (b) Deleting Chapter 17 on arbitration, thereby leaving the subject of arbitration fully to the existing instruments on arbitration and to existing national law;
 - (c) Taking away any possible impediment for voluntary incorporation of the draft convention in contracts of carriage that pursuant to article 9 are excluded from the scope of the draft convention, by adding a provision that explicitly provides for the freedom to include [jurisdiction or] arbitration clauses in such contracts;
 - (d) Extending the provision relating to agreements after the dispute has arisen to arbitration agreements as well.
4. It was suggested during the fifteenth session of the Working Group that, possibly, exceptions should be made for certain specialized liner transportation (see para. 178, A/CN.9/576). Wording to that effect is not yet included in the proposal.

5. In terms of actual drafting, this proposal may lead to the following changes in the draft convention as contained in A/CN.9/WG.III/WP.56:¹

(a) The heading of Chapter 16 should read: **“Jurisdiction and arbitration”**.

(b) Add a second paragraph to article 78 that reads:

“2. Subject to article 81 bis, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

(a) The person asserting a claim against the carrier has the option of either:

(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or

(ii) instituting court proceedings in any other place, provided such place is specified in article 75 (a) to (c);

(b) The carrier may not enforce the arbitration agreement unless it gives the person asserting a claim against the carrier the option to arbitrate in any of the places specified in article 75 (a) to (d).”

(c) Insert the following phrase at the end of article 81 between the words “action” and “is”:

“or which refers the dispute to arbitration”

(d) Add a new article 81 bis that reads:

“Nothing in this Convention affects the enforceability of [a jurisdiction or] an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply solely by reason of:

(i) the application of article 10, or

(ii) the parties’ voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.”

(e) Delete the whole of Chapter 17 (articles 82 to 86).

¹ The proposal, however, depends upon the outcome of the Working Group’s consideration of the contents of article 76 on exclusive jurisdiction.

**H. Preparation of a draft instrument on the carriage of goods
[wholly or partly] [by sea]: shipper's obligations: information
presented by the Swedish delegation, submitted to the
Working Group on Transport Law at its sixteenth session
(A/CN.9/WG.III/WP.55) [Original: English]**

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), the Government of Sweden submitted to the Secretariat the paper attached hereto as an annex with respect to shipper's obligations in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Swedish delegation advised that the text was intended to facilitate consideration of the topic of shipper's obligations in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

The paper in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

I. Introduction

1. Shipper's obligations were discussed during the thirteenth session of Working Group III (transport law) in New York, 3-14 May 2004. The deliberations and decisions are reproduced in the report A/CN.9/552, par. 118-161. The UNCITRAL secretariat was requested to prepare a revised draft of those provisions considered. The draft provisions on shipper's obligations were published in A/CN.9/WG.III/WP.39, par. 14-22. During the summer 2005 the delegation of Sweden distributed an informal questionnaire on shipper's obligations to interested delegations. The purpose of the questionnaire was to facilitate the debate on the subject and to investigate whether there was room for compromise regarding certain questions in the text. Replies to the questionnaire were submitted by a total of 19 delegations. One reply was submitted as a joint document from three different delegations. In between the distribution of the questionnaire and the publication of the report, a new consolidated version of the draft convention has been prepared and submitted for publication as A/CN.9/WG.III/WP.56. This report is based on that consolidated version, but it also refers to the original draft provisions in A/CN.9/WG.III/WP.39. The texts proposed in the report do not necessarily reflect the views of the delegation of Sweden, but represent possible compromises that the Working Group might wish to consider.

II. Delivery ready for carriage, draft article 28 (former article 25)

2. Article 28 contains a general obligation to deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage. However it does not regulate where and when the goods have to be delivered to the carrier. Delegations were asked whether they wished to include a rule that, unless otherwise agreed, the shipper has to deliver the goods at the time and place indicated by the carrier. Around half of the delegations indicated that they do not find such a rule necessary. Some delegations are of the view that this is a commercial matter, which the parties would always agree on anyway in the contract of carriage. One other delegation was of the view that it followed implicitly from the existing text in article 28 that unless otherwise agreed the shipper has an obligation to deliver the goods at the time and place indicated by the shipper. A few delegations more strongly opposed the proposal because of the fact that there is a risk that the balance between the carrier and the shipper will be affected to the detriment of the latter and that there is no need for unification of the law here. Consequently, it was suggested that liability for late delivery should be left to national law.

3. Other delegations have stated that they would like to see a general rule such as the one suggested in article 28. None of these delegations has however presented any specific reasons for why they would like to have such a regulation.

4. As to the question whether the words "intended carriage" cover all parts of the carriage and not only the sea carriage, a majority of the delegations have felt that the text is clear and that there is no need to clarify that the goods must be packed and stowed in order to withstand the sea carriage as well as the ancillary land carriages.

5. Despite the fact that no specific proposals regarding the relationship between the first and the second sentence of article 28 were made in the questionnaire, a significant number

of delegations have commented on that issue. A majority of these delegations have come to the conclusion that the obligation to stow, lash and secure the goods inside a container in the second sentence is already covered by the more general obligation in the first sentence. The argument here seems to be that if the parties agree that the wares are to be delivered in a container, the shipper must not only load, handle, stow, lash and secure the wares themselves properly, for example by packing those in boxes which will withstand the carriage, but also secure the boxes inside the container. In other words, the latter obligation is seen as a part of the stowage of the wares.

6. On the other hand, one delegation has expressed the view that these are two separate matters, which both need to be regulated. Another reason for retaining the second sentence is that containers are subject to specific regulation elsewhere in the draft.

7. However, it could be argued that the general approach in the draft convention as a whole is that goods and their packing, including containers, are treated on equal footing. The fact that containers are explicitly included in the definition of “goods” in article 1(w), provided that the carrier or a performing party does not supply these, illustrates this. Looking at the other specific provisions on containers, these often serve more specific purposes compared to in article 28. For example, article 26 it is necessary to make a distinction between containerized cargo and other cargo, because of the fact that the carrier may carry the former type of cargo on deck without a specific agreement with the shipper.

8. If the text in article 28 is interpreted such that containers are not covered by the first sentence, but only by the second sentence, this will probably contradict the definition in art 1(w), in addition to creating a risk that the shipper will no longer be responsible for the condition of the container provided by him, but only for the stowage of the wares inside it. In practice, however, the problem is not only that the stowage of the wares inside the container is bad, but that the container itself is in such a bad condition that it cannot withstand the carriage.

9. On the basis of the discussion above the Working Group might wish to consider whether article 28 should read as follows:

“The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage.”

III. Carrier’s obligation to provide information and instructions (draft article 29, former 26)

10. No proposal whether to delete article 29 as unnecessary was made in the questionnaire. Some delegations have, however, indicated that they would like to see the draft article deleted in its entirety. The reasons for this are that the chapter regulates the obligations of the shipper and that this specific obligation is already covered by the general provisions on carrier obligations and liability set out elsewhere in the draft convention. However, a majority of the delegations seem to be of the view that such a provision is a useful regulation in relation to article 30 on the shipper’s obligation to provide information and instructions.

11. A majority of the delegations would like to see both the words within square brackets in the first sentence and the bracketed second sentence deleted. According to these delegations, the carrier has an implicit obligation to provide accurate and complete

information in a timely manner. Some of these delegations were of the view that the words within square brackets in the first sentence were acceptable and that it could be an idea to specifically point out that the information must be given in a timely manner.

12. A minority of delegations suggested keeping the words within square brackets because of the fact that it could be useful to state these obligations explicitly. One delegation wished to delete only the second sentence of the article. In addition to this, one delegation suggested that the word “such” ought to be included before the word “instructions” in the first sentence.

13. The Working Group might wish to consider a text that reads as follows:

“The carrier must provide to the shipper, on its request and in a timely manner, such information as is within the carrier’s knowledge and such instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28.”

IV. Shipper’s obligation to provide information, instructions and documents (article 30, former 27)

14. The views of the delegations were divided with respect to article 30. Regarding the original and the proposed alternative text, some delegations have stated that they would like to retain the original text in article 30. Other delegations have stated that the alternative text is acceptable as a basis for further discussions. A few delegations that favoured the original text stated that the words “reasonably necessary for” in the chapeau and the words “may reasonably assume” in little (a) and (c) represent two different types of tests, one objective and one subjective. This means that in a situation where the document cannot be considered as reasonably necessary for the handling of the goods, the shipper has no obligation to provide it even if he is aware of the fact that the carrier does not have the information—this is the objective test. And likewise in a situation where the document is reasonably necessary, but where there are reasons to assume that the carrier already has the information, the shipper is under no obligation to provide the document this is the subjective test.

15. However, some delegations have also stated that they would like to see a provision where no subjective test is included—in other words, the shipper should have the obligation to provide all documents as soon as these are necessary in themselves for the handling of the goods. A subjective test would run the risk of causing much confusion in practice. Another reason for deleting the words could be that both situations—where the actual document is not necessary and where the carrier is already aware of the information—are covered in the alternative text by the words “reasonably necessary”. A document could be either not necessary at all for the handling of the goods or not necessary because of the fact that the carrier already has the information.

16. One other delegation has proposed to delete “reasonably” in the chapeau in that the shipper would have to provide all necessary documents.

17. Some delegations have also asked for a reference to article 38(1)(a) regarding the description of the goods to be included in the original text of article 30(c). The liability for the description of the goods would then become a strict one according to 31(2). On the other hand some delegations have stated that the liability for breach of the article 30 ought to be entirely based on negligence. A strict liability is considered to put too much burden on the shipper.

18. Some delegations have felt that the words within the chapeau could be deleted because of the fact that these are to be considered as implied terms, while others have argued that these words should be kept in the text.

19. Regarding the reference to the timeliness, accuracy and completeness it must be noted that according to article 31(2), variant B, the shipper is deemed to have guaranteed them in relation to article 30(b) and (c).

20. On the basis of the discussion above the Working Group might wish to consider the following text as an alternative to article 30 in A/CN.9/WG.III/WP.56:

The shipper must provide to the carrier in a timely manner such information, instructions, and documents that are reasonably necessary for:

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;

(b) Compliance with rules, regulations and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 38(1)[(a),(b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic record is to be issued, if any.

V. Basis of shipper's liability (draft article 31, former 29)

21. Article 31 regulates the liability of the shipper. In paragraph 1 it is stated that the general liability is based on negligence. Paragraph 2 then modifies the paragraph 1 by saying that for breach of its obligations under paragraphs 30 (b) and (c), the shipper has strict liability. The difference between variant A and B is here that according to variant A the strict liability comprises the obligation to provide this information, as well as its accuracy and completeness. According to variant B, only the timeliness, accuracy and completeness is covered by the strict liability. The obligation to provide the information is covered by the general liability in paragraph 1. In that respect, it is a little bit odd that the word timeliness has been included in variant B—this means that the question whether the shipper has to provide the information and the questions whether this has been done in due time will be governed by different liability regimes.

22. A majority of delegations preferred variant A of paragraph 2. However, the reasons for this vary a lot. Some delegations have stated that they prefer variant A because of the fact that the text is more simple and clearer. Other delegations have stated that they want it to be clear that the information provided by the shipper is correct—something which is already covered by variant B. And finally some delegations have emphasized that strict liability should cover not only the accuracy and completeness of the information, but also the obligation to provide it.

23. Delegations who have spoken in favour of variant B tend to emphasize the balance between the liability of the carrier and the shipper. A strict liability that covers most of the obligations in article 30 would put too much burden on the shipper, taking into account that the carrier's liability is based on negligence. A further reason that might speak in favour of variant B is that the obligation of the shipper in article 30 is limited to provide

information that is reasonably necessary. This makes it difficult to link the obligation with a strict liability. Another issue is that the information actually provided must be accurate and that the shipper will have a strict liability for this.

24. Whether the strict liability should cover the obligation to provide the information in article 30 (b) and (c) is a matter of policy. Some delegations have during the negotiations emphasized the importance of having a strict liability linked to the obligation in paragraph (b) and (c), especially paragraph (b).

25. Some delegations have also pointed out that they would like to limit the scope of the provision to the relationship between the shipper and the carrier. It has been proposed that the words “to the carrier” ought to be inserted in paragraph 1 and that paragraph 3 ought to be deleted.

26. Based on the discussions above the Working Group might wish to consider the following text as an alternative to article 31:

1. The shipper is liable to the carrier for loss, damage and injury caused by the goods, and for breach of its obligations under article 28 and article 30. The shipper is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage or injury is not attributable to its fault or to the fault of any person referred to in article 35.

2. The shipper is deemed to have guaranteed to the carrier the accuracy at the time of receipt by the carrier of the information, instructions and documents that it provides under article 30. It must indemnify the carrier against all loss, damages, delay and expenses arising or resulting from the information, instructions and documents not being accurate, unless the inaccuracy was caused by the carrier or any person referred to in article 19.

27. The alternative text is based on the assumption that the liability for not providing the reasonable information, documents, etc. ought to be based on negligence with a reversed burden of proof (the text mirrors in this respect the provision on carrier liability) and that the scope of the provision should be the relationship between the shipper and the carrier. Retaining alternative A in the original text of paragraph 2 might modify this rule. The shipper will in that situation have a strict liability for providing the information in article 30 (b) and (c).

28. In paragraph 2 in the alternative text, the shipper has a strict liability for the information that he provides, unless the carrier or anyone for whom it is responsible caused the inaccuracy. The text covers all parts of article 30 and not only paragraphs (b) and (c).

29. Paragraph 3 has been left out as a consequence of the discussion above regarding the scope of the provision.

VI. Material misstatement by the shipper (draft article 32, former 29 bis)

30. A clear majority of the delegations have expressed the view that the provision is not acceptable. Many of these delegations have also proposed that it ought to be deleted. The reason for this is that it appears as a provision of a punitive character. There is no causation required between the misstatement and the liability for delay, loss or damage to the goods. It has also been argued that if there is for example a delay because of a material

misstatement on the shipper's side it follows already from article 17 on the carrier's liability that the carrier is not liable for this.

31. Some delegations have spoken in favour of the provision. One reason for this was that it is particularly important that the shipper provide the carrier with correct information and that the latter may suffer damage because of a material misstatement. However, it could be argued that this is already covered by the liability for providing inaccurate information in article 30, especially the proposed paragraph 2 where the liability is strict regarding information which is provided by the shipper.

VII. Special rules on dangerous goods (draft article 33, former 30)

32. A majority of the delegations have expressed that they prefer either no definition at all or a more general and simplified definition than that proposed in A/CN.9/WG.III/WP.39. The reasons for not using the definition in the International Convention On Liability And Compensation For Damage In Connection With The Carriage Of Hazardous And Noxious Substances By Sea, 1996, ("HNS Convention") were that the HNS Convention fulfils a public interest, i.e. protecting the environment and third parties, rather than a private one, and that a technical definition like this one always runs the risk of soon being out of date. Those who preferred a general definition indicated that a general definition might inhibit the courts from applying varying interpretations of the notion of dangerous goods, and so promote uniformity.

33. In A/CN.9/WG.III/WP.56, the Secretariat has proposed a more general definition in draft article 33, paragraph 1. In paragraph 2 and 3 it is regulated that the shipper must mark and label the dangerous goods and that it has an obligation to inform the carrier of the dangerous nature or character of the goods. If the shipper does not do so, it is strictly liable for the loss, damage, delay and expenses directly or indirectly resulting from such failure. Regarding the obligation to inform, the shipper is only liable if the carrier does not otherwise have knowledge of the dangerous character of the goods.

VIII. Assumption of shipper's right and obligation (draft article 34, former 31)

34. Some delegations have expressed the view that the provision ought to be deleted. The reasons for this are that the chapter should only regulate the liability between the carrier and the shipper and that the question of the position of the "free-on-board", or "FOB" seller does not belong in a convention on carriage of goods, but rather in a convention on sale of goods.

35. However, a majority of the delegations have expressed a preference for including a regulation on the liability of the FOB seller, who very often will be the actual shipper. The problem is viewed as a practical one and it is noted that the relation between the FOB seller and the carrier is not very clear. The effect of such a regulation will be that the carrier may claim compensation directly from the actual shipper and that the latter may make use of the defences in the chapter on shipper's obligations. Looking at the situation today in many jurisdictions, this is something that is regulated by general tort law.

36. A few delegations have also discussed the wording of the provision. The view of one of these delegations is here that the word "accepts" is too vague compared to other alternative word "receives".

37. Another delegation favours a provision where the actual shipper will be liable if it “agrees to” be named as the shipper in the contract particulars. The person considered as the shipper will also have the opportunity to escape its liability if it proves that it is not the shipper by indicating who is really the shipper.

38. Some delegations have also indicated that they would like to see an explicit provision regulating that the shipper and the actual shipper are jointly liable. However, one delegation has expressed the view that provided that the actual shipper is liable, the contractual shipper should be relieved of his liability. The reason for this view seem to be that otherwise the carrier will be put in a better position compared to an shipment under a “cost, insurance, freight”, or “CIF” sale where the carrier may only claim compensation from the shipper (i.e. the seller under the sales contract), but not the consignee (i.e. the buyer under the sales contract).

39. On the basis of the discussion above the Working Group might wish to consider the following text:

1. If a person identified as “shipper” in the contract particulars, although not the shipper as defined in paragraph 1(h), receives the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper’s rights and immunities provided by this chapter and by chapter 14.

2. Paragraph 1 of this Article does not affect the responsibilities, liabilities, rights or immunities of the shipper.

IX. Vicarious liability of the shipper (draft article 35, former 32)

40. A majority of the delegations supports the article. One delegation is, however, of the view that it is not necessary to mirror the regulation of the carrier’s liability and that this question should be left to national law. Among the delegations that favour an inclusion of a provision on vicarious liability of the shipper, some have commented on the wording of the text. One delegation has expressed the view that the first sentence is repetitious. Other delegations have suggested that it is necessary to explicitly state that the shipper is not liable in cases where the performance is delegated to the carrier or a performing party on the carrier’s side, for example, under a “free in and out (stowed)”, or “FIOS”, clause.

41. On the basis of the discussion above the Working Group might wish to consider the following text:

1. The shipper is liable for the acts and omissions of any person, including subcontractors, employees and agents, to which it has delegated the performance of its responsibilities under this chapter as if such acts or omissions were its own. Liability is imposed on the shipper under this article only when the act or omission of the person concerned is within the scope of that person’s contract, employment or agency.

2. Notwithstanding paragraph 1 the shipper is not liable for acts and omissions of the carrier or a performing party on the carrier’s side to which it has delegated the performance of its responsibilities under this chapter.

X. Cessation of the shipper's liability (draft article 36, former 43(2))

42. The article was not dealt with in the questionnaire because of the fact that it was formerly located in the now-deleted chapter 9 on freight. The provisions of article 36 must be reviewed in connection with article 94. It seems that article 36 is already covered by paragraph 2 of article 94, which mandatorily regulates the responsibility and liability of the shipper and persons referred to in article 34. If the text in article 94 paragraph 2 is later deleted (the text is now placed within square brackets), the provisions of article 34 would contradict the principle in article 94, paragraph 1, (read *e contrario*) that it is possible to agree on terms more favourable for the shipper.

**I. Note by the Secretariat on transport law: draft convention on the
carriage of goods [wholly or partly] [by sea], submitted to the
Working Group on Transport Law at its sixteenth session
(A/CN.9/WG.III/WP.56) [Original: English]**

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.ⁱ The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.48.

2. Annex I of this document contains a consolidation of revised provisions for a draft convention on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group. While the Working Group has not yet completed second reading of the draft convention, it was thought that the number of revisions to the most recent consolidated text of the draft convention (contained in document A/CN.9/WG.III/WP.32) that have been agreed upon by the Working Group called for the publication of a more recent consolidated text. Changes to the consolidated text previously considered by the Working Group (contained in documents A/CN.9/WG.III/WP.32) have been indicated in footnotes to that text by reference to the working paper in which such interim revised text appeared (A/CN.9/WG.III/WP.36, A/CN.9/WG.III/WP.39, A/CN.9/WG.III/WP.44, and A/CN.9/WG.III/WP.47), or to the paragraph of the report in which such text appeared (A/CN.9/572 and A/CN.9/576). For ease of reference and to facilitate discussion in the Working Group, annex II of this document consists of the same document as annex I, but with underlining and strikeout, where appropriate, to indicate the changes from previously published versions of the text. Where suggested corrections, clarifications, improvements and relocation of provisions are thought to relate to drafting only, they are indicated by underlining and strikeout in annex II without further explanation. However, where more substantive changes are suggested to the text, these are explained in footnotes or through the introduction of variants in the text.

ⁱ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 345.

Annex I

Draft convention¹ on the carriage of goods [wholly or partly] [by sea]²

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.³

(b) “Volume contract” means a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.⁴

(c) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.⁵

(d) “Carrier” means a person that enters into a contract of carriage with a shipper.

(e) “Performing party” means a person other than the carrier that physically performs or undertakes to perform any of the carrier’s responsibilities under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery⁶ of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. The term “performing party” includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this paragraph but does not include any person that is retained by a shipper, a person referred to in article 34, consignor, controlling party⁷ or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than

¹ Without intending to predetermine the form of this Instrument, the word “Instrument” has been replaced with the word “Convention” throughout, in an effort to achieve consistency.

² As noted in para. 2 of A/CN.9/WG.III/WP.36, the Working Group decided to retain the current title unchanged for the purposes of future discussion.

³ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in paras. 53 and 58 of A/CN.9/576.

⁴ Corrections are to text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576. Amendment proposed to address concerns regarding previously bracketed phrase “a specified minimum quantity of”.

⁵ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576.

⁶ List expanded to parallel specific obligations set out in para. 14(1).

⁷ List expanded to be consistent with parties referred to in art. 10.

the carrier) who is retained by a shipper, a person referred to in article 34, consignor, controlling party or consignee.⁸

(f) “Maritime performing party” means a performing party that performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be].⁹ In the event of a trans-shipment, the performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.¹⁰

(g) “Non-maritime performing party” means a performing party that performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge.¹¹

(h) “Shipper” means a person that enters into a contract of carriage with a carrier.

(i) “Consignor” means a person that delivers the goods to the carrier or a performing party for carriage.

(j) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record.¹²

(k) “Consignee” means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record.

(l) “Right of control” has the meaning given in article 54.

⁸ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

⁹ As set out in footnote 9 of A/CN.9/WG.III/WP.36, there was support in the Working Group for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, but that a widely shared view was that movement between two physically distinct ports should be considered as part of a non-maritime performing party’s functions. This clarification could be achieved by the inclusion here of the phrase “including inland movements within a single port”. It was further suggested at para. 31 of A/CN.9/544 that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. The Working Group may wish to consider this suggestion.

¹⁰ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

¹¹ As set out in footnote 10 of A/CN.9/WG.III/WP.36, a concern was raised regarding whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole.

¹² Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 207 of A/CN.9/576.

(m) “Controlling party” means the person that pursuant to article 56 is entitled to exercise the right of control.

(n) “Transport document” means a document issued pursuant to a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:

(i) it evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

(ii) it evidences or contains a contract of carriage.

(o) “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

(p) “Non-negotiable transport document” means a transport document that does not qualify as a negotiable transport document.

(q) “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.¹³

(r) “Electronic transport record” means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions:

(i) it evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

(ii) it evidences or contains a contract of carriage.¹⁴

(s) “Negotiable electronic transport record” means an electronic transport record

(i) that indicates, by statements such as “to order”, or “negotiable”, or other

¹³ Suggested clarification to ensure that the draft convention does not draw an unnecessary distinction between the means of transmission and the form in which the data are stored. The definition of “electronic communication” draws on the definition of “data message” in art. 2 of the United Nations Model Law on Electronic Commerce, 1996 (“MLEC”), without the illustrative list of techniques. In the MLEC and the United Nations Draft Convention on the Use of Electronic Communications in International Contracts (“draft Electronic Contracting Convention”), Annex I to *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17, (A/60/17)*, not all data messages are capable of having the same value as written paper documents, which is only possible in respect of data messages that are “accessible so as to be usable for subsequent reference”. In the draft instrument, the notion of “electronic communication”, also incorporates the criteria for the functional equivalence between data messages and written documents on art. 6 of MLEC and art. 9, para. 2 of draft Electronic Contracting Convention. Thus, an “electronic communication” under the instrument must always be capable of replicating the function of written documents.

¹⁴ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.47, that was approved for further discussion in paras. 207 and 210 of A/CN.9/576.

appropriate¹⁵ statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and

(ii) the use of which meets the requirements of article 6(1).¹⁶

(t) “Non-negotiable electronic transport record” means an electronic transport record that does not qualify as a negotiable electronic transport record.¹⁷

(u) The “issuance” and the “transfer” of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person that has the rights in the negotiable electronic transport record.]¹⁸

(v) “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.¹⁹

(w) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]] and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.²⁰

(x) “Ship” means any vessel used to carry goods by sea.²¹

(y) “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods,²² and any equipment ancillary to such unit load.²³

¹⁵ As set out in footnote 12 of A/CN.9/WG.III/WP.47, the Working Group may wish to consider whether the word “appropriate” is necessary in light of the use of the phrase “recognized as having the same effect” and whether similar language in draft para. 1(o) should be aligned accordingly.

¹⁶ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

¹⁷ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

¹⁸ Text as set out in para. 207 of A/CN.9/576, and as approved for further discussion in para. 210 of A/CN.9/576. As noted in para. 208 of A/CN.9/576, the square brackets around the second sentence are intended to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion. The Working Group may wish to consider the suggestion noted in para. 209 of A/CN.9/576, that the intention behind this draft para. should be explained in an explanatory note to the draft convention.

¹⁹ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

²⁰ With reference to the discussion in footnote 15 of A/CN.9/WG.III/WP.32, deletion of the phrase “or a performing party [received for carriage]” is suggested.

²¹ Definition added to clarify and standardize the use of “ship” and “vessel”, depending on which is intended in the particular provision in issue, such that “ship” means an ocean-going vessel, and “vessel” means all other vessels.

²² The alternatives “[capable of being carried by sea]” and “[designed for carriage by sea]” were deleted as unnecessary since these issues are addressed in the articles in which they arise, draft arts. 64 and 26.

(z) “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.²⁴

(aa) “Domicile” means the place where (a) a company or other legal person [or association of natural or legal persons] has its (i) statutory seat or place of incorporation or registered office, as appropriate, (ii) central administration, or (iii) principal place of business, and (b) a natural person has her or his habitual residence.²⁵

[(bb) [Unless otherwise provided in this Convention] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.²⁶]

[(cc) [Unless otherwise provided in this Convention,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.²⁷]

Article 2. Interpretation of this Convention ²⁸

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

²³ Note footnote to draft art 64(3) that the definition of “container” might need to be further considered to ensure that it covered pallets. It is proposed that reference to “pallets”, if any, should be addressed in para. 64(3) rather than here.

²⁴ Deletion of this definition is proposed given the deletion of the chapter on freight and the inclusion of “freight” in the definition of “contract of carriage” in para. 1(a).

²⁵ Suggested adjustments to text as set out in para. 115 of A/CN.9/576. It is suggested that reference should be made to associations, since these legal entities often own ships, but may not be included in “other legal persons”. “Place of incorporation or registered office” have been added for certainty, since “statutory seat” is not universally recognized. All of these changes conform with the text of art. 60 of Council Regulation (EC) No. 44/2001, 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001] (“Brussels I”), from which the original text was drawn.

²⁶ Text as set out in para. 117 of A/CN.9/576, and as approved for further discussion in para. 120 of A/CN.9/576. If this definition is retained, the text must be aligned with draft arts. 8, 11, 75 and 77.

²⁷ *Ibid.* See note 26.

²⁸ Text as set out in para. 4 of A/CN.9/WG.III/WP.39.

*Article 3. Form requirements*²⁹

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20(2), 24(1), 24(2), 24(3), 38(1)(b) and (c), 41(c), 47, 52, 56(1), 63(2), 64(1), 71, 76, 95(1) and 95(6)(b) must³⁰ be in writing. Electronic communications may be used for these purposes, provided the use of such means is with the express or implied consent of the party by which it is communicated and of the party to which it is communicated.”

*Article 4. Applicability of defences and limitations*³¹

1. The defences and limitations of liability provided for in this Convention and the responsibilities imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, or damage to, the goods covered by a contract of carriage and delay in delivery of such goods, or for the breach of any other obligation under this Convention,³² whether the action is founded in contract, in tort, or otherwise.³³
2. If an action is brought³⁴ against an employee or agent of the carrier or a maritime performing party, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [that person proves that]³⁵ it acted within the scope of its employment or agency.

²⁹ Text as set out in para. 6 of A/CN.9/WG.III/WP.47, with inclusion of references to draft arts. 20(2), 64(1), 56(1), 63(2), 95(1) and 95(6)(b) and corrections to the opening description of types of communication. The Working Group may wish to note that this list is not closed, pending further examination. Further, the Working Group may wish to consider whether it is advisable to include with the final text an explanatory note that any notices contemplated in this convention that are not included in art. 3 may be made by any means including orally or by exchange of data messages that do not meet the definition of “electronic communication”. It is implicit in the definition of “electronic communication” that it must be capable of replicating the function of written documents (see *supra*, note 13).

³⁰ While UNCITRAL practice has been to use the “shall” form in its instruments, it has been suggested that modern legislative drafting practice prefers to use other forms, such as “must”. While this version of the draft convention has adopted the more modern approach, the Working Group may wish to consider which approach is preferable.

³¹ Corrections are to text as set out in para. 10 of A/CN.9/WG.III/WP.39. This art. has been moved to chapter 1 (General provisions) because it relates to the broad applicability and preemptive effect of the draft Convention rather than simply to the liability of the carrier, where it was previously located.

³² The addition of “the breach of any other obligation” is thought to have made the reference to “[or in connection with]” the goods unnecessary.

³³ As set out in footnote 52 of A/CN.9/WG.III/WP.39, the potentially repetitious nature of para. 20(4) and draft art. 4 was to be further considered in the next iteration of the draft convention. Adjustments to these provisions may have remedied the problem.

³⁴ The phrase “under this Convention” has not been repeated from the parallel provision in para. 20(4) because an action against an employee or agent will not be brought under the draft Convention since those persons are not subject to it, except for the maritime performing party, which is covered under para. 20(4).

³⁵ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the employee or agent

CHAPTER 2. ELECTRONIC COMMUNICATION

*Article 5. Use and effect of electronic communications*³⁶

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document in pursuance of this Convention may be recorded or communicated by using electronic communications³⁷ instead of by means of the transport document, provided the issuance and subsequent use of an electronic transport record is with the express or implied consent of the carrier and the shipper; and

(b) The issuance, control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 6. Procedures for use of negotiable electronic transport records*³⁸

1. The use of a negotiable electronic transport record must be subject to procedures that provide for:

(a) The method for the issuance and the³⁹ transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The way in which confirmation is given that delivery to the holder has been effected; or that, pursuant to articles 7(2) or 49(a)(ii), the negotiable electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.⁴⁰

³⁶ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 187 of A/CN.9/576.

³⁷ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 187 of A/CN.9/576.

³⁸ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

³⁹ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as revised for further discussion in paras. 207 and 210 of A/CN.9/576.

⁴⁰ As set out in footnote 34 in A/CN.9/WG.III/WP.47, the term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft convention.

*Article 7. Replacement of negotiable transport document or negotiable electronic transport record*⁴¹

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder must surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier must issue to the holder a negotiable electronic transport record that includes a statement that it is issued in substitution for the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier must issue to the holder, in substitution for that electronic transport record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic transport record; and

(b) Upon such substitution, the electronic transport record ceases to have any effect or validity.

CHAPTER 3. SCOPE OF APPLICATION⁴²

*Article 8. General scope of application*⁴³

1. Subject to article 9(1), this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a Contracting State⁴⁴; or

(b) The place of delivery [or port of discharge] is located in a Contracting State; or

[(c) The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract.]⁴⁵

References to [places and]⁴⁶ ports mean the [places and] ports agreed in the contract of carriage.

⁴¹ Text as set out in para. 5 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 189 of A/CN.9/576.

⁴² Where chapter and article titles were missing, language has been proposed for the consideration of the Working Group.

⁴³ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 62 of A/CN.9/576.

⁴⁴ In general, it is the practice of UNCITRAL to use the term “Contracting State” as opposed to “State Party”, or similar language. This change has been effected throughout the draft convention.

⁴⁵ Reference may be had to the discussion of this para. As set out in para. 61 of A/CN.9/576.

⁴⁶ If art. 1 includes definitions of “place of receipt” and “place of delivery”, as it currently does at

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

*Article 9. Specific exclusions and inclusions*⁴⁷

1. This Convention does not apply to:
 - (a) Charterparties;
 - (b) Contracts for the use of a ship or of any space thereon;
 - (c) Except as provided in paragraph 2, other contracts in non-liner transportation;
 and
 - (d) Except as provided in paragraph 3, volume contracts.
2. Without prejudice to subparagraphs 1(a) and (b), this Convention applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charterparty or to a contract for the use of a ship or of any space thereon.
3. (a) This Convention applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter so specify.
 - (b) This Convention applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Convention under subparagraph (a).

*Article 10. Application to certain parties*⁴⁸

Notwithstanding article 9, if a transport document or an electronic transport record is issued pursuant to a charterparty or a contract under article 9 (1)(b) or (c), this Convention applies to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 34 that is not the charterer or the party to the contract under article 9 (1)(b) or (c).

CHAPTER 4. PERIOD OF RESPONSIBILITY⁴⁹

Article 11. Period of responsibility of the carrier

1. Subject to article 12, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.
2. The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing such agreement, the time and location that is in accordance

draft paras. (bb) and (cc), the references to "place" would become unnecessary.

⁴⁷ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 66 of A/CN.9/576.

⁴⁸ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 73 of A/CN.9/576, bearing in mind the possibility of inserting a reference to draft subpara. 9(1)(d) at the end of draft art. 10, and any necessary clarification of the treatment of receipts.

⁴⁹ Corrections are to text as set out in A/CN.9/WG.III/WP.32.

with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

3. If the consignor is required to hand over the goods at the place of receipt to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the carrier may collect them, the time and location of the carrier's collection of the goods from the authority or other third party is the time and location of the receipt of the goods by the carrier under paragraph 2.⁵⁰

4. The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

5. If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the consignee may collect them, such handing over is a delivery of the goods by the carrier to the consignee under paragraph 4.

6. For the purposes of determining the carrier's period of responsibility and subject to paragraph 14(2), the contract of carriage may not provide that:

(a) The time of receipt of the goods is subsequent to the commencement of their initial loading under the contract of carriage, or

(b) The time of delivery of the goods is prior to the completion of their final discharge under the contract of carriage.⁵¹

Article 12. Transport beyond the contract of carriage⁵²

Variant A of article 12⁵³

1. The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.

2. In such event the carrier must exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

⁵⁰ This para. is proposed to address the situation when the consignor is required to hand over the goods to an authority, such as a customs authority, prior to them being handed over to the carrier. The text parallels that of para. 5.

⁵¹ Para. 6 is suggested in order to ensure that fictions may not be included in the contract of carriage in order to reduce the carrier's period of responsibility.

⁵² Suggested improved title. The Working Group may wish to consider whether art. 12 is properly placed within chapter 4 on period of responsibility.

⁵³ Variant A is art. 12 as set out in A/CN.9/WG.III/WP.32.

Variant B of article 12⁵⁴

On the request of the shipper, the carrier may agree to issue a single transport document or an electronic transport record that includes specified transport that is not covered by the contract of carriage. In such an event, the responsibility of the carrier covers the period of the contract of carriage and, unless otherwise agreed, the carrier, on behalf of the shipper, must arrange the additional transport as provided in such transport document or electronic transport record.

CHAPTER 5. OBLIGATIONS OF THE CARRIER

Article 13. Carriage and delivery of the goods

The carrier must, subject to this Convention and in accordance with the terms of the contract of carriage,⁵⁵ carry the goods to the place of destination and deliver them to the consignee.

Article 14. Specific obligations

1. The carrier must during the period of its responsibility as defined in article 11, and subject to article 27, properly and carefully receive,⁵⁶ load, handle, stow, carry, keep, care for, discharge and deliver the goods.

[2. The parties may agree that the loading, stowing and discharging of the goods is to be performed by the shipper or any person referred to in article 35, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]⁵⁷

Article 15. Goods that may become a danger

Variant A⁵⁸

Notwithstanding articles 13, 14, and 16(1), the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, an actual danger to persons or property or an illegal or unacceptable danger to the environment.

⁵⁴ The first sentence of Variant B is intended as a clarification of para. 1 of Variant A. The second sentence of Variant B modifies para. 2 of Variant A by changing the obligation of the carrier in its arrangement of additional transport from one of due diligence to whatever is agreed in the contract of carriage or elsewhere.

⁵⁵ Suggested deletion of “[properly and carefully]” as unnecessary and repetitious, since “subject to this Convention” already includes proper and careful carriage. Further, draft art. 13 is intended as a general obligation that is enhanced in subsequent articles.

⁵⁶ “Receive” and “deliver” added to ensure they are recognized as carrier’s obligations.

⁵⁷ As set out in footnote 47 of A/CN.9/WG.III/WP.32, it was noted in para. 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to arts. 13 and 14(1).

⁵⁸ Variant A of art. 15 is based on the original text of the draft convention (A/CN.9/WG.III/WP.21).

Variant B⁵⁹

Notwithstanding articles 13, 14, and 16(1), the carrier may unload, destroy or render goods harmless if they become an actual danger to persons or property.

*Article 16. Specific obligations applicable to the voyage by sea*⁶⁰

1. The carrier is bound, before, at the beginning of, and during⁶¹ the voyage by sea, to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly man,⁶² equip and supply the ship and keep the ship so manned,⁶³ equipped and supplied throughout the voyage;⁶⁴

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers when supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

[2. Notwithstanding articles 13, 14, and 16(1), the carrier may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril⁶⁵ human life or⁶⁶ other property involved in the common adventure.]⁶⁷

⁵⁹ Variant B is based on the principles expressed in art. 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods.

⁶⁰ Text as set out in para. 11 of A/CN.9/WG.III/WP.36, including footnotes.

⁶¹ As set out in footnote 55 of A/CN.9/WG.III/WP.36, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft para. 16(1) surrounding the phrases "and during" in draft para. 16(1), "and keep" in draft subpara. 16(1)(a), and "and keep" in draft subpara. 16(1)(c) should thus be removed, and the text in them retained. The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft convention, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the convention.

⁶² As set out in footnote 56 of A/CN.9/WG.III/WP.36, a drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship". The Working Group may wish to consider this suggestion.

⁶³ *Ibid.*

⁶⁴ As set out in footnote 58 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to make the necessary changes to subpara. (b) to ensure that this obligation was understood to be of a continuing nature. It is suggested that the addition of the phrase "throughout the voyage" could achieve this effect. A possible alternative could be to insert the phrase "and continuously" after the opening word, "Properly".

⁶⁵ As set out in footnote 59 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the presence of imminent danger, but that care should be taken not to prejudice or alter the rules on general average. Consistent with the language in Rule A of the York-Antwerp Rules of 1994, the phrase "from peril" was added after the word "preserving".

⁶⁶ As set out in footnote 60 to A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the preservation of human life. The phrase "human life" has been added before the phrase "or other property".

⁶⁷ As set out in footnote 61 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain draft para. 16(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 18 on general average.

CHAPTER 6. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

*Article 17. Basis of liability*⁶⁸

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

(b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

- (i) the unseaworthiness of the ship;
- (ii) the improper manning, equipping, and supplying of the ship; or
- (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article 16(1); or

(B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

⁶⁸ Text as set out in paras. 31 and 75 of A/CN.9/572, and as broadly accepted in paras. 33 and 80 of A/CN.9/572.

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;⁶⁹

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects in the [ship][vessel][means of transport]⁷⁰ not discoverable by due diligence;

(h) Act or omission of the shipper or any person referred to in article 35,⁷¹ the controlling party, or the consignee;

(i) Handling, loading, [stowage,] or discharging⁷² of the goods [actually performed] by the shipper or any person referred to in article 35,⁷³ the controlling party, or the consignee;⁷⁴

(j) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

[(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 15 and 16(2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.]⁷⁵

4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs.

⁶⁹ Further examination is needed whether the reference to art. 19 is necessary.

⁷⁰ The Working Group may wish to consider which of the terms in square brackets is intended to be addressed in this para.

⁷¹ Further examination is needed whether the reference to art. 35 is necessary.

⁷² “Discharging” is suggested in order to be consistent with the language in draft art. 14.

⁷³ Further examination is needed whether the reference to art. 35 is necessary.

⁷⁴ As noted in para. 76 of A/CN.9/572, the Working Group agreed to add a footnote to para. (i) indicating that the final text of it would depend upon the outcome of the discussion on para. 14(2).

⁷⁵ The Working Group may wish to reconsider this provision in light of the treatment of draft art. 33.

*Article 18. Carrier's liability for failure to provide information and instructions*⁷⁶

The carrier is liable⁷⁷ for loss, damage [, delay]⁷⁸ or injury caused by a breach of its obligations under article 29, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person referred to in article 19 caused [or contributed to] the loss, damage [, delay] or injury.

*Article 19. Vicarious liability of the carrier*⁷⁹

1. Subject to paragraph 20(4),⁸⁰ the carrier is liable for the acts and omissions of:

(a) Any performing party, and

(b) Any other person, including a performing party's subcontractors, employees⁸¹ and agents, that performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own.

2. The carrier is liable under paragraph 1 only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

*Article 20. Liability of maritime performing parties*⁸²

1. A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this Convention, and entitled to the carrier's rights and immunities provided by this Convention if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; or (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Convention, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 65, 64⁸³ and 26(4), a maritime performing party is not bound by this agreement

⁷⁶ Text as set out in para. 18 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 85 of A/CN.9/WG.III/WP.39, aspects of draft arts. 31 and 33 dealing with the liability of the carrier have been called "art. 18", for possible placement here.

⁷⁷ See *infra*, note 125.

⁷⁸ See *infra*, note 127.

⁷⁹ Corrections to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸⁰ As set out in footnote 63 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain this opening phrase, although the suggestion was made that it should be replaced with the phrase "Subject to the liability and limitations of liability available to the carrier" since draft art. 19 dealt with actions brought against the carrier, while draft para. 20(4) dealt with actions brought against any person other than the carrier.

⁸¹ As set out in footnote 64 of A/CN.9/WG.III/WP.36, as a matter of drafting, further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

⁸² Corrections are to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸³ As set out in footnote 69 of A/CN.9/WG.III/WP.36, the Working Group took note of the suggestion to limit the reference to draft art. 64, since it was stated that, while the reference to

unless the maritime performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 4, a maritime performing party is liable for the acts and omissions of any person to which it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A maritime performing party is liable under this paragraph only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.⁸⁴

Variant A of paragraph 4⁸⁵

4. If an action under this Convention is brought against a maritime performing party, that party is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁶ it acted within the scope of its contract, employment or agency.

Variant B of paragraph 4

4. If an action under this Convention is brought against any person, other than the carrier, referred to in article 19 or paragraph 3, [, including employees or agents of the contracting carrier or of a maritime performing party,]⁸⁷ that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁸ it acted within the scope of its contract, employment, or agency.

Article 21. Joint and several liability and set-off⁸⁹

1. If the carrier and one or more maritime performing parties are liable⁹⁰ for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several [, such that

paras. (1), (3) and (4) of draft art. 64 was acceptable, para. (2) of draft art. 64 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group decided that this suggestion might need to be further discussed after a decision had been made regarding the inclusion of para. (2) of draft art. 64 in the draft convention.

⁸⁴ As set out in footnote 74 of A/CN.9/WG.III/WP.36, the Working Group reaffirmed its decision that the structure of this para. should mirror new draft art. 19, and took note of the views expressed regarding whether draft para. 20(3) should cover both maritime and non-maritime performing parties for continuation of the discussion at a future session.

⁸⁵ Suggested variant for para. 20(4) in order to respond to the Working Group's desire, as set out in footnote 77 of A/CN.9/WG.III/WP.36, to examine a variant limiting the scope of this para. to the maritime sphere, and in light of the text proposed for para. 4(2) which parallels this para., but in the context of employees and agents.

⁸⁶ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the maritime performing party.

⁸⁷ As set out in footnote 80 of A/CN.9/WG.III/WP.36, the Working Group may wish to consider the following simplified text for the opening phrase of the para. ending with "that person": "If an action under this Convention is brought against any maritime performing party [, including its sub-contractors, employees or agents,] that person ...".

⁸⁸ See *supra*, note 86.

⁸⁹ Text as set out in para. 2 of A/CN.9/WG.III/WP.39, including footnotes.

⁹⁰ As set out in footnote 3 of A/CN.9/WG.III/WP.39, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a

each such party is liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may have against other liable parties,]⁹¹ but only up to the limits provided for in articles 22, 64 and 26.

2. Without prejudice to article 66, the aggregate liability of all such persons must not exceed the overall limits of liability under this Convention.

[3. When a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant is set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.]⁹²

*Article 22. Delay*⁹³

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage or journey.⁹⁴

*Article 23. Calculation of compensation*⁹⁵

1. Subject to article 64, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 11.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

separate draft art., for greater clarity, the phrase “If more than one maritime performing party is liable” as it appears in A/CN.9/WG.III/WP.36, has been changed to “If the carrier and one or more maritime performing parties are liable”. The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 21(3) below.

⁹¹ As set out in footnote 4 of A/CN.9/WG.III/WP.39, the phrase in square brackets has been added for clarification of the meaning of “joint and several liability”. However, the Working Group may wish to consider the use of the term “joint and several liability” in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of Modification of 1999 (“CIM-COTIF 1999”); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (“CMNI”); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 (“Warsaw Convention”); and para. 36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (“Montreal Convention”).

⁹² As set out in footnote 7 of A/CN.9/WG.III/WP.39, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 90. The Working Group may wish to consider whether this para. is necessary or whether it can be deleted.

⁹³ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.39.

⁹⁴ Art. 22(2), formerly draft art. 16(2) in A/CN.9/WG.III/WP.32, has been moved to become art. 65 in the new chapter on limitation of liability.

⁹⁵ Text as set out in para. 5 of A/CN.9/WG.III/WP.39.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 20.

*Article 24. Notice of loss, damage, or delay*⁹⁶

[Variant A of paragraph 1]⁹⁷

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice⁹⁸ of loss of or damage to⁹⁹ the goods, indicating the general nature of such loss or damage, was given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][seven days][seven working days at the place of delivery][seven consecutive days] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection¹⁰⁰ of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

[Variant B of paragraph 1]¹⁰¹

1. Notice of loss of or damage to¹⁰² the goods, indicating the general nature of such loss or damage, must be given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days]¹⁰³[__ working days at the place of delivery] [__ consecutive days] after the delivery of the goods. [A court [may] [must] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 17(1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

2. No compensation is payable under article 22 unless notice of loss due to delay was given to the carrier within 21 consecutive days following delivery of the goods.

⁹⁶ Corrections are to text as set out in para. 9 of A/CN.9/WG.III/WP.39.

⁹⁷ As set out in footnote 39 of A/CN.9/WG.III/WP.39, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant A of para. 1 is the text in A/CN.9/WG.III/WP.32, but for the deletion of “[a reasonable time]” as decided at para. 75 of A/CN.9/552, and with the additions as noted.

⁹⁸ As set out in footnote 40 of A/CN.9/WG.III/WP.39, draft art. 3 of the draft convention states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

⁹⁹ “In connection with” deleted as unnecessary in this para.

¹⁰⁰ As set out in footnote 43 of A/CN.9/WG.III/WP.39, it was suggested in para. 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

¹⁰¹ As set out in footnote 44 of A/CN.9/WG.III/WP.39, Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

¹⁰² See *infra*, note 212.

¹⁰³ As set out in para. 75 of A/CN.9/552, the Working Group had decided to delete the phrase “[a reasonable time]” from the original text from which this variant was derived.

3. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

4. In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods and must provide access to records and documents relevant to the carriage of the goods.

CHAPTER 7. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 25. Deviation during sea carriage

[Variant A]¹⁰⁴

1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life [or property] at sea[, or by any other [reasonable] deviation].

2. When under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this Convention.^{105]}

[Variant B]¹⁰⁶

1. The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.

2. To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this Convention, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of a ship.

3. To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this Convention. In particular, a deviation does not deprive the carrier of its rights under this Convention except to the extent provided in article 66.]

¹⁰⁴ As set out in footnote 59 of A/CN.9/WG.III/WP.39, Variant A is the draft art. as set out at A/CN.9/WG.III/WP.32.

¹⁰⁵ As set out in footnote 60 of A/CN.9/WG.III/WP.39 and in footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read:

"Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this Convention."

If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

¹⁰⁶ As set out in footnote 61 of A/CN.9/WG.III/WP.39, Variant B is the draft art. as proposed at para. 38 of A/CN.9/WG.III/WP.34.

*Article 26. Deck cargo on ships*¹⁰⁷

1. Goods may be carried on or above the deck of a ship only if:
 - (a) Such carriage is required by applicable laws or administrative rules or regulations, or
 - (b) They are carried in or on containers [fitted to carry cargo on deck] on decks that are specially fitted to carry such containers, or
 - (c) [In cases not covered by subparagraphs (a) or (b) of this paragraph,] the carriage on deck [is in accordance with the contract of carriage, or] complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.
2. If the goods have been shipped in accordance with subparagraphs 1(a) or (c), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to subparagraph 1(b), the carrier is liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Convention without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under paragraph 1, the carrier is liable, irrespective of article 17, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.¹⁰⁸
3. If the goods have been shipped in accordance with subparagraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with subparagraph 1(c) and, if a negotiable transport document or a negotiable electronic transport record is issued, is not entitled to invoke that subparagraph against a third party that has acquired such negotiable transport document or electronic transport record in good faith.¹⁰⁹
4. If the carrier is liable under this article for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided in articles 22, 64 and 66(1); but, if the carrier and shipper [expressly] agreed that the goods would be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods [[that exclusively][to the extent that such damage] resulted from their carriage on deck]¹¹⁰.¹¹¹

¹⁰⁷ Corrections are to text as set out in para. 13 of A/CN.9/WG.III/WP.39.

¹⁰⁸ As set out in footnote 63 of A/CN.9/WG.III/WP.39, para. 2 may need to be discussed in greater detail in conjunction with draft para. 17(4), however, changes to para. 17(4) may render this discussion unnecessary.

¹⁰⁹ As set out in footnote 64 of A/CN.9/WG.III/WP.39, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic transport records would continue after discussion of third-party rights and freedom of contract.

¹¹⁰ As set out in footnote 67 of A/CN.9/WG.III/WP.39, square brackets were placed around “that exclusively resulted from their carriage on deck”. A further alternative has been added.

¹¹¹ As set out in footnote 69 of A/CN.9/WG.III/WP.39, square brackets were placed around para. 4, for discussion at a future session, with further study of its relationship with draft art. 66.

[Article 27. Carriage preceding or subsequent to sea carriage]

1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier's period of responsibility but:

(a) Before the time of their loading on to the ship;

(b) After their discharge from the ship to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:

(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable]¹¹², and

(ii) specifically provide for carrier's liability, limitation of liability, or time for suit, and

(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]

[2. Paragraph 1 does not affect the application of article 64(2).¹¹³]

[3. Article 27 applies regardless of the national law otherwise applicable to the contract of carriage.¹¹⁴]

CHAPTER 8. OBLIGATIONS OF THE SHIPPER

*Article 28. Delivery for carriage*¹¹⁵

The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended

¹¹² As set out in para. 55 of A/CN.9/WG.III/WP.21, this bracketed text reflected the situation under the 1980 Convention concerning International Carriage by Rail ("COTIF"). Once the 1999 Protocol for the Modification of COTIF enters into force, expected to be in the fall of 2005, the Working Group may wish to delete the bracketed language.

¹¹³ If para. 64(2) is deleted, this para. should also be deleted.

¹¹⁴ As set out in para. 54 of A/CN.9/WG.III/WP.21, this para. is a conflict of law provision that was intended to safeguard the applicability of inland transport conventions. Further, as set out in footnotes 42 and 231 of A/CN.9/WG.III/WP.32, draft art. 27 inspired a request that a conflict of convention provision be inserted into chapter 19. Draft art. 89 was inserted in response to that request.

¹¹⁵ Text as set out in para. 14 of A/CN.9/WG.III/WP.39, including footnotes.

carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.¹¹⁶

*Article 29. Carrier's obligation to provide information and instructions*¹¹⁷

The carrier must provide to the shipper, on its request [and in a timely manner]¹¹⁸, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28.¹¹⁹ [The information and instructions so provided must be accurate and complete.]¹²⁰

*Article 30. Shipper's obligation to provide information, instructions and documents*¹²¹

The shipper must provide to the carrier [in a timely manner, such accurate and complete]¹²² information, instructions, and documents as are reasonably necessary for:

- (a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, except to the extent that the shipper may reasonably assume that such information is already known to the carrier¹²³;
- (b) Compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;
- (c) The compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38(1)(b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any, unless the shipper may reasonably assume that such information is already known to the carrier.

¹¹⁶ As set out in footnote 71 of A/CN.9/WG.III/WP.39, to improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft art. 28:

“In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer.”

¹¹⁷ Text as set out in para. 15 of A/CN.9/WG.III/WP.39, including footnotes.

¹¹⁸ As set out in footnote 72 of A/CN.9/WG.III/WP.39, former draft art. 28 of A/CN.9/WG.III/WP.32 was deleted and replaced by a mention in draft art. 29 that the shipper should provide “[in a timely manner]” the information and instructions required.

¹¹⁹ As set out in footnote 73 of A/CN.9/WG.III/WP.39, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, “unless the carrier may reasonably assume that such information is already known to the shipper”.

¹²⁰ As set out in footnote 74 of A/CN.9/WG.III/WP.39, “[the information and instructions given must be accurate and complete]” has been added for future discussion.

¹²¹ Corrections are to text as set out in para. 16 of A/CN.9/WG.III/WP.39.

¹²² As set out in footnote 75 of A/CN.9/WG.III/WP.39, “[in a timely manner, such accurate and complete information, instructions and documents ...]” has been added for future discussion.

¹²³ As set out in footnote 76 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, but “except to the extent that the shipper may reasonably assume that such information is already known to the carrier” was added to the end of subpara. (a).

*Article 31. Basis of shipper's liability*¹²⁴

1. The shipper is liable¹²⁵ for¹²⁶ loss, damage [, delay]¹²⁷ or injury caused by the goods, and for breach of its obligations under article 28 and paragraph 30(a), [unless][unless and to the extent that][except to the extent that] the shipper proves that neither its fault nor the fault of any person referred to in article 35 caused or contributed to the loss, damage [, delay] or injury.

Variant A of paragraph 2¹²⁸

2. The shipper is liable¹²⁹ for loss or damage caused by a breach of its obligations under paragraphs 30(b) and (c).]

[Variant B of paragraph 2]¹³⁰

2. The shipper is deemed to have guaranteed to the carrier the timeliness, accuracy and completeness at the time of receipt by the carrier of the information, instructions and documents that the shipper is required to provide under paragraphs 30(b) and (c). The shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from any breach of obligations under paragraphs 30(b) and (c). The right of the carrier to such indemnity in no way limits its responsibility under the contract of carriage to any person other than the shipper.]

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier are jointly liable to the consignee or the controlling party¹³¹ for any such loss or damage [or injury].¹³²

¹²⁴ Corrections are to text as set out in para. 18 of A/CN.9/WG.III/WP.39.

¹²⁵ As set out in footnote 77 of A/CN.9/WG.III/WP.39, para. 31(1) has been redrafted to mirror the provision on carrier's liability at draft para. 17(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft art. 17 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft art. 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

¹²⁶ The phrase "loss resulting from" was deleted to conform with the approach taken in draft art. 17.

¹²⁷ As set out in footnote 78 of A/CN.9/WG.III/WP.39, "delay" arises by virtue of creating a mirror provision of draft art. 17, but it has been placed in square brackets since it has not been specifically discussed in the context of draft art. 31.

¹²⁸ As set out in footnote 80 of A/CN.9/WG.III/WP.39, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft art. 30.

¹²⁹ See *supra*, note 125.

¹³⁰ As set out in footnote 82 of A/CN.9/WG.III/WP.39, a provision similar to art. III.5 of the Hague Rules has been introduced in square brackets. This provision has been revised as indicated from the version set out in A/CN.9/WG.III/WP.39.

¹³¹ As set out in footnote 83 of A/CN.9/WG.III/WP.39, the issue of liability to the consignee and the controlling party might need to be reconsidered later.

¹³² As set out in footnote 84 of A/CN.9/WG.III/WP.39, para. 3 of Variant B of draft art. 31 (A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft art. 17.

[Article 32. *Material misstatement by shipper*¹³³

A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document or electronic transport record.]¹³⁴

Article 33. *Special rules on dangerous goods*¹³⁵

1. “Dangerous goods” means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment.
2. The shipper must mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such failure.
3. The shipper must inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such shipment.

Article 34. *Assumption of shipper’s rights and obligations*¹³⁶

If a person identified as “shipper” in the contract particulars, although not the shipper as defined in paragraph 1(h), [accepts][receives][becomes a holder of] the transport document or electronic transport record, then such person is (a) [subject to the responsibilities and liabilities] imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper’s rights and immunities provided by this chapter and by chapter 14.

Article 35. *Vicarious liability of the shipper*¹³⁷

The shipper is liable for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons [except the carrier or performing parties] that act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Liability is imposed on

¹³³ Corrections are to text as set out in para. 20 of A/CN.9/WG.III/WP.39.

¹³⁴ As set out in footnote 90 of A/CN.9/WG.III/WP.39, draft art. 32 has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft art. 32 could be placed in chapter 6 on the liability of the carrier.

¹³⁵ This text is thought to better reflect the discussion in and request of the Working Group as set out in paras. 146 to 148 of A/CN.9/552, and replaces the text proposed in para. 19 of A/CN.9/WG.III/WP.39.

¹³⁶ Corrections are to text as set out in para. 21 of A/CN.9/WG.III/WP.39. As set out in footnote 91 of A/CN.9/WG.III/WP.39, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

¹³⁷ Corrections are to text as set out in para. 22 of A/CN.9/WG.III/WP.39. Changes have been made to this provision to align it with art. 19, relating to the vicarious liability of the carrier.

the shipper under this article only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.¹³⁸

[Article 36. Cessation of shipper's liability]¹³⁹

If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain time, such cessation is not valid:

(a) With respect to any liability under this chapter of the shipper or a person referred to in article 34; or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security¹⁴⁰ for the payment of such amounts.

(c) To the extent that it conflicts with article 63.^{141]}

CHAPTER 9. TRANSPORT DOCUMENTS AND
ELECTRONIC TRANSPORT RECORDS¹⁴²

*Article 37. Issuance of the transport document or
the electronic transport record*

Upon delivery of the goods to the carrier or performing party:

(a) The consignor is entitled to obtain a transport document or, subject to article 5(a), an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and

(b) The shipper or, if the shipper instructs the carrier, the person referred to in article 34, is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5(a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one.¹⁴³

¹³⁸ As set out in footnote 94 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, and questions regarding the interaction of this provision with para. 14 (2) and draft art. 32 should be considered at a future session.

¹³⁹ Former para. 43(2) of A/CN.9/WG.III/WP.32, moved to this placement from the now-deleted Chapter 9 on freight.

¹⁴⁰ Given the deletion of former draft art. 45 from A/CN.9/WG.III/WP.32, the phrase "pursuant to art. 45 or otherwise" has been deleted from the draft art. in order to take into account that deletion.

¹⁴¹ As set out in footnote 208, *infra*, former draft art. 62 of A/CN.9/WG.III/WP.32 was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

¹⁴² But for the indicated renumbering, drafting improvements and proposed titles for draft arts., as well as the adjustments that arose as a result of electronic commerce considerations and which were approved by the Working Group in para. 200 of A/CN.9/576 (for revisions to art. 37) and in paras. 207, 209 and 210 of A/CN.9/576 (for revisions to art. 39), this chapter remains largely unchanged from A/CN.9/WG.III/WP.32.

¹⁴³ As set out in footnote 127 of A/CN.9/WG.III/WP.32, with respect to para. (a), it was acknowledged that, since not all transport documents as defined under draft art. 1(n) served the function of evidencing receipt of the goods by the carrier, it was important to make it clear that,

Article 38. Contract Particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 37 must include:

- (a) A description of the goods;
- (b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;
- (c) (i) The number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods and
- (ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods¹⁴⁴;
- (d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;
- (e) The name and address of the carrier; and
- (f) The date
 - (i) on which the carrier or a performing party received the goods, or
 - (ii) on which the goods were loaded on board the ship, or
 - (iii) on which the transport document or electronic transport record was issued.¹⁴⁵

2. The phrase “apparent order and condition of the goods” in paragraph 1 refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.

under para. (a), the transport document should serve the receipt function.

¹⁴⁴ As set out in footnote 129 of A/CN.9/WG.III/WP.32, the concern was expressed in para. 28 of A/CN.9/526 that this phrase might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase “as furnished by the shipper” with the phrase “if furnished by the shipper”.

¹⁴⁵ As set out in footnote 130 of A/CN.9/WG.III/WP.32, it was suggested that the Working Group should consider redrafting para. 1 to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to draft art. 48, *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory elements, and to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

*Article 39. Signature*¹⁴⁶

1. A transport document must be signed by the carrier or a person having authority from the carrier.
2. An electronic transport record must include the electronic signature of the carrier or a person having authority from the carrier. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.¹⁴⁷

Article 40. Deficiencies in the contract particulars

1. The absence of one or more of the contract particulars referred to in article 38(1), or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, then the date is considered to be:
 - (a) If the contract particulars indicate that the goods have been loaded on board a ship, the date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship; or
 - (b) If the contract particulars do not indicate that the goods have been loaded on board a ship, the date on which the carrier or a performing party received the goods.
- [3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]¹⁴⁸

¹⁴⁶ While this draft art. has been revised by the Working Group as indicated during its review of the electronic commerce aspects of the draft convention, the original text as set out in A/CN.9/WG.III/WP.32 attached the following at footnote 132: The Working Group may wish to consider whether "signature" should be defined as, for example, in para. 14(3) of the Hamburg Rules, particularly in light of modern practice.

¹⁴⁷ As a consequence of its review of the electronic commerce provisions of the draft convention at its fifteenth session, these changes were approved for further discussion by the Working Group in paras. 205 and 207 of A/CN.9/576. The United Nations Model Law on Electronic Signatures 2001 defines an electronic signature as, "data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory's approval of the information contained in the data message." Since this term only appears once in the draft convention, it is suggested that no definition is needed. The provision retains, however, the reference to the essential functions of the electronic signature (i.e. identifying the signatory and indicating its approval of the record). The only difference is the use of the word "authorization" rather than "approval" in the draft convention.

¹⁴⁸ As set out in footnote 137 of A/CN.9/WG.III/WP.32., the prevailing view in the Working Group was that para. 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep para. 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date.

4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the transport document or electronic transport record is either *prima facie* or conclusive evidence under article 43, as the case may be, that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party.

Article 41. Qualifying the description of the goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38(1)(a), 38(1)(b) or 38(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

(i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

(ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

(b) For goods delivered to the carrier or a performing party in a closed container, unless¹⁴⁹ the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate¹⁵⁰, the carrier may include a qualifying clause in the contract particulars with respect to

(i) the leading marks on the goods inside the container, or

¹⁴⁹ As set out in footnote 140 of A/CN.9/WG.III/WP.32, the phrase “unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the para. in order to clarify that it is intended to apply to the entire para.

¹⁵⁰ As set out in footnote 141 of A/CN.9/WG.III/WP.32, another suggestion was that language along the lines of subpara. (a)(ii) should be included also in para. (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in para. 37 of A/CN.9/526 that the carrier that decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft convention should deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, when the carrier acting in bad faith had voluntarily agreed not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

(i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or

(ii) the carrier can show that there was no reasonable means of checking the weight of the container.¹⁵¹

Article 42. Reasonable means of checking and good faith

For purposes of article 41:

(a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable.

(b) The carrier acts in “good faith” when issuing a transport document or an electronic transport record if

(i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and

(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.

(c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith.

Article 43. Prima facie and conclusive evidence

Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is:

(a) Prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and

(b) Conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars

[(i)] if a negotiable transport document or a negotiable electronic transport record has been transferred to a third party acting in good faith [or

¹⁵¹ As set out in footnote 129 of A/CN.9/WG.III/WP.32, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. However, it was thought that the word “commercially” was unnecessary in light of the definition in para. 42(a), and it was deleted.

(ii) Variant A of paragraph (b)(ii)¹⁵²

if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars.]

(ii) Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]¹⁵³

Article 44. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause.¹⁵⁴

*[Article 45. "Freight prepaid"]*¹⁵⁵

If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee, is liable for the payment of the freight. This article does not apply if the holder or the consignee is also the shipper.]

¹⁵² Variant A of subpara. (b)(ii) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁵³ As set out in footnote 145 of A/CN.9/WG.III/WP.32, the prevailing view in the Working Group was to retain subpara. (b)(ii) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paras. 45 to 47 of A/CN.9/526. Variant B was proposed in A/CN.9/WG.III/WP.32 to respond to concerns that Variant A appeared to introduce a novel use for non-negotiable documents that was unknown in European law.

¹⁵⁴ As set out in footnote 146 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider the alternative language for draft art. 44 suggested in paras. 153 and 154 of A/CN.9/WG.III/WP.21:

"If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under art. 43, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under para. 2."

It would then be necessary to add a new provision, perhaps as para. 2, which might provide:

"A qualifying clause in the contract particulars is effective for the purposes of para. 1 under the following circumstances:

(a) For non-containerized goods, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms.

(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms if

(i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and

(ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that

(1) a container was opened for the purpose of inspection,

(2) the inspection was properly witnessed, and

(3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

¹⁵⁵ Former draft para. 44(1) from A/CN.9/WG.III/WP.32 retained as agreed (see paras. 162 to 164 of A/CN.9/552) in draft art. 45.

CHAPTER 10. DELIVERY TO THE CONSIGNEE¹⁵⁶*Article 46. Obligation to accept delivery*

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]¹⁵⁷ must accept delivery of the goods at the time and location referred to in article 11(4). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party acts in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the performing party]¹⁵⁸ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.]¹⁵⁹

Article 47. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee must acknowledge receipt¹⁶⁰ of the goods from the carrier or the performing party in the manner that is customary at the place of destination.

Article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply:

(a) If the name and address of the consignee is not referred to in the contract particulars the controlling party must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;¹⁶¹

¹⁵⁶ The original text of this chapter with drafting improvements and corrections suggested in red-line underline and strike-out, is taken from A/CN.9/WG.III/WP.32.

¹⁵⁷ As set out in footnote 160 of A/CN.9/WG.III/WP.32, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

¹⁵⁸ As set out in footnote 161 of A/CN.9/WG.III/WP.32, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of draft art. 46 could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”.

¹⁵⁹ As set out in footnote 162 of A/CN.9/WG.III/WP.32, suggestions were made that draft art. 46 and draft arts. 51, 52 and 53 could be merged, or that to reduce the confusion caused by the interplay of draft art. 46 and draft arts. 51, 52, and 53, the second sentence of draft art. 46 could be deleted, and draft arts. 51, 52, and 53 could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

¹⁶⁰ It was thought that deletion of the phrase “shall confirm delivery” and replacement with the phrase “must acknowledge receipt” was preferable since the consignee could confirm its own act, but not the fulfilment of the carrier’s obligation.

¹⁶¹ As set out in footnote 164 of A/CN.9/WG.III/WP.32, the suggestion made in para. 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to draft subpara. 38(1)(f), *supra*.

(b) Variant A of paragraph (b)¹⁶²

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee upon the consignee's production of proper identification;¹⁶³

Variant B of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification.

Variant C of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. The carrier may refuse delivery if the consignee does not produce proper identification.

(c) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling party, the shipper. In such event, the controlling party or shipper must give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 is deemed to be the shipper for purposes of this paragraph. The carrier that delivers the goods upon instruction of the controlling party or the shipper under this paragraph is discharged from its obligations to deliver the goods under the contract of carriage.¹⁶⁴

Article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

When a negotiable transport document or a negotiable electronic transport record has been issued, the following paragraphs apply:

(a) (i) Without prejudice to article 46 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(ii) Without prejudice to article 46 the holder of a negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods

¹⁶² As set out in footnote 165 of A/CN.9/WG.III/WP.32, Variant A of para. (b) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁶³ As set out in footnote 166 of A/CN.9/WG.III/WP.32, the suggestion made in para. 76 of A/CN.9/526 that para. (b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier, has been incorporated in the text of both Variant B and C.

¹⁶⁴ As set out in footnote 167 of A/CN.9/WG.III/WP.32, a suggestion was made during the consideration of draft para. 49(b) and (c) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as para. (c).

at the time and location referred to in article 11(4) to such holder if it demonstrates in accordance with the procedures referred to in article 6 that it is the holder of the electronic transport record. Upon such delivery, the electronic transport record ceases to have any effect or validity.¹⁶⁵

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper must give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁶

(c) [Notwithstanding paragraph (d),]¹⁶⁷ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) is discharged from its obligation to deliver the goods under the contract of carriage to the holder,¹⁶⁸ irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 6, that it is the holder.

Variant A of paragraph (d)¹⁶⁹

(d) [Except as provided in paragraph (c)]¹⁷⁰ if the delivery of the goods by the carrier at the place of destination occurs without the surrender of the negotiable transport document to the carrier or without the demonstration referred to in paragraph (a)(ii), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights [against the carrier]¹⁷¹ under the contract of carriage only if: (i) the passing of the negotiable

¹⁶⁵ As set out in footnote 168 of A/CN.9/WG.III/WP.32, subject to the note of caution raised in para. 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in para. 81 of A/CN.9/526, the Working Group found the substance of paras. (a)(i) and (ii) to be generally acceptable.

¹⁶⁶ As set out in footnote 169 of A/CN.9/WG.III/WP.32, the suggestion made in para. 82 of A/CN.9/526, that the carrier should have the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery appear to be already addressed by the text of para. (b).

¹⁶⁷ As set out in footnote 170 of A/CN.9/WG.III/WP.32, it was suggested that it was unclear how paras. (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. A link between paras. (c) and (d) already exists, since para. (c) starts with the words, "Notwithstanding paragraph (d)". Other alternatives are possible, for example, to start para. (d) with the words, "Except as provided", or to add at the end of that para. a new sentence reading, "This paragraph does not apply where the goods are delivered by the carrier pursuant to paragraph (c)." The various alternatives are provisionally inserted in square brackets.

¹⁶⁸ It is suggested that the square brackets around "to the holder", which appeared in the original text in A/CN.9/WG.III/WP.21, be deleted and the phrase retained in order to clarify the text.

¹⁶⁹ Variant A is the text as it appeared in A/CN.9/WG.III/WP.32, revised as indicated.

¹⁷⁰ See *supra*, note 167.

¹⁷¹ As set out in footnote 172 of A/CN.9/WG.III/WP.32, the first concern expressed in para. 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport

transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods; or (ii) unless such person at the time it became a holder did not have and could not reasonably have had knowledge of such delivery. [This paragraph does not apply when the goods are delivered by the carrier pursuant to paragraph (c).]¹⁷²

Variant B of paragraph (d), which comprises (d) and (e)¹⁷³

(d) If the goods are delivered pursuant to paragraph (c), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods, when only the transfer of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods.

(e) Notwithstanding paragraphs (c) and (d), the holder that did not have or could not reasonably have had knowledge of such delivery at the time it became a holder acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.

*Article 50. Failure to give adequate instructions*¹⁷⁴

If the controlling party or the shipper does not give the carrier adequate instructions under articles 48 and 49 or if the controlling party or the shipper cannot be found¹⁷⁵, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 51, 52 and 53.

document after delivery had been effected should be more precisely established. A solution might be to indicate in subpara. (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under draft art. 13, but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for draft art. 61, *infra*. The second concern expressed in para. 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase “could not reasonably have had knowledge of such delivery” has not specifically been addressed.

¹⁷² See *supra*, note 167.

¹⁷³ Variant B is proposed as improved drafting of the same principles set out in Variant A.

¹⁷⁴ It is suggested that the clarity of the text is improved by placing the text of draft para. 49(e) in a separate article as draft art. 50.

¹⁷⁵ As set out in footnote 174 of A/CN.9/WG.III/WP.32, this addition has been made on the basis of the suggestion in para. 89 of A/CN.9/526 that para. (e) should be aligned with para. (b) through the insertion of this phrase. Further adjustments have been made, and the square brackets removed, in order to clarify the text.

Article 51. When goods are undeliverable

1. The carrier is entitled to exercise the rights and remedies referred to in paragraph 2 at the risk and expense¹⁷⁶ of the person entitled to the goods, if the goods have arrived at the place of destination and:

(a) The consignee did not actually accept delivery of the goods under this chapter at the time and location referred to in article 11(4) [and no express or implied contract has been concluded between the carrier or the performing party and the consignee with respect to the custody of the goods]¹⁷⁷; or

(b) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee.

2. The rights and remedies referred to in paragraph 1 are:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or

(c) To cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time.

3. If the goods are sold under paragraph 2(c), the carrier must hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier.

Article 52. Notice of arrival at destination

The carrier is allowed to exercise the rights referred to in article 51 only after it has given reasonable advance¹⁷⁸ notice that the goods have arrived at the place of destination to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper.

¹⁷⁶ As set out in footnote 176 of A/CN.9/WG.III/WP.32, concern was expressed that when the carrier exercised its rights under draft art. 51 it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase “and expense” in para. 1 is intended to meet these concerns.

¹⁷⁷ As set out in footnote 175 of A/CN.9/WG.III/WP.32, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage” as confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

¹⁷⁸ As set out in footnote 177 of A/CN.9/WG.III/WP.32, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase “reasonable advance” before the word “notice” in draft art. 52 is intended to meet these concerns.

Article 53. Carrier's liability for undeliverable goods

When exercising its rights referred to in article 51(2), the carrier or a performing party is liable¹⁷⁹ for loss of or damage to the goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]¹⁸⁰.

CHAPTER 11. RIGHT OF CONTROL¹⁸¹*Article 54. Definition of right of control*

The right of control of the goods [means][is] the right under the contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 11(1).]¹⁸² Such right includes and is limited to:

- (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage¹⁸³;
- (b) The right to demand delivery of the goods [before their arrival at the place of destination][at an intermediate port or place en route]¹⁸⁴; and
- (c) The right to replace the consignee by any other person including the controlling party.¹⁸⁵

¹⁷⁹ As set out in footnote 178 of A/CN.9/WG.III/WP.32, the concern expressed in para. 94 of A/CN.9/526 that the wording of draft art. 53 could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words "acts as an agent of the person entitled to the goods but without any liability" and the addition of the words "is only liable", is intended to meet this concern.

¹⁸⁰ As set out in footnote 179 of A/CN.9/WG.III/WP.32, it was suggested that the phrase "or of the performing party" be added after the phrase "personal act or omission of the carrier", and that the word "personal" be deleted. Both of these suggestions have been adopted in the text..

¹⁸¹ The original text of this chapter, with drafting improvements, proposed variants and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

¹⁸² As set out in footnote 181 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider whether this sentence should be somewhat altered and moved to the draft para. 1(l) definition of "right of control".

¹⁸³ As set out in footnote 182 of A/CN.9/WG.III/WP.32, the concern was raised in para. 102 of A/CN.9/526 that the phrase "give or modify instructions...that do not constitute a variation of the contract" might be read as contradictory. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. It is suggested that moving para. (d) to a separate art. in draft art. 55 may alleviate this concern.

¹⁸⁴ This proposed alternative in square brackets is intended to clarify that the delivery of the goods before arrival at destination is not meant to be any change of destination, but only delivery at a place en route.

¹⁸⁵ As set out in footnote 180 of A/CN.9/WG.III/WP.32, the concerns raised in para. 103 of A/CN.9/526 that para. (d) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. In order to address those

[Article 55. *Variations to the contract of carriage*

1. The controlling party is the exclusive person that may exercise the right of control and may agree with the carrier to a variation of the contract of carriage other than the variations referred to in article 54 (b) and (c).¹⁸⁶
2. Any variation to the contract of carriage, including those referred to in article 54 (b) and (c), upon becoming effective, must be stated in the [negotiable] transport document or incorporated in the [negotiable] electronic transport record and be initialed or signed in accordance with article 39.^{187]}

Article 56. Applicable rules based on transport document or electronic transport record issued

1. When no negotiable transport document or no negotiable electronic transport record is issued, the following rules apply:
 - (a) The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party]¹⁸⁸.
 - (b) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the transferee][or, if applicable law permits, the transferee]¹⁸⁹ must notify the carrier of such transfer.
 - (c) When the controlling party exercises the right of control in accordance with article 54, it must produce proper identification.

concerns and to avoid confusion between the right of control and the right to agree with the carrier on variations to the contract of carriage, it is suggested that former para. 54(d) be moved to a separate art. in draft art. 55. It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in draft para. 1(l).

¹⁸⁶ Para. 1 includes former para. 54(d), as well as text to emphasize the exclusivity of the position of the controlling party.

¹⁸⁷ Para. 2 is suggested as desirable to ensure that amendments to the contract of carriage are signed or, at least initialed, as is the current practice. Should this proposal be accepted by the Working Group, it is suggested that reference be made to the draft art. 39 signature requirement. Draft paras. 56(2)(d) and (3)(c) have been deleted in light of this proposed para. 2.

¹⁸⁸ As set out in footnote 184 of A/CN.9/WG.III/WP.32, the question was raised in para. 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, para. 1(b) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words “unless the shipper” in square brackets for possible deletion and inserting instead, in square brackets, the text “designates the consignee or another person as the controlling party”.

¹⁸⁹ As set out in footnote 185 of A/CN.9/WG.III/WP.32, the concern mentioned in para. 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” para. 1(b). This phrase is placed in square brackets, along with alternative text consistent with that approved for further discussion in draft art. 63.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]¹⁹⁰

2. When a negotiable transport document is issued, the following rules apply:

(a) The holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 61, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) In order to exercise the right of control, the holder must, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] must be produced, failing which the right of control cannot be exercised.¹⁹¹

3. When a negotiable electronic transport record is issued:

(a) The holder is the sole controlling party and is entitled to transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 6, upon which transfer the transferor loses its right of control.

(b) In order to exercise the right of control, the holder must, if the carrier so requires, demonstrate, in accordance with the procedures referred to in article 6, that it is the holder.

4. Notwithstanding article 63¹⁹², a person, not being the shipper or the person referred to in article 34, that transferred the right of control without having exercised that right, is upon such transfer discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Convention.

¹⁹⁰ As set out in footnote 186 of A/CN.9/WG.III/WP.32, the controlling party remained in control of the goods until their final delivery. However, nothing is said in draft art. 56 regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic transport record is issued. It is thought that something could be said to take care of the observation that has been made, and para. 1(d) has been added. Note, however, that para. 106 of A/CN.9/526 also notes the concern that the common shipper's instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since art. 54 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under art. 11, it may be unnecessary to state when the right of control ends.

¹⁹¹ As set out in footnote 188 of A/CN.9/WG.III/WP.32, the Working Group was in agreement that para. 2(c) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added para. 2(c).

¹⁹² Reference was to draft art. 62 of A/CN.9/WG.III/WP.32, which was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

*Article 57. Carrier's execution of instruction*1. Variant A of paragraph 1, including para. 1 bis¹⁹³

Subject to paragraphs 1 *bis*, 2 and 3, the carrier must execute any instruction referred to in article 54¹⁹⁴ if it:

- (a) Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;
- (b) Will not interfere with the normal operations of the carrier or a performing party; and
- (c) Would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage.

1 bis. If it is reasonably expected that one or more of the conditions referred to in subparagraphs (a), (b) and (c) is not satisfied, then the carrier is under no obligation to execute the instruction.¹⁹⁵

Variant B of paragraph 1

Subject to paragraphs 2 and 3, the carrier is bound to execute the instructions referred to in article 54¹⁹⁶ if:

- (a) The person giving such instructions is entitled to exercise the right of control;
- (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
- (c) The instructions will not interfere with the normal operations of the carrier or a performing party.¹⁹⁷

¹⁹³ Variant A of para. 1 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. As set out in footnote 192 of A/CN.9/WG.III/WP.32, the Working Group generally agreed that para. 1 should be recast to reflect the views and suggestions in paras. 114 to 116. It was agreed that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session, and this has been attempted in Variant B.

¹⁹⁴ Reference to "(a), (b) or (c)" has been deleted in light of the drafting proposal to move para. 54(d) to a separate provision in draft art. 55.

¹⁹⁵ Para. 1 *bis* was created out of the final sentence of Variant A of para. 1 purely as a drafting suggestion with no substantive change intended.

¹⁹⁶ See note 194, *supra*.

¹⁹⁷ Variant B was suggested in A/CN.9/WG.III/WP.32 to respond to concerns set out in footnote 193 of A/CN.9/WG.III/WP.32. To avoid a contradiction between para. 1(c) and draft para. 54(b) with respect to the right of control and the possible generation of "additional expenses", it was suggested that either the carrier should be under no obligation to execute the instruction received under draft para. 54(b) or that para. 1(c) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses. Further, as noted in para. 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of para. 1(c). In view of these suggestions, para. 1 could be

2. In any event, the controlling party must reimburse¹⁹⁸ the carrier, performing parties, and any persons interested in other goods carried on the same voyage or journey for any additional expense that they may incur and must indemnify them against any loss or damage that they may suffer as a result of executing any instruction under this article.¹⁹⁹
3. At the request of the carrier, the controlling party must provide security²⁰⁰ for the amount of the reasonably expected additional expense, loss or damage. [The carrier is entitled to obtain security from the controlling party if it:
 - (a) Reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and
 - (b) Is nevertheless willing to execute the instruction.]
4. The carrier is liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in breach of its obligation under paragraph 1.²⁰¹

Article 58. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 54(b) are deemed to be delivered at the place of destination and the provisions of chapter 10 relating to such delivery are applicable to such goods.

reworded as indicated, and the right of the carrier under para. 3 could be made more stringent, as indicated *infra*, note 200. In addition, para. 1(c) has been deleted.

¹⁹⁸ As set out in footnote 194 of A/CN.9/WG.III/WP.32, the notion of “indemnity” inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party.

¹⁹⁹ As set out in footnote 195 of A/CN.9/WG.III/WP.32, the changes to para. 2 have been made in view of the suggestion in para. 117 of A/CN.9/526 that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

²⁰⁰ As set out in footnote 196 of A/CN.9/WG.III/WP.32, although para. 3 was found “generally acceptable”, as noted in para. 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on draft para. 57(1). See note 197, *supra*.

²⁰¹ As set out in footnote 197 of A/CN.9/WG.III/WP.32, a question was raised regarding the nature of the obligation incurred by the carrier under draft art. 57, and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft convention should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new para. 4 has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

*Article 59. Obligation to provide information, instructions
or documents to carrier*

If the carrier or a performing party during the period that it has custody of the goods reasonably requires information, instructions, or documents in addition to those referred to in article 30(a), the controlling party, on request of the carrier or such performing party, must provide such information.²⁰² If the carrier, after reasonable effort, is unable to identify and find the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper or the person referred to in article 34 must do so.

Article 60. Variation by agreement

Articles 54(b) and (c), and 57 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 56(1)(b). If a negotiable transport document or a negotiable electronic transport record is issued, any agreement referred to in this article must be stated or incorporated²⁰³ in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS²⁰⁴

*Article 61. When a negotiable transport document or negotiable
electronic transport record is issued*

1. If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring such document to another person:
 - (a) If an order document, duly endorsed either to such other person or in blank, or,
 - (b) If a bearer document or a blank endorsed document, without endorsement, or,
 - (c) If a document made out to the order of a named person and the transfer is between the first holder and such named person, without endorsement.²⁰⁵
2. If a negotiable electronic transport record is issued, its holder is entitled to transfer the rights incorporated in such electronic transport record, whether it be made out to order

²⁰² As set out in footnote 199 of A/CN.9/WG.III/WP.32, the suggestion to add reference to the performing party in addition to the carrier was generally supported. In view also of the recommendation mentioned in para. 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of draft art. 59.

²⁰³ As set out in footnote 200 of A/CN.9/WG.III/WP.32, there was broad support in the Working Group that the revised draft of art. 60 should avoid suggesting any restriction to the freedom of parties to derogate from chapter 11. Further, it appears to be implied that the last sentence of draft art. 60 should apply only if a negotiable document or electronic transport record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

²⁰⁴ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁰⁵ As set out in footnote 201 of A/CN.9/WG.III/WP.32, there was strong support in the Working Group to maintain the text of draft para. 61(1) as drafted in order to promote harmonization and to accommodate negotiable electronic transport records. The concern raised in para. 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 6.²⁰⁶

Article 62. Liability of holder

1. Without prejudice to article 59, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of being a holder.

2. Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record].²⁰⁷

3. For the purpose of paragraphs 1 and 2 [and article 46]²⁰⁸, any holder that is not the shipper does not exercise any right under the contract of carriage solely by reason of the fact that it:

(a) Under article 7 agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document, or

(b) Under article 61 transfers its rights.

²⁰⁶ As set out in footnote 202 of A/CN.9/WG.III/WP.32, para. 2 was discussed during the fifteenth session of the Working Group in conjunction with the other provisions in the draft convention regarding electronic transport records.

²⁰⁷ As set out in footnote 204 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of para. 2 with due consideration being given to the views expressed. However, the views expressed in the preceding paras. 137 to 139 of A/CN.9/526 were not consistent. Those that favoured a revision of the text requested that the subpara. stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract, and an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under draft art. 28).

²⁰⁸ Inclusion of the text in square brackets will depend upon the decision of the Working Group regarding the inclusion of the bracketed text in draft art. 46.

Article 63²⁰⁹ When no negotiable transport document or negotiable electronic transport record is issued

If no negotiable transport document or no negotiable electronic transport record is issued, the following paragraphs apply to the transfer of rights under a contract of carriage:

- (a) The transfer is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer;
- (b) The transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage; and
- (c) Regardless of the law applicable pursuant to paragraphs (a) and (b),
 - (i) A transfer that is otherwise permissible under the applicable law may be made by electronic means,
 - (ii) A transfer must be notified to the carrier by the transferor or, if applicable law permits, by the transferee²¹⁰, and
 - (iii) If a transfer includes liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.

CHAPTER 13: LIMITATION OF LIABILITY

Article 64. Basis of limitation of liability²¹¹

1. Subject to articles 65 and 66(1), the carrier's liability for breaches of its obligations under this Convention²¹² is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except when the nature and value of the goods have been declared by the shipper before shipment and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

²⁰⁹ Draft art. 63, formerly draft art. 61 *bis*, has replaced draft arts. 61 and 62 from A/CN.9/WG.III/WP.32, as agreed by the Working Group in para. 213 of A/CN.9/576, following its consideration of the electronic commerce aspects of art. 63, as set out in para. 12 of A/CN.9/WG.III/WP.47, and its consideration of replacing draft arts. 61 and 62 with draft art. 63 in paras. 212 and 213 of A/CN.9/576.

²¹⁰ As set out in footnote 57 of A/CN.9/WG.III/WP.47, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase "either by the transferor or the transferee" with the phrase "by the transferor or, if other applicable law permits, by the transferee", so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.

²¹¹ Corrections are to text of paras. 1 and 3, and Variant B of para. 2 as set out in para. 6 of A/CN.9/WG.III/WP.39; Variant A of para. 2 is proposed new text.

²¹² The addition of breaches of the carrier's obligations is thought to have made the reference to " [or in connection with]" the goods unnecessary.

Variant A of paragraph 2²¹³

[2. Notwithstanding paragraph 1, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁴ during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable under article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, then the carrier's liability for such loss, damage, [or delay] is limited according to the limitation terms of any international convention [or national law]²¹⁵ that would have been applicable if the place where the damage occurred had been established, or the limitation terms of this Convention, whichever would result in the highest limitation amount.]

Variant B of paragraph 2²¹⁶

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁷ during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national]²¹⁸ mandatory provisions that govern the different parts of the transport applies.]

3. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods,²¹⁹ the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport are deemed one shipping unit.

4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.²²⁰

²¹³ Variant A is intended as a clarification of the text of Variant B that appeared in para. 6 of A/CN.9/WG.III/WP.39, and is not intended to change the suggested approach.

²¹⁴ See, *infra*, note 217.

²¹⁵ Text placed in square brackets to mirror the text in art. 27(1), pending a decision by the Working Group.

²¹⁶ Variant B is the text as it appeared in para. 6 of A/CN.9/WG.III/WP.39.

²¹⁷ As set out in footnote 16 of A/CN.9/WG.III/WP.39, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

²¹⁸ See, *supra*, 215.

²¹⁹ As set out in footnote 17 of A/CN.9/WG.III/WP.39, the definition of "container" in draft art. 1 might need to be further considered to ensure that it covered pallets. The text proposed for addition mirrors that of art. IV.5 of the Hague-Visby Rules and of art. 6(2) of the Hamburg Rules.

²²⁰ The text of para. 4 is substantially the same as para. 1 of the text adopted on a non-mandatory

*Article 65. Liability for loss caused by delay*²²¹Variant A²²²

Subject to paragraph 66(2), compensation for physical loss of or damage to the goods caused by delay must be calculated in accordance with article 23 and [, unless otherwise agreed,] liability²²³ for economic loss caused by delay is limited to an amount equivalent to [one times] the freight payable on the goods delayed. The total amount payable under this article and paragraph 64(1) may not exceed the limit that would be established under paragraph 64(1) in respect of the total loss of the goods concerned.

Variant B²²⁴

Subject to paragraph 66(2), unless otherwise agreed,²²⁵ if delay in delivery causes [consequential]²²⁶ loss not resulting from loss of or damage to the goods carried and hence not covered by article 23, the liability²²⁷ for such loss is limited to an amount equivalent to [one times]²²⁸ the freight payable on the goods delayed. The total amount payable under this article and article 64(1) may not exceed the limit that would be established under article 64(1) in respect of the total loss of the goods concerned.

basis by the United Nations Commission on International Trade Law (UNCITRAL) at its fifteenth session (A/37/17, paras. 53-55 and 63, and Annex I, reproduced in UNCITRAL Yearbook, Vol. XIII: 1982, pp.10-11) as preferred text for the unit of account provision in the preparation of future international conventions containing limitation of liability provisions. The Working Group may wish to consider the addition of the following para., which is para. 2 of the text adopted in 1982 by the Commission:

“5. The calculation referred to in the last sentence of paragraph 4 is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in this article as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.”

²²¹ Former draft art. 16(2) as it appeared in A/CN.9/WG.III/WP.32 was moved here to become a separate art. in chapter 13.

²²² Variant A is based on the suggested alternative wording for the first sentence of para. 2 set out in footnote 11 of A/CN.9/WG.III/WP.39. No change is intended but for the clarification of the wording regarding consequential damages as suggested in para. 25 of A/CN.9/552.

²²³ The word “liability” is suggested to make the text consistent with the new chapter created for “limitation of liability”.

²²⁴ Variant B is a slightly revised version of the text in A/CN.9/WG.III/WP.32 as set out in para. 3 of A/CN.9/WG.III/WP.39, and as agreed in paras. 20, 22, 24, 28 and 31 of A/CN.9/552.

²²⁵ As set out in footnote 10 of A/CN.9/WG.III/WP.39, the words “unless otherwise agreed” were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft art. 66 and chapter 20.

²²⁶ As set out in footnote 11 of A/CN.9/WG.III/WP.39, clarification of the wording regarding consequential damages has been suggested.

²²⁷ See *supra*, note 223.

²²⁸ As set out in footnote 12 of A/CN.9/WG.III/WP.39, the words “[one times] the freight payable on the goods delayed” were inserted in para. 2 for continuation of the discussion at a future session.

*Article 66. Loss of the right to limit liability*²²⁹

1. Neither the carrier nor any of the persons referred to in article 19 may limit their liability as provided in articles 64 and 26(4)²³⁰, [or as provided in the contract of carriage,]²³¹ if the claimant proves that²³² the loss of, or the damage to the goods or the breach of the carrier's obligation under this Convention²³³ resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.
2. Neither the carrier nor any of the persons mentioned in article 19 may limit their liability as provided in article 65 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.²³⁴

CHAPTER 14. RIGHTS OF SUIT²³⁵*Article 67. Parties*Variant A²³⁶

1. Without prejudice to articles 68 and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:
 - (a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;
 - (b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage; or
 - (c) Any person to which the shipper or the consignee has transferred its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.
2. In case of any passing of rights of suit through transfer or subrogation under subparagraph 1(c), the carrier and the performing party are entitled to all defences

²²⁹ Corrections are to text as set out in para. 8 of A/CN.9/WG.III/WP.39.

²³⁰ As set out in footnote 34 of A/CN.9/WG.III/WP.39, the suggestion to add a reference to art. 23 might need to be further discussed in the context of chapter 20.

²³¹ As set out in footnote 35 of A/CN.9/WG.III/WP.39, the words "[or as provided in the contract of carriage,]" were maintained in square brackets pending further discussion on chapter 20.

²³² Reference to delay was deleted here in favour of the addition of para. 66(2).

²³³ The addition of "the breach of the carrier's obligation" is thought to have made the reference to "[or in connection with]" the goods unnecessary.

²³⁴ It is proposed that loss of the right to limit liability for loss due to delay should be dealt with separately from para. 1, and para. 2 has been added for that purpose.

²³⁵ The original text of this chapter, with drafting improvements and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

²³⁶ Variant A of art. 67 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. The changes to the original text, particularly combining subparas. (c) and (d) and placing the last sentence of the original text of the art. in a separate para. 2, are not intended to be substantive, but are only drafting suggestions to avoid any ambiguity there may have been in the original text.

and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.²³⁷

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.²³⁸

Article 68. When negotiable transport document or negotiable electronic transport record is issued

In the event that a negotiable transport document or negotiable electronic transport record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and²³⁹

(b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.²⁴⁰

²³⁷ As set out in footnote 210 of A/CN.9/WG.III/WP.32, while strong support was expressed for the deletion of draft art. 67, the Working Group decided to defer any decision regarding draft art. 67 until it had completed its review of the draft arts. and further discussed the scope of application of the draft convention.

²³⁸ As set out in footnote 211 of A/CN.9/WG.III/WP.32, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether Variant B adequately deals with the situation of the freight forwarder.

²³⁹ As set out in footnote 212 of A/CN.9/WG.III/WP.32, although no request appears to have been made to the Secretariat in respect of draft art. 68, from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the phrase, “irrespective of whether it suffered loss or damage itself” is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft convention.

²⁴⁰ It was thought that moving former draft art. 65 to become para. (b) under art. 68 was a drafting improvement to unite these provisions in a single article.

CHAPTER 15. TIME FOR SUIT²⁴¹*Article 69. Limitation of actions*Variant A²⁴²

The carrier is discharged from all liability under this Convention²⁴³ if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper is discharged from all liability under chapter 8 of this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year.²⁴⁴

Variant B

All [rights] [actions] under this Convention are extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

Article 70. Commencement of limitation period

The period referred to in article 69 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 11(4) or 11(5) or, in cases in which no goods have been delivered, on the [last] day on which the goods should have been delivered. The day on which the period commences is not included in the period.²⁴⁵

²⁴¹ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁴² Variant A of art. 69 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

²⁴³ This text is suggested to make this provision consistent with draft art. 64.

²⁴⁴ As set out in footnote 215 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to place “one” in square brackets, and to prepare a revised draft of draft art. 69, with due consideration being given to the views expressed.

Concern was raised in para. 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to Chapter 8 of the draft convention, and why it did not also refer to shipper liability pursuant to other arts., such as the since-deleted chapter 9 on freight. A further suggestion was made that all persons subject to liability under the contract of carriage should be included in draft art. 69. It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft convention, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that Chapter 15 would apply to all liabilities regulated in the draft convention.

The suggestion in para. 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft convention is barred (or any right extinguished) might be a good solution.

Concern was also raised in para. 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (art. III.3), COTIF-CIM (art. 47), Warsaw Convention (art. 29) and probably CMR (art. 32). It extinguishes the action under the Hamburg Rules (art. 20), the 1980 Multimodal Convention (art. 25), CMNI (art. 24) and Montreal Convention (art. 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

²⁴⁵ As set out in footnote 216 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to retain the text of draft art. 70, with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in para. 170 of A/CN.9/526 that since the date of delivery “in the contract of carriage” might be much earlier than the date of actual delivery, the date of actual

Article 71. Extension of limitation period

The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 72. Action for indemnity

An action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if the indemnity action is instituted within the later of:

(a) The time allowed by applicable law in the jurisdiction²⁴⁶ where proceedings are instituted; or

(b) Variant A of paragraph (b)²⁴⁷

90 days commencing from the day when the person instituting the action for indemnity has either

- (i) settled the claim; or
- (ii) been served with process in the action against itself.

Variant B of paragraph (b)

90 days commencing from the day when either

- (i) the person instituting the action for indemnity has settled the claim; or
- (ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.²⁴⁸

delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day “on which the carrier has completed delivery”, which is the day of actual delivery.

Concern was also raised in para. 171 of A/CN.9/526 with respect to the “last day” on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, when goods have not been delivered, the “last day” is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in para. 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under draft subpara. 72(b)(ii) as noted in para. 172, or in a separate para. of the draft convention. See *infra* the alternative text for draft art. 73.

²⁴⁶ The text is suggested in order to accommodate the inclusion of federal jurisdictions in States.

²⁴⁷ Variant A of art. 72 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

²⁴⁸ As set out in footnote 219 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 72, with due consideration being given to the views expressed.

It was noted in para. 176 of A/CN.9/526 that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgment in the case had been rendered, and it was suggested that the 90-day period be adjusted to commence from the date the legal judgment is effective. Alternative language was offered that the 90-day period should

Article 73. Counterclaims

A counterclaim by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.²⁴⁹

Article 74. Actions against the bareboat charterer

[If the registered owner of a ship defeats the presumption that it is the carrier under article 40(3), an action against the bareboat charterer may be instituted even after the expiration of the period referred to in article 69 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction²⁵⁰ where proceedings are instituted; or

(b) 90 days commencing from the day when the registered owner [both

(i) proves that the ship was under a bareboat charter at the time of the carriage; and]

[(ii)] adequately identifies the bareboat charterer.]²⁵¹

run from the day the judgment against the recourse claimant became final and unreviewable.

These suggestions are reflected in Variant B.

²⁴⁹ As set out in footnote 220 of A/CN.9/WG.III/WP.32, it was reiterated in para. 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to draft subpara. 72(b)(ii) or in a separate subpara., but they should be treated in similar fashion to draft subpara. 72(b)(ii). Draft art. 73 sets out this provision as a separate art.

²⁵⁰ See note 246, *supra*.

²⁵¹ As set out in footnote 221 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 74, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain draft para. 40(3) in square brackets, and that it therefore requested the Secretariat to retain draft art. 74 in square brackets, bearing in mind that the fate of the latter art. was linked to that of the former.

Concern was raised in para. 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by para. (b)(ii).

It was also suggested that subparas. (i) and (ii) of para. (b) be combined into one, since subpara. (ii) could be considered a sufficiently rigorous condition to subsume subpara. (i). A revised text is proposed.

CHAPTER 16. JURISDICTION

*Article 75. Actions against the carrier*²⁵²

In judicial proceedings against the carrier²⁵³ relating to carriage of goods under this Convention the plaintiff²⁵⁴, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the defendant;²⁵⁵ or
- (b) The contractual place of receipt or the contractual place of delivery; or²⁵⁶
- [(c) the port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or]
- (d) Any additional place [designated][agreed upon]²⁵⁷ for that purpose in the transport document or electronic transport record.²⁵⁸

*[Article 76. Exclusive jurisdiction agreements]*²⁵⁹

1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction. Such jurisdiction is exclusive, provided that the agreement conferring it:

- (a) Is evidenced in writing or by electronic communication;
- (b) Clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and
- (c) Expressly provides that the jurisdiction of the chosen court is to be exclusive.²⁶⁰

2. When an exclusive forum is agreed under paragraph 1, the shipper and the carrier may also expressly agree that the exclusive choice of forum is binding on any other person bringing an action under this Convention, and it is so binding, provided that:²⁶¹

²⁵² Text as set out in para. 111 of A/CN.9/576, with suggested and previously approved revisions as noted.

²⁵³ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁴ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁵ Text as agreed for further discussion in para. 116 of A/CN.9/576.

²⁵⁶ Text as agreed for further discussion in para. 120 of A/CN.9/576.

²⁵⁷ Text as agreed for further discussion in para. 124 of A/CN.9/576.

²⁵⁸ As noted in para. 124 of A/CN.9/576, matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

²⁵⁹ As requested in para. 168 of A/CN.9/576, this draft art. on exclusive jurisdiction agreements has been prepared for consideration by the Working Group.

²⁶⁰ Text proposed to fulfil the conditions suggested in para. 161 of A/CN.9/576. If this approach is adopted, this provision should be added to the list of notices set out in draft art. 3, and draft para. 75(e) could be deleted.

²⁶¹ Text proposed to fulfil the conditions suggested in para. 164 of A/CN.9/576. If this approach is not adopted, this provision should be removed from the list of notices set out in draft article 3.

Variant A of subparagraph 2(a)

- (a) Such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record]; and

Variant B of subparagraph 2(a)

- (a) Such person is given adequate notice of the place where the action can be brought; and

Variant C of subparagraph 2(a)²⁶²

- (a) Such person expressly consents to the agreement, and such consent complies with the requirements of article 95(6)(b); and
- (b) The forum is in one of the places designated under paragraphs 75(a), (b) or (c).]

Article 77. Actions against the maritime performing party²⁶³

In judicial proceedings against the maritime performing party relating to carriage of goods under this Convention, the plaintiff, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The place where the goods are [initially] received by the maritime performing party; and the place where the goods are [ultimately] delivered by the maritime performing party.

Article 78. No additional bases of jurisdiction

Subject to article 80, no judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not designated under article 75 or 77.²⁶⁴

Article 79. Arrest and provisional or protective measures²⁶⁵

1. Nothing in this Convention affects jurisdiction with regard to:

- (a) Arrest [pursuant to applicable rules of international law [or the law of the forum state]]; or

²⁶² Variant C suggests the alternative that the third party must expressly consent to be bound by the choice of jurisdiction clause, in similar fashion to the consent required in draft subpara. 95(6)(b).

²⁶³ Text as set out in para. 125 of A/CN.9/576, with suggested and previously approved revisions as noted.

²⁶⁴ In order to address the concerns raised in para. 42 of A/CN.9/576, and for the purposes of clarification, it is suggested that the first sentence of former draft art. 74 be placed in a separate art. as art. 78, and that arrest and provisional or protective measures should be treated in the same art., as has been proposed in draft art. 79.

²⁶⁵ Suggested adjustments are to text as set out in para. 130 of A/CN.9/576, as agreed for further discussion at para. 136 of A/CN.9/576.

- (b) Provisional or protective measures.
- [2. For the purpose of this article “provisional or protective measures” means:
 - (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
 - (b) An order securing the amount in dispute; or
 - (c) An order appointing a receiver; or
 - (d) Any other orders to ensure that any judgment or arbitral is not rendered ineffectual by the dissipation of assets by the other party; or
 - (e) An interim injunction or other interim order.]²⁶⁶

Article 80. Consolidation and removal of actions

Variant A of paragraph 1²⁶⁷

- [1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in one of the places specified in article 77, whether or not that place is specified in article 75.]²⁶⁸

Variant B of paragraph 1

- [1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]²⁶⁹

Variant C of paragraph 1²⁷⁰

- [1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 77, where actions can be instituted against the maritime performing party.]
- 2. If the carrier or maritime performing party institutes an action under this Convention, then the claimant, at the request of the defendant, must withdraw the action and

²⁶⁶ Corrections are to text as agreed for further discussion in para. 142 of A/CN.9/576.

²⁶⁷ While Variant C of draft para. 80(1) is the text as agreed for further discussion in para. 149 of A/CN.9/576, it is suggested that Variants A and B are improved drafts that set out two alternative approaches between which the Working Group could choose. Variant B would require that in order to determine where an action against both the carrier and the maritime performing party should be instituted, resort must first be had to a place that is designated in both arts. 74 and 76, and that only thereafter could resort be had to a the place designated only in art. 76. The approach in Variant A is that such an action could only be instituted in a place designated under art. 76, regardless of whether or not that place was designated under art. 74.

²⁶⁸ The Working Group may wish to note that this approach may raised difficulties in situations when the action is against more than one maritime performing party, or when none of the places designated under art. 77 is in a contracting State.

²⁶⁹ *Ibid.*

²⁷⁰ Text as agreed for further discussion in para. 149 of A/CN.9/576.

recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant.²⁷¹

*Article 81. Agreement after dispute has arisen*²⁷²

Notwithstanding the preceding articles of this chapter, an agreement made by the parties to the dispute under the contract of carriage after the dispute has arisen, that designates the place where the claimant may institute an action, is effective.²⁷³

CHAPTER 17. ARBITRATION²⁷⁴

Variant A

Article 82.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Convention applies must be referred to arbitration.

Article 83.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. When a charterparty contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision is binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.

Article 84.

The arbitration proceedings must, at the option of the claimant, be instituted at one of the following places:

- (a) A place in a State within whose territory is situated:
 - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

²⁷¹ Text as agreed for further discussion in para. 152 of A/CN.9/576, with drafting suggestions. As noted in para. 152 of A/CN.9/576, consideration should be given to limiting the application of this provision to declaratory relief sought by the carrier or the maritime performing party.

²⁷² Text taken from Variant A of A/CN.9/WG.III/WP.32.

²⁷³ Text as agreed for further discussion in para. 171 of A/CN.9/576.

²⁷⁴ Note the decision of the Working Group in para. 179 of A/CN.9/576 that a new draft of this chapter will be submitted for the consideration of the Working Group at a future session. Such a draft is anticipated for introduction at the sixteenth session of the Working Group. As set out in footnote 225 of A/CN.9/WG.III/WP.32, Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paras. that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

[(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]

(iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 85.

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 85 bis.

Article 83 and 84 are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement that is inconsistent therewith is void.

Article 86.

Nothing in this chapter affects the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

Variant B

Article 82.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Convention applies must be referred to arbitration.

Article 83.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. When a charterparty contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision is binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.²⁷⁵

²⁷⁵ As set out in footnote 227 of A/CN.9/WG.III/WP.32, the amended text of art. 83 of the provision on arbitration in Variant B is not a reproduction of Art. 22(2) of the Hamburg Rules, since it was thought that Art. 22(2) of the Hamburg Rules was too specific.

*Article 84.*²⁷⁶*Article 85.*

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 86.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

CHAPTER 18. GENERAL AVERAGE²⁷⁷*Article 87. Provisions on general average*

Nothing in this Convention prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

Article 88. Contribution in general average

1. [With the exception of the chapter on time for suit,] the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse to contribute in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

2. All [actions for] [rights to] contribution in general average are [time-barred] [extinguished] if judicial or arbitral proceedings are not instituted within a period of [one year] from the date of the issuance of the general average statement.²⁷⁸

²⁷⁶ As set out in footnote 228 of A/CN.9/WG.III/WP.32, in order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this para. has been omitted. No decision was reached by the CMI regarding a suitable replacement para. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

²⁷⁷ The original text of this chapter, with drafting improvements suggested, is taken from A/CN.9/WG.III/WP.32.

²⁷⁸ As set out in footnote 230 of A/CN.9/WG.III/WP.32, it was suggested that the fact that the time for suit provisions of the draft convention do not apply to general average should be expressed more clearly. Since para. 1 states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

As further suggested in para. 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of para. 2. Such a provision should probably cover both claims for contribution and claims for indemnities.

In para. 189 of A/CN.9/526, the question was raised whether para. 1 should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

CHAPTER 19. OTHER CONVENTIONS²⁷⁹*Article 89. International instruments governing other modes of transport*

Subject to article 92, nothing contained in this Convention prevents a Contracting State from applying any other international instrument which is already in force at the date of this Convention and that applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.²⁸⁰

Article 90. Prevalence over earlier conventions

[As between parties to this Convention, it prevails over those][Subject to article 102, this Convention prevails between its parties over those]²⁸¹ of an earlier convention to which they may be parties [that are incompatible with those of this Convention].²⁸²

Article 91. Global limitation of liability

This Convention does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of vessels.

Article 92. Other provisions on carriage of passengers and luggage

No liability arises under this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is liable under any convention or national law relating to the carriage of passengers and their luggage.

²⁷⁹ The original text of this chapter, with suggested drafting improvements, is taken from A/CN.9/WG.III/WP.32.

²⁸⁰ As set out in footnote 231 of A/CN.9/WG.III/WP.32, in connection with draft art. 27 and discussions relating to the relationship of the draft convention with other transport conventions and with domestic legislation, the Secretariat was instructed in paras. 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in Chapter 19. It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new draft art. 89 is based on art. 25(5) of the Hamburg Rules.

²⁸¹ Proposed alternate language.

²⁸² As set out in footnote 232 of A/CN.9/WG.III/WP.32, the suggestion in para. 196 of A/CN.9/526 that it would be helpful if draft art. 91 were amended to add language stating that the draft convention would prevail over other transport conventions except in relation to States that are not member of the convention is in line with the provisions of art. 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate para., rather than to the present draft art. 91, that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as draft art. 90.

*Article 93. Other provisions on damage caused by
nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997,²⁸³ or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.²⁸⁴

CHAPTER 20. VALIDITY OF CONTRACTUAL STIPULATIONS

Article 94. General provisions

1. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.²⁸⁵

²⁸³ In order to capture subsequent amendments to these instruments or new instruments negotiated in the future, the Working Group may wish to consider an additional phrase such as “including any amendment to these instruments and any future instrument in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident”, or the inclusion of a simple tacit amendment procedure limited to this provision that could be commenced by the depositary.

²⁸⁴ As set out in footnote 235 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to update the list of conventions and instruments in draft art. 93, and to prepare a revised draft with due consideration being given to the views expressed.

In para. 200 of A/CN.9/526, it was pointed out that the list of conventions in draft art. 89 was not complete and reference was made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in para. 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in draft art. 93, such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent para. 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

²⁸⁵ As approved for further discussion in para. 77 of A/CN.9/576.

[2. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under chapter 8 of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34 for breach of any of their obligations under chapter 8.]²⁸⁶

*Article 95. Special rules for volume contracts*²⁸⁷

1. Notwithstanding article 94, if terms of a volume contract are subject to this Convention under article 9(3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Convention provided that the volume contract [is agreed to in writing or electronically], contains a prominent statement that it derogates from this Convention, and:

(a) Is individually negotiated; or

(b) Prominently specifies the sections of the volume contract containing the derogations.²⁸⁸

2. A derogation under paragraph 1 must be set forth in the contract and may not be incorporated by reference from another document.²⁸⁹

3. A [carrier's public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.²⁹⁰

4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Convention under article 9(3)(a).²⁹¹

5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in article 16(1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

[(b) Rights and obligations stipulated in articles, [28], [29], [30], [33] and [66] [and the liability arising from the breach thereof]].²⁹²

²⁸⁶ As approved for further discussion in para. 85 of A/CN.9/576, following an examination of the shipper's obligations in Chapter 8.

²⁸⁷ Text as set out in para. 52 of A/CN.9/576.

²⁸⁸ As approved for further discussion in para. 85 of A/CN.9/576.

²⁸⁹ As approved for further discussion in para. 89 of A/CN.9/576.

²⁹⁰ As noted in para. 89 of A/CN.9/576, it was decided that this para. should be retained in the text as a basis for continuation of the discussion.

²⁹¹ As approved for further discussion in para. 92 of A/CN.9/576.

²⁹² As approved for further discussion in para. 99 of A/CN.9/576, bearing in mind the drafting suggestions expressed on the inclusion of other arts. of the draft convention and to the provisions of the draft convention on jurisdiction and arbitration; clarification of the relationship between draft para. 95(5) and the other paras. in draft art. 94, as well as with the provisions of other international transport instruments; and the possibility of inserting in a separate para. of draft para. 95(5) a reference to liability for intentional or reckless behaviour

6. Paragraph 1 applies:

(a) Between the carrier and the shipper;

(b) Between the carrier and any other party that has expressly consented [in writing or electronically] to be bound by the terms of the volume contract that derogate from this Convention. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from this Convention and the consent shall not be set forth in a [carrier's public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]²⁹³

*Article 96. Special rules for live animals and certain other goods*²⁹⁴

Notwithstanding chapters 5 and 6 of this Convention and the obligations of the carrier²⁹⁵, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except when it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person referred to in article 19] or of a maritime performing party²⁹⁶ done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 21. FINAL CLAUSES

Article 97. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention²⁹⁷.

Article 98. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

should be the object of further discussion.

²⁹³ As approved for further discussion in para. 104 of A/CN.9/576, along with the suggestion to insert a reference to paras. (1) to (5) of draft art. 95 in the chapeau of draft para. 95(6) should be considered.

²⁹⁴ Text as set out in para. 52 of A/CN.9/576.

²⁹⁵ As approved for further discussion in paras. 106 and 109 of A/CN.9/576.

²⁹⁶ As approved for further discussion in paras. 107 and 109 of A/CN.9/576.

²⁹⁷ Text taken from art. 15 of the draft Electronic Contracting Convention and art. 27 of the Hamburg Rules.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.²⁹⁸

Article 99. Reservations

No reservations may be made to this Convention²⁹⁹.

Article 100. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State³⁰⁰.

Article 101. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of [one year from] [six months after] the date of deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession.
2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State must apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State³⁰¹.

²⁹⁸ Text taken from art. 16 of the draft Electronic Contracting Convention.

²⁹⁹ Text taken from art. 22 of the draft Electronic Contracting Convention and art. 29 of the Hamburg Rules.

³⁰⁰ Text is taken from art. 18 of the draft Electronic Contracting Convention. See also art. 52 of the Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001.

³⁰¹ Text is taken from art. 30 of the Hamburg Rules. Note that the second suggested time period in square brackets is drawn from art. 23 of the draft Electronic Contracting Convention. The time selected for entry into force, which is a function of both the number of ratifications required and of the length of time required after the deposit of the appropriate instrument, is generally the time considered appropriate for business practice to adjust to the new regime.

Article 102. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to any or all of the following instruments: the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; and the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979; or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, must at the same time denounce, as the case may be, the relevant international agreements to that effect.
2. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraph 1 are not effective until such denunciations as may be required on the part of those States in respect of these instruments have themselves become effective. The depositary of this Convention must consult with the Government of Belgium, as the depositary of other relevant conventions, so as to ensure necessary co-ordination in this respect³⁰².

Article 103. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary must convene a conference of the Contracting States for revising or amending it.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended³⁰³.

³⁰² Text is taken from paras. 99(3) and (6) of the United Nations Convention on Contracts for the International Sale of Goods. See also art. 31 of the Hamburg Rules, and art. 55 of the Montreal Convention. The approach taken in the Montreal Convention does not require a formal denunciation of other conventions, but rather holds that the Montreal Convention prevails as between States Parties that are also common parties to another convention. As such, the regime in place between a Contracting State of the new convention in issue and a non-contracting State would continue to apply even after the new convention came into force, and until both States became Contracting States of the new convention.

³⁰³ Text is taken from art. 32 of the Hamburg Rules. Amendment procedures are not common in UNCITRAL texts, but the Hamburg rules have a general provision in art. 32 and a special provision in art. 33 for revision of the limitation amounts and the unit of account. In the draft Electronic Contracting Convention, the Commission decided not to have a provision on amendments because the States parties to that Convention may initiate an amendment procedure under general treaty law (typically, with a diplomatic conference and an amending protocol, such as in the case of the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, New York, 14 June 1974), if applicable, after discussion in the Commission. Note that the amendment provisions at draft art. 25 and at draft art. 103 may be adopted independently.

*Article 104. Amendment of limitation amounts*³⁰⁴

1. Without prejudice to article 103, the special procedure in this article applies solely for the purposes of amending the limitation amount set out in paragraph 64(1) of this Convention.
2. Upon the request of at least [one quarter³⁰⁵] of the Contracting States to this Convention³⁰⁶, the depositary must circulate any proposal to amend the limitation amount specified in paragraph 64(1) of this Convention to all of the Contracting States³⁰⁷ and must convene a meeting of a Committee composed of a representative from each of the Contracting States to consider the proposed amendment.
3. The meeting of the Committee must take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
4. Amendments must be adopted by the Committee by a two-thirds majority of its members present and voting.³⁰⁸
5. When acting on a proposal to amend the limits, the Committee will take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.³⁰⁹
6. (a) No amendment of the limit under this article may be considered less than [five³¹⁰] years from the date on which this Convention was opened for signature nor less

³⁰⁴ Text as set out in para. 7 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 19 of A/CN.9/WG.III/WP.39, the proposal is based upon the amendment procedure set out at art. 23 of the 2002 Protocol to the Athens Convention ("Athens Convention") and at art. 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("OTT Convention"). Similar approaches have been taken in a number of International Maritime Organization ("IMO") conventions, such as the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (not yet in force) ("2003 Protocol to the IOPC Fund 1992"); the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976; and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

³⁰⁵ As set out in footnote 21 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention refers to "one half" rather than "one quarter" of the Contracting States.

³⁰⁶ As set out in footnote 22 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention includes the phrase "but in no case less than six" of the Contracting States.

³⁰⁷ As set out in footnote 24 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention also includes reference to Members of the IMO.

³⁰⁸ As set out in footnote 25 of A/CN.9/WG.III/WP.39, para. 23(5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the Contracting States to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the Contracting States to the Convention as revised by this Protocol shall be present at the time of voting."

³⁰⁹ As set out in footnote 26 of A/CN.9/WG.III/WP.39, this provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

³¹⁰ As set out in footnote 27 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

than [five] years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.³¹¹

(c) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention multiplied by [three].³¹²

7. Any amendment adopted in accordance with paragraph 4 must be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of [eighteen³¹³] months after the date of notification, unless within that period not less than [one fourth³¹⁴] of the States that were Contracting States at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and has no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 enters into force [eighteen]³¹⁵ months after its acceptance.

9. All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 105 at least six months before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

10. When an amendment has been adopted but the [eighteen]-month period for its acceptance has not yet expired, a State that becomes a Contracting State during that period is bound by the amendment if it enters into force. A State that becomes a Contracting State after that period is bound by an amendment that has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.

Article 105. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration

³¹¹ As set out in footnote 28 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this Convention increased or decreased by twenty-one per cent in any single adjustment."

³¹² As set out in footnote 29 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this Convention by more than one hundred per cent, cumulatively."

³¹³ As set out in footnote 30 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

³¹⁴ As set out in footnote 31 of A/CN.9/WG.III/WP.39, the OTT Convention specifies at para. 24(7) "not less than one third of the States that were States Parties".

³¹⁵ Recent IMO conventions have reduced this period to twelve months when urgency is important. See, for example, the 2003 Protocol to the IOPC Fund 1992, at para. 24(8).

of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary³¹⁶.

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

³¹⁶ Text is taken from art. 34 of the Hamburg Rules. The second sentence of para. 2 is not strictly necessary but is present in the Hamburg Rules and in some other UNCITRAL treaties, including the draft Electronic Contracting Convention. It is not present, for instance, in art. 27 of the United Nations International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (the most recent text deposited with the Secretary-General), which provides some slightly modified alternative language:

“1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.”

Annex II¹

Transport Law

Draft convention on the carriage of goods [wholly or partly] [by sea]

Note by the Secretariat

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¹ For ease of reference and to facilitate discussion in the Working Group, Annex II contains a text of the Draft convention on the carriage of goods [wholly or partly][by sea] that illustrates through underlining and strikethrough changes made to each of the provisions from their most recently published version.

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Annex II

Draft convention² on the carriage of goods [wholly or partly] [by sea]³

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.⁴

(b) “Volume contract” means a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.⁵

(c) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.⁶

(d) “Carrier” means a person that enters into a contract of carriage with a shipper.

(e) “Performing party” means a person other than the carrier that physically performs or undertakes to perform any of the carrier’s responsibilities under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery⁷ of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. The term “performing party” includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this paragraph but does not include any person that is retained by a shipper, a person referred to in article 34, consignor, controlling party⁸ or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the

² Without intending to predetermine the form of this Instrument, the word “Instrument” has been replaced with the word “Convention” throughout, in an effort to achieve consistency.

³ As noted in para. 2 of A/CN.9/WG.III/WP.36, the Working Group decided to retain the current title unchanged for the purposes of future discussion.

⁴ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in paras. 53 and 58 of A/CN.9/576.

⁵ Corrections are to text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576. Amendment proposed to address concerns regarding previously bracketed phrase “a specified minimum quantity of”.

⁶ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576.

⁷ List expanded to parallel specific obligations set out in para. 14(1).

⁸ List expanded to be consistent with parties referred to in art. 10.

carrier) who is retained by a shipper, a person referred to in article 34, consignor, controlling party or consignee.⁹

(f) “Maritime performing party” means a performing party that performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be].¹⁰ In the event of a trans-shipment, the performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.¹¹

(g) “Non-maritime performing party” means a performing party that performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge.¹²

(h) “Shipper” means a person that enters into a contract of carriage with a carrier.

(i) “Consignor” means a person that delivers the goods to the carrier or a performing party for carriage.

(j) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record.¹³

(k) “Consignee” means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record.

⁹ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

¹⁰ As set out in footnote 9 of A/CN.9/WG.III/WP.36, there was support in the Working Group for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, but that a widely shared view was that movement between two physically distinct ports should be considered as part of a non-maritime performing party’s functions. This clarification could be achieved by the inclusion here of the phrase “including inland movements within a single port”. It was further suggested at para. 31 of A/CN.9/544 that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. The Working Group may wish to consider this suggestion.

¹¹ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

¹² As set out in footnote 10 of A/CN.9/WG.III/WP.36, a concern was raised regarding whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole.

¹³ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 207 of A/CN.9/576.

- (l) “Right of control” has the meaning given in article 54.
- (m) “Controlling party” means the person that pursuant to article 56 is entitled to exercise the right of control.
- (n) “Transport document” means a document issued pursuant to a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:
 - (i) it evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or
 - (ii) it evidences or contains a contract of carriage.
- (o) “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.
- (p) “Non-negotiable transport document” means a transport document that does not qualify as a negotiable transport document.
- (q) “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.¹⁴
- (r) “Electronic transport record” means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions:
 - (i) it evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or
 - (ii) it evidences or contains a contract of carriage.¹⁵
- (s) “Negotiable electronic transport record” means an electronic transport record

¹⁴ Suggested clarification to ensure that the draft convention does not draw an unnecessary distinction between the means of transmission and the form in which the data are stored. The definition of “electronic communication” draws on the definition of “data message” in art. 2 of the United Nations Model Law on Electronic Commerce, 1996 (“MLEC”), without the illustrative list of techniques. In the MLEC and the United Nations Draft Convention on the Use of Electronic Communications in International Contracts (“draft Electronic Contracting Convention”), Annex I to *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17*, (A/60/17), not all data messages are capable of having the same value as written paper documents, which is only possible in respect of data messages that are “accessible so as to be usable for subsequent reference”. In the draft instrument, the notion of “electronic communication”, also incorporates the criteria for the functional equivalence between data messages and written documents on art. 6 of MLEC and art. 9, para. 2 of draft Electronic Contracting Convention. Thus, an “electronic communication” under the instrument must always be capable of replicating the function of written documents.

¹⁵ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.47, that was approved for further discussion in paras. 207 and 210 of A/CN.9/576.

(i) that indicates, by statements such as “to order”, or “negotiable”, or other appropriate¹⁶ statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and

(ii) the use of which meets the requirements of article 6(1).¹⁷

(t) “Non-negotiable electronic transport record” means an electronic transport record that does not qualify as a negotiable electronic transport record.¹⁸

(u) The “issuance” and the “transfer” of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person that has the rights in the negotiable electronic transport record.]¹⁹

(v) “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.²⁰

(w) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]] and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.²¹

(x) “Ship” means any vessel used to carry goods by sea.²²

¹⁶ As set out in footnote 12 of A/CN.9/WG.III/WP.47, the Working Group may wish to consider whether the word “appropriate” is necessary in light of the use of the phrase “recognized as having the same effect” and whether similar language in draft para. 1(o) should be aligned accordingly.

¹⁷ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

¹⁸ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

¹⁹ Text as set out in para. 207 of A/CN.9/576, and as approved for further discussion in para. 210 of A/CN.9/576. As noted in para. 208 of A/CN.9/576, the square brackets around the second sentence are intended to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion. The Working Group may wish to consider the suggestion noted in para. 209 of A/CN.9/576, that the intention behind this draft para. should be explained in an explanatory note to the draft convention.

²⁰ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

²¹ With reference to the discussion in footnote 15 of A/CN.9/WG.III/WP.32, deletion of the phrase “or a performing party [received for carriage]” is suggested.

²² Definition added to clarify and standardize the use of “ship” and “vessel”, depending on which is intended in the particular provision in issue, such that “ship” means an ocean-going vessel, and “vessel” means all other vessels.

(y) “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods,²³ and any equipment ancillary to such unit load.²⁴

(z) “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.²⁵

(aa) “Domicile” means the place where (a) a company or other legal person [or association of natural or legal persons] has its (i) statutory seat or place of incorporation or registered office, as appropriate, (ii) central administration, or (iii) principal place of business, and (b) a natural person has her or his habitual residence.²⁶

[(bb) [Unless otherwise provided in this Convention] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.²⁷]

[(cc) [Unless otherwise provided in this Convention,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.²⁸]

²³ The alternatives “[capable of being carried by sea]” and “[designed for carriage by sea]” were deleted as unnecessary since these issues are addressed in the articles in which they arise, draft arts. 64 and 26.

²⁴ Note footnote to draft art 64(3) that the definition of “container” might need to be further considered to ensure that it covered pallets. It is proposed that reference to “pallets”, if any, should be addressed in para. 64(3) rather than here.

²⁵ Deletion of this definition is proposed given the deletion of the chapter on freight and the inclusion of “freight” in the definition of “contract of carriage” in para. 1(a).

²⁶ Suggested adjustments to text as set out in para. 115 of A/CN.9/576. It is suggested that reference should be made to associations, since these legal entities often own ships, but may not be included in “other legal persons”. “Place of incorporation or registered office” have been added for certainty, since “statutory seat” is not universally recognized. All of these changes conform with the text of art. 60 of Council Regulation (EC) No. 44/2001, 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001] (“Brussels I”), from which the original text was drawn.

²⁷ Text as set out in para. 117 of A/CN.9/576, and as approved for further discussion in para. 120 of A/CN.9/576. If this definition is retained, the text must be aligned with draft arts. 8, 11, 75 and 77.

²⁸ *Ibid.* See note 343.

Article 2. Interpretation of this Convention²⁹

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3. Form requirements³⁰

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20(2), 24(1), 24(2), 24(3), 38(1)(b) and (c), 41(c), 47, 52, 56(1), 63(2), 64(1), 71, 76, 95(1) and 95(6)(b) must³¹ be in writing. Electronic communications may be used for these purposes, provided the use of such means is with the express or implied consent of the party by which it is communicated and of the party to which it is communicated.”

²⁹ Text as set out in para. 4 of A/CN.9/WG.III/WP.39.

³⁰ Text as set out in para. 6 of A/CN.9/WG.III/WP.47, with inclusion of references to draft arts. 20(2), 64(1), 56(1), 63(2), 95(1) and 95(6)(b) and corrections to the opening description of types of communication. The Working Group may wish to note that this list is not closed, pending further examination. Further, the Working Group may wish to consider whether it is advisable to include with the final text an explanatory note that any notices contemplated in this convention that are not included in art. 3 may be made by any means including orally or by exchange of data messages that do not meet the definition of “electronic communication”. It is implicit in the definition of “electronic communication” that it must be capable of replicating the function of written documents (see *supra*, note 330).

³¹ While UNCITRAL practice has been to use the “shall” form in its instruments, it has been suggested that modern legislative drafting practice prefers to use other forms, such as “must”. While this version of the draft convention has adopted the more modern approach, the Working Group may wish to consider which approach is preferable.

Article 4. Applicability of defences and limitations³²

1. The defences and limitations of liability provided for in this Convention and the responsibilities imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, or damage to, the goods covered by a contract of carriage and delay in delivery of such goods, or for the breach of any other obligation under this Convention,³³ whether the action is founded in contract, in tort, or otherwise.³⁴
2. If an action is brought³⁵ against an employee or agent of the carrier or a maritime performing party, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [that person proves that]³⁶ it acted within the scope of its employment or agency.

CHAPTER 2. ELECTRONIC COMMUNICATION

Article 5. Use and effect of electronic communications³⁷

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document in pursuance of this Convention may be recorded or communicated by using electronic communications³⁸ instead of by means of the transport document, provided the issuance and subsequent use of an electronic transport record is with the express or implied consent of the carrier and the shipper; and

(b) The issuance, control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

³² Corrections are to text as set out in para. 10 of A/CN.9/WG.III/WP.39. This art. has been moved to chapter 1 (General provisions) because it relates to the broad applicability and preemptive effect of the draft Convention rather than simply to the liability of the carrier, where it was previously located.

³³ The addition of “the breach of any other obligation” is thought to have made the reference to “[or in connection with]” the goods unnecessary.

³⁴ As set out in footnote 52 of A/CN.9/WG.III/WP.39, the potentially repetitious nature of para. 20(4) and draft art. 4 was to be further considered in the next iteration of the draft convention. Adjustments to these provisions may have remedied the problem.

³⁵ The phrase “under this Convention” has not been repeated from the parallel provision in para. 20(4) because an action against an employee or agent will not be brought under the draft Convention since those persons are not subject to it, except for the maritime performing party, which is covered under para. 20(4).

³⁶ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the employee or agent

³⁷ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 187 of A/CN.9/576.

³⁸ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 187 of A/CN.9/576.

Article 6. Procedures for use of negotiable electronic transport records³⁹

1. The use of a negotiable electronic transport record must be subject to procedures that provide for:
 - (a) The method for the issuance and the⁴⁰ transfer of that record to an intended holder;
 - (b) An assurance that the negotiable electronic transport record retains its integrity;
 - (c) The manner in which the holder is able to demonstrate that it is the holder; and
 - (d) The way in which confirmation is given that delivery to the holder has been effected; or that, pursuant to articles 7(2) or 49(a)(ii), the negotiable electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.⁴¹

Article 7. Replacement of negotiable transport document or negotiable electronic transport record⁴²

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:
 - (a) The holder must surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
 - (b) The carrier must issue to the holder a negotiable electronic transport record that includes a statement that it is issued in substitution for the negotiable transport document; and
 - (c) The negotiable transport document ceases thereafter to have any effect or validity.
2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:
 - (a) The carrier must issue to the holder, in substitution for that electronic transport record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic transport record; and

³⁹ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

⁴⁰ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as revised for further discussion in paras. 207 and 210 of A/CN.9/576.

⁴¹ As set out in footnote 34 in A/CN.9/WG.III/WP.47, the term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft convention.

⁴² Text as set out in para. 5 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 189 of A/CN.9/576.

(b) Upon such substitution, the electronic transport record ceases to have any effect or validity.

CHAPTER 3. SCOPE OF APPLICATION⁴³

Article 8. General scope of application⁴⁴

1. Subject to article 9(1), this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a Contracting State⁴⁵; or

(b) The place of delivery [or port of discharge] is located in a Contracting State; or

[(c) The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract.]⁴⁶

References to [places and]⁴⁷ ports mean the [places and] ports agreed in the contract of carriage.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

⁴³ Where chapter and article titles were missing, language has been proposed for the consideration of the Working Group.

⁴⁴ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 62 of A/CN.9/576.

⁴⁵ In general, it is the practice of UNCITRAL to use the term “Contracting State” as opposed to “State Party”, or similar language. This change has been effected throughout the draft convention.

⁴⁶ Reference may be had to the discussion of this para. As set out in para. 61 of A/CN.9/576.

⁴⁷ If art. 1 includes definitions of “place of receipt” and “place of delivery”, as it currently does at draft paras. (bb) and (cc), the references to “place” would become unnecessary.

Article 9. Specific exclusions and inclusions⁴⁸

1. This Convention does not apply to:
 - (a) Charterparties;
 - (b) Contracts for the use of a ship or of any space thereon;
 - (c) Except as provided in paragraph 2, other contracts in non-liner transportation;
 and
 - (d) Except as provided in paragraph 3, volume contracts.
2. Without prejudice to subparagraphs 1(a) and (b), this Convention applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charterparty or to a contract for the use of a ship or of any space thereon.
3. (a) This Convention applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter so specify.
 - (b) This Convention applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Convention under subparagraph (a).

Article 10. Application to certain parties⁴⁹

Notwithstanding article 9, if a transport document or an electronic transport record is issued pursuant to a charterparty or a contract under article 9 (1)(b) or (c), this Convention applies to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 34 that is not the charterer or the party to the contract under article 9 (1)(b) or (c).

CHAPTER 4. PERIOD OF RESPONSIBILITY⁵⁰

Article 11. Period of responsibility of the carrier

1. Subject to article 12, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.
2. The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

⁴⁸ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 66 of A/CN.9/576.

⁴⁹ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 73 of A/CN.9/576, bearing in mind the possibility of inserting a reference to draft subpara. 9(1)(d) at the end of draft art. 10, and any necessary clarification of the treatment of receipts.

⁵⁰ Corrections are to text as set out in A/CN.9/WG.III/WP.32.

3. If the consignor is required to hand over the goods at the place of receipt to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the carrier may collect them, the time and location of the carrier's collection of the goods from the authority or other third party is the time and location of the receipt of the goods by the carrier under paragraph 2.⁵¹

4. The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

5. If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the consignee may collect them, such handing over is a delivery of the goods by the carrier to the consignee under paragraph 4.

6. For the purposes of determining the carrier's period of responsibility and subject to paragraph 14(2), the contract of carriage may not provide that:

(a) The time of receipt of the goods is subsequent to the commencement of their initial loading under the contract of carriage, or

(b) The time of delivery of the goods is prior to the completion of their final discharge under the contract of carriage.⁵²

Article 12. Transport beyond the contract of carriage⁵³

Variant A of article 12⁵⁴

1. The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.

2. In such event the carrier must exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

⁵¹ This para. is proposed to address the situation when the consignor is required to hand over the goods to an authority, such as a customs authority, prior to them being handed over to the carrier. The text parallels that of para. 5.

⁵² Para. 6 is suggested in order to ensure that fictions may not be included in the contract of carriage in order to reduce the carrier's period of responsibility.

⁵³ Suggested improved title. The Working Group may wish to consider whether art. 12 is properly placed within chapter 4 on period of responsibility.

⁵⁴ Variant A is art. 12 as set out in A/CN.9/WG.III/WP.32.

Variant B of article 12⁵⁵

On the request of the shipper, the carrier may agree to issue a single transport document or an electronic transport record that includes specified transport that is not covered by the contract of carriage. In such an event, the responsibility of the carrier covers the period of the contract of carriage and, unless otherwise agreed, the carrier, on behalf of the shipper, must arrange the additional transport as provided in such transport document or electronic transport record.

CHAPTER 5. OBLIGATIONS OF THE CARRIER

Article 13. Carriage and delivery of the goods

The carrier must, subject to this Convention and in accordance with the terms of the contract of carriage,⁵⁶ carry the goods to the place of destination and deliver them to the consignee.

Article 14. Specific obligations

1. The carrier must during the period of its responsibility as defined in article 11, and subject to article 27, properly and carefully receive,⁵⁷ load, handle, stow, carry, keep, care for, discharge and deliver the goods.

[2. The parties may agree that the loading, stowing and discharging of the goods is to be performed by the shipper or any person referred to in article 35, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]⁵⁸

Article 15. Goods that may become a danger

Variant A⁵⁹

Notwithstanding articles 13, 14, and 16(1), the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, an actual danger to persons or property or an illegal or unacceptable danger to the environment.

⁵⁵ The first sentence of Variant B is intended as a clarification of para. 1 of Variant A. The second sentence of Variant B modifies para. 2 of Variant A by changing the obligation of the carrier in its arrangement of additional transport from one of due diligence to whatever is agreed in the contract of carriage or elsewhere.

⁵⁶ Suggested deletion of “[properly and carefully]” as unnecessary and repetitious, since “subject to this Convention” already includes proper and careful carriage. Further, draft art. 13 is intended as a general obligation that is enhanced in subsequent articles.

⁵⁷ “Receive” and “deliver” added to ensure they are recognized as carrier’s obligations.

⁵⁸ As set out in footnote 47 of A/CN.9/WG.III/WP.32, it was noted in para. 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to arts. 13 and 14(1).

⁵⁹ Variant A of art. 15 is based on the original text of the draft convention (A/CN.9/WG.III/WP.21).

Variant B⁶⁰

Notwithstanding articles 13, 14, and 16(1), the carrier may unload, destroy or render goods harmless if they become an actual danger to persons or property.

Article 16. Specific obligations applicable to the voyage by sea⁶¹

1. The carrier is bound, before, at the beginning of, and during⁶² the voyage by sea, to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly man,⁶³ equip and supply the ship and keep the ship so manned,⁶⁴ equipped and supplied throughout the voyage;⁶⁵

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers when supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

[2. Notwithstanding articles 13, 14, and 16(1), the carrier may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril⁶⁶ human life or⁶⁷ other property involved in the common adventure.]⁶⁸

⁶⁰ Variant B is based on the principles expressed in art. 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods.

⁶¹ Text as set out in para. 11 of A/CN.9/WG.III/WP.36, including footnotes.

⁶² As set out in footnote 55 of A/CN.9/WG.III/WP.36, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft para. 16(1) surrounding the phrases "and during" in draft para. 16(1), "and keep" in draft subpara. 16(1)(a), and "and keep" in draft subpara. 16(1)(c) should thus be removed, and the text in them retained. The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft convention, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the convention.

⁶³ As set out in footnote 56 of A/CN.9/WG.III/WP.36, a drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship". The Working Group may wish to consider this suggestion.

⁶⁴ *Ibid.*

⁶⁵ As set out in footnote 58 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to make the necessary changes to subpara. (b) to ensure that this obligation was understood to be of a continuing nature. It is suggested that the addition of the phrase "throughout the voyage" could achieve this effect. A possible alternative could be to insert the phrase "and continuously" after the opening word, "Properly".

⁶⁶ As set out in footnote 59 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the presence of imminent danger, but that care should be taken not to prejudice or alter the rules on general average. Consistent with the language in Rule A of the York-Antwerp Rules of 1994, the phrase "from peril" was added after the word "preserving".

⁶⁷ As set out in footnote 60 to A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the preservation of human life. The phrase "human life" has been added before the phrase "or other property".

⁶⁸ As set out in footnote 61 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain draft para. 16(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 18 on general average.

CHAPTER 6. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

Article 17. Basis of liability⁶⁹

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

(b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

- (i) the unseaworthiness of the ship;
- (ii) the improper manning, equipping, and supplying of the ship; or
- (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article 16(1); or

(B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

⁶⁹ Text as set out in paras. 31 and 75 of A/CN.9/572, and as broadly accepted in paras. 33 and 80 of A/CN.9/572.

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;⁷⁰

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects in the [ship][vessel][means of transport]⁷¹ not discoverable by due diligence;

(h) Act or omission of the shipper or any person referred to in article 35,⁷² the controlling party, or the consignee;

(i) Handling, loading, [stowage,] or discharging⁷³ of the goods [actually performed] by the shipper or any person referred to in article 35,⁷⁴ the controlling party, or the consignee;⁷⁵

(j) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

[(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 15 and 16(2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.]⁷⁶

4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs.

⁷⁰ Further examination is needed whether the reference to art. 19 is necessary.

⁷¹ The Working Group may wish to consider which of the terms in square brackets is intended to be addressed in this para.

⁷² Further examination is needed whether the reference to art. 35 is necessary.

⁷³ “Discharging” is suggested in order to be consistent with the language in draft art. 14.

⁷⁴ Further examination is needed whether the reference to art. 35 is necessary

⁷⁵ As noted in para. 76 of A/CN.9/572, the Working Group agreed to add a footnote to para. (i) indicating that the final text of it would depend upon the outcome of the discussion on para. 14(2).

⁷⁶ The Working Group may wish to reconsider this provision in light of the treatment of draft art. 33.

Article 18. Carrier's liability for failure to provide information and instructions⁷⁷

The carrier is liable⁷⁸ for loss, damage [, delay]⁷⁹ or injury caused by a breach of its obligations under article 29, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person referred to in article 19 caused [or contributed to] the loss, damage [, delay] or injury.

Article 19. Vicarious liability of the carrier⁸⁰

1. Subject to paragraph 20(4),⁸¹ the carrier is liable for the acts and omissions of:
 - (a) Any performing party, and
 - (b) Any other person, including a performing party's subcontractors, employees⁸² and agents, that performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own.
2. The carrier is liable under paragraph 1 only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

Article 20. Liability of maritime performing parties⁸³

1. A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this Convention, and entitled to the carrier's rights and immunities provided by this Convention if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; or (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.
2. If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Convention, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 65, 64⁸⁴ and 26(4), a maritime performing party is not bound by this agreement

⁷⁷ Text as set out in para. 18 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 85 of A/CN.9/WG.III/WP.39, aspects of draft arts. 31 and 33 dealing with the liability of the carrier have been called "art. 18", for possible placement here.

⁷⁸ See *infra*, note 445.

⁷⁹ See *infra*, note 447.

⁸⁰ Corrections to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸¹ As set out in footnote 63 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain this opening phrase, although the suggestion was made that it should be replaced with the phrase "Subject to the liability and limitations of liability available to the carrier" since draft art. 19 dealt with actions brought against the carrier, while draft para. 20(4) dealt with actions brought against any person other than the carrier.

⁸² As set out in footnote 64 of A/CN.9/WG.III/WP.36, as a matter of drafting, further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

⁸³ Corrections are to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸⁴ As set out in footnote 69 of A/CN.9/WG.III/WP.36, the Working Group took note of the suggestion to limit the reference to draft art. 64, since it was stated that, while the reference to paras. (1), (3) and (4) of draft art. 64 was acceptable, para. (2) of draft art. 64 should not be

unless the maritime performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 4, a maritime performing party is liable for the acts and omissions of any person to which it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A maritime performing party is liable under this paragraph only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.⁸⁵

Variant A of paragraph 4⁸⁶

4. If an action under this Convention is brought against a maritime performing party, that party is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁷ it acted within the scope of its contract, employment or agency.

Variant B of paragraph 4

4. If an action under this Convention is brought against any person, other than the carrier, referred to in article 19 or paragraph 3, [, including employees or agents of the contracting carrier or of a maritime performing party,]⁸⁸ that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁹ it acted within the scope of its contract, employment, or agency.

Article 21. Joint and several liability and set-off⁹⁰

1. If the carrier and one or more maritime performing parties are liable⁹¹ for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several [, such that

referred to since the performing party was not liable in case of non-localized damage. The Working Group decided that this suggestion might need to be further discussed after a decision had been made regarding the inclusion of para. (2) of draft art. 64 in the draft convention.

⁸⁵ As set out in footnote 74 of A/CN.9/WG.III/WP.36, the Working Group reaffirmed its decision that the structure of this para. should mirror new draft art. 19, and took note of the views expressed regarding whether draft para. 20(3) should cover both maritime and non-maritime performing parties for continuation of the discussion at a future session.

⁸⁶ Suggested variant for para. 20(4) in order to respond to the Working Group's desire, as set out in footnote 77 of A/CN.9/WG.III/WP.36, to examine a variant limiting the scope of this para. to the maritime sphere, and in light of the text proposed for para. 4(2) which parallels this para., but in the context of employees and agents.

⁸⁷ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the maritime performing party.

⁸⁸ As set out in footnote 80 of A/CN.9/WG.III/WP.36, the Working Group may wish to consider the following simplified text for the opening phrase of the para. ending with "that person": "If an action under this Convention is brought against any maritime performing party [, including its sub-contractors, employees or agents,] that person ...".

⁸⁹ See *supra*, 404.

⁹⁰ Text as set out in para. 2 of A/CN.9/WG.III/WP.39, including footnotes.

⁹¹ As set out in footnote 3 of A/CN.9/WG.III/WP.39, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a separate draft art., for greater clarity, the phrase "If more than one maritime performing party is liable" as it appears in A/CN.9/WG.III/WP.36, has been changed to "If the carrier and one or

each such party is liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may have against other liable parties,]⁹² but only up to the limits provided for in articles 22, 64 and 26.

2. Without prejudice to article 66, the aggregate liability of all such persons must not exceed the overall limits of liability under this Convention.

[3. When a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant is set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.]⁹³

Article 22. Delay⁹⁴

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage or journey.⁹⁵

Article 23. Calculation of compensation⁹⁶

1. Subject to article 64, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 11.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

more maritime performing parties are liable". The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 21(3) below.

⁹² As set out in footnote 4 of A/CN.9/WG.III/WP.39, the phrase in square brackets has been added for clarification of the meaning of "joint and several liability". However, the Working Group may wish to consider the use of the term "joint and several liability" in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF 1999"); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 ("CMNI"); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 ("Warsaw Convention"); and para. 36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 ("Montreal Convention").

⁹³ As set out in footnote 7 of A/CN.9/WG.III/WP.39, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 407. The Working Group may wish to consider whether this para. is necessary or whether it can be deleted.

⁹⁴ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.39.

⁹⁵ Art. 22(2), formerly draft art. 16(2) in A/CN.9/WG.III/WP.32, has been moved to become art. 65 in the new chapter on limitation of liability.

⁹⁶ Text as set out in para. 5 of A/CN.9/WG.III/WP.39.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 20.

Article 24. Notice of loss, damage, or delay⁹⁷

[Variant A of paragraph 1]⁹⁸

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice⁹⁹ of loss of or damage to¹⁰⁰ the goods, indicating the general nature of such loss or damage, was given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][seven days][seven working days at the place of delivery][seven consecutive days] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection¹⁰¹ of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

[Variant B of paragraph 1]¹⁰²

1. Notice of loss of or damage to¹⁰³ the goods, indicating the general nature of such loss or damage, must be given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days]¹⁰⁴[__ working days at the place of delivery] [__ consecutive days] after the delivery of the goods. [A court [may] [must] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 17(1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

2. No compensation is payable under article 22 unless notice of loss due to delay was given to the carrier within 21 consecutive days following delivery of the goods.

⁹⁷ Corrections are to text as set out in para. 9 of A/CN.9/WG.III/WP.39.

⁹⁸ As set out in footnote 39 of A/CN.9/WG.III/WP.39, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant A of para. 1 is the text in A/CN.9/WG.III/WP.32, but for the deletion of “[a reasonable time]” as decided at para. 75 of A/CN.9/552, and with the additions as noted.

⁹⁹ As set out in footnote 40 of A/CN.9/WG.III/WP.39, draft art. 3 of the draft convention states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

¹⁰⁰ “In connection with” deleted as unnecessary in this para.

¹⁰¹ As set out in footnote 43 of A/CN.9/WG.III/WP.39, it was suggested in para. 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

¹⁰² As set out in footnote 44 of A/CN.9/WG.III/WP.39, Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

¹⁰³ See *infra*, note 538.

¹⁰⁴ As set out in para. 75 of A/CN.9/552, the Working Group had decided to delete the phrase “[a reasonable time]” from the original text from which this variant was derived.

3. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

4. In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods and must provide access to records and documents relevant to the carriage of the goods.

CHAPTER 7. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 25. Deviation during sea carriage

[Variant A]¹⁰⁵

1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life [or property] at sea[, or by any other [reasonable] deviation].

2. When under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this Convention.^{106]}

[Variant B]¹⁰⁷

1. The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.

2. To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this Convention, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of a ship.

3. To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this Convention. In particular, a deviation does not deprive the carrier of its rights under this Convention except to the extent provided in article 66.]

¹⁰⁵ As set out in footnote 59 of A/CN.9/WG.III/WP.39, Variant A is the draft art. as set out at A/CN.9/WG.III/WP.32.

¹⁰⁶ As set out in footnote 60 of A/CN.9/WG.III/WP.39 and in footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read:

“Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this Convention.”

If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

¹⁰⁷ As set out in footnote 61 of A/CN.9/WG.III/WP.39, Variant B is the draft art. as proposed at para. 38 of A/CN.9/WG.III/WP.34.

Article 26. Deck cargo on ships¹⁰⁸

1. Goods may be carried on or above the deck of a ship only if:
 - (a) Such carriage is required by applicable laws or administrative rules or regulations, or
 - (b) They are carried in or on containers [fitted to carry cargo on deck] on decks that are specially fitted to carry such containers, or
 - (c) [In cases not covered by subparagraphs (a) or (b) of this paragraph,] the carriage on deck [is in accordance with the contract of carriage, or] complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.
2. If the goods have been shipped in accordance with subparagraphs 1(a) or (c), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to subparagraph 1(b), the carrier is liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Convention without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under paragraph 1, the carrier is liable, irrespective of article 17, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.¹⁰⁹
3. If the goods have been shipped in accordance with subparagraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with subparagraph 1(c) and, if a negotiable transport document or a negotiable electronic transport record is issued, is not entitled to invoke that subparagraph against a third party that has acquired such negotiable transport document or electronic transport record in good faith.¹¹⁰
4. If the carrier is liable under this article for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided in articles 22, 64 and 66(1); but, if the carrier and shipper [expressly] agreed that the goods would be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods [[that exclusively][to the extent that such damage] resulted from their carriage on deck]¹¹¹.¹¹²

¹⁰⁸ Corrections are to text as set out in para. 13 of A/CN.9/WG.III/WP.39.

¹⁰⁹ As set out in footnote 63 of A/CN.9/WG.III/WP.39, para. 2 may need to be discussed in greater detail in conjunction with draft para. 17(4), however, changes to para. 17(4) may render this discussion unnecessary.

¹¹⁰ As set out in footnote 64 of A/CN.9/WG.III/WP.39, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic transport records would continue after discussion of third-party rights and freedom of contract.

¹¹¹ As set out in footnote 67 of A/CN.9/WG.III/WP.39, square brackets were placed around “that exclusively resulted from their carriage on deck”. A further alternative has been added.

¹¹² As set out in footnote 69 of A/CN.9/WG.III/WP.39, square brackets were placed around para. 4, for discussion at a future session, with further study of its relationship with draft art. 66.

[Article 27. Carriage preceding or subsequent to sea carriage]

1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier's period of responsibility but:

- (a) Before the time of their loading on to the ship;
- (b) After their discharge from the ship to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:

- (i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable]¹¹³, and
- (ii) specifically provide for carrier's liability, limitation of liability, or time for suit, and
- (iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]

[2. Paragraph 1 does not affect the application of article 64(2).¹¹⁴]

[3. Article 27 applies regardless of the national law otherwise applicable to the contract of carriage.¹¹⁵]

CHAPTER 8. OBLIGATIONS OF THE SHIPPER

Article 28. Delivery for carriage¹¹⁶

The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the

¹¹³ As set out in para. 55 of A/CN.9/WG.III/WP.21, this bracketed text reflected the situation under the 1980 Convention concerning International Carriage by Rail ("COTIF"). Once the 1999 Protocol for the Modification of COTIF enters into force, expected to be in the fall of 2005, the Working Group may wish to delete the bracketed language.

¹¹⁴ If para. 64(2) is deleted, this para. should also be deleted.

¹¹⁵ As set out in para. 54 of A/CN.9/WG.III/WP.21, this para. is a conflict of law provision that was intended to safeguard the applicability of inland transport conventions. Further, as set out in footnotes 42 and 231 of A/CN.9/WG.III/WP.32, draft art. 27 inspired a request that a conflict of convention provision be inserted into chapter 19. Draft art. 89 was inserted in response to that request.

¹¹⁶ Text as set out in para. 14 of A/CN.9/WG.III/WP.39, including footnotes.

intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.¹¹⁷

Article 29. Carrier's obligation to provide information and instructions¹¹⁸

The carrier must provide to the shipper, on its request [and in a timely manner]¹¹⁹, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28.¹²⁰ [The information and instructions so provided must be accurate and complete.]¹²¹

Article 30. Shipper's obligation to provide information, instructions and documents¹²²

The shipper must provide to the carrier [in a timely manner, such accurate and complete]¹²³ information, instructions, and documents as are reasonably necessary for:

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, except to the extent that the shipper may reasonably assume that such information is already known to the carrier¹²⁴;

(b) Compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38(1)(b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any, unless the shipper may reasonably assume that such information is already known to the carrier.

¹¹⁷ As set out in footnote 71 of A/CN.9/WG.III/WP.39, to improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft art. 28:

"In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer."

¹¹⁸ Text as set out in para. 15 of A/CN.9/WG.III/WP.39, including footnotes.

¹¹⁹ As set out in footnote 72 of A/CN.9/WG.III/WP.39, former draft art. 28 of A/CN.9/WG.III/WP.32 was deleted and replaced by a mention in draft art. 29 that the shipper should provide "[in a timely manner]" the information and instructions required.

¹²⁰ As set out in footnote 73 of A/CN.9/WG.III/WP.39, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, "unless the carrier may reasonably assume that such information is already known to the shipper".

¹²¹ As set out in footnote 74 of A/CN.9/WG.III/WP.39, "[the information and instructions given must be accurate and complete]" has been added for future discussion.

¹²² Corrections are to text as set out in para. 16 of A/CN.9/WG.III/WP.39.

¹²³ As set out in footnote 75 of A/CN.9/WG.III/WP.39, "[in a timely manner, such accurate and complete information, instructions and documents ...]" has been added for future discussion.

¹²⁴ As set out in footnote 76 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, but "except to the extent that the shipper may reasonably assume that such information is already known to the carrier" was added to the end of subpara. (a).

Article 31. Basis of shipper's liability¹²⁵

1. The shipper is liable¹²⁶ for¹²⁷ loss, damage [, delay]¹²⁸ or injury caused by the goods, and for breach of its obligations under article 28 and paragraph 30(a), [unless][unless and to the extent that][except to the extent that] the shipper proves that neither its fault nor the fault of any person referred to in article 35 caused or contributed to the loss, damage [, delay] or injury.

[Variant A of paragraph 2]¹²⁹

2. The shipper is liable¹³⁰ for loss or damage caused by a breach of its obligations under paragraphs 30(b) and (c).]

[Variant B of paragraph 2]¹³¹

2. The shipper is deemed to have guaranteed to the carrier the timeliness, accuracy and completeness at the time of receipt by the carrier of the information, instructions and documents that the shipper is required to provide under paragraphs 30(b) and (c). The shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from any breach of obligations under paragraphs 30(b) and (c). The right of the carrier to such indemnity in no way limits its responsibility under the contract of carriage to any person other than the shipper.]

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier are jointly liable to the consignee or the controlling party¹³² for any such loss or damage [or injury].¹³³

¹²⁵ Corrections are to text as set out in para. 18 of A/CN.9/WG.III/WP.39.

¹²⁶ As set out in footnote 77 of A/CN.9/WG.III/WP.39, para. 31(1) has been redrafted to mirror the provision on carrier's liability at draft para. 17(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft art. 17 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft art. 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

¹²⁷ The phrase "loss resulting from" was deleted to conform with the approach taken in draft art. 17.

¹²⁸ As set out in footnote 78 of A/CN.9/WG.III/WP.39, "delay" arises by virtue of creating a mirror provision of draft art. 17, but it has been placed in square brackets since it has not been specifically discussed in the context of draft art. 31.

¹²⁹ As set out in footnote 80 of A/CN.9/WG.III/WP.39, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft art. 30.

¹³⁰ See *supra*, note 445.

¹³¹ As set out in footnote 82 of A/CN.9/WG.III/WP.39, a provision similar to art. III.5 of the Hague Rules has been introduced in square brackets. This provision has been revised as indicated from the version set out in A/CN.9/WG.III/WP.39.

¹³² As set out in footnote 83 of A/CN.9/WG.III/WP.39, the issue of liability to the consignee and the controlling party might need to be reconsidered later.

¹³³ As set out in footnote 84 of A/CN.9/WG.III/WP.39, para. 3 of Variant B of draft art. 31 (A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft art. 17.

[Article 32. Material misstatement by shipper¹³⁴

A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document or electronic transport record.]¹³⁵

Article 33. Special rules on dangerous goods¹³⁶

1. “Dangerous goods” means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment.
2. The shipper must mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such failure.
3. The shipper must inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such shipment.

Article 34. Assumption of shipper’s rights and obligations¹³⁷

If a person identified as “shipper” in the contract particulars, although not the shipper as defined in paragraph 1(h), [accepts][receives][becomes a holder of] the transport document or electronic transport record, then such person is (a) [subject to the responsibilities and liabilities] imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper’s rights and immunities provided by this chapter and by chapter 14.

Article 35. Vicarious liability of the shipper¹³⁸

The shipper is liable for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons [except the carrier or performing parties] that act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Liability is imposed on the shipper

¹³⁴ Corrections are to text as set out in para. 20 of A/CN.9/WG.III/WP.39.

¹³⁵ As set out in footnote 90 of A/CN.9/WG.III/WP.39, draft art. 32 has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft art. 32 could be placed in chapter 6 on the liability of the carrier.

¹³⁶ This text is thought to better reflect the discussion in and request of the Working Group as set out in paras. 146 to 148 of A/CN.9/552, and replaces the text proposed in para. 19 of A/CN.9/WG.III/WP.39.

¹³⁷ Corrections are to text as set out in para. 21 of A/CN.9/WG.III/WP.39. As set out in footnote 91 of A/CN.9/WG.III/WP.39, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

¹³⁸ Corrections are to text as set out in para. 22 of A/CN.9/WG.III/WP.39. Changes have been made to this provision to align it with art. 19, relating to the vicarious liability of the carrier.

under this article only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.¹³⁹

[Article 36. Cessation of shipper's liability¹⁴⁰

If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain time, such cessation is not valid:

(a) With respect to any liability under this chapter of the shipper or a person referred to in article 34; or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security¹⁴¹ for the payment of such amounts.

(c) To the extent that it conflicts with article 63.^{142]}

CHAPTER 9. TRANSPORT DOCUMENTS AND
ELECTRONIC TRANSPORT RECORDS¹⁴³

Article 37. Issuance of the transport document or the electronic transport record

Upon delivery of the goods to the carrier or performing party:

(a) The consignor is entitled to obtain a transport document or, subject to article 5(a), an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and

(b) The shipper or, if the shipper instructs the carrier, the person referred to in article 34, is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5(a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one.¹⁴⁴

¹³⁹ As set out in footnote 94 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, and questions regarding the interaction of this provision with para. 14 (2) and draft art. 32 should be considered at a future session.

¹⁴⁰ Former para. 43(2) of A/CN.9/WG.III/WP.32, moved to this placement from the now-deleted Chapter 9 on freight.

¹⁴¹ Given the deletion of former draft art. 45 from A/CN.9/WG.III/WP.32, the phrase "pursuant to art. 45 or otherwise" has been deleted from the draft art. in order to take into account that deletion.

¹⁴² As set out in footnote 535, *infra*, former draft art. 62 of A/CN.9/WG.III/WP.32 was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

¹⁴³ But for the indicated renumbering, drafting improvements and proposed titles for draft arts., as well as the adjustments that arose as a result of electronic commerce considerations and which were approved by the Working Group in para. 200 of A/CN.9/576 (for revisions to art. 37) and in paras. 207, 209 and 210 of A/CN.9/576 (for revisions to art. 39), this chapter remains largely unchanged from A/CN.9/WG.III/WP.32.

¹⁴⁴ As set out in footnote 127 of A/CN.9/WG.III/WP.32, with respect to para. (a), it was acknowledged that, since not all transport documents as defined under draft art. 1(n) served the function of evidencing receipt of the goods by the carrier, it was important to make it clear that, under para. (a), the transport document should serve the receipt function.

Article 38. Contract Particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 37 must include:
 - (a) A description of the goods;
 - (b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;
 - (c)
 - (i) The number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods and
 - (ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods¹⁴⁵;
 - (d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;
 - (e) The name and address of the carrier; and
 - (f) The date
 - (i) on which the carrier or a performing party received the goods, or
 - (ii) on which the goods were loaded on board the ship, or
 - (iii) on which the transport document or electronic transport record was issued.¹⁴⁶
2. The phrase “apparent order and condition of the goods” in paragraph 1 refers to the order and condition of the goods based on:
 - (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and
 - (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.

¹⁴⁵ As set out in footnote 129 of A/CN.9/WG.III/WP.32, the concern was expressed in para. 28 of A/CN.9/526 that this phrase might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase “as furnished by the shipper” with the phrase “if furnished by the shipper”.

¹⁴⁶ As set out in footnote 130 of A/CN.9/WG.III/WP.32, it was suggested that the Working Group should consider redrafting para. 1 to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to draft art. 48, *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory elements, and to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

Article 39. Signature¹⁴⁷

1. A transport document must be signed by the carrier or a person having authority from the carrier.
2. An electronic transport record must include the electronic signature of the carrier or a person having authority from the carrier. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.¹⁴⁸

Article 40. Deficiencies in the contract particulars

1. The absence of one or more of the contract particulars referred to in article 38(1), or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, then the date is considered to be:
 - (a) If the contract particulars indicate that the goods have been loaded on board a ship, the date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship; or
 - (b) If the contract particulars do not indicate that the goods have been loaded on board a ship, the date on which the carrier or a performing party received the goods.
- [3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]¹⁴⁹

¹⁴⁷ While this draft art. has been revised by the Working Group as indicated during its review of the electronic commerce aspects of the draft convention, the original text as set out in A/CN.9/WG.III/WP.32 attached the following at footnote 132: The Working Group may wish to consider whether "signature" should be defined as, for example, in para. 14(3) of the Hamburg Rules, particularly in light of modern practice.

¹⁴⁸ As a consequence of its review of the electronic commerce provisions of the draft convention at its fifteenth session, these changes were approved for further discussion by the Working Group in paras. 205 and 207 of A/CN.9/576. The United Nations Model Law on Electronic Signatures 2001 defines an electronic signature as, "data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory's approval of the information contained in the data message." Since this term only appears once in the draft convention, it is suggested that no definition is needed. The provision retains, however, the reference to the essential functions of the electronic signature (i.e. identifying the signatory and indicating its approval of the record). The only difference is the use of the word "authorization" rather than "approval" in the draft convention.

¹⁴⁹ As set out in footnote 137 of A/CN.9/WG.III/WP.32., the prevailing view in the Working Group was that para. 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep para. 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date.

4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the transport document or electronic transport record is either *prima facie* or conclusive evidence under article 43, as the case may be, that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party.

Article 41. Qualifying the description of the
goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38(1)(a), 38(1)(b) or 38(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

(i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

(ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

(b) For goods delivered to the carrier or a performing party in a closed container, unless¹⁵⁰ the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate¹⁵¹, the carrier may include a qualifying clause in the contract particulars with respect to

(i) the leading marks on the goods inside the container, or

¹⁵⁰ As set out in footnote 140 of A/CN.9/WG.III/WP.32, the phrase “unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the para. in order to clarify that it is intended to apply to the entire para.

¹⁵¹ As set out in footnote 141 of A/CN.9/WG.III/WP.32, another suggestion was that language along the lines of subpara. (a)(ii) should be included also in para. (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in para. 37 of A/CN.9/526 that the carrier that decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft convention should deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, when the carrier acting in bad faith had voluntarily agreed not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

- (ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.
- (c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if
 - (i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or
 - (ii) the carrier can show that there was no reasonable means of checking the weight of the container.¹⁵²

Article 42. Reasonable means of checking and good faith

For purposes of article 41:

- (a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable.
- (b) The carrier acts in “good faith” when issuing a transport document or an electronic transport record if
 - (i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and
 - (ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.
- (c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith.

Article 43. Prima facie and conclusive evidence

Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is:

- (a) Prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and
- (b) Conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars
 - [(i)] if a negotiable transport document or a negotiable electronic transport record has been transferred to a third party acting in good faith [or

¹⁵² As set out in footnote 129 of A/CN.9/WG.III/WP.32, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. However, it was thought that the word “commercially” was unnecessary in light of the definition in para. 42(a), and it was deleted.

(ii) Variant A of paragraph (b)(ii)¹⁵³

if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars.]

(ii) Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]¹⁵⁴

Article 44. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause.¹⁵⁵

¹⁵³ Variant A of subpara. (b)(ii) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁵⁴ As set out in footnote 145 of A/CN.9/WG.III/WP.32, the prevailing view in the Working Group was to retain subpara. (b)(ii) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paras. 45 to 47 of A/CN.9/526. Variant B was proposed in A/CN.9/WG.III/WP.32 to respond to concerns that Variant A appeared to introduce a novel use for non-negotiable documents that was unknown in European law.

¹⁵⁵ As set out in footnote 146 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider the alternative language for draft art. 44 suggested in paras. 153 and 154 of A/CN.9/WG.III/WP.21:

“If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under art. 43, to the extent that the description of the goods is qualified by the clause, when the clause is “effective” under para. 2.”

It would then be necessary to add a new provision, perhaps as para. 2, which might provide:

“A qualifying clause in the contract particulars is effective for the purposes of para. 1 under the following circumstances:

(a) For non-containerized goods, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms.

(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms if

(i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and

(ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that

(1) a container was opened for the purpose of inspection,

(2) the inspection was properly witnessed, and

(3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection.”

[Article 45. “Freight prepaid”¹⁵⁶

If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement “freight prepaid” or a statement of a similar nature, then neither the holder nor the consignee, is liable for the payment of the freight. This article does not apply if the holder or the consignee is also the shipper.]

CHAPTER 10. DELIVERY TO THE CONSIGNEE¹⁵⁷

Article 46. Obligation to accept delivery

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]¹⁵⁸ must accept delivery of the goods at the time and location referred to in article 11(4). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party acts in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the performing party]¹⁵⁹ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.]¹⁶⁰

Article 47. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee must acknowledge receipt¹⁶¹ of the goods from the carrier or the performing party in the manner that is customary at the place of destination.

¹⁵⁶ Former draft para. 44(1) from A/CN.9/WG.III/WP.32 retained as agreed (see paras. 162 to 164 of A/CN.9/552) in draft art. 45.

¹⁵⁷ The original text of this chapter with drafting improvements and corrections suggested in red-line underline and strike-out, is taken from A/CN.9/WG.III/WP.32.

¹⁵⁸ As set out in footnote 160 of A/CN.9/WG.III/WP.32, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

¹⁵⁹ As set out in footnote 161 of A/CN.9/WG.III/WP.32, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of draft art. 46 could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”.

¹⁶⁰ As set out in footnote 162 of A/CN.9/WG.III/WP.32, suggestions were made that draft art. 46 and draft arts. 51, 52 and 53 could be merged, or that to reduce the confusion caused by the interplay of draft art. 46 and draft arts. 51, 52, and 53, the second sentence of draft art. 46 could be deleted, and draft arts. 51, 52, and 53 could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

¹⁶¹ It was thought that deletion of the phrase “shall confirm delivery” and replacement with the phrase “must acknowledge receipt” was preferable since the consignee could confirm its own act, but not the fulfilment of the carrier’s obligation.

Article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply:

(a) If the name and address of the consignee is not referred to in the contract particulars the controlling party must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;¹⁶²

(b) Variant A of paragraph (b)¹⁶³

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee upon the consignee's production of proper identification;¹⁶⁴

Variant B of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification.

Variant C of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. The carrier may refuse delivery if the consignee does not produce proper identification.

(c) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling party, the shipper. In such event, the controlling party or shipper must give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 is deemed to be the shipper for purposes of this paragraph. The carrier that delivers the goods upon instruction of the controlling party or the shipper under this paragraph is discharged from its obligations to deliver the goods under the contract of carriage.¹⁶⁵

¹⁶² As set out in footnote 164 of A/CN.9/WG.III/WP.32, the suggestion made in para. 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to draft subpara. 38(1)(f), *supra*.

¹⁶³ As set out in footnote 165 of A/CN.9/WG.III/WP.32, Variant A of para. (b) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁶⁴ As set out in footnote 166 of A/CN.9/WG.III/WP.32, the suggestion made in para. 76 of A/CN.9/526 that para. (b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier, has been incorporated in the text of both Variant B and C.

¹⁶⁵ As set out in footnote 167 of A/CN.9/WG.III/WP.32, a suggestion was made during the consideration of draft para. 49(b) and (c) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as para. (c).

Article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

When a negotiable transport document or a negotiable electronic transport record has been issued, the following paragraphs apply:

(a) (i) Without prejudice to article 46 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(ii) Without prejudice to article 46 the holder of a negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) to such holder if it demonstrates in accordance with the procedures referred to in article 6 that it is the holder of the electronic transport record. Upon such delivery, the electronic transport record ceases to have any effect or validity.¹⁶⁶

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper must give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁷

(c) [Notwithstanding paragraph (d),]¹⁶⁸ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) is discharged from its obligation to deliver the goods under the contract of carriage to the holder¹⁶⁹, irrespective of whether the negotiable transport document

¹⁶⁶ As set out in footnote 168 of A/CN.9/WG.III/WP.32, subject to the note of caution raised in para. 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in para. 81 of A/CN.9/526, the Working Group found the substance of paras. (a)(i) and (ii) to be generally acceptable.

¹⁶⁷ As set out in footnote 169 of A/CN.9/WG.III/WP.32, the suggestion made in para. 82 of A/CN.9/526, that the carrier should have the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery appear to be already addressed by the text of para. (b).

¹⁶⁸ As set out in footnote 170 of A/CN.9/WG.III/WP.32, it was suggested that it was unclear how paras. (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. A link between paras. (c) and (d) already exists, since para. (c) starts with the words, "Notwithstanding paragraph (d)". Other alternatives are possible, for example, to start para. (d) with the words, "Except as provided", or to add at the end of that para. a new sentence reading, "This paragraph does not apply where the goods are delivered by the carrier pursuant to paragraph (c)." The various alternatives are provisionally inserted in square brackets.

¹⁶⁹ It is suggested that the square brackets around "to the holder", which appeared in the original text in A/CN.9/WG.III/WP.21, be deleted and the phrase retained in order to clarify the text.

has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 6, that it is the holder.

Variant A of paragraph (d)¹⁷⁰

(d) [Except as provided in paragraph (c)]¹⁷¹ if the delivery of the goods by the carrier at the place of destination occurs without the surrender of the negotiable transport document to the carrier or without the demonstration referred to in paragraph (a)(ii), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights [against the carrier]¹⁷² under the contract of carriage only if: (i) the passing of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods; or (ii) unless such person at the time it became a holder did not have and could not reasonably have had knowledge of such delivery. [This paragraph does not apply when the goods are delivered by the carrier pursuant to paragraph (c).]¹⁷³

Variant B of paragraph (d), which comprises (d) and (e)¹⁷⁴

(d) If the goods are delivered pursuant to paragraph (c), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods, when only the transfer of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods.

(e) Notwithstanding paragraphs (c) and (d), the holder that did not have or could not reasonably have had knowledge of such delivery at the time it became a holder acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.

¹⁷⁰ Variant A is the text as it appeared in A/CN.9/WG.III/WP.32, revised as indicated.

¹⁷¹ See *supra*, note 490.

¹⁷² As set out in footnote 172 of A/CN.9/WG.III/WP.32, the first concern expressed in para. 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. A solution might be to indicate in subpara. (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under draft art. 13, but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for draft art. 61, *infra*. The second concern expressed in para. 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase “could not reasonably have had knowledge of such delivery” has not specifically been addressed.

¹⁷³ See *supra*, note 490.

¹⁷⁴ Variant B is proposed as improved drafting of the same principles set out in Variant A.

Article 50. Failure to give adequate instructions¹⁷⁵

If the controlling party or the shipper does not give the carrier adequate instructions under articles 48 and 49 or if the controlling party or the shipper cannot be found¹⁷⁶, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 51, 52 and 53.

Article 51. When goods are undeliverable

1. The carrier is entitled to exercise the rights and remedies referred to in paragraph 2 at the risk and expense¹⁷⁷ of the person entitled to the goods, if the goods have arrived at the place of destination and:

(a) The consignee did not actually accept delivery of the goods under this chapter at the time and location referred to in article 11(4) [and no express or implied contract has been concluded between the carrier or the performing party and the consignee with respect to the custody of the goods]¹⁷⁸; or

(b) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee.

2. The rights and remedies referred to in paragraph 1 are:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or

(c) To cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time.

3. If the goods are sold under paragraph 2(c), the carrier must hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier.

¹⁷⁵ It is suggested that the clarity of the text is improved by placing the text of draft para. 49(e) in a separate article as draft art. 50.

¹⁷⁶ As set out in footnote 174 of A/CN.9/WG.III/WP.32, this addition has been made on the basis of the suggestion in para. 89 of A/CN.9/526 that para. (e) should be aligned with para. (b) through the insertion of this phrase. Further adjustments have been made, and the square brackets removed, in order to clarify the text.

¹⁷⁷ As set out in footnote 176 of A/CN.9/WG.III/WP.32, concern was expressed that when the carrier exercised its rights under draft art. 51 it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase “and expense” in para. 1 is intended to meet these concerns.

¹⁷⁸ As set out in footnote 175 of A/CN.9/WG.III/WP.32, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage” as confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

Article 52. Notice of arrival at destination

The carrier is allowed to exercise the rights referred to in article 51 only after it has given reasonable advance¹⁷⁹ notice that the goods have arrived at the place of destination to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper.

Article 53. Carrier's liability for undeliverable goods

When exercising its rights referred to in article 51(2), the carrier or a performing party is liable¹⁸⁰ for loss of or damage to the goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]¹⁸¹.

CHAPTER 11. RIGHT OF CONTROL¹⁸²

Article 54. Definition of right of control

The right of control of the goods [means][is] the right under the contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 11(1).]¹⁸³ Such right includes and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage¹⁸⁴;

(b) The right to demand delivery of the goods [before their arrival at the place of destination][at an intermediate port or place en route]¹⁸⁵; and

¹⁷⁹ As set out in footnote 177 of A/CN.9/WG.III/WP.32, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase "reasonable advance" before the word "notice" in draft art. 52 is intended to meet these concerns.

¹⁸⁰ As set out in footnote 178 of A/CN.9/WG.III/WP.32, the concern expressed in para. 94 of A/CN.9/526 that the wording of draft art. 53 could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words "acts as an agent of the person entitled to the goods but without any liability" and the addition of the words "is only liable", is intended to meet this concern.

¹⁸¹ As set out in footnote 179 of A/CN.9/WG.III/WP.32, it was suggested that the phrase "or of the performing party" be added after the phrase "personal act or omission of the carrier", and that the word "personal" be deleted. Both of these suggestions have been adopted in the text..

¹⁸² The original text of this chapter, with drafting improvements, proposed variants and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

¹⁸³ As set out in footnote 181 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider whether this sentence should be somewhat altered and moved to the draft para. 1(l) definition of "right of control".

¹⁸⁴ As set out in footnote 182 of A/CN.9/WG.III/WP.32, the concern was raised in para. 102 of A/CN.9/526 that the phrase "give or modify instructions...that do not constitute a variation of the contract" might be read as contradictory. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. It is suggested that moving para. (d) to a separate art. in draft art. 55 may alleviate this concern.

¹⁸⁵ This proposed alternative in square brackets is intended to clarify that the delivery of the goods

(c) The right to replace the consignee by any other person including the controlling party.¹⁸⁶

[Article 55. Variations to the contract of carriage

1. The controlling party is the exclusive person that may exercise the right of control and may agree with the carrier to a variation of the contract of carriage other than the variations referred to in article 54 (b) and (c).¹⁸⁷

2. Any variation to the contract of carriage, including those referred to in article 54 (b) and (c), upon becoming effective, must be stated in the [negotiable] transport document or incorporated in the [negotiable] electronic transport record and be initialed or signed in accordance with article 39.^{188]}

Article 56. Applicable rules based on transport document or electronic transport record issued

1. When no negotiable transport document or no negotiable electronic transport record is issued, the following rules apply:

(a) The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party]¹⁸⁹.

(b) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the

before arrival at destination is not meant to be any change of destination, but only delivery at a place en route.

¹⁸⁶ As set out in footnote 180 of A/CN.9/WG.III/WP.32, the concerns raised in para. 103 of A/CN.9/526 that para. (d) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. In order to address those concerns and to avoid confusion between the right of control and the right to agree with the carrier on variations to the contract of carriage, it is suggested that former para. 54(d) be moved to a separate art. in draft art. 55. It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in draft para. 1(l).

¹⁸⁷ Para. 1 includes former para. 54(d), as well as text to emphasize the exclusivity of the position of the controlling party.

¹⁸⁸ Para. 2 is suggested as desirable to ensure that amendments to the contract of carriage are signed or, at least initialed, as is the current practice. Should this proposal be accepted by the Working Group, it is suggested that reference be made to the draft art. 39 signature requirement. Draft paras. 56(2)(d) and (3)(c) have been deleted in light of this proposed para. 2.

¹⁸⁹ As set out in footnote 184 of A/CN.9/WG.III/WP.32, the question was raised in para. 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, para. 1(b) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words “unless the shipper” in square brackets for possible deletion and inserting instead, in square brackets, the text “designates the consignee or another person as the controlling party”.

transferee][or, if applicable law permits, the transferee]¹⁹⁰ must notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article 54, it must produce proper identification.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]¹⁹¹

2. When a negotiable transport document is issued, the following rules apply:

(a) The holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 61, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) In order to exercise the right of control, the holder must, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] must be produced, failing which the right of control cannot be exercised.¹⁹²

3. When a negotiable electronic transport record is issued:

(a) The holder is the sole controlling party and is entitled to transfer the right of control to another person by transferring the negotiable electronic transport record in

¹⁹⁰ As set out in footnote 185 of A/CN.9/WG.III/WP.32, the concern mentioned in para. 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” para. 1(b). This phrase is placed in square brackets, along with alternative text consistent with that approved for further discussion in draft art. 63.

¹⁹¹ As set out in footnote 186 of A/CN.9/WG.III/WP.32, the controlling party remained in control of the goods until their final delivery. However, nothing is said in draft art. 56 regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic transport record is issued. It is thought that something could be said to take care of the observation that has been made, and para. 1(d) has been added. Note, however, that para. 106 of A/CN.9/526 also notes the concern that the common shipper’s instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since art. 54 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under art. 11, it may be unnecessary to state when the right of control ends.

¹⁹² As set out in footnote 188 of A/CN.9/WG.III/WP.32, the Working Group was in agreement that para. 2(c) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added para. 2(c).

accordance with the procedures referred to in article 6, upon which transfer the transferor loses its right of control.

(b) In order to exercise the right of control, the holder must, if the carrier so requires, demonstrate, in accordance with the procedures referred to in article 6, that it is the holder.

4. Notwithstanding article 63¹⁹³, a person, not being the shipper or the person referred to in article 34, that transferred the right of control without having exercised that right, is upon such transfer discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Convention.

Article 57. Carrier's execution of instruction

1. Variant A of paragraph 1, including para. 1 *bis*¹⁹⁴

Subject to paragraphs 1 *bis*, 2 and 3, the carrier must execute any instruction referred to in article 54¹⁹⁵ if it:

(a) Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;

(b) Will not interfere with the normal operations of the carrier or a performing party; and

(c) Would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage.

1 *bis*. If it is reasonably expected that one or more of the conditions referred to in subparagraphs (a), (b) and (c) is not satisfied, then the carrier is under no obligation to execute the instruction.¹⁹⁶

¹⁹³ Reference was to draft art. 62 of A/CN.9/WG.III/WP.32, which was deleted in favour of draft art. 61 *bis*, which has been renumbered as draft art. 63.

¹⁹⁴ Variant A of para. 1 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. As set out in footnote 192 of A/CN.9/WG.III/WP.32, the Working Group generally agreed that para. 1 should be recast to reflect the views and suggestions in paras. 114 to 116. It was agreed that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session, and this has been attempted in Variant B.

¹⁹⁵ Reference to "(a),(b) or (c)" has been deleted in light of the drafting proposal to move para. 54(d) to a separate provision in draft art. 55.

¹⁹⁶ Para. 1 *bis* was created out of the final sentence of Variant A of para. 1 purely as a drafting suggestion with no substantive change intended.

Variant B of paragraph 1

Subject to paragraphs 2 and 3, the carrier must execute the instructions referred to in article 54¹⁹⁷ if:

- (a) The person giving such instructions is entitled to exercise the right of control;
 - (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
 - (c) The instructions will not interfere with the normal operations of the carrier or a performing party.¹⁹⁸
2. In any event, the controlling party must reimburse¹⁹⁹ the carrier, performing parties, and any persons interested in other goods carried on the same voyage or journey for any additional expense that they may incur and must indemnify them against any loss or damage that they may suffer as a result of executing any instruction under this article.²⁰⁰
3. At the request of the carrier, the controlling party must provide security²⁰¹ for the amount of the reasonably expected additional expense, loss or damage. [The carrier is entitled to obtain security from the controlling party if it:
- (a) Reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and
 - (b) Is nevertheless willing to execute the instruction.]
4. The carrier is liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in breach of its obligation under paragraph 1.²⁰²

¹⁹⁷ See note 518, *supra*.

¹⁹⁸ Variant B was suggested in A/CN.9/WG.III/WP.32 to respond to concerns set out in footnote 193 of A/CN.9/WG.III/WP.32. To avoid a contradiction between para. 1(c) and draft para. 54(b) with respect to the right of control and the possible generation of “additional expenses”, it was suggested that either the carrier should be under no obligation to execute the instruction received under draft para. 54(b) or that para. 1(c) should limit the obligation of the carrier to execute to cases where the instruction would not cause “significant” additional expenses. Further, as noted in para. 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of para. 1(c). In view of these suggestions, para. 1 could be reworded as indicated, and the right of the carrier under para. 3 could be made more stringent, as indicated *infra*, note 524. In addition, para. 1(c) has been deleted.

¹⁹⁹ As set out in footnote 194 of A/CN.9/WG.III/WP.32, the notion of “indemnity” inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party.

²⁰⁰ As set out in footnote 195 of A/CN.9/WG.III/WP.32, the changes to para. 2 have been made in view of the suggestion in para. 117 of A/CN.9/526 that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

²⁰¹ As set out in footnote 196 of A/CN.9/WG.III/WP.32, although para. 3 was found “generally acceptable”, as noted in para. 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on draft para. 57(1). See note 521, *supra*.

²⁰² As set out in footnote 197 of A/CN.9/WG.III/WP.32, a question was raised regarding the nature of the obligation incurred by the carrier under draft art. 57, and whether the carrier should be

Article 58. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 54(b) are deemed to be delivered at the place of destination and the provisions of chapter 10 relating to such delivery are applicable to such goods.

Article 59. Obligation to provide information, instructions or documents to carrier

If the carrier or a performing party during the period that it has custody of the goods reasonably requires information, instructions, or documents in addition to those referred to in article 30(a), the controlling party, on request of the carrier or such performing party, must provide such information.²⁰³ If the carrier, after reasonable effort, is unable to identify and find the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper or the person referred to in article 34 must do so.

Article 60. Variation by agreement

Articles 54(b) and (c), and 57 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 56(1)(b). If a negotiable transport document or a negotiable electronic transport record is issued, any agreement referred to in this article must be stated or incorporated²⁰⁴ in the contract particulars.

under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft convention should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new para. 4 has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

²⁰³ As set out in footnote 199 of A/CN.9/WG.III/WP.32, the suggestion to add reference to the performing party in addition to the carrier was generally supported. In view also of the recommendation mentioned in para. 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of draft art. 59.

²⁰⁴ As set out in footnote 200 of A/CN.9/WG.III/WP.32, there was broad support in the Working Group that the revised draft of art. 60 should avoid suggesting any restriction to the freedom of parties to derogate from chapter 11. Further, it appears to be implied that the last sentence of draft art. 60 should apply only if a negotiable document or electronic transport record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

CHAPTER 12. TRANSFER OF RIGHTS²⁰⁵

Article 61. When a negotiable transport document or negotiable electronic transport record is issued

1. If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring such document to another person:
 - (a) If an order document, duly endorsed either to such other person or in blank, or,
 - (b) If a bearer document or a blank endorsed document, without endorsement, or,
 - (c) If a document made out to the order of a named person and the transfer is between the first holder and such named person, without endorsement.²⁰⁶
2. If a negotiable electronic transport record is issued, its holder is entitled to transfer the rights incorporated in such electronic transport record, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 6.²⁰⁷

Article 62. Liability of holder

1. Without prejudice to article 59, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of being a holder.
2. Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record].²⁰⁸

²⁰⁵ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁰⁶ As set out in footnote 201 of A/CN.9/WG.III/WP.32, there was strong support in the Working Group to maintain the text of draft para. 61(1) as drafted in order to promote harmonization and to accommodate negotiable electronic transport records. The concern raised in para. 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

²⁰⁷ As set out in footnote 202 of A/CN.9/WG.III/WP.32, para. 2 was discussed during the fifteenth session of the Working Group in conjunction with the other provisions in the draft convention regarding electronic transport records.

²⁰⁸ As set out in footnote 204 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of para. 2 with due consideration being given to the views expressed. However, the views expressed in the preceding paras. 137 to 139 of A/CN.9/526 were not consistent. Those that favoured a revision of the text requested that the subpara. stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract, and an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under draft art. 28).

3. For the purpose of paragraphs 1 and 2 [and article 46]²⁰⁹, any holder that is not the shipper does not exercise any right under the contract of carriage solely by reason of the fact that it:

(a) Under article 7 agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document, or

(b) Under article 61 transfers its rights.

Article 63.²¹⁰ When no negotiable transport document or negotiable electronic transport record is issued

If no negotiable transport document or no negotiable electronic transport record is issued, the following paragraphs apply to the transfer of rights under a contract of carriage:

(a) The transfer is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer;

(b) The transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage; and

(c) Regardless of the law applicable pursuant to paragraphs (a) and (b),

(i) A transfer that is otherwise permissible under the applicable law may be made by electronic means,

(ii) A transfer must be notified to the carrier by the transferor or, if applicable law permits, by the transferee²¹¹, and

(iii) If a transfer includes liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.

²⁰⁹ Inclusion of the text in square brackets will depend upon the decision of the Working Group regarding the inclusion of the bracketed text in draft art. 46.

²¹⁰ Draft art. 63, formerly draft art. 61 *bis*, has replaced draft arts. 61 and 62 from A/CN.9/WG.III/WP.32, as agreed by the Working Group in para. 213 of A/CN.9/576, following its consideration of the electronic commerce aspects of art. 63, as set out in para. 12 of A/CN.9/WG.III/WP.47, and its consideration of replacing draft arts. 61 and 62 with draft art. 63 in paras. 212 and 213 of A/CN.9/576.

²¹¹ As set out in footnote 57 of A/CN.9/WG.III/WP.47, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase "either by the transferor or the transferee" with the phrase "by the transferor or, if other applicable law permits, by the transferee", so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.

CHAPTER 13: LIMITATION OF LIABILITY

Article 64. Basis of limitation of liability²¹²

1. Subject to articles 65 and 66(1), the carrier's liability for breaches of its obligations under this Convention²¹³ is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except when the nature and value of the goods have been declared by the shipper before shipment and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

Variant A of paragraph 2²¹⁴

[2. Notwithstanding paragraph 1, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁵ during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable under article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, then the carrier's liability for such loss, damage, [or delay] is limited according to the limitation terms of any international convention [or national law]²¹⁶ that would have been applicable if the place where the damage occurred had been established, or the limitation terms of this Convention, whichever would result in the highest limitation amount.]

Variant B of paragraph 2²¹⁷

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁸ during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national]²¹⁹ mandatory provisions that govern the different parts of the transport applies.]

3. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods,²²⁰ the packages or shipping units enumerated in the contract

²¹² Corrections are to text of paras. 1 and 3, and Variant B of para. 2 as set out in para. 6 of A/CN.9/WG.III/WP.39; Variant A of para. 2 is proposed new text.

²¹³ The addition of breaches of the carrier's obligations is thought to have made the reference to "[or in connection with]" the goods unnecessary.

²¹⁴ Variant A is intended as a clarification of the text of Variant B that appeared in para. 6 of A/CN.9/WG.III/WP.39, and is not intended to change the suggested approach.

²¹⁵ See, *infra*, note 543.

²¹⁶ Text placed in square brackets to mirror the text in art. 27(1), pending a decision by the Working Group.

²¹⁷ Variant B is the text as it appeared in para. 6 of A/CN.9/WG.III/WP.39.

²¹⁸ As set out in footnote 16 of A/CN.9/WG.III/WP.39, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

²¹⁹ See, *supra*, note 541.

²²⁰ As set out in footnote 17 of A/CN.9/WG.III/WP.39, the definition of "container" in draft art. 1 might need to be further considered to ensure that it covered pallets. The text proposed for addition mirrors that of art. IV.5 of the Hague-Visby Rules and of art. 6(2) of the Hamburg Rules.

particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport are deemed one shipping unit.

4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.²²¹

Article 65. Liability for loss caused by delay²²²

Variant A²²³

Subject to paragraph 66(2), compensation for physical loss of or damage to the goods caused by delay must be calculated in accordance with article 23 and[, unless otherwise agreed,] liability²²⁴ for economic loss caused by delay is limited to an amount equivalent to [one times] the freight payable on the goods delayed. The total amount payable under this article and paragraph 64(1) may not exceed the limit that would be established under paragraph 64(1) in respect of the total loss of the goods concerned.

²²¹ The text of para. 4 is substantially the same as para. 1 of the text adopted on a non-mandatory basis by the United Nations Commission on International Trade Law (UNCITRAL) at its fifteenth session (A/37/17, paras. 53-55 and 63, and Annex I, reproduced in UNCITRAL Yearbook, Vol. XIII: 1982, pp.10-11) as preferred text for the unit of account provision in the preparation of future international conventions containing limitation of liability provisions. The Working Group may wish to consider the addition of the following para., which is para. 2 of the text adopted in 1982 by the Commission:

“5. The calculation referred to in the last sentence of paragraph 4 is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in this article as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.”

²²² Former draft art. 16(2) as it appeared in A/CN.9/WG.III/WP.32 was moved here to become a separate art. in chapter 13.

²²³ Variant A is based on the suggested alternative wording for the first sentence of para. 2 set out in footnote 11 of A/CN.9/WG.III/WP.39. No change is intended but for the clarification of the wording regarding consequential damages as suggested in para. 25 of A/CN.9/552.

²²⁴ The word “liability” is suggested to make the text consistent with the new chapter created for “limitation of liability”.

Variant B²²⁵

Subject to paragraph 66(2), unless otherwise agreed,²²⁶ if delay in delivery causes [consequential]²²⁷ loss not resulting from loss of or damage to the goods carried and hence not covered by article 23, the liability²²⁸ for such loss is limited to an amount equivalent to [one times]²²⁹ the freight payable on the goods delayed. The total amount payable under this article and article 64(1) may not exceed the limit that would be established under article 64(1) in respect of the total loss of the goods concerned.

Article 66. Loss of the right to limit liability²³⁰

1. Neither the carrier nor any of the persons referred to in article 19 may limit their liability as provided in articles 64 and 26(4)²³¹, [or as provided in the contract of carriage,]²³² if the claimant proves that²³³ the loss of, or the damage to the goods or the breach of the carrier's obligation under this Convention²³⁴ resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.
2. Neither the carrier nor any of the persons mentioned in article 19 may limit their liability as provided in article 65 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.²³⁵

²²⁵ Variant B is a slightly revised version of the text in A/CN.9/WG.III/WP.32 as set out in para. 3 of A/CN.9/WG.III/WP.39, and as agreed in paras. 20, 22, 24, 28 and 31 of A/CN.9/552.

²²⁶ As set out in footnote 10 of A/CN.9/WG.III/WP.39, the words "unless otherwise agreed" were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft art. 66 and chapter 20.

²²⁷ As set out in footnote 11 of A/CN.9/WG.III/WP.39, clarification of the wording regarding consequential damages has been suggested.

²²⁸ See *supra*, note 549.

²²⁹ As set out in footnote 12 of A/CN.9/WG.III/WP.39, the words "[one times] the freight payable on the goods delayed" were inserted in para. 2 for continuation of the discussion at a future session.

²³⁰ Corrections are to text as set out in para. 8 of A/CN.9/WG.III/WP.39.

²³¹ As set out in footnote 34 of A/CN.9/WG.III/WP.39, the suggestion to add a reference to art. 23 might need to be further discussed in the context of chapter 20.

²³² As set out in footnote 35 of A/CN.9/WG.III/WP.39, the words "[or as provided in the contract of carriage,]" were maintained in square brackets pending further discussion on chapter 20.

²³³ Reference to delay was deleted here in favour of the addition of para. 66(2).

²³⁴ The addition of "the breach of the carrier's obligation" is thought to have made the reference to "[or in connection with]" the goods unnecessary.

²³⁵ It is proposed that loss of the right to limit liability for loss due to delay should be dealt with separately from para. 1, and para. 2 has been added for that purpose.

CHAPTER 14. RIGHTS OF SUIT²³⁶

Article 67. Parties

Variant A²³⁷

1. Without prejudice to articles 68 and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage; or

(c) Any person to which the shipper or the consignee has transferred its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.

2. In case of any passing of rights of suit through transfer or subrogation under subparagraph 1(c), the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.²³⁸

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.²³⁹

²³⁶ The original text of this chapter, with drafting improvements and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

²³⁷ Variant A of art. 67 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. The changes to the original text, particularly combining subparas. (c) and (d) and placing the last sentence of the original text of the art. in a separate para. 2, are not intended to be substantive, but are only drafting suggestions to avoid any ambiguity there may have been in the original text.

²³⁸ As set out in footnote 210 of A/CN.9/WG.III/WP.32, while strong support was expressed for the deletion of draft art. 67, the Working Group decided to defer any decision regarding draft art. 67 until it had completed its review of the draft arts. and further discussed the scope of application of the draft convention.

²³⁹ As set out in footnote 211 of A/CN.9/WG.III/WP.32, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether Variant B adequately deals with the situation of the freight forwarder.

Article 68. When negotiable transport document or negotiable electronic transport record is issued

In the event that a negotiable transport document or negotiable electronic transport record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and²⁴⁰

(b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.²⁴¹

CHAPTER 15. TIME FOR SUIT²⁴²

Article 69. Limitation of actions

Variant A²⁴³

The carrier is discharged from all liability under this Convention²⁴⁴ if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper is discharged from all liability under chapter 8 of this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year.²⁴⁵

²⁴⁰ As set out in footnote 212 of A/CN.9/WG.III/WP.32, although no request appears to have been made to the Secretariat in respect of draft art. 68, from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the phrase, “irrespective of whether it suffered loss or damage itself” is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft convention.

²⁴¹ It was thought that moving former draft art. 65 to become para. (b) under art. 68 was a drafting improvement to unite these provisions in a single article.

²⁴² The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁴³ Variant A of art. 69 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

²⁴⁴ This text is suggested to make this provision consistent with draft art. 64.

²⁴⁵ As set out in footnote 215 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to place “one” in square brackets, and to prepare a revised draft of draft art. 69, with due consideration being given to the views expressed.

Concern was raised in para. 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to Chapter 8 of the draft convention, and why it did not also refer to shipper liability pursuant to other arts., such as the since-deleted chapter 9 on freight. A further suggestion was made that all persons subject to liability under the contract of carriage should be included in draft art. 69. It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft convention, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that Chapter 15 would apply to all liabilities regulated in the draft convention.

The suggestion in para. 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft convention is barred (or any right extinguished) might be a good solution.

Concern was also raised in para. 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (art. III.3), COTIF-CIM (art. 47), Warsaw Convention (art. 29) and probably CMR

Variant B

All [rights] [actions] under this Convention are extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

Article 70. Commencement of limitation period

The period referred to in article 69 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 11(4) or 11(5) or, in cases in which no goods have been delivered, on the [last] day on which the goods should have been delivered. The day on which the period commences is not included in the period.²⁴⁶

Article 71. Extension of limitation period

The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 72. Action for indemnity

An action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if the indemnity action is instituted within the later of:

(a) The time allowed by applicable law in the jurisdiction²⁴⁷ where proceedings are instituted; or

(art. 32). It extinguishes the action under the Hamburg Rules (art. 20), the 1980 Multimodal Convention (art. 25), CMNI (art. 24) and Montreal Convention (art. 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

²⁴⁶ As set out in footnote 216 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to retain the text of draft art. 70, with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in para. 170 of A/CN.9/526 that since the date of delivery “in the contract of carriage” might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day “on which the carrier has completed delivery”, which is the day of actual delivery.

Concern was also raised in para. 171 of A/CN.9/526 with respect to the “last day” on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, when goods have not been delivered, the “last day” is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in para. 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under draft subpara. 72(b)(ii) as noted in para. 172, or in a separate para. of the draft convention. See *infra* the alternative text for draft art. 73.

²⁴⁷ The text is suggested in order to accommodate the inclusion of federal jurisdictions in States.

(b) Variant A of paragraph (b)²⁴⁸

90 days commencing from the day when the person instituting the action for indemnity has either

- (i) settled the claim; or
- (ii) been served with process in the action against itself.

Variant B of paragraph (b)

90 days commencing from the day when either

- (i) the person instituting the action for indemnity has settled the claim; or
- (ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.²⁴⁹

Article 73. Counterclaims

A counterclaim by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.²⁵⁰

Article 74. Actions against the bareboat charterer

[If the registered owner of a ship defeats the presumption that it is the carrier under article 40(3), an action against the bareboat charterer may be instituted even after the expiration of the period referred to in article 69 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction²⁵¹ where proceedings are instituted; or
- (b) 90 days commencing from the day when the registered owner [both
 - (i) proves that the ship was under a bareboat charter at the time of the carriage; and]

²⁴⁸ Variant A of art. 72 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

²⁴⁹ As set out in footnote 219 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 72, with due consideration being given to the views expressed.

It was noted in para. 176 of A/CN.9/526 that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgment in the case had been rendered, and it was suggested that the 90-day period be adjusted to commence from the date the legal judgment is effective. Alternative language was offered that the 90-day period should run from the day the judgment against the recourse claimant became final and unreviewable. These suggestions are reflected in Variant B.

²⁵⁰ As set out in footnote 220 of A/CN.9/WG.III/WP.32, it was reiterated in para. 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to draft subpara. 72(b)(ii) or in a separate subpara., but they should be treated in similar fashion to draft subpara. 72(b)(ii). Draft art. 73 sets out this provision as a separate art.

²⁵¹ See note 572, *supra*.

[(ii)] adequately identifies the bareboat charterer.]²⁵²

CHAPTER 16. JURISDICTION

Article 75. Actions against the carrier²⁵³

In judicial proceedings against the carrier²⁵⁴ relating to carriage of goods under this Convention the plaintiff²⁵⁵, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the defendant;²⁵⁶ or
- (b) The contractual place of receipt or the contractual place of delivery; or²⁵⁷
- [(c) the port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or]
- (d) Any additional place [designated][agreed upon]²⁵⁸ for that purpose in the transport document or electronic transport record.²⁵⁹

[Article 76. Exclusive jurisdiction agreements²⁶⁰

1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction. Such jurisdiction is exclusive, provided that the agreement conferring it:

- (a) Is evidenced in writing or by electronic communication;

²⁵² As set out in footnote 221 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 74, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain draft para. 40(3) in square brackets, and that it therefore requested the Secretariat to retain draft art. 74 in square brackets, bearing in mind that the fate of the latter art. was linked to that of the former.

Concern was raised in para. 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by para. (b)(ii).

It was also suggested that subparas. (i) and (ii) of para. (b) be combined into one, since subpara. (ii) could be considered a sufficiently rigorous condition to subsume subpara. (i). A revised text is proposed.

²⁵³ Text as set out in para. 111 of A/CN.9/576, with suggested and previously approved revisions as noted.

²⁵⁴ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁵ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁶ Text as agreed for further discussion in para. 116 of A/CN.9/576.

²⁵⁷ Text as agreed for further discussion in para. 120 of A/CN.9/576.

²⁵⁸ Text as agreed for further discussion in para. 124 of A/CN.9/576.

²⁵⁹ As noted in para. 124 of A/CN.9/576, matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

²⁶⁰ As requested in para. 168 of A/CN.9/576, this draft art. on exclusive jurisdiction agreements has been prepared for consideration by the Working Group.

(b) Clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and

(c) Expressly provides that the jurisdiction of the chosen court is to be exclusive.²⁶¹

2. When an exclusive forum is agreed under paragraph 1, the shipper and the carrier may also expressly agree that the exclusive choice of forum is binding on any other person bringing an action under this Convention, and it is so binding, provided that:²⁶²

Variant A of subparagraph 2(a)

(a) Such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record]; and

Variant B of subparagraph 2(a)

(a) Such person is given adequate notice of the place where the action can be brought; and

Variant C of subparagraph 2(a)²⁶³

(a) Such person expressly consents to the agreement, and such consent complies with the requirements of article 95(6)(b); and

(b) The forum is in one of the places designated under paragraphs 75(a), (b) or (c).]

Article 77. Actions against the maritime performing party²⁶⁴

In judicial proceedings against the maritime performing party relating to carriage of goods under this Convention, the plaintiff, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The place where the goods are [initially] received by the maritime performing party; and the place where the goods are [ultimately] delivered by the maritime performing party.

²⁶¹ Text proposed to fulfil the conditions suggested in para. 161 of A/CN.9/576. If this approach is adopted, this provision should be added to the list of notices set out in draft art. 3, and draft para. 75(e) could be deleted.

²⁶² Text proposed to fulfil the conditions suggested in para. 164 of A/CN.9/576. If this approach is not adopted, this provision should be removed from the list of notices set out in draft article 3.

²⁶³ Variant C suggests the alternative that the third party must expressly consent to be bound by the choice of jurisdiction clause, in similar fashion to the consent required in draft subpara. 95(6)(b).

²⁶⁴ Text as set out in para. 125 of A/CN.9/576, with suggested and previously approved revisions as noted.

Article 78. No additional bases of jurisdiction

Subject to article 80, no judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not designated under article 75 or 77²⁶⁵.

Article 79. Arrest and provisional or protective measures²⁶⁶

1. Nothing in this Convention affects jurisdiction with regard to:

- (a) Arrest [pursuant to applicable rules of international law [or the law of the forum state]]; or
- (b) Provisional or protective measures.

[2. For the purpose of this article “provisional or protective measures” means:

- (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
- (b) An order securing the amount in dispute; or
- (c) An order appointing a receiver; or
- (d) Any other orders to ensure that any judgment or arbitral is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) An interim injunction or other interim order.]²⁶⁷

Article 80. Consolidation and removal of actions

Variant A of paragraph 1²⁶⁸

[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in one of the places specified in article 77, whether or not that place is specified in article 75.]²⁶⁹

²⁶⁵ In order to address the concerns raised in para. 42 of A/CN.9/576, and for the purposes of clarification, it is suggested that the first sentence of former draft art. 74 be placed in a separate art. as art. 78, and that arrest and provisional or protective measures should be treated in the same art., as has been proposed in draft art. 79.

²⁶⁶ Suggested adjustments are to text as set out in para. 130 of A/CN.9/576, as agreed for further discussion at para. 136 of A/CN.9/576.

²⁶⁷ Corrections are to text as agreed for further discussion in para. 142 of A/CN.9/576.

²⁶⁸ While Variant C of draft para. 80(1) is the text as agreed for further discussion in para. 149 of A/CN.9/576, it is suggested that Variants A and B are improved drafts that set out two alternative approaches between which the Working Group could choose. Variant B would require that in order to determine where an action against both the carrier and the maritime performing party should be instituted, resort must first be had to a place that is designated in both arts. 74 and 76, and that only thereafter could resort be had to a place designated only in art. 76. The approach in Variant A is that such an action could only be instituted in a place designated under art. 76, regardless of whether or not that place was designated under art. 74.

²⁶⁹ The Working Group may wish to note that this approach may raised difficulties in situations when the action is against more than one maritime performing party, or when none of the places designated under art. 77 is in a contracting State.

Variant B of paragraph 1

[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]²⁷⁰

Variant C of paragraph 1²⁷¹

[1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 77, where actions can be instituted against the maritime performing party.]

2. If the carrier or maritime performing party institutes an action under this Convention, then the claimant, at the request of the defendant, must withdraw the action and recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant.²⁷²

Article 81. Agreement after dispute has arisen²⁷³

Notwithstanding the preceding articles of this chapter, an agreement made by the parties to the dispute under the contract of carriage after the dispute has arisen, that designates the place where the claimant may institute an action, is effective.²⁷⁴

CHAPTER 17. ARBITRATION²⁷⁵Variant A

Article 82.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Convention applies must be referred to arbitration.

²⁷⁰ *Ibid.*

²⁷¹ Text as agreed for further discussion in para. 149 of A/CN.9/576.

²⁷² Text as agreed for further discussion in para. 152 of A/CN.9/576, with drafting suggestions. As noted in para. 152 of A/CN.9/576, consideration should be given to limiting the application of this provision to declaratory relief sought by the carrier or the maritime performing party.

²⁷³ Text taken from Variant A of A/CN.9/WG.III/WP.32.

²⁷⁴ Text as agreed for further discussion in para. 171 of A/CN.9/576.

²⁷⁵ Note the decision of the Working Group in para. 179 of A/CN.9/576 that a new draft of this chapter will be submitted for the consideration of the Working Group at a future session. Such a draft is anticipated for introduction at the sixteenth session of the Working Group. As set out in footnote 225 of A/CN.9/WG.III/WP.32, Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paras. that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

Article 83.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. When a charterparty contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision is binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.

Article 84.

The arbitration proceedings must, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

[(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]

(iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 85.

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 85 *bis*.

Article 83 and 84 are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement that is inconsistent therewith is void.

Article 86.

Nothing in this chapter affects the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

Variant B

Article 82.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Convention applies must be referred to arbitration.

Article 83.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents

or record or expressly incorporated therein by reference. When a charterparty contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision is binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.²⁷⁶

Article 84.²⁷⁷

Article 85.

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 86.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

CHAPTER 18. GENERAL AVERAGE²⁷⁸

Article 87. Provisions on general average

Nothing in this Convention prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

Article 88. Contribution in general average

1. [With the exception of the chapter on time for suit,] the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse to contribute in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.
2. All [actions for] [rights to] contribution in general average are [time-barred] [extinguished] if judicial or arbitral proceedings are not instituted within a period of [one year] from the date of the issuance of the general average statement.²⁷⁹

²⁷⁶ As set out in footnote 227 of A/CN.9/WG.III/WP.32, the amended text of art. 83 of the provision on arbitration in Variant B is not a reproduction of Art. 22(2) of the Hamburg Rules, since it was thought that Art. 22(2) of the Hamburg Rules was too specific.

²⁷⁷ As set out in footnote 228 of A/CN.9/WG.III/WP.32, in order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this para. has been omitted. No decision was reached by the CMI regarding a suitable replacement para.. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

²⁷⁸ The original text of this chapter, with drafting improvements suggested, is taken from A/CN.9/WG.III/WP.32.

²⁷⁹ As set out in footnote 230 of A/CN.9/WG.III/WP.32, it was suggested that the fact that the time for suit provisions of the draft convention do not apply to general average should be expressed more clearly. Since para. 1 states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

As further suggested in para. 188 of A/CN.9/526, a separate provision could be

CHAPTER 19. OTHER CONVENTIONS²⁸⁰

Article 89. International instruments governing other modes of transport

Subject to article 92, nothing contained in this Convention prevents a Contracting State from applying any other international instrument which is already in force at the date of this Convention and that applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.²⁸¹

Article 90. Prevalence over earlier conventions

[As between parties to this Convention, it prevails over those][Subject to article 102, this Convention prevails between its parties over those]²⁸² of an earlier convention to which they may be parties [that are incompatible with those of this Convention].²⁸³

Article 91. Global limitation of liability

This Convention does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of vessels.

Article 92. Other provisions on carriage of passengers and luggage

No liability arises under this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is liable under any convention or national law relating to the carriage of passengers and their luggage.

established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of para. 2. Such a provision should probably cover both claims for contribution and claims for indemnities.

In para. 189 of A/CN.9/526, the question was raised whether para. 1 should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

²⁸⁰ The original text of this chapter, with suggested drafting improvements, is taken from A/CN.9/WG.III/WP.32.

²⁸¹ As set out in footnote 231 of A/CN.9/WG.III/WP.32, in connection with draft art. 27 and discussions relating to the relationship of the draft convention with other transport conventions and with domestic legislation, the Secretariat was instructed in paras. 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in Chapter 19. It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new draft art. 89 is based on art. 25(5) of the Hamburg Rules.

²⁸² Proposed alternate language.

²⁸³ As set out in footnote 232 of A/CN.9/WG.III/WP.32, the suggestion in para. 196 of A/CN.9/526 that it would be helpful if draft art. 91 were amended to add language stating that the draft convention would prevail over other transport conventions except in relation to States that are not member of the convention is in line with the provisions of art. 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate para., rather than to the present draft art. 91, that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as draft art. 90.

Article 93. Other provisions on damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997,²⁸⁴ or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.²⁸⁵

CHAPTER 20. VALIDITY OF CONTRACTUAL STIPULATIONS

Article 94. General provisions

1. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.²⁸⁶

²⁸⁴ In order to capture subsequent amendments to these instruments or new instruments negotiated in the future, the Working Group may wish to consider an additional phrase such as “including any amendment to these instruments and any future instrument in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident”, or the inclusion of a simple tacit amendment procedure limited to this provision that could be commenced by the depositary.

²⁸⁵ As set out in footnote 235 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to update the list of conventions and instruments in draft art. 93, and to prepare a revised draft with due consideration being given to the views expressed.

In para. 200 of A/CN.9/526, it was pointed out that the list of conventions in draft art. 89 was not complete and reference was made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in para. 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in draft art. 93, such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent para. 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

²⁸⁶ As approved for further discussion in para. 77 of A/CN.9/576.

[2. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under chapter 8 of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34 for breach of any of their obligations under chapter 8.]²⁸⁷

Article 95. Special rules for volume contracts²⁸⁸

1. Notwithstanding article 94, if terms of a volume contract are subject to this Convention under article 9(3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Convention provided that the volume contract [is agreed to in writing or electronically], contains a prominent statement that it derogates from this Convention, and:

(a) Is individually negotiated; or

(b) Prominently specifies the sections of the volume contract containing the derogations.²⁸⁹

2. A derogation under paragraph 1 must be set forth in the contract and may not be incorporated by reference from another document.²⁹⁰

3. A [carrier's public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.²⁹¹

4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Convention under article 9(3)(a).²⁹²

5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in article 16(1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

[(b) Rights and obligations stipulated in articles, [28], [29], [30], [33] and [66] [and the liability arising from the breach thereof]].²⁹³

²⁸⁷ As approved for further discussion in para. 85 of A/CN.9/576, following an examination of the shipper's obligations in Chapter 8.

²⁸⁸ Text as set out in para. 52 of A/CN.9/576.

²⁸⁹ As approved for further discussion in para. 85 of A/CN.9/576.

²⁹⁰ As approved for further discussion in para. 89 of A/CN.9/576.

²⁹¹ As noted in para. 89 of A/CN.9/576, it was decided that this para. should be retained in the text as a basis for continuation of the discussion.

²⁹² As approved for further discussion in para. 92 of A/CN.9/576.

²⁹³ As approved for further discussion in para. 99 of A/CN.9/576, bearing in mind the drafting suggestions expressed on the inclusion of other arts. of the draft convention and to the provisions of the draft convention on jurisdiction and arbitration; clarification of the relationship between draft para. 95(5) and the other paras. in draft art. 94, as well as with the provisions of other international transport instruments; and the possibility of inserting in a separate para. of draft para. 95(5) a reference to liability for intentional or reckless behaviour

6. Paragraph 1 applies:

- (a) Between the carrier and the shipper;
- (b) Between the carrier and any other party that has expressly consented [in writing or electronically] to be bound by the terms of the volume contract that derogate from this Convention. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from this Convention and the consent shall not be set forth in a [carrier's public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]²⁹⁴

Article 96. Special rules for live animals and certain other goods²⁹⁵

Notwithstanding chapters 5 and 6 of this Convention and the obligations of the carrier²⁹⁶, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

- (a) The goods are live animals except when it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person referred to in article 19] or of a maritime performing party²⁹⁷ done recklessly and with knowledge that such loss, damage, or delay would probably occur; or
- (b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 21. FINAL CLAUSES

Article 97. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention²⁹⁸.

Article 98. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.

should be the object of further discussion.

²⁹⁴ As approved for further discussion in para. 104 of A/CN.9/576, along with the suggestion to insert a reference to paras. (1) to (5) of draft art. 95 in the chapeau of draft para. 95(6) should be considered.

²⁹⁵ Text as set out in para. 52 of A/CN.9/576.

²⁹⁶ As approved for further discussion in paras. 106 and 109 of A/CN.9/576.

²⁹⁷ As approved for further discussion in paras. 107 and 109 of A/CN.9/576.

²⁹⁸ Text taken from art. 15 of the draft Electronic Contracting Convention and art. 27 of the Hamburg Rules.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.²⁹⁹

Article 99. Reservations

No reservations may be made to this Convention³⁰⁰.

Article 100. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State³⁰¹.

Article 101. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of [one year from] [six months after] the date of deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession.
2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State must apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State³⁰².

²⁹⁹ Text taken from art. 16 of the draft Electronic Contracting Convention.

³⁰⁰ Text taken from art. 22 of the draft Electronic Contracting Convention and art. 29 of the Hamburg Rules.

³⁰¹ Text is taken from art. 18 of the draft Electronic Contracting Convention. See also art. 52 of the Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001.

³⁰² Text is taken from art. 30 of the Hamburg Rules. Note that the second suggested time period in square brackets is drawn from art. 23 the draft Electronic Contracting Convention. The time selected for entry into force, which is a function of both the number of ratifications required and of the length of time required after the deposit of the appropriate instrument, is generally the time considered appropriate for business practice to adjust to the new regime.

Article 102. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to any or all of the following instruments: the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; and the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979; or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, must at the same time denounce, as the case may be, the relevant international agreements to that effect.
2. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraph 1 are not effective until such denunciations as may be required on the part of those States in respect of these instruments have themselves become effective. The depositary of this Convention must consult with the Government of Belgium, as the depositary of other relevant conventions, so as to ensure necessary co-ordination in this respect³⁰³.

Article 103. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary must convene a conference of the Contracting States for revising or amending it.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended³⁰⁴.

³⁰³ Text is taken from paras. 99(3) and (6) of the United Nations Convention on Contracts for the International Sale of Goods. See also art. 31 of the Hamburg Rules, and art. 55 of the Montreal Convention. The approach taken in the Montreal Convention does not require a formal denunciation of other conventions, but rather holds that the Montreal Convention prevails as between States Parties that are also common parties to another convention. As such, the regime in place between a Contracting State of the new convention in issue and a non-contracting State would continue to apply even after the new convention came into force, and until both States became Contracting States of the new convention.

³⁰⁴ Text is taken from art. 32 of the Hamburg Rules. Amendment procedures are not common in UNCITRAL texts, but the Hamburg rules have a general provision in art. 32 and a special provision in art. 33 for revision of the limitation amounts and the unit of account. In the draft Electronic Contracting Convention, the Commission decided not to have a provision on amendments because the States parties to that Convention may initiate an amendment procedure under general treaty law (typically, with a diplomatic conference and an amending protocol, such as in the case of the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, New York, 14 June 1974), if applicable, after discussion in the Commission. Note that the amendment provisions at draft art. 25 and at draft art. 103 may be adopted independently.

Article 104. Amendment of limitation amounts³⁰⁵

1. Without prejudice to article 103, the special procedure in this article applies solely for the purposes of amending the limitation amount set out in paragraph 64(1) of this Convention.
2. Upon the request of at least [one quarter³⁰⁶] of the Contracting States to this Convention³⁰⁷, the depositary must circulate any proposal to amend the limitation amount specified in paragraph 64(1) of this Convention to all of the Contracting States³⁰⁸ and must convene a meeting of a Committee composed of a representative from each of the Contracting States to consider the proposed amendment.
3. The meeting of the Committee must take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
4. Amendments must be adopted by the Committee by a two-thirds majority of its members present and voting.³⁰⁹
5. When acting on a proposal to amend the limits, the Committee must take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.³¹⁰
6. (a) No amendment of the limit under this article may be considered less than [five³¹¹] years from the date on which this Convention was opened for signature nor less

³⁰⁵ Text as set out in para. 7 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 19 of A/CN.9/WG.III/WP.39, the proposal is based upon the amendment procedure set out at art. 23 of the 2002 Protocol to the Athens Convention ("Athens Convention") and at art. 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("OTT Convention"). Similar approaches have been taken in a number of International Maritime Organization ("IMO") conventions, such as the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (not yet in force) ("2003 Protocol to the IOPC Fund 1992"); the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976; and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

³⁰⁶ As set out in footnote 21 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention refers to "one half" rather than "one quarter" of the Contracting States.

³⁰⁷ As set out in footnote 22 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention includes the phrase "but in no case less than six" of the Contracting States.

³⁰⁸ As set out in footnote 24 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention also includes reference to Members of the IMO.

³⁰⁹ As set out in footnote 25 of A/CN.9/WG.III/WP.39, para. 23(5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the Contracting States to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the Contracting States to the Convention as revised by this Protocol shall be present at the time of voting."

³¹⁰ As set out in footnote 26 of A/CN.9/WG.III/WP.39, this provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

³¹¹ As set out in footnote 27 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

than [five] years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.³¹²

(c) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention multiplied by [three].³¹³

7. Any amendment adopted in accordance with paragraph 4 must be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of [eighteen³¹⁴] months after the date of notification, unless within that period not less than [one fourth³¹⁵] of the States that were Contracting States at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and has no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 enters into force [eighteen]³¹⁶ months after its acceptance.

9. All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 105 at least six months before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

10. When an amendment has been adopted but the [eighteen]-month period for its acceptance has not yet expired, a State that becomes a Contracting State during that period is bound by the amendment if it enters into force. A State that becomes a Contracting State after that period is bound by an amendment that has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.

Article 105. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

³¹² As set out in footnote 28 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this Convention increased or decreased by twenty-one per cent in any single adjustment."

³¹³ As set out in footnote 29 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this Convention by more than one hundred per cent, cumulatively."

³¹⁴ As set out in footnote 30 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

³¹⁵ As set out in footnote 31 of A/CN.9/WG.III/WP.39, the OTT Convention specifies at para. 24(7) "not less than one third of the States that were States Parties".

³¹⁶ Recent IMO conventions have reduced this period to twelve months when urgency is important. See, for example, the 2003 Protocol to the IOPC Fund 1992, at para. 24(8).

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary³¹⁷.

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

³¹⁷ Text is taken from art. 34 of the Hamburg Rules. The second sentence of para. 2 is not strictly necessary but is present in the Hamburg Rules and in some other UNCITRAL treaties, including the draft Electronic Contracting Convention. It is not present, for instance, in art. 27 of the United Nations International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (the most recent text deposited with the Secretary-General), which provides some slightly modified alternative language:

“1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.”

**J. Preparation of a draft convention on the carriage of goods
[wholly or partly] [by sea]: delivery: information presented
by the delegation of the Netherlands, submitted to the
Working Group on Transport Law at its sixteenth session
(A/CN.9/WG.III/WP57.) [Original: English]**

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), the Government of the Netherlands submitted the paper attached hereto as an annex in order to facilitate consideration by the Working Group of the chapter on delivery in the draft convention on the carriage of goods [wholly or partly] [by sea].

The Dutch delegation has advised that it has circulated informally to other delegations the text of the questionnaire as it appears in the annex to this note, with the intention of compiling the views expressed by responding delegations for facilitation of the discussion of the chapter on delivery in the Working Group.

The questionnaire in the annex attached hereto is reproduced in the form in which it was received by the Secretariat.

Annex

Questionnaire on ‘Delivery’

General remarks

1. This informal questionnaire deals with the chapter on delivery in the draft convention on the carriage of goods [wholly or partly] [by sea]. However, because delivery marks the end of the carrier's responsibility, the provisions on the period of responsibility are also included in this questionnaire. In addition, the related matter of ‘free in and out (stowed)’ (‘FIO(S)’) is dealt with. Finally, at the end of this questionnaire, the matter of the liability of the carrier and the shipper for any breach of their obligations under the delivery provisions is raised.

2. In this informal questionnaire, the texts of the provisions are taken from A/CN.9/WG.III/WP.56, which includes the newly consolidated texts that will be the basis of the forthcoming discussions during the sixteenth session of the Working Group in Vienna. The numbering used in this questionnaire is that of A/CN.9/WG.III/WP.56, which has been prepared and submitted for translation and publication. To avoid confusion, the ‘old’ A/CN.9/WG.III/WP.32 numbering is added between brackets.

3. Paragraphs 11(1), (2) and (4) (previously 7 (1), (2) and (3)). Period of responsibility of the carrier

1. Subject to article 12, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

2. The time and location of receipt of the goods is the time and location agreed in the contract of carriage, or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

4. The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

4. Providing for a definition of delivery is not that easy. Some jurisdictions require some act of actual receipt by the consignee; others regard the placing of the goods at the free disposal of the consignee as delivery. Such placing at the consignee's disposal may be done actually or through documents, such as a delivery order. In this respect, a lot of variations are possible. Therefore, the draft avoids a definition of delivery. It just defines the beginning and the end of the period of responsibility of the carrier.

5. Such definition of the beginning and end is in principle a contractual affair: what is

decisive is what the parties have agreed are the receipt of the goods and their delivery. As an example: if the contract of carriage includes a provision “*the consignee shall accept the goods alongside the vessel as fast as she can deliver*”, the responsibility of the carrier (under the contract of carriage) ends when he has placed the goods on the quay. If no express or implied agreement has been made about the time and place of receipt or delivery, but certain customs, practices or usages of the trade at the place of destination exist, then such customs, practices or usages apply. If no agreement, customs, practices or usages are applicable, a general fall-back provision applies. In such case the actual taking custody of the goods or the actual discharge or unloading of the goods from the final vessel or vehicle in which they are carried is the relevant time and place of receipt or delivery. One of the consequences of this approach is that the classic “tackle-to-tackle” clause has to refer to the scope of the contract rather than to an exclusion of the carrier’s liability.

6. *Questions:*
 - (a) *Is this concept acceptable?*
 - (b) *Do you have any suggestions for drafting improvements?*
7. **Paragraphs 11 (3) (newly drafted) and (5) (previously 7 (4))**
 3. **If the consignor is required to hand over the goods at the place of receipt to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the carrier may collect them, the time and location of the carrier’s collection of the goods from the authority or other third party is the time and location of receipt of the goods by the carrier under paragraph 2.**
 5. **If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the consignee may collect them, such handing over is a delivery of the goods by the carrier under paragraph 4.**
8. In a limited number of countries, export goods must be handed over to certain authorities before the carrier may take receipt of them, or import goods must be handed over to certain authorities before the consignee may take delivery of them. These paragraphs deal with these situations.
9. *Questions:*
 - (a) *Are these concepts acceptable?*
 - (b) *Do you have any suggestions for drafting improvements?*
10. **Paragraph 11 (6) (newly drafted) and paragraphs 14(1) and (2) (previously 11(1) and (2))**

Article 11

6. **For the purpose of determining the carrier’s period of responsibility and subject to paragraph 14(2) (previously 11(2)), the contract of carriage may not provide that:**
 - (a) **the time of receipt of the goods is subsequent to the commencement of their initial loading under the contract of carriage, or**

(b) the time of delivery of the goods is prior to the completion of their final discharge under the contract of carriage.

Article 14

1. The carrier must during the period of its responsibility as defined in article 11 (previously 7), and subject to article 27 (previously 8), properly and carefully receive, load, handle, stow, carry, keep, care for, discharge and deliver the goods.

[2. The parties may agree that the loading, stowing and discharging of the goods is to be performed by the shipper or any person referred to in article 35 (previously 32), the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]

11. Because of the views expressed in the Working Group that the commercial flexibility of article 11 (previously 7) could be misused by the carrier in order to reduce its period of responsibility, the Secretariat has included in A/CN.9/WG.III/WP.56 a new paragraph 11(6). In addition, it has amended the bracketed paragraph 14(2) substantially. It is now expressly provided that the period of responsibility must include loading and discharging of the goods and that any delegation by the carrier of any of its duties during this period is restricted to loading, stowing and discharging only.

12. Taken together, the new paragraph 11(6) and the amended paragraph 14(2) may solve the problem of the FIO(S) clauses as well. The use of these clauses is a widespread practice in some sectors of maritime carriage¹. However, unlike inland transport conventions such as the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 ("CMNI"), the Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol ("CMR") and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 ("COTIF"), the existing maritime transport conventions include loading and discharging as the (automatic) duties of the carrier. As a result, the existing law is here on strained terms with an established practice.

13. Solutions for this problem differ in various jurisdictions. Some adhere to the theory that a FIO(S) clause determines the scope of the voyage. Then, delivery of the goods is deemed to take place on board the vessel. Other jurisdictions rely on the 'act or omission of the shipper' exception in order to relieve the carrier from the consequences of improper stowage of the cargo. The view also exists that a FIO(S) clause is to be regarded as relating to the costs of loading, stowing, etc. only without having an impact on the carrier's liability. This legal uncertainty is aggravated when the FIO(S) clause itself is not clear, with the result that sometimes different judges in the same jurisdiction arrive at different conclusions.

14. The draft attempts to create some uniformity by providing in the new paragraph 11(6) together with paragraph 14(1) (previously 11(1)) that loading, stowing and discharging is a

¹ This practice almost exclusively exists in the non-liner sector. There, shippers/consignees often prefer doing the loading and/or discharging operations themselves because, for instance, they own the terminal involved or have a special expertise in respect of the goods. In such cases the freight rate excludes the cost element for loading and/or discharging. Pursuant to article 10 (previously 2(4)), the application of this Convention may be extended to non-liner carriage as well, which is the reason for which the draft pays attention to this matter.

carrier's duty within the period of his responsibility. Subsequently, paragraph 14(2) (previously 11(2)) states that FIO(S) clauses are legally permitted and must be regarded as an exception to this duty of the carrier. The consequence of these provisions is that loading, stowing and discharging are placed within the boundaries of the contract of carriage and, therefore, under the draft Convention. A FIO(S) clause as such may no longer determine the time of receipt or delivery of the goods. It follows that loading, stowage and discharging is without prejudice to all other obligations of the carrier, such as its due diligence obligation. The further consequences of a FIO(S) clause will depend on its construction. If it is the intention of the parties that the clause makes the cargo side responsible for loading, stowage or discharging, a carrier may be relieved from liability for the consequences of improper stowage, but only within the scope of the liability system outlined in article 17 (previously 14). In this article, the 'act or omission of the shipper' exception is retained, but this exception operates now within the context of another division of the burden of proof between the carrier and the claimant than it did under the Hague-Visby Rules.

15. *Questions:*

- (a) *Is, after the revisions made by the secretariat, the concept of the manner how the draft Convention deals with the existence of FIO(S) clauses acceptable?*
- (b) *Do you have any suggestions for drafting improvements?*

16. **Article 46. Obligation to accept delivery**

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage] must accept delivery of the goods at the time and location referred to in article 11(4) (previously 7(3)). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party acts in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the performing party] done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.]

17. Pursuant to article 13 (previously 10) the carrier is obliged to deliver the goods to the consignee. And article 1 (k) (previously 1(i)) defines the consignee as the person entitled to take delivery of the goods. This leaves the problem to what extent a consignee should be allowed *not* to take delivery. As to this question, the draft including the bracketed language provides that only the consignee that is not actively involved in the carriage, may not take delivery. As soon as he becomes active, he must take delivery. This applies even if a consignee takes samples of the goods and subsequently decides to reject them under the contract of sale. In line with article 86 of the United Nations Convention on Contracts for the International Sale of Goods, such consignee when taking delivery from the carrier does so on behalf of the seller. The inactive consignee, such as a bank holding a bill of lading as security, is under no obligation to take delivery itself, but may have to take action under article 48 or 49.

18. In the discussion within the Working Group the question has arisen whether the duty of the consignee should be unconditional. On the other hand, an unconditional duty might make it too easy to get rid of goods that have lost all commercial value. Also, the level of the consignee's activity that would trigger its duty to accept delivery has been a point of discussion. In this respect, attention is drawn to paragraph 62(3) (previously 60(3)) that

qualifies the level of activity in order the holder of a negotiable transport document to assume liabilities².

19. *Questions:*

- (a) *Is the concept laid down in the first sentence of article 49, including its bracketed part, acceptable, or should the duty of the consignee to accept delivery be unconditional?*
- (b) *If the concept is acceptable, should the exercising of any of its rights by the consignee further be qualified, for instance along the lines of paragraph 62(3) (previously 60(3))?*

20. The second sentence of this article relating to liability is dealt with in the paragraphs 46 to 48 of this questionnaire.

21. **Article 47. Obligation to acknowledge receipt**

On request of the carrier or the performing party that delivers the goods, the consignee must acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of destination.

This provision was generally acceptable to the Working Group and, therefore, does not lead to specific questions under this questionnaire.

22. **Article 48. Delivery when no negotiable transport document or negotiable electronic record is issued**

When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply:

(a) If the name and address of the consignee is not referred to in the contract particulars the controlling party must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;

(b)

Variant A of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) (previously 7 (3)) to the consignee upon the consignee's production of proper identification.

² This provision reads: "... any holder that is not the shipper does not exercise any rights under the contract of carriage solely by reason of the fact that it:

- (a) under article 7 (previously 4) agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace an electronic transport record by a negotiable transport document, or
- (b) under article 61 (previously 59) transfers its rights."

Variant B of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) (previously 7 (3)) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification.

Variant C of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) (previously 7 (3)) to the consignee. The carrier may refuse delivery if the consignee does not produce proper identification.

(c) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling party, the shipper. In such event, the controlling party or shipper must give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 (previously 31) is deemed to be the shipper for purposes of this paragraph. The carrier that delivers the goods upon instruction of the controlling party or the shipper under this paragraph is discharged from its obligations to deliver the goods under the contract of carriage.

23. This article applies when no negotiable document has been issued, or, for instance in e-commerce situations, when no document at all is used. It sets out the principle that it is the obligation of the controlling party (which in these situations often will be the shipper) to secure that the carrier is able to deliver the goods. This concept was already endorsed by the Working Group. The only matter left was whether a carrier that is under the obligation to deliver pursuant article 13 (previously 10), could refuse delivery if the consignee claiming delivery could not produce adequate identification. The draft was considered unclear at this point and the secretariat made two variations that may solve this matter.

24. *Question: Do you prefer Variant A (the original text), Variant B or Variant C?*

25. Article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

When a negotiable transport document or a negotiable electronic transport record has been issued, the following paragraphs apply:

(a)(i) Without prejudice to article 46 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) (previously 7 (3)) to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals will cease to have any effect or validity.

(ii) Without prejudice to article 46 the holder of a negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must

deliver the goods at the time and location referred to in article 11(4) (previously 7 (3)) to such holder if it demonstrates in accordance with the procedures referred to in article 6 that it is the holder of the electronic transport record. Upon such delivery, the electronic transport record will cease to have any effect or validity.

26. The problem here is with the negotiable bill of lading. This document provides security to its holder by granting it the exclusive right to take delivery of the goods at the place of destination. And it provides security to the carrier that, if it delivers the goods to the bill of lading holder, the carrier is discharged from its obligation to deliver. However, these key functions of the document can only be fulfilled if it is available at the place of destination. If the document is not available, both parties may feel insecure. To provide for a solution, the draft starts to state in this paragraph that the bill of lading holder is entitled, but not obliged, to take delivery against presentation of the bill of lading. And, in such case, the carrier is obliged to deliver. This approach follows the normal practice today.

27. **Article 49**

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper must give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 (previously 31) shall be deemed to be the shipper for purposes of this paragraph.

28. When the bill of lading is not available at the place of destination of the goods, or the bill of lading holder does not want to take delivery, the same principle as under the previous article applies: it is the primary duty of the controlling party to take care that the carrier will be able to perform his obligation under the contract of carriage to deliver the goods. The controlling party is the party interested in the goods and it may be required that the controlling party protects its interests. It may be that the controlling party does not establish contact with the carrier and/or cannot be traced by the carrier. In such event, the shipper, being the original contractual counterpart of the carrier, has to assume the responsibility of advising the carrier about delivery. The shipper must try to find the right person to whom delivery should be made, or, if it fails in its efforts, the shipper may take the responsibility for a proper delivery itself by, for instance, requesting the carrier to store the goods on its behalf. If the shipper does not fulfill this obligation, it may be held liable. As to the standard of liability see paragraphs 49 to 53 of this questionnaire.

29. **Article 49**

(c) [Notwithstanding paragraph (d),] the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 6, that it is the holder.

30. When the carrier delivers upon instruction of, in principle, the controlling party, the carrier is discharged from its obligation under the contract of carriage to deliver to the consignee. However, if the bill of lading holder cannot be traced (in which event the shipper has to instruct the carrier about the delivery), it may be expected that the bill of lading will not be presented. Then, the question arises what rights are connected to such bill of lading after delivery of the goods by the carrier. This matter is dealt with in the next paragraph (d).

31.

Article 49

Variant A of paragraph (d)

(d) [Except as provided in paragraph (c)] if the delivery of the goods by the carrier at the place of destination occurs without the surrender of the negotiable transport document to the carrier or without the demonstration referred to in paragraph (a)(ii), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights [against the carrier] under the contract of carriage only if: (i) the passing of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods; or (ii) unless such person at the time it became a holder did not have and could not reasonably have had knowledge of such delivery. [This paragraph does not apply when the goods are delivered by the carrier pursuant to paragraph (c).]

32. This paragraph deals with two situations. The one is the event that there is a bill of lading holder who acquired the bill of lading after delivery was made by the carrier, but pursuant to a contractual arrangement other than the contract of carriage and made before delivery. A typical example of such person is an intermediate buyer in a string of buyers and sellers where the bill of lading goes too slowly through the string to be available in time at the place of destination. If such intermediate buyer becomes a bill of lading holder after the carrier has delivered the goods to the final buyer, he has no right to delivery any more, but may have acquired a right to sue the carrier if there is a liability of the carrier for loss or damage to the goods.

33. The other situation is that of an 'innocent' party, someone who did not have or could reasonably not have knowledge of the delivery, has acquired the bill of lading in good faith. That party is protected and may rely on the contents of the bill of lading, including the right of delivery of the goods. A typical example is not easy to give because, when all parties involved in a commercial transaction act diligently (and honestly), arguably, this situation should not occur. But, obviously, it should not be excluded either, which is the reason for its inclusion in the draft.

34. In the Working Group, some concern was raised that this paragraph is insufficiently clear. It was also suggested that the relationship between this paragraph and the previous one should be clarified. Therefore, the Secretariat made the following alternative to address these points. Subparagraph (d) in this alternative is complementary to subparagraph (c) and subparagraph (e) prevails over subparagraph (c) and (d).

35.

Article 49**Variant B of paragraph (d), which comprises (d) and (e)**

(d) If the goods are delivered pursuant to paragraph (c), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods, when only the transfer of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods.

(e) Notwithstanding paragraphs (c) and (d), the holder that did not have or could reasonably not have knowledge of such delivery at the time it became a holder acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.

36. Article 49 as a whole received the general support of the Working Group. The general view was that the problem of delivery without presentation of a bill of lading deserves a solution. Trade practices have weakened the bill of lading system and an attempt for repair should be made, in the interest of the carriers as well as the cargo side. However, a note of caution was raised that the balance of the different rights and obligations requires a careful examination in order to strike the right one and to reach workable solutions.

37. *Questions:*

- (a) Do you prefer Variant B over the original draft of subparagraph (d)?*
- (b) Does article 49 strike a right balance of the different rights and obligations?*
- (c) Do you regard the concept of article 49 as workable?*
- (d) Do you have suggestions for improvements?*

38. **Article 50 (previously paragraph 49(e)). Failure to give adequate instructions**

If the controlling party or the shipper does not give the carrier adequate instructions under articles 48 and 49 or if the controlling party or the shipper cannot be found, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 51, 52 and 53 (previously 50, 51 and 52).

39. This provision was generally acceptable to the Working Group and, therefore, does not lead to specific questions under this questionnaire.

40. **Article 51 (previously 50). When goods are undeliverable**

1. The carrier is entitled to exercise the rights and remedies referred to in paragraph 2 at the risk and expense of the person entitled to the goods, if the goods have arrived at the place of destination and:

- (a) The consignee did not actually accept delivery of the goods under this chapter at the time and location referred to in article 11(4) (previously 7(3)) [and no express or implied contract has been concluded between the carrier or the performing party and the consignee with respect the custody of the goods]; or**

(b) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

2. The rights and remedies referred to in paragraph 1 are:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or

(c) To cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time.

3. If the goods are sold under paragraph 2(c), the carrier must hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier.

41. General support was expressed by Working Group for the concept of this provision. The issue left, therefore, is the bracketed part that some delegates found somewhat confusing.

42. *Questions:*

(a) *Would you like to retain the bracketed part of subparagraph (a)?*

(b) *If so, do you have any suggestions to improve the language?*

43. **Article 52 (previously 51). Notice of arrival at destination**

The carrier is allowed to exercise the rights referred to in article 51 only after it has given reasonable advance notice that the goods have arrived at the place of destination to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper.

44. This article provides that the carrier should make an effort to avoid a situation that on the part of the consignee no adequate reaction is forthcoming.

45. *Questions:*

(a) *Is this concept acceptable?*

(b) *Do you have any suggestions for drafting improvements?*

46. **Article 53 (previously 52). Carrier's liability for undeliverable goods**

When exercising its rights referred to in article 51(2) (previously 50(2)), the carrier or a performing party is liable for loss of or damage to the goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result].

47. In this article and in the second sentence of article 46, the liability of the carrier for loss or damage to the goods is dealt with in cases when the goods are undeliverable. The main question is what the standard of liability of the carrier must be under these circumstances. These circumstances may qualify (under national law) as 'creditors default'

(the consignee being the creditor of the carrier), ‘agent (or bailee) by necessity’ (the carrier being such agent or bailee) and the like. Under these special circumstances the standard of liability of a person having a certain duty of care for the goods, is usually of a lower level than it under normal circumstances would have been.

48. *Questions:*

- (a) *Should the provisions on the carrier’s liability in articles 46 and 53 (previously 52) be consolidated in one single provision?*
- (b) *In case of such consolidation, what would be an acceptable standard of liability of the carrier for loss of or damage to the goods under the circumstances referred to in the articles 46 and 51 (previously 50)?*
- (c) *If you prefer no such consolidation, please indicate your preferred standard for each situation.*

49. **Liability of the carrier and shipper for a breach of obligation under the Convention not already dealt with**

50. Chapter 10 does not pretend to provide solutions for all possible problems connected with delivery. Its focus is on the main problem, namely that the goods arrive at their place of destination without someone there to receive them or the consignee being unwilling to take delivery of the goods. The chapter subsequently sets out the legal position of the carrier and the consignee in such cases. What could be added are one or more provisions setting out the standard of liability of the carrier and shipper if one of these is in breach of any of its obligations in respect of delivery. Such breach may lead to a claim under the draft Convention.

51. The duty of the carrier to deliver the goods to the consignee is dealt with in article 13 (previously 10). What if the carrier does not deliver the goods to the person entitled to them? Chapter 6 (previously 5) only applies to loss, damage or delay to the goods and not, for instance, to misdelivery. Should the draft Convention include a provision that sets out the standard of liability of the carrier for breaches under the draft Convention other than causing loss, damage or delay to the goods? Such provision (not necessarily to be included in Chapter 10) could be a fault-based liability with a reversal of the burden of proof, similar to the provision relating to the shipper’s liability in paragraph 31(1) (previously 29(1)). Assuming that, for instance, the time bar and the limitation of liability will apply to *any* claim against the carrier under the draft Convention, there may be some logic in determining the standard of liability of the carrier beyond the matter of loss, damage or delay to the goods as well.

52. A similar question may arise with regard to the shipper’s liability. Under Chapter 8 (previously 7) the shipper’s liability is limited to breaches under article 28 (previously 25) and paragraph 30(a) (previously 27(a)). Should this standard of shipper’s liability be extended to, for instance, a breach by the shipper of his obligation to accept delivery under article 46? Or, drawing this line further, to any breach of obligation under the draft Convention to the extent that the shipper’s liability is not dealt with otherwise (such as the strict liability under paragraph 31(2) (previously 29(2)))?

53. *Questions:*

- (a) *Should the draft Convention include a general provision relating to the carrier’s liability for a breach of any of its obligations under the draft Convention that should apply to the extent that its liability is not already dealt with (such as in*

Chapter 6 (previously 5) and article 53 (previously 52)) or should this matter be left to national law?

- (b) *Should the draft Convention extend the provision on shipper's liability in paragraph 31(1) (previously 29(1)) to a breach of any of the shipper's obligations under the draft Convention that should apply to the extent that the shipper's liability is not dealt with otherwise, or should this matter be left to national law?*

**K. Preparation of a draft convention on the carriage of goods [wholly or partly]
[by sea]: proposal by the United States of America, submitted to the
Working Group on Transport Law at its sixteenth session
(A/CN.9/WG.III/WP.58) [Original: English]**

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), during which the Working Group is expected to continue its second reading of a draft convention on the carriage of goods [wholly or partly] [by sea] based on a note by the Secretariat (A/CN.9/WG.III/WP.56), the Government of the United States of America, on 15 November 2005, submitted a proposal regarding the inclusion of “ports” in draft article 75 of the draft convention, in the chapter on jurisdiction, for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

The Benefits of Including “Ports” in Article 75

1. As currently drafted, article 75(c), which permits a plaintiff to bring an action against the carrier in the port of loading or the port of discharge, is in square brackets. The United States believes that the brackets should be removed and the bracketed language should be retained.¹
2. It is important to recognize the context in which this issue matters most.² For a traditional port-to-port shipment, the port of loading is the place of receipt and the port of discharge is the place of delivery. In this context, article 75(c) would generally be irrelevant because the same places would already be covered by article 75(b).³ It is only when the port of loading differs from the place of receipt or the port of discharge differs from the place of delivery that the issue matters. This question is therefore important under door-to-door contracts (and, to a lesser extent, port-to-door and door-to-port contracts).
3. When the parties have concluded a door-to-door contract, it is in both of their interests to have the ports of loading and discharge available as potential forums. The advantage to the cargo interests is obvious. If the claimant wishes to sue the carrier in a port, it will be beneficial to have that option available. If the claimant does not wish to sue the carrier in a port, it can choose another option (and the inclusion of ports on the list will not have caused any harm).
4. The advantage to the carrier is less self-evident but nevertheless real. Although the carrier would prefer never to be sued at all (or, barring that, to be sued only in the place designated in a forum selection clause, *cf. supra* note 2), if the carrier is going to be sued in the claimant’s jurisdiction it would generally prefer to be sued at the port through which the goods passed rather than at the inland location in which an agent collected or delivered the cargo. Including ports on the article 75 list does not guarantee that suit will be filed in the port, but excluding ports from the article 75 list could make a suit in the port impossible. Unless ports are on the list, both sides may be bound to litigate a matter at an inland location when both would prefer the litigation to be in a port.
5. There are a number of practical reasons why both parties would often prefer to litigate in a port rather than in an inland location. As a practical matter, damage is disproportionately likely to occur in a port because cargo is more likely to be damaged when it is handled. Although cargo can be lost at sea (or damaged in a train derailment or truck collision), there are many more cases of cargo damage during the loading and

¹ This is substantially the same position that we advocated in paragraphs 30-31 of A/CN.9/WG.III/WP.34. In this paper, we explain our analysis in more detail.

² Furthermore, it must be remembered that this issue would be essentially irrelevant to the extent that exclusive forum selection clauses are fully enforceable. Under the U.S. proposal, forum selection clauses in volume contracts would be enforceable and binding on third parties under specified conditions. In that context, it would not matter what places are included on the article 75 list. (The U.S. proposal on this issue was originally presented in paragraphs 34 and 35 of A/CN.9/WG.III/WP.34. A modified/compromise iteration is contained in article 95 of A/CN.9/WG.III/WP.56. Article 76 of A/CN.9/WG.III/WP.56 (which the U.S. opposes in its current form) also deals with the enforceability of exclusive choice of forum clauses.)

³ One possible difference might arise if article 75(b) is limited to “contractual” places and article 75(c) refers to the actual ports. The United States would not object to revising article 75(c) to cover contractual ports. As a practical matter, multimodal bills of lading in current usage commonly identify the intended ports of loading and discharge.

unloading operations. Even if the cargo is not being handled, it is more likely to be stolen from a warehouse (which is more likely to be in a port area) than from a vessel on the high seas or a moving truck or train. If the cargo is lost or damaged at the port, it will be more convenient for everyone to resolve the dispute there—where both parties have easier access to witnesses and other evidence.

6. When cargo is lost or damaged at the port, a performing party (such as a stevedore or terminal operator) will often be responsible. Thus the cargo owner will wish to claim against both the carrier, which is contractually liable, and the performing party, which is liable for the damage that it actually caused. Under article 77, the port may be the only place in which the claimant can bring an action against the performing party. It would often be the only place in which the claimant can bring a single action against both. If ports are not on the article 75 list, however, there may be no forum in which a single action is possible, thus requiring multiple lawsuits to resolve a single incident.

7. Even if the cargo owner chooses to bring a single action against the carrier alone, the carrier may wish to seek contribution or indemnity from a negligent performing party. This can often be done most efficiently if the carrier joins the negligent performing party as an additional or third-party defendant (using whatever procedural device is available under the forum's law). In many legal systems, this would be possible only if the original court has jurisdiction over the negligent performing party. And that is far more likely to be the case when the action is pending in a port, which could occur under the new convention only if ports are on the article 75 list.

8. Even when the potential liability of performing parties does not make the port a more attractive forum, it will often be in both parties' interest to have any litigation take place in a port. Lawyers with expertise in maritime cases are more likely to practice in or near a port and judges with expertise in maritime issues are more likely to sit in courts with jurisdiction over ports. Of course, not every port in the world will have the maritime legal and judicial expertise of the world's major shipping centres. But that is not the choice at issue here. Even if maritime expertise in a particular port is below the norm, it is still likely to be an improvement over the maritime expertise in the inland place of receipt or delivery.

9. Finally, omitting ports from the list may interfere with the courts' ability to manage their own dockets. In the United States, the doctrine of *forum non conveniens* permits a court, in appropriate circumstances, to transfer a case to another court that is better suited to decide the issues. But this option is available only if the more convenient court has jurisdiction—which may not be the case if ports are not included on the article 75 list.

L. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: comments by the United Kingdom of Great Britain and Northern Ireland, submitted to the Working Group on Transport Law at its sixteenth session
(A/CN.9/WG.III/WP.59.) [Original: English]

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), during which the Working Group is expected to continue its second reading of a draft convention on the carriage of goods [wholly or partly] [by sea] based on a note by the Secretariat (A/CN.9/WG.III/WP.56), the Government of the United Kingdom of Great Britain and Northern Ireland, on 18 November 2005, submitted comments regarding arbitration, for consideration by the Working Group. The text of those comments is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration

1. Arbitration is a consensual process chosen by parties to a contract as a means of resolving any disputes which might arise. The principles of freedom of arbitration, the enforcement of arbitration agreements, and the enforcement and recognition of arbitral awards is enshrined in Articles II and III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention). 134 States are signatories to the New York Convention of which many are leading maritime nations.

2. Arbitration is the preferred mechanism for the resolution of disputes, mainly in the bulk and tramp trades. The nature of such disputes often involves issues of legal or commercial principle. Charterparties used in such trades almost always incorporate an arbitration provision nominating a particular forum and law in the event of a dispute and such provisions are often expressly incorporated into bills of lading issued under these charterparties. Nevertheless, there are also occasions where arbitration could be appropriate to liner carriage, particularly in the context of specialist trades. Over the years, a number of centres of excellence have developed where experts in specific technical and legal matters are available to arbitrate disputes in maritime commerce.

3. Commercial parties are satisfied with the functioning of the arbitration system both in terms of disputes between the originating parties and, through an incorporation clause, application of the arrangements to third party holders of bills of lading (or in the future, transport documents). The system is understood by parties involved in commercial transactions with buyers and sellers, throughout the chain, aware of their rights and obligations. Third party buyers see this as part of the wider commercial transactions from which they expect to make a profit. The arrangements work well with few, if any, complaints or practical difficulties about the concepts.

4. The widely accepted Hague and Hague Visby Rules do not set out provisions regulating arbitration: this is a matter left to the contracting parties and national law. In contrast, prescriptive provisions in the Hamburg Rules are arguably one of the main reasons why this convention has not been widely implemented. As a matter of principle, it is questionable whether there is a compelling case for the inclusion of any provisions on arbitration in the UNICTRAL draft instrument. If, however, provisions are to be included, the most straightforward approach would be a provision upholding the validity and enforceability of an arbitration agreement in accordance with the parties' agreement, including the extension of such agreements to bind third party buyers.

5. The current text in the draft instrument offers two alternatives, Variant A and Variant B. However, article 84 of Variant A reflects the Hamburg Rules model and provides the claimant with the option of where to institute proceedings. This means that an agreement to arbitrate contained in a contract of carriage subject to the instrument would not be enforceable against either the original party to the contract e.g. a shipper, or a third party buyer.

6. Variant B leaves the location to the agreement of the parties. This would reflect current practice. However, it has been held to provide carriers with an opportunity to circumvent the Jurisdiction provisions in the current Chapter 16. This is not seen as a problem in practice since contracts of carriage in the liner trade do not generally

incorporate arbitration agreements but incorporate provisions referring disputes to the exclusive jurisdiction of named courts or states.

7. An alternative proposal has been put forward by the Netherlands to reconcile freedom to arbitrate in the bulk/tramp trades with the application of jurisdiction provisions to liner carriage. This could provide a basis for finding a way forward but further consideration needs to be given to the following points:

- Proposed paragraph 2 of article 78 is understood as imposing a restriction on the right to arbitrate under a contract to which the draft instrument will apply on a mandatory basis. It would give the claimant the right to resile from an arbitration agreement set out in the contract and decide whether to arbitrate or refer the dispute to a court in one of the listed jurisdictions with the added possible confusion of overturning the nominated governing law;
- Proposed article 81 bis seeks to extend the enforceability of a charterparty arbitration agreement to the third party holder of a bill of lading (or other transport document) through the disapplication of article 10. However, this might not, in fact, be the outcome since article 10 brings bills of lading issued under a charterparty or contract otherwise excluded under Article 9 within the mandatory scope of the draft instrument. This is possibly a drafting matter; and
- Arrangements may need to be developed for arbitration to be accepted as the parties' agreed dispute resolution mechanism in certain specialist liner trades.

8. The line of approach is in the right direction but the issues need further study. However, a solution avoiding the difficulties identified in this paper would be a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification, a system which has proved satisfactory and efficient in resolving maritime disputes over the years.

**M. Report of the Working Group on Transport Law on the work
of its seventeenth session (New York, 3-13 April 2006)
(A/CN.9/594) [Original: English]**

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.¹ The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.60.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its seventeenth session in New York from 3 to 13 April 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Benin, Brazil, Canada, Chile, China, Colombia, Czech Republic, Fiji, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Madagascar, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

3. The session was also attended by observers from the following States: Bulgaria, Cyprus, Democratic Republic of Congo, Denmark, El Salvador, Finland, Holy See, Kuwait, the Netherlands, New Zealand, Norway, Philippines, Senegal and Ukraine.

4. The session was also attended by observers from the following international organizations:

(a) **Intergovernmental organizations invited by the Commission:**
Asian-African Legal Consultative Organization, European Community (EC);

(b) **International non-governmental organizations invited by the Commission:**
Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), and the International Union of Marine Insurance (IUMI).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter de Sá Leitão (Brazil)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.60 and A/CN.9/WG.III/WP.60/Corr.1);

(b) A document on right of control orally presented for the information of the Working Group at its fifteenth session and published for its sixteenth session from the delegation of Norway (A/CN.9/WG.III/WP.50/Rev.1);

(c) A document on transfer of rights orally presented for the information of the Working Group at its fifteenth session and published for its sixteenth session from the delegation of Switzerland (A/CN.9/WG.III/WP.52);

(d) A document on delivery published for its sixteenth session, but consideration of which was not completed at that session, from the delegation of the Netherlands (A/CN.9/WG.III/WP.57);

(e) A proposal by Finland on scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.61);

(f) A document on transport documents and electronic transport records presented for information by the delegation of the United States of America (A/CN.9/WG.III/WP.62);

(g) A proposal by the delegation of Switzerland on the delivery to the consignee and the carrier's right of retention of the goods (A/CN.9/WG.III/WP.63);

(h) Comments of the European Shippers' Council on the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.64);

(i) A proposal by Japan on scope of application (A/CN.9/WG.III/WP.65);

(j) A document on volume contracts presented for the information of the Working Group by the Comité Maritime International (A/CN.9/WG.III/WP.66);

(k) A drafting proposal by the Swedish delegation on shipper's obligations (A/CN.9/WG.III/WP.67);

(l) A proposal by the Netherlands on bills of lading consigned to a named person (A/CN.9/WG.III/WP.68);

(m) A proposal by the United States of America on shipper's obligations (A/CN.9/WG.III/WP.69); and

(n) Proposals by the Italian delegation regarding transport documents and electronic transport records and scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.70).

7. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea].
4. Other business.
5. Adoption of the report.

I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annexes to a note by the Secretariat (A/CN.9/WG.III/WP.56), and discussed various proposals, including the proposal by Finland on scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.61); the proposal by Switzerland on the carrier's right of retention of the goods (A/CN.9/WG.III/WP.63); the proposal by Japan on scope of application (A/CN.9/WG.III/WP.65); the drafting proposal by Sweden on shipper's obligations (A/CN.9/WG.III/WP.67); the proposal by the Netherlands on bills of lading consigned to a named person (A/CN.9/WG.III/WP.68); the proposal by the United States of America on shipper's obligations (A/CN.9/WG.III/WP.69); and the proposals by Italy regarding transport documents and electronic transport records and scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.70). The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Right of control—Chapter 11

9. The Working Group was reminded that it had most recently considered the topic of right of control at its eleventh session (see A/CN.9/526, paras. 100-126). It was also reminded that a document containing information relating to right of control had been presented by Norway at the Working Group's sixteenth session (A/CN.9/WG.III/WP.50/Rev.1; see A/CN.9/576, para. 211). The consideration by the

Working Group of the provisions of chapter 11 was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56, and on the proposed text as suggested in A/CN.9/WG.III/WP.50/Rev.1.

Draft article 54. Definition of right of control

Draft article 54. General comments

10. The Working Group considered the text of draft article 54 as contained in A/CN.9/WG.III/WP.50/Rev.1, paragraph 7, and in A/CN.9/WG.III/WP.56. It was indicated that draft article 54 of A/CN.9/WG.III/WP.56 did not clearly distinguish between the right of the controlling party to give unilateral instructions, on the one hand, and the right of the controlling party to agree with the carrier on a variation of the contract of carriage, on the other hand. The Working Group was also reminded that draft paragraph 54 (b), providing that the controlling party could demand delivery of the goods before their arrival at the place of destination, had been the object of discussion in the past. In particular, it was indicated that according to some, such a demand would always amount to a variation of the contract of carriage and would therefore require the parties' agreement. Others, however, held the view that such a right was unilateral in nature and should be retained as essential, for instance, in cases when no negotiable transport record was issued and the seller or credit institutions must enforce a pledge on the goods.

11. General support was expressed for the approach adopted in A/CN.9/WG.III/WP.56, in which provisions of right of control which may be exercised unilaterally by the controlling party were dealt with in draft article 54, while provisions requiring a variation to the contract of carriage and therefore the agreement of the carrier were dealt with separately in draft article 55.

12. Support was expressed to retain the bracketed word "means" and to delete the bracketed word "is" in the chapeau of draft article 54.

Controlling party as the exclusive person that may exercise the right of control

13. It was observed that the opening phrase of draft article 55, "the controlling party is the exclusive person that may exercise the right of control" was a general proposition regarding the right of control that should apply equally to draft article 54. The view was expressed that this phrase should be moved from draft article 55 to the chapeau of draft article 54, but other views were expressed that care should be taken in drafting to ensure that the statement of the general rule also applied to draft article 55 variations to the contract of carriage. There was general agreement that adjustments should be made to draft articles 54 and 55 to ensure the general application of the rule that the controlling party was the exclusive person that could exercise the right of control. In addition, it was suggested that a separate provision applying to both draft articles 54 and 55 could be considered.

Draft paragraph 54 (b). Delivery at intermediate port or place en route

14. The view was expressed that the request for delivery of goods at an intermediate port or place en route would always amount to a variation of the original terms of the contract of carriage and would entail a significant burden for the carrier as it would almost always interfere with the normal operations of the carrier and the right as such would conflict with the safeguards provided for in draft article 57. It was, therefore, suggested that draft paragraph 54 (b) should be deleted. However, the prevailing view in the Working Group was in favour of retaining the principle expressed in draft paragraph 54 (b), since it was

deemed important to provide the controlling party with an effective manner to exercise the right of control, particularly in the face of a potentially insolvent buyer.

15. Support was expressed for retaining the second set of bracketed text in draft paragraph 54 (b) and for deleting the first set of bracketed text. It was stated that the controlling party should only have the right to request the carrier to deliver goods at intermediate ports or places en route. It was suggested that allowing the controlling party to request delivery at different ports or places would impose an unreasonable burden of deviation on the carrier with potentially serious economic consequences. In that connection, it was suggested that the reference to “an intermediate port or place en route” was not sufficient to protect the carrier against possible deviations arising from requests of the controlling party and that the draft provision should be further refined to clarify that the controlling party could request early delivery only at a scheduled port of call on that voyage. Further concerns were expressed regarding the possibility that the controlling party’s request for delivery at a port or place other than originally foreseen would entail additional charges for the carrier such as, for example, those relating to discharging a container stowed at the bottom of the vessel, and that in any case, the carrier should be reimbursed for any additional cost arising from such early delivery. However, it was also indicated that those concerns could be addressed by draft article 57, and, in particular, those provisions relating to non-interference with normal operations of the carrier, and with reimbursement of additional costs.

Conclusions reached by the Working Group regarding draft article 54:

16. After discussion, the Working Group decided that:

- The text of draft article 54 contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group’s future deliberations;
- The brackets around the word “means” and the bracketed word “is” should be deleted in the chapeau of draft article 54;
- The principle according to which the controlling party was the exclusive person that may exercise the right of control should be inserted in the chapeau of draft article 54;
- The brackets around the second set of bracketed text and the first set of bracketed text should be deleted in draft article 54 (b);
- Words such as “at a scheduled port of call” should replace the words “at an intermediate port” in draft article 54 (b); and that
- The Secretariat should prepare a new version of draft article 54 taking into account the above deliberations.

Draft article 55. Variations to the contract of carriage

Separate treatment in draft article 55 of variations to the contract of carriage

17. As noted above in paragraph 11, there was general agreement in the Working Group for the structure of draft article 55 as it appeared in A/CN.9/WG.III/WP.56 in terms of it providing for separate treatment of the exercise of the right of control that resulted in a variation of the contract of carriage. Some concern was expressed that, while the creation of a separate provision concerning exercises of the right of control that resulted in variations to the contract of carriage was a positive step, paragraphs (b) and (c) of draft article 54 could also be considered variations to the contract of carriage, and that further modifications could be considered to the drafting of the draft articles 54 and 55 in order to

clarify these concerns. Further, it was suggested that the title of draft article 55 could require adjustment, in addition to modifications that would be necessary to the definitions of “right of control” and “controlling party” in draft article 1.

Rights and obligations of the parties to the contract of carriage prior to its variation

18. Concern was expressed that it was unclear in the text of draft article 55 how a variation of the contract resulting from an exercise of the right of control would affect the rights and obligations of the parties to the previously existing contract of carriage. While it was suggested that the application of general contract law would appropriately govern any potential problem, the suggestion was made that specific text should be included in draft article 55 to ensure that any variation to the contract of carriage did not affect the rights and obligations of the parties to the contract prior to its variation.

“[negotiable]” transport document or electronic transport record

19. The question was raised whether to include in the text of draft paragraph 55 (2) reference to “negotiable” transport documents and electronic transport records by including the text that currently appeared in square brackets. The view was expressed that limiting this reference to negotiable transport documents and electronic transport records rendered the rule too narrow. In addition, it was thought that simple deletion of the word “negotiable” as it appeared in square brackets might expand the types of documents too broadly because the term “transport documents” could include such a document that evidences the carrier’s receipt of the goods but does not evidence or contain a contract of carriage.

20. The contrary view was also expressed in the Working Group that practical problems could arise if the reference were widened beyond “negotiable” transport documents and electronic transport records, since such documents and records had to be in the possession of the controlling party in order for it to exercise its right of control, but in the case of non-negotiable transport documents or electronic transport records, it was unlikely that the controlling party would be in possession or control of them. Further, it was noted that since negotiable transport documents and electronic transport records had a special character in terms of providing conclusive evidence of the contract of carriage, it was a legal necessity for such variations to be noted thereon, and that such a legal necessity did not exist for non-negotiable transport documents or electronic transport records, variations to which could be governed by commercial practice.

21. It was further suggested that, in the case of non-negotiable transport documents or electronic transport records, the controlling party should be entitled to have a new document or record issued so as to reflect the variation of the contract of carriage. The Working Group agreed that the word “negotiable” should be deleted and that modification of this provision should take into account the concerns raised in the paragraph above, in addition to a consideration of how this provision would operate with draft paragraph 56 (2)(c).

Conclusions reached by the Working Group regarding draft article 55:

22. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the text of draft article 55 in keeping with the general concerns raised in the discussion as set out in the above paragraphs;
- The exclusivity of the controlling party’s exercise of the right of control should be made equally clear in draft articles 54 and 55; and

- The word “negotiable” should be deleted in draft paragraph 55 (2) and further modification of this provision should take into account the concerns raised in the paragraphs above, including the operation of this provision with draft paragraph 56 (2)(c).

Draft article 56. Applicable rules based on transport document or electronic transport record issued

Title

23. The Working Group agreed that the title of draft article 56 was too cumbersome and should be modified to more accurately and succinctly reflect the contents of the draft provision. One suggestion made in this regard was that the title could be “Controlling parties”.

Draft paragraph 56 (1)(a)—alternative bracketed text

24. A concern was expressed that draft paragraph 56 (1)(a) might not adequately protect the interests of the FOB seller of the goods when the shipper was the controlling party and the FOB seller was only the consignor, and not the shipper. It was suggested that this concern was adequately addressed under the second alternative bracketed text in draft paragraph 1 (a), since the shipper would have to advise the carrier that the FOB seller was the controlling party, and, additionally, since the shipper would likely be obliged to do so under the contract of sale. The view was also expressed that the question raised would be considered in connection with the chapter on transport documents, since it concerned which documents or records the consignor would be entitled to receive once it had delivered the cargo to the carrier, in order to protect itself in the face of potentially insolvent buyers.

25. There was support for the view in the Working Group that the second alternative bracketed text in draft paragraph 1 (a), “[designates the consignee or another person as the controlling party]”, was preferable to the first bracketed text, since it was clearer and more simply drafted.

26. The Working Group heard other suggestions for the clarification of the text. It was proposed that draft paragraph 1 (a) should specify that the “contract of carriage”, rather than the “shipper” should designate the controlling party. In response, it was noted that this suggested change would probably have the same result as the current text, since the shipper would likely make such a designation in the contract of carriage. It was also suggested that draft paragraphs 1 (a) and (b) should take into account that under Rule 6 of the Comité Maritime International’s Uniform Rules for Sea Waybills, the shipper may transfer the right of control to the consignee, and that the exercise of this option must be noted on the sea waybill or similar document. However, some doubt was expressed regarding this suggestion, since it was thought that the question of the identity of the controlling party was relevant only as between the carrier and the cargo interests, and that if third parties, such as banks, were interested, the parties could advise them accordingly.

Draft paragraph 56 (1)(b)—alternative bracketed text

27. There was general agreement in the Working Group that inclusion of the text in the first set of square brackets in draft paragraph 56 (1)(b) was inadequate, since it would render the provision too uncertain for the carrier if it were to allow either the transferor or the transferee to notify the carrier of a transfer of the right of control. While there was some support for the inclusion of the text in the second set of square brackets of draft

paragraph 56 (1)(b) as accommodating those jurisdictions where the transferee was allowed to notify the carrier of the transfer of the right of control, doubts were also expressed regarding whether this approach would be sufficiently clear. It was noted that it would be more easily verified by the carrier if notification of a transfer of the right of control were made by the transferor, who would typically be known to the carrier. A preference was expressed in the Working Group for the deletion of both sets of bracketed alternative text, since allowing the transferee to notify the carrier did not seem to adequately protect all of the relevant interests, nor did it provide sufficient clarity.

28. The suggestion was also made that draft paragraph 56 (1)(b) should express the consequences of a failure to notify the carrier of the transfer of the right of control by stating that the transfer was not effective until the carrier had been notified by the transferor.

Paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1

29. The suggestion was made that draft paragraphs 56 (1)(a) and (b) could be replaced by the text that appeared in paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1. While there was some support for that suggestion, some doubts were raised whether the text in A/CN.9/WG.III/WP.50/Rev.1 would adequately cover the situation where the controlling party had to transfer the right of control, particularly in the situation where there were no documents at all. Some support was also expressed for the view that the text in A/CN.9/WG.III/WP.50/Rev.1 could replace draft paragraph 56 (1)(a), but that view did not receive sufficient support in the Working Group.

Draft paragraph 56 (1)(c)—“in accordance with article 54”

30. There was general agreement in the Working Group that the phrase “in accordance with article 54” was superfluous, and could be deleted.

Conclusions reached by the Working Group regarding draft paragraphs 56 (1)(a), (b) and (c):

31. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the title of draft article 56;
- The second alternative bracketed text in draft paragraph 56 (1)(a) was preferable, but the Secretariat should be requested to make the appropriate drafting modifications bearing in the mind the views expressed in the Working Group;
- The alternative text appearing in brackets in draft paragraph 56 (1)(b) should be deleted in its entirety, and the Secretariat should be requested to consider whether the transfer of the right of control should only be effective upon notification of the carrier; and
- The phrase “in accordance with article 54” in draft paragraph 56 (1)(c) should be deleted.

Draft paragraph 56 (1)(d)—termination or transfer of the right of control

32. The view was expressed that draft paragraph 56 (1)(d) dealing with the termination of the right of control or, alternatively, its transfer to the consignee, was unnecessary and could be deleted, in light of the fact that the chapeau of draft article 54 limited the controlling party’s entitlement to exercise the right of control to the period of responsibility as set out in draft paragraph 11 (1). However, some doubt was expressed regarding

whether deletion of the paragraph was appropriate given the particular problems that could flow from the timing of the termination of the right of control.

33. It was observed that the Working Group had before it three possible approaches to the termination of the right of control or its transfer to the consignee, each of which entailed different consequences. One approach, reflected in the first set of square brackets in draft paragraph 56 (1)(d), was that the right of control terminated when the goods arrived at destination and the consignee requested delivery. A second approach was that reflected in the second set of square brackets in draft paragraph 56 (1)(d), where the right of control was transferred to the consignee when the goods arrived at destination and the consignee requested delivery. It was observed that these two approaches were in keeping with the tradition in many civil law countries, and that these approaches were consistent with several international transport conventions, but that certain practical problems had arisen with respect to them. A third approach was said to be that reflected in the text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1, where the right of control terminated when the goods had been delivered.

34. The view was expressed that the timing of the termination of the right of control was the key to deciding the optimum approach to take in the draft convention. It was suggested that if the right of control was not transferred to the consignee or terminated until the last possible moment, such as until actual delivery, it could cause the carrier undue hardship, since the carrier might have already begun the process of delivery and it could be very burdensome to receive last minute instructions from the controlling party regarding changes in delivery once that process had already begun. However, another view was expressed that the right of control should not be terminated or transferred too early, since the most common instruction given by a controlling party to a carrier was an instruction not to deliver the goods until the carrier had confirmed with the seller or controlling party that it had been paid. Strong preferences were expressed in the Working Group for each of these approaches.

35. Several possible solutions were suggested for the resolution of this issue:

(a) The termination of the right of control under draft paragraph 1 (d) could be treated as a non-mandatory right of control provision subject to draft article 60, although some doubts were raised regarding whether this would provide an adequate solution to the problem;

(b) Since draft article 57 set out certain limitations with respect to the carrier's obligation to execute instructions that it received from the controlling party, it was thought that following its consideration of draft article 57, the Working Group might be better placed to reconsider its approach to the termination of the right of control. Further, if draft article 57 provided sufficient protection for the carrier in its obligation to execute instructions from the controlling party, draft paragraph 1 (d) would be less important and could possibly be deleted.

Conclusions reached by the Working Group regarding draft paragraph 56 (1)(d):

36. After discussion, the Working Group decided that:

- Draft paragraph 56 (1)(d) should be retained in square brackets for further consideration once the Working Group had considered draft article 57 (see below, paras. 68 to 71).

Draft paragraphs 56 (2)(a) and (b)

37. It was suggested that draft paragraph 56 (2)(b) could be deleted as redundant since it was evident that under draft paragraph 56 (2)(a) the holder of the transport document was also the controlling party and that, since the transferee of the transport document would also become holder, the right of control would pass accordingly. A suggestion was also made that the second sentence in draft paragraph 56 (2)(b) could be moved to draft article 61, which contained rules on transfer of rights when a negotiable transport document had been issued.

Draft paragraph 56 (2)(c)—text in square brackets

38. It was suggested that the bracketed text in draft paragraph 56 (2)(c) should be deleted. The view was expressed that the provision was redundant since no party could request others to produce documents that the requesting party already held. There was support in the Working Group for this view.

Draft paragraph 56 (2)(c). “if the carrier so requires”

39. It was suggested that the words “if the carrier so requires” should be deleted from draft paragraph 56 (2)(c). The view was expressed that, when a negotiable transport document had been issued, the carrier should accept instructions issued pursuant to the right of control only from the holder of that document. In this respect, it was added that, it was the carrier’s option to verify that the holder could produce the necessary documents to confirm its identity as the controlling party, and that the carrier would bear any risk arising from a failure to exercise this option. However, it was also indicated that the provision must also affirm that an otherwise valid exercise of the right of control remained valid even if the carrier did not request production of document by the holder.

Conclusions reached by the Working Group regarding draft paragraph 56 (2):

40. After discussion, the Working Group decided that:

- The text of draft paragraph 56 (2) as contained in A/CN.9/WG.III/WP.56, after deletion of the words “if the carrier so requires” and of the bracketed text in draft paragraph 56 (2)(c), should be retained as a basis for the Working Group’s future deliberations;
- The Secretariat should prepare a new version of draft paragraph 56 (2) taking into account the above deliberations, including the possible drafting suggestion of combining the contents of draft paragraphs (a) and (b).

Draft paragraph 56 (3)

41. In light of its deliberations on draft paragraph 56 (2)(c), the Working Group decided that the text of draft paragraph 56 (3) as contained in A/CN.9/WG.III/WP.56, after deletion of the words “if the carrier so requires” in draft paragraph 56 (3)(b), should be retained as a basis for the Working Group’s future deliberations.

Draft paragraph 56 (4)

42. In response to a query on the purpose of draft paragraph 56 (4), it was explained that the draft provision aimed at creating a parallelism with draft paragraph 62 (1), according to which any holder that was not the shipper and that did not exercise any right under the contract of carriage, did not assume any liability under the contract of carriage solely by

reason of being a holder. Accordingly, it was thought that no liability under this provision should be imposed on a transferor of the right of control pursuant to its position as controlling party if the transferor did not exercise its right of control. However, it was also observed that this approach did not fit comfortably with that taken in draft article 34 in the chapter on shipper's obligations, where the holder of the transport document or electronic transport record that was identified as the "shipper" in the contract particulars was subject to the responsibilities and liabilities imposed on the shipper under that chapter, and that therefore the interaction of that draft provision with draft paragraph 56 (4) should be clarified.

43. It was suggested that the word "liabilities" in draft paragraph 56 (4) should be replaced by the term "obligations" since only the obligations should be transferred along with the transfer of the right of control, while any liabilities arising from the exercise of that right of control would always remain with the party that had incurred them. However, it was noted that the word "liability" was the proper term to be used in draft paragraph 56 (4) given its precise meaning in draft article 34 of the draft convention, to which draft paragraph 56 (4) referred. Furthermore, it was indicated that the proposed amendment could render the draft provision redundant since draft article 62 already provided that obligations would pass with the transfer of the document.

44. Several additional drafting suggestions were made regarding the treatment of draft paragraph 56 (4), including deletion of the entire provision and a rephrasing of it in a positive sense to say which aspects of the right of control were transferred, rather than in its current negative sense. The view was also expressed that the Working Group's consideration of draft paragraph 62 (1) could assist it in coming to a decision regarding draft paragraph 56 (4).

Conclusions reached by the Working Group regarding draft paragraph 56 (4):

45. After discussion, the Working Group decided that:

- The text of draft paragraph 56 (4) should be placed in square brackets pending its possible modification by the Secretariat or its deletion, following further consideration of the issues raised and consideration of the text in draft paragraph 62 (1).

Draft article 57. Carrier's execution of instruction

Draft paragraph 57 (1)—Variant A or Variant B

46. The Working Group heard the view that there were two main substantive differences between Variants A and B of draft paragraph 57 (1) which established the circumstances under which the carrier was required to execute the instructions of the controlling party. The first difference was thought to be the reference in draft paragraph 1 (a) of Variant B that the controlling party was entitled to exercise the right of control, and the second, more substantive difference was said to be draft paragraph 1 (c) of Variant A, that made reference to additional expense, loss or damage that the carrier or performing party might incur in the execution of the instructions from the performing party. It was suggested that the safeguards for the carrier such as those set out in draft paragraph 1 (c) of Variant A were important and should be retained, but that they might be sufficiently expressed in draft article 57 (3).

47. While there were expressions of support for Variant A, which expressly allowed the carrier to refuse to carry out instructions that carried an additional expense, loss or damage

to the carrier or to any other goods on the same voyage, a strong preference was expressed in the Working Group for Variant B of draft paragraph 57 (1).

48. Following specific discussion regarding Variant B of draft paragraph 57 (1), the Working Group decided to delete reference to the performing party in subparagraph (c) in keeping with its previous decision to exclude performing parties from the right of control provisions. In addition, a drafting suggestion was made to merge subparagraphs (b) and (c), since their content was thought to be quite similar. In response to the concern that the flexible standards of subparagraphs (b) and (c) might not be objectively interpreted in determining the reasonableness of a carrier's failure to execute instructions, it was suggested that the principle in draft article 1 bis from Variant A could be adopted into Variant B. However, it was indicated that the reasonableness test in draft paragraph 1 bis of Variant A would not of itself render more objective the interpretation of the standards in subparagraphs (b) and (c). It was observed that a carrier's right to refuse to execute instructions would ultimately involve a determination of a reasonableness standard in either suggested variant of draft paragraph 57 (1). In addition, it was suggested that the burden of proof for the carrier's failure to execute the instructions should be dealt with in draft paragraph 57 (4).

Conclusions reached by the Working Group regarding draft paragraph 57 (1):

49. After discussion, the Working Group decided that:

- The text of Variant B of draft paragraph 1 was preferable to that of Variant A; and
- The Secretariat would take into account drafting suggestions made with a view to improving the text (see also para. 51 below).

Draft paragraph 57 (2)

50. There was agreement in the Working Group that in keeping with decisions made previously, reference in draft paragraph 57 (2) to persons outside of the controlling party and carrier should be deleted. However, there was some support for the concern raised that revising the text of draft paragraph 57 (2) in this fashion could result in the inability of the carrier to obtain reimbursement for any damages that it might have to pay to other shippers resulting from loss or damage caused to their goods by the execution of the controlling party's instructions. Following from this suggestion, a view was expressed that it might be necessary to include a reference in draft paragraph 1 allowing the carrier to decline execution of the instructions if such execution would cause damage to the goods of other shippers, but it was thought that a more appropriate solution would be to clarify that in draft paragraph 57 (2), the carrier had the right to be reimbursed for any damages that it was required to pay to third parties.

Conclusions reached by the Working Group regarding draft paragraph 57 (2):

51. After discussion, the Working Group decided that:

- Reference to parties other than the controlling party and the carrier should be deleted from draft paragraph 2;
- Care must be taken in the modification of the text that the right of the carrier to claim reimbursement for damages paid to other shippers as a result of the execution of the instructions was retained; and

- The Secretariat would be requested to consider whether it was necessary to include any reference to possible damage caused to the goods of other shippers in draft paragraph 57 (1).

Draft paragraph 57 (3)

52. There was general agreement in the Working Group that the first sentence of draft paragraph 57 (3) should be deleted, but that the text in square brackets should be retained and the brackets removed. It was noted that the purpose of deleting the first sentence was to avoid duplication, but it was suggested that the content of the first sentence regarding the amount of security that must be provided by the controlling party should be maintained.

53. Some concerns were expressed regarding the intention of draft paragraph 57 (3)(b), since it was thought that by requesting the security, the carrier was indicating its intention to carry out the instruction, and that the carrier was not entitled to refuse to execute instructions based on expense pursuant to Variant B of draft paragraph 57 (1). The suggestion was therefore made to delete draft paragraph 57 (3)(b). However, there was support for the opposing view that the principle in draft paragraph 57 (3)(b) was still useful in light of the ability of the carrier to decline to execute instructions that interfered with its normal operations, although the drafting in this regard could be clarified. An additional clarification was suggested of the implied right of the carrier to refuse execution of the instructions if security was not provided by the controlling party.

Conclusions reached by the Working Group regarding draft paragraph 57 (3):

54. After discussion, the Working Group decided that the Secretariat should be requested to modify the text such that:

- The text appearing in square brackets should be retained and the brackets deleted;
- The first sentence of the draft paragraph should be deleted but the principle regarding the amount of security that must be provided should be maintained in a revised draft; and
- The text of subparagraph (b) should be clarified or replaced to indicate that the carrier may refuse to execute the instruction if no security is provided.

Draft paragraph 57 (4)

55. The Working Group was reminded that the nature of the liability of the carrier for non-execution of the instructions of the controlling party and any limitation on that liability, as well as questions of burden of proof, were intended to be discussed in relation to draft paragraph 57 (4). The view was expressed that the text of draft paragraph 57 (4) proposed in paragraph 20 of A/CN.9/WG.III/WP.50/Rev.1 was an improvement on the existing text in the draft convention, since it clarified the basis of liability and the limitation on that liability.

56. By way of further clarification, the view was expressed that physical loss or damage that arose in connection with the carrier's failure to comply with instructions would be covered by the general provisions of draft article 17 of the draft convention. To the extent that losses were physical, it was thought that draft paragraph 57 (4) could be deleted in deference to the general liability rules. However, it was noted that such losses were more likely to be economic losses rather than physical ones, such as, for example, losses resulting from a failure to unload the goods at a scheduled or programmed port of call

entailing a subsequent sale at a reduced profit. It was indicated that the text of draft paragraph 57 (4) did not adequately deal with the possibility of economic loss, and that deletion of the text to rely on the general liability provisions would not solve the problem either. There was general agreement in the Working Group that in light of the very complicated provisions that would be required to cover economic loss, the economic loss in this regard should be left to national law. While it was thought by some that simple deletion of draft paragraph 57 (4) would subject the physical loss aspect to the general liability and limitation provisions and the economic loss aspect to national law as intended by the Working Group, there was support for the view that provisions clarifying this intention should be prepared for further consideration. In addition, it was thought that a more general provision leaving economic loss to be governed by national law might be necessary elsewhere in the draft convention, and that issue was left for future consideration by the Working Group.

57. There was some support for the view that if the issue of economic loss was left to national law, that the issue of limitation of economic loss would also have to be left to national law. The Working Group took note of this suggestion for future consideration.

Conclusions reached by the Working Group regarding draft paragraph 57 (4):

58. After discussion, the Working Group decided that:

- The current text of draft paragraph 57 (4) should be deleted; and
- The Secretariat should be requested to prepare text for the consideration of the Working Group indicating that physical losses under this provision should be covered by the general liability rules and the rules on limitation of liability, and that economic losses should be governed by national law.

Draft article 58. Deemed delivery

59. The Working Group approved the substance of draft article 58.

Draft article 59. Obligation to provide information, instructions or documents to carrier

Questions regarding scope of and need for draft article 59

60. The following questions concerning the scope of, and need for, the draft article were raised:

- (a) The controlling party might not necessarily have a vested interest in the cargo and, therefore, it might not always be the party best placed to provide the carrier with the required information;
- (b) Since the controlling party did not need to give its assent to its designation as controlling party and might even be unaware of its designation, it was not appropriate to impose on the controlling party the type of obligations provided for in the draft article;
- (c) The draft article referred not only to information, but also to “instructions or documents”, not all of which might necessarily be available to the controlling party;
- (d) The relationship between the information referred to in the draft article and the information that the shipper was already required to provide under draft paragraph 30 (a) was not clear;

(e) It might not be appropriate to request, in the second sentence of the draft article, that the shipper should provide information not obtained from the controlling party, since the shipper, at the time the need for information arose, might no longer have an interest in the carriage, for instance because the information related to instructions for unloading pursuant to special delivery requests made by the controlling party;

(f) It was not clear what might be the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier; and

(g) Only the carrier, as party to the contract of carriage, and not the performing party, should have the right to request additional information, instructions or documents.

Responses to issues regarding scope and need for draft article 59

61. In response to those questions, strong support was expressed for the principle reflected in the draft article, as it was crucial for the carrier to be able to turn to a specific party to obtain information that became necessary after the carrier had taken the goods in its custody. Such information might be needed, for instance, with a view to carrying out instructions given under draft article 54 or as a result of supervening facts (e.g. a strike at the port of unloading or the need for special measures to preserve the goods). Furthermore, it was pointed out that:

(a) The designation of a controlling party would typically occur pursuant to the sales contract or documentary credit so that a buyer/consignee or a bank issuing a letter of credit could usually be expected to have anticipated such possibility;

(b) Even when a controlling party had not expressly accepted its designation as controlling party, or was unaware of the designation, the controlling party could normally be assumed to have an interest in preserving the goods, for instance because it had purchased them or had a security interest in them;

(c) The position of the performing party was different in the context of draft article 59 as compared with other provisions in which reference to the performing party was easily deleted as being outside of the contractual relationship, and thus the reference could be maintained to the maritime performing party; and

(d) The availability of the information, instructions or documents could be taken into account through the addition of the phrase “if available” to ease the burden on the controlling party.

Consequences of failure to provide the information sought

62. As regards the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier, the following possibilities were noted:

(a) The carrier would be excused from liability for damage to the goods or delay in their delivery that resulted from lack of the information contemplated by the draft article. This would flow from the general liability regime under article 17 and would not require special rules under draft article 59;

(b) The carrier might have the right to refuse to carry out instructions given under draft article 54 unless and until the controlling party or the shipper provided the information it sought pursuant to draft article 59. This consequence might be implied by the requirement, in draft article 57, paragraph 1, Variant B, (b), that instructions given to the carrier could be reasonably executed, but it was suggested that the Working Group might wish to consider further clarification in due course.

Prevailing view and additional drafting suggestions

63. The prevailing view that emerged within the Working Group was that the draft article provided a useful rule to address a concrete problem and that its substance should be retained. However, certain questions remained regarding the possible overlap of this provision with the draft paragraph 30 (a) shipper's obligation to provide information, and the appropriateness of making this ability to access information an obligation of the controlling party. As a possible solution to these problems, it was suggested that the title of the draft article could be adjusted to reflect its scope with respect to the provision of additional information, and the text of the provision could be redrafted to provide for slightly different obligations on the controlling party that was active, or exercised its right of control, and the controlling party that did not exercise its right of control.

Conclusions reached by the Working Group regarding draft article 59:

64. The Working Group decided that:

- The substance of draft article 59 should be retained;
- The title of the draft article should be examined for adjustment to differentiate it from that of draft article 30 by referring to "additional" information, instructions or documents and by removing the reference to "obligations";
- The reference to the performing party should be retained and examined with a view to determining if it was necessary with respect to this provision; and
- The Secretariat should be requested to reformulate the draft article, taking into account the above deliberations, for consideration by the Working Group at a later stage.

Draft article 60. Variation by agreement*Expansion of the list of non-mandatory provisions subject to variation*

65. While the Working Group was generally of the view that the content of draft article 60 was acceptable, the view was expressed that the list of provisions that were capable of variation by agreement should be expanded, particularly in light of the commercial nature of the draft convention, and unless there was a requirement for mandatory provisions to protect certain parties. Particular provisions mentioned for possible inclusion within draft article 60 were said to be draft paragraph 56 (1)(a), draft paragraph 56 (1)(d) and draft article 59. However, there was support for the view that a cautious approach should be taken to adding to the list of non-mandatory provisions in draft article 60, since there were relevant parties that needed protection in regard to these provisions, such as the consignee or a later holder of a bill of lading. It was generally agreed that the possibility of adding provisions to draft article 60 should be examined carefully on an article by article basis.

Possibility of overlap with draft paragraph 55 (2)

66. The attention of the Working Group was drawn to the possibility that the second sentence of draft article 60 requiring that any variation by agreement be stated or incorporated in the contract particulars might overlap slightly with draft paragraph 55 (2) requiring the notation of variations to the contract of carriage on the transport document or the electronic transport record.

Conclusions reached by the Working Group regarding draft article 60:

67. After discussion, the Working Group decided that:

- The possibility of adding provisions to the list of non-mandatory provisions in draft article 60 would be undertaken on an article by article basis; and
- The Secretariat would examine the possibility of any overlap with draft paragraph 55 (2) in its preparation of a text.

Reconsideration of draft paragraph 56 (1)(d) and proposed compromise approach

68. Having reached the conclusion of its consideration of Chapter 11 on Right of Control, the Working Group reverted as agreed to its consideration of draft paragraph 56 (1)(d) concerning the termination of the right of control or its transfer to the consignee (see para. 36 above). With particular emphasis on the strongly held opposing views expressed in this regard in the Working Group, the following compromise approach to draft paragraph 56 (1)(d) was suggested:

(a) The duration of the right of control should be extended slightly from the text in A/CN.9/WG.III/WP.56 to terminate upon actual delivery of the goods, in keeping with the proposed text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1;

(b) Draft article 56 (1)(d) should be added to the list of non-mandatory provisions in draft article 60, enabling parties to agree to shorten the duration of the right of control; and

(c) Variant B of draft paragraph 57 (1)(c) should be amended slightly to include the delivery process in the provision allowing for non-execution of instructions by the carrier where there was interference with its normal operations.

69. By way of explanation to questions raised regarding the intended operation of this compromise approach, it was clarified that the default rule for the termination of the right of control upon actual delivery would be expressed in draft paragraph 56 (1)(d), but that the duration of the right of control could be varied by the agreement of the parties through the use of draft article 60. It was further explained that the reference to the delivery process in Variant B of draft paragraph 57 (1)(c) was intended as an additional protection against unduly burdening the carrier by allowing it to decline to execute instructions received from the controlling party once the carrier had begun the delivery process.

70. While some delegations expressed a preference to see the text of the compromise prior to endorsing it, there was strong support for the compromise approach in general. The view was reiterated by some that the duration of the right of control was already set out in the chapeau of draft article 54, and that a text in draft paragraph 56 (1)(d) setting out when the right of control terminated was not necessary. However, it was observed that including the provision as a non-mandatory one in draft article 60 would require that there be specific text setting out the termination of the right of control. Other views were expressed that specific reference in Variant B of draft paragraph 57 (1)(c) to the delivery process was unnecessary since the concept was already included in the normal operations of the carrier. As a drafting matter, it was observed that in preparing the required drafting modifications to implement the proposed compromise, the question of possible overlap regarding the notation of variations to the contract of carriage on the transport document or electronic transport record resulting from the interplay of draft paragraph 55 (2) and draft article 60 would also have to be considered.

Conclusions reached by the Working Group regarding draft paragraph 56 (1)(d):

71. After discussion, the Working Group decided that:

- The Secretariat should be requested to draft text implementing the compromise approach set out in paragraph 68 above, with due care to the specific drafting issues raised in that connection.

Substantive topics considered for inclusion in the draft convention

72. Prior to continuing with the next topic scheduled for consideration by the Working Group (see A/CN.9/WG.III/WP.60, para. 26), a proposal was made regarding a reconsideration of the substantive topics currently being considered for inclusion in the draft convention. It was observed that pursuant to the most recent time frame set out by the Commission for the completion of the work of Working Group III,² there were certain time pressures on the Working Group to complete its work on the draft convention. While it was observed that all of the substantive topics currently included in the draft convention were considered important and worthy of efforts toward achieving international legal harmonization, some were more contentious than others and required more detailed treatment, and were thus possibly not well-suited for inclusion in the draft convention. It was further suggested that while these topics were important, they did not belong in the same group as the core subjects of the draft convention, which included provisions such as those with respect to the liability regime and to electronic commerce. It was thought that the more difficult and complex issues, for example, the right of retention of the goods, liens, the position of third parties to the contract of carriage, transfer of liabilities and freight, might better be considered at greater length and for possible inclusion in another type of international instrument, such as a model law.

73. The advantages of placing some of the more difficult issues in the draft convention on an agenda for future and separate work outside of the draft convention were said to be several:

- (a) The text of the draft convention would be simplified and streamlined;
- (b) The text of the draft convention could be capable of broader acceptance;
- (c) The more complicated legal issues could be treated more suitably under a more flexible international legal instrument such as a model law;
- (d) Additional time could be devoted to the more difficult issues; and
- (e) The streamlined draft convention might be more rapidly completed.

74. In light of this general concern, it was proposed that the Working Group could consider recommending to the Commission placing the treatment of these more difficult issues on its agenda for consideration as future work. It was said that if the Working Group approved of this approach, it could request the assistance of the Secretariat in making that recommendation to the Commission.

75. This suggestion received strong support in the Working Group. While it was agreed that any removal of substantive topics from the current draft convention for placement on the list of more complicated topics for future work would require consultations, the view was expressed that the Working Group could begin immediately to draw up an open and preliminary list of such topics.

² Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 182.

Conclusions reached by the Working Group:

76. After discussion, the Working Group agreed that certain of the more complicated and difficult issues that were currently treated in the draft convention should be removed from consideration for the time being, and placed on a list for future treatment, possibly by means of a model law or other more flexible international legal instrument.

Transfer of rights—Chapter 12

77. In light of its decision to defer the consideration of some of the more complex issues until a future date, the Working Group heard that chapter 12 on transfer of rights was one of the topics that should be so deferred. It was further suggested that only draft article 62 should fall into the category of issues that should be deferred for future discussion, and that draft articles 61 and 63 should be considered by the Working Group during its current session. A contrary view was expressed that chapter 12 should be deleted in its entirety from the draft convention. While it was thought to be premature to delete the chapter, there was support in the Working Group for the view that consideration of the entire chapter should be deferred until a future date.

Conclusions reached by the Working Group:

78. After discussion, the Working Group agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations.

Delivery to the consignee—Chapter 10 (*continued*)

79. The Working Group was reminded that its most recent consideration of draft chapter 10 on delivery to the consignee had commenced at its sixteenth session (see A/CN.9/591, paras. 188 to 239) but that it had been interrupted due to time constraints until the current session. It was also recalled that the most recent complete consideration of the topic by the Working Group took place during its eleventh session (see A/CN.9/526, paras. 62 to 99), and that a document containing information relating to delivery had been presented by the delegation of the Netherlands at the Working Group's sixteenth session (A/CN.9/WG.III/WP.57).

Draft article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued*Draft paragraph 49 (c)*

80. The Working Group resumed its deliberations on draft chapter 10 commencing with draft paragraph 49 (c), continuing on from its deliberations at its sixteenth session (see A/CN.9/591, para. 239). It was indicated that draft paragraph 49 (c) aimed at addressing a specific systemic problem faced by carriers where they were pressured to deliver the goods to the consignee without presentation of the negotiable transport document or negotiable electronic transport record. It was noted that this practice was fairly common in certain trades, not only in those cases when a negotiable transport document was not available for presentation due to delays, for instance, in the credit system, but also in cases where the nature of the bill of lading was so misused that no bill of lading could be available in the port of discharge, as was common in the oil trade. In such cases, draft paragraph 49 (c) was intended to provide comfort to the carrier by discharging it from its obligation to deliver the goods to the holder.

81. Some concerns were raised regarding the operation of draft paragraph 49 (c), since it would run counter to the long-standing principle of requiring the presentation of the bill of lading to obtain receipt of the goods. A further problem was said to be that since the bill of lading would continue to be in circulation, a holder could later appear and ask for delivery of the goods. Some concern was also expressed regarding the consistency of the regime in the draft convention, since under the draft chapter on right of control, the controlling party under the draft convention was required to produce the negotiable document to the carrier in order to exercise its right of control and give instructions to the carrier, so that the carrier would always be aware that the controlling party was also the holder of the negotiable document.

82. In response, it was pointed out that the regime was intended to prevent abuses of the bill of lading system, for example, those relating to the deliberate non-production of documents of title in order to use them as promissory notes without a maturity date, and that the controlling party's production of the bill of lading in order to provide the instructions to the carrier did not necessarily entail surrender of the bill of lading to obtain delivery of the goods. In response to a query regarding whether the FOB seller would be adequately protected, it was said that in the case of an FOB sale, the FOB seller would be protected, because it would also be the holder of the negotiable document or electronic transport record, and therefore it would also be the controlling party that would give delivery instructions to the carrier.

83. There was some support in the Working Group for the deletion of draft paragraph 49 (c). However, the existence of the problem of abuse of the bill of lading system was noted in the Working Group, and there was approval for efforts to find a solution for that problem that would provide some comfort to the carrier. While it was acknowledged that full consideration of draft paragraph 49 (c) would depend upon the Working Group's consideration of the connected provisions in draft paragraphs (d) and (e), support was expressed for draft paragraph 49 (c).

Conclusions reached by the Working Group regarding draft paragraph 49 (c):

84. After discussion, the Working Group decided that:

- The text of draft paragraph 49 (c) as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group's future deliberations.

Variant A, comprising draft paragraph 49 (d); and Variant B, comprising draft paragraphs 49 (d) and (e)

85. It was indicated that both variants of draft paragraph 49 (d) were meant to indicate that the holder of the negotiable transport document or negotiable electronic transport record did not retain the right to delivery of the goods after delivery had actually taken place. It was suggested that clarification in the draft might be sought on this point.

86. The view was expressed that Variants A and B of draft paragraph 49 (d) differed considerably, as the text in square brackets in Variant A excluded those cases of delivery of goods without presentation of documents foreseen under draft paragraph 49 (c) from its scope of application, while Variant B explicitly referred to such cases. Therefore, a preference was expressed for Variant B, as it provided additional safeguards for those cases falling under draft paragraph 49 (c). A concern was raised that Variant B could be too narrow, since it might be interpreted to apply only to delivery pursuant to draft paragraph 49 (c), and could thus limit the protection of holders in good faith not included in the scope of draft paragraph 49 (c).

87. Reference was also made to protection of the holder in those cases in which multiple originals of bills of lading were issued. It was noted that in such cases, commercial practice entitled the holder of one of the originals to delivery of the goods, and that this was the situation covered by draft paragraph 49 (a). It was suggested that a requirement that the bill of lading should state on its face the number of multiple originals issued should be inserted in draft paragraph 49 (d) or, alternatively, in draft chapter 9 on transport documents and electronic transport records of the draft convention, as suggested in paragraph 14 of A/CN.9/WG.III/WP.62, and it was suggested that consideration of the topic be deferred until the consideration of chapter 9 (see paras. 227, 230 and 233 below).

88. In response to a query, it was indicated that the reference to “contractual or other arrangement other than the contract of carriage” in draft article 49 (d) was meant to provide protection to all good faith holders of negotiable documents. It was further specified that, in the case of banks under letter of credit transactions, the protection under draft paragraph 49 (d) would extend not only to those cases when the bank had already confirmed the letter and was therefore obliged to accept the negotiable document, but also to those cases when the intermediary bank had only been nominated and therefore did not yet have such an obligation.

Conclusions reached by the Working Group regarding draft paragraph 49 (d):

89. After discussion, the Working Group decided that:

- The text of draft paragraphs 49 (d) and (e), i.e. Variant B, as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group’s future deliberations; and that
- The Secretariat should consider drafting modification of Variant B, taking into account the above discussion.

Draft article 50. Failure to give adequate instructions

90. It was indicated that draft article 50 was meant to provide the carrier with a safeguard for those cases, not rare in practice, when it could not perform the delivery of the goods due to inadequate instructions from the controlling party or the shipper under draft articles 48 and 49, or to an inability to locate the controlling party or the shipper. It was suggested that the qualification “adequate” to the word “instructions” could give rise to problems of interpretation and that it could possibly be clarified, for example, by specifying that the instructions should be sufficient to allow for delivery of the goods.

91. It was suggested that the reference to draft articles 52 and 53 in draft article 50 should be deleted, while the reference to draft article 51 should be retained since only that provision set out the rights that the carrier could exercise. In response, the view was expressed that draft articles 52 and 53 were relevant for the operation of draft article 50. In particular, it was explained that draft article 52 was meant to provide for those cases in which the transport document incorporated an obligation to give notice of arrival at destination, possibly to a party different from the controlling party, and such notice had not been given.

92. It was suggested that reference to the consignee should be added in the draft provision since after the arrival of the goods at the destination the identity of the controlling party and of the consignee might not coincide.

Conclusions reached by the Working Group regarding draft article 50:

93. After discussion, the Working Group decided that:

- The Secretariat should consider drafting modifications of draft article 50 based on the concerns raised in the above discussion.

Draft article 51. When goods are undeliverable

94. It was indicated that draft article 51 was intended to provide rights and remedies to the carrier in those cases in which the carrier had tried to deliver goods but was unable to do so, either through the failure of the consignee to accept delivery or because of an inability to deliver the goods to the consignee due to applicable law or regulation.

95. It was suggested that the text of draft article 51 should be expressly linked to draft article 50, so as to avoid the impression that draft article 50 provided the rights indicated to the carrier independently of any failure on the part of the controlling party or the shipper to provide adequate instructions for delivery. Some concerns were raised regarding the relationship between several of the provisions in the chapter on delivery, and there was support for the view that the relationship between draft articles 46, 50, 51 and 53, in particular, should be clarified. The view was also expressed that adjusting the order of certain provisions, such as moving the draft article 52 notice provision in front of draft article 51, or possibly merging it with portions of draft article 51, could assist in clarifying the intended operation of the provisions.

Draft paragraph 51 (1)

96. It was observed with respect to draft paragraph 51 (1)(a) that two types of contractual arrangements could be made in connection with the custody of undeliverable goods: a successive contract to store the goods or an agreement by the shipper and carrier not to apply the draft article 51 remedies and to make other arrangements. The view was expressed that the text in square brackets in draft paragraph 51 (1)(a) was not necessary for the creation of a successive contract and that it should be deleted. Further, it was proposed that the other arrangements entered into by the shipper and the carrier could be accommodated by the insertion at an appropriate place in the provision of the phrase “unless otherwise agreed in the contract of carriage”. There was support for these proposals, and it was observed that care should be taken with the placement of the phrase “unless otherwise agreed in the contract of carriage” in draft paragraph 51 (1), so as not to create unintended results, such as the modification of draft paragraph 51 (2) through its reference to draft paragraph 51 (1).

Draft paragraph 51 (2)

97. It was suggested that in order to further clarify draft paragraph 51 (2)(b), the reference “to act otherwise in respect of the goods” should be qualified to include destruction of goods. There was support in the Working Group for this modification, since often carriers needed to act quickly to destroy goods left in their custody when those goods were perishable or had become dangerous. A question was raised regarding whether this right to destroy the goods was intended to be conditional or unconditional. In addition, it was suggested that a provision on the destruction of the goods should be made subject to the supervision of the local authorities, in similar fashion to text regarding the sale of the goods pursuant to draft paragraph 51 (2)(c).

98. Concern was raised regarding the phrase “in the opinion of the carrier” in draft paragraph 51 (2)(b), particularly if the paragraph was intended to include the destruction of

goods as suggested. It was thought that this phrase should be deleted since it made the test too subjective by relying on the opinion of the carrier, but that the remainder of the phrase “as the circumstances reasonably may require” was appropriate and should be kept. While some concern was expressed that deletion of the phrase “in the opinion of the carrier” could be too restrictive to the carrier in situations where it was necessary to make quick decisions, it was thought that the remaining reasonableness test was sufficiently flexible to be properly applied in such circumstances. A further proposal was made to apply the “reasonable circumstances” condition to paragraphs (a) and (c) of draft paragraph 51 (2) as well as to paragraph (b). The view was expressed that in determining the appropriate test for this provision, the context should be kept in mind, in that it did not concern disposal of the goods during the contract of carriage, but rather it gave the carrier the rights necessary to deal with the goods left in its custody after it had completed its obligations under the contract of carriage.

Conclusions reached by the Working Group regarding draft paragraphs 51 (1) and (2):

99. After discussion, the Working Group decided that:

- The text in square brackets in draft paragraph 51 (1)(a) should be deleted;
- The phrase “unless otherwise agreed in the contract of carriage” should be inserted at a suitable place into the text of draft paragraph 51 (1)(a);
- A provision on the destruction of goods should be added to draft paragraph 51 (2)(b), and consideration should be given to requiring such disposal to be in the presence of local authorities;
- The phrase “in the opinion of the carrier” in draft paragraph 51 (2)(b) should be deleted;
- The title of the draft article should be adjusted to better reflect its content;
- The order of the provisions in the draft chapter on delivery and their interrelationship should be examined for possible clarification and adjustment, particularly in the case of the placement of draft article 52;
- The Secretariat should be requested to consider and prepare the necessary modifications to the text, in light of the above discussion.

Draft paragraph 51 (3)

100. Some concern was expressed with respect to the second portion of the text in draft paragraph 51 (3), since it was thought that the phrase “subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier” could be interpreted to include amounts owed to the carrier with respect to other shipments of goods. There was support in the Working Group for the view that that was not the intention of the provision, and it was suggested that moving the phrase “in respect of the goods” to the end of the sentence could clarify the text. A question was raised regarding this clarification, and it was suggested that the carrier should have a right to deduct any amounts owed to it from previous carriages from the proceeds of the sale. However, this approach was not accepted, and there was support for the view that the provision should cover those amounts for which the carrier would have a lien against the particular goods in question, and where the debt was unrelated to the goods, the draft convention should make no provision, thereby leaving the matter of set-off to national law.

Conclusions reached by the Working Group regarding draft paragraph 51 (3):

101. After discussion, the Working Group decided that:

- There was support for this provision and the Secretariat should be requested to consider modifications to the text to achieve clarification, as indicated in the above discussion; and
- Consideration could be given to the use of the term “unclaimed goods” rather than “undeliverable goods”.

Draft article 52. Notice of arrival at destination*Draft article 52*

102. The view was expressed that the current text of the draft article was too restrictive in that it only dealt with notice of arrival of the goods at destination. In practice, however, carriers were often faced with the urgent need for taking protective or other measures in respect of cargo that had not arrived at destination, for instance as a result of a casualty. The draft article, it was suggested, should be widened to cover those situations as well.

103. In response, it was stated that the draft article was intended to be limited to situations where the goods had arrived at destination. The carrier’s general duty of care of the cargo, for example, was stated in draft article 14, while the carrier’s remedies in respect of goods that might become a danger to cargo were already dealt with in draft article 15 and the carrier’s right to obtain instructions from the controlling party was covered by draft article 59. Taken together, those provisions already afforded the carrier the authority needed to act under extraordinary circumstances. It was nevertheless recognized that the interplay between those various provisions might need to be more clearly expressed in a future version of the draft convention.

104. Questions were raised as to whether the carrier should give a specific notice to the appropriate person that it would exercise any of the rights mentioned in draft paragraph 51 (2). In response, it was noted that the purpose of draft article 52 was merely to make the exercise of any rights by the carrier under draft paragraph 51 (2), conditional upon giving reasonable notice to the appropriate person of the arrival of the goods at destination. That is, a carrier could not, for instance, cause unclaimed goods to be sold if it had not notified the appropriate person of the arrival of the goods at destination. Nothing in the draft article required a second notice with specific reference to the measures envisaged by the carrier in respect of the unclaimed goods as a condition for the operation of draft paragraph 51 (2).

105. It was generally agreed that the carrier should not avail itself of draft paragraph 51 (2), if it had failed to give notice of arrival of the goods to the appropriate person. The suggestion was made, in that connection, that the draft convention should expressly require, as a general obligation of the carrier, to make such notice, possibly in a provision to be placed earlier in the text. The Working Group was however reminded of its earlier deliberations in respect of draft article 46, when it had been decided that no general requirement to provide notice of arrival of goods should be made by the draft convention (see A/CN.9/591, para. 214). In addition, it was suggested that the provision should be clarified regarding which order the parties named therein were to be notified.

Conclusions reached by the Working Group regarding draft article 52:

106. After discussion, the Working Group decided that:

- The substance of the draft article should be retained, but it should be clarified in which order the parties named therein were to be notified; and
- The appropriate placement of the draft article might need to be reconsidered.

Draft article 53. Carrier's liability for undeliverable goods*Possible consolidation with draft article 46*

107. It was noted that both draft article 53 and the second sentence of draft article 46 referred to the liability of the carrier in cases of goods left in the custody of the carrier after their arrival at destination. It was further indicated that, even if the scope of draft article 51, to which draft article 53 referred, was broader than that of draft article 46, the liability of the carrier in draft articles 46 and 53 was of a similar nature. It was therefore proposed that draft article 53 and the second sentence of draft article 46 could be consolidated into a single provision. There was support for this proposal in the Working Group, although it was noted that the liability for the goods would shift at slightly different times pursuant to draft article 46 and to draft article 53.

Standard of liability

108. A large number of delegations expressed dissatisfaction with the low standard of liability of the carrier as set out in draft article 53, which required intentional or reckless behaviour to hold the carrier liable for loss of undeliverable goods. At the same time, it was generally felt that the standard of liability should not be as high as that under draft article 17 of the draft convention, on the general liability of the carrier for loss of or damage to the goods during its period of responsibility, since under draft article 53, the carrier was left with the custody of the goods due to the default of the consignee in failing to accept delivery. There was strong support in the Working Group for the view that the standard of liability of the carrier should be somewhere between that of draft article 17 and that of the current text in draft article 53.

109. A number of different views were expressed regarding how the standard of liability of the carrier in the case of a consolidated draft article 46 and draft article 53 should be articulated in the draft convention in order to be interpreted in a similar fashion in all legal systems. Specific proposals in this regard were made as follows:

- (a) Gross negligence or "faute grave"; but this concept was thought to be unknown in some jurisdictions;
- (b) Reasonable care in the circumstances; but that standard was considered by some to be reminiscent of the standard of due diligence, which was thought to be too high, and it was said that this standard coupled with a fault basis would increase the liability of the carrier in some jurisdictions to a level on a par with draft article 17;
- (c) Handling the goods as though they were one's own, or taking care of the goods without gross negligence, although this standard was not widely known; and
- (d) Adopting the standard of liability of draft article 17 based on fault, but with an ordinary rather than a reversed burden of proof.

110. While some support was expressed for each of the possibilities listed in the paragraph above, it was thought that no single suggestion had emerged in the course of the

discussion which would be capable of a standard interpretation in various legal systems. However, it was felt that there was sufficient agreement in the Working Group on the standard of liability for the carrier in these circumstances that draft text could be prepared for the consideration of the Working Group.

111. The view was also expressed that a different standard of care for the goods might be required depending upon whether the carrier had kept the undeliverable goods in its custody or had given those goods over to the custody of a third party. It was suggested that, in the first case, the carrier should continue to be liable subject to a stricter standard, while in the second case the carrier should be liable only for fault in the choice of the custodian. However, some doubts were expressed whether there should be any distinction between these two situations, since the carrier's responsibility for the care of the goods was probably not capable of delegation to another party.

Burden of proof

112. The issue of the burden of proof of the loss of or damage to the goods under the consolidated article was also considered, and it was suggested that the consignee should bear the burden of proof given the carrier's position of being left in the custody of the goods due to the consignee's failure to accept delivery at the conclusion of the contract of carriage. There was support for that view.

Conclusions reached by the Working Group regarding draft article 53:

113. After discussion, the Working Group decided that:

- The text of draft article 53 should be consolidated with the second sentence of draft article 46;
- The standard of care should be higher than that currently expressed in draft article 53, but lower than that expressed in draft article 17, and should be capable of similar interpretation in all legal systems; and
- The Secretariat should prepare a new draft of the draft provision based on the above discussions, as a basis for the Working Group's future deliberations.

Right of retention

114. The Working Group was reminded that the introduction of a provision regulating the right of the carrier to retain the cargo in certain cases had been suggested at its sixteenth session during the discussion of chapter 10 of the draft convention on delivery to the consignee (see A/CN.9/591, paras. 221 and 222). It was further recalled that a proposal on the carrier's right of retention of the goods had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.63).

115. It was indicated that, while substantive provisions on the right of retention could be considered by the Working Group as part of the more complete set of issues to be set aside for possible future work, the carrier's absolute obligation to deliver the goods pursuant to draft article 13 of the draft convention could be interpreted as preventing the application by the carrier of a right of retention arising from other applicable law. It was therefore proposed that a provision specifying the non-interference of the draft convention with the right of retention in other applicable law should be inserted in the draft convention. It was further suggested that such a new provision should be drafted along the lines of the text contained in paragraph 14 of A/CN.9/WG.III/WP.63, bearing in mind the similar approach taken in draft article 87 of the draft convention, relating to provisions on general average.

There was support in the Working Group for this proposal, including a suggestion that the Secretariat should consider the most appropriate location for the new provision, as well as make drafting adjustments to the text to ensure consistency with the existing provisions of the draft convention, with particular regard to the reference to the maritime performing party in paragraph 14 of A/CN.9/WG.III/WP.63.

116. However, caution was urged against excessive recourse to provisions clarifying the intention of the draft convention to preserve applicable law in relation to matters not specifically regulated, since it was thought that a failure to identify all such instances in the draft convention could lead to the interpretation that in the instances not specifically mentioned, the draft convention did intend to interfere with the applicable law.

Conclusions reached by the Working Group:

117. After discussion, the Working Group decided that:

- The Secretariat should draft a new provision on right of retention based on the above discussions, and, in particular, on the text contained in paragraph 14 of A/CN.9/WG.III/WP.63, for appropriate placement in the draft convention.

Liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with

118. The Working Group was informed that, in connection with informal consultations that took place in connection with the topic of delivery to the consignee, the question was raised whether the draft convention should contain a general provision on the liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with in the draft convention (see A/CN.9/WG.III/WP.57, paras. 49 to 52).

119. It was suggested that such general provision might be useful to address certain instances such as, for example, cases of misdelivery. However, it was also indicated that, while the adoption of such a provision might in principle have some merit, its drafting might prove to be excessively complex and time-consuming, and that the final text could add to the overall burden of the draft convention. It was further suggested that the matter should be left to domestic law, and that certain specific matters, such as, for instance, those relating to limitation of liability for misdelivery, might be better addressed in the chapter on limitation of liability in the draft convention.

Conclusions reached by the Working Group:

120. After discussion, the Working Group decided that:

- A general provision on the liability of the carrier and the shipper not expressly dealt with in the draft convention should not be inserted in the draft convention.

Scope of application, freedom of contract and related provisions

121. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 81 to 104, and A/CN.9/576, paras. 10 to 109). It was also recalled that proposals concerning the scope of application, freedom of contract and related provisions had been presented for the consideration of the Working Group at its current session. (A/CN.9/WG.III/WP.61, A/CN.9/WG.III/WP.65, and A/CN.9/WG.III/WP.70).

122. The Working Group agreed with the suggestion that it should consider scope of application, freedom of contract and related provisions on the basis of the proposed revised

text contained in the documents presented (in particular, A/CN.9/WG.III/WP.61) following what were thought to be the key outstanding issues:

- (a) Proposed deletion of draft paragraph 8 (1)(c) of the draft convention;
- (b) New text proposed to clarify draft article 9 which articulated the scope of application of the draft convention;
- (c) New proposed text for draft article 10, on the protection of third parties to contracts of carriage outside of the scope of application of the draft convention, and in particular, whether it was acceptable to define them without reference to transport documents or electronic transport records;
- (d) New proposed draft paragraph 20 (5), to further clarify scope of application with respect to maritime performing parties;
- (e) Further consideration of draft paragraph 94 (2) on the mandatory application of certain provisions of the draft convention with respect to shippers and other parties;
- (f) Modified text of draft paragraph 95 (1), on the conditions for the exercise of freedom of contract in the case of volume contracts;
- (g) Further consideration of draft paragraph 95 (4) mandatory provisions of the draft convention from which there could be no derogation;
- (h) Modified text of draft paragraph 95 (5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract;
- (i) The appropriateness of the text of draft paragraph 95 (5)(c) which placed the burden of proof on the party claiming the benefit of the volume contract; and
- (j) Any additional issues regarding the scope of application and freedom of contract that were of concern to the Working Group

Draft article 8. General scope of application

123. The Working Group considered the text of draft article 8 as found in the annexes to A/CN.9/WG.III/WP.56, and in light of the adjustments to that text as proposed in paragraphs 19 to 22 of A/CN.9/WG.III/WP.61. There was support in the Working Group for the proposal that the brackets around the phrases “port of loading” and “port of discharge” in draft paragraphs 8 (1)(a) and (b) should be removed and the text retained in order to be consistent with the adoption of those connecting factors as a basis for jurisdiction in claims against a carrier (see A/CN.9/WG.III/WP.61, para. 21). Concern was expressed regarding the proposed deletion of the phrases with respect to the internationality of the sea leg currently found in square brackets in the chapeau of draft paragraph 8 (1), and their suggested replacement with an appropriate explanatory note to the draft convention.

Draft paragraph 8 (1)(c). Contractual incorporation of the draft convention or the governing law

124. The Working Group was reminded that it had last considered draft paragraph 8 (1)(c) at its fifteenth session (A/CN.9/576, para. 61), at which time the Working Group had not reached a decision concerning whether to delete or to retain draft paragraph 8 (1)(c). The Working Group heard that those issues were further explored in document A/CN.9/WG.III/WP.65, which was intended to be of assistance to the Working Group in making a decision in this regard. It was recalled that the text of draft paragraph 8 (1)(c) had

been taken from article 10 (c) of the Hague-Visby Rules, which had been inserted therein by the Visby Amendment in order to expand the rather limited geographical scope of application of the Hague Rules.

125. The view was expressed that the current broad scope of application of the draft convention did not require a provision such as draft paragraph 8 (1)(c) to further broaden it, particularly when the problems that such an inclusion could create might outweigh the benefits of the slightly expanded scope of application. Such problems were thought to include:

(a) Perpetuating the differences in the interpretation of the text that have arisen with respect to the Hague-Visby Rules, particularly regarding whether the provision was intended as a choice of law rule, or whether it simply referred to the substantive incorporation of the provisions of the draft convention by the parties to the contract of carriage;

(b) Creating a possible conflict in regard to the many procedural rules in the draft convention's chapters on jurisdiction and arbitration, which would normally be governed by the *lex fori* rather than by the law of the State chosen in the contract of carriage;

(c) The maritime performing party could be in the questionable position of being subject to the draft convention even though it may have performed its duties during carriage between non-contracting States;

(d) Certain countries had experienced difficulties at the constitutional level as a result of the rule in issue, since parties could use it as an opportunity to avoid having a contract of carriage be governed by the mandatory law or public order rules of the contracting State; and

(e) The law giving effect to the draft convention under draft paragraph 8 (1)(c) could differ from the provisions of the draft convention, thus creating further potential conflicts.

126. In addition to the potential creation of the problems cited above through the insertion of draft paragraph 8 (1)(c), it was suggested that its deletion would not prevent parties from incorporating the draft convention into the terms of their contract of carriage, subject to the limits of applicable law. In view of these factors, there was support in the Working Group for the deletion of draft paragraph 8 (1)(c).

127. On the other hand, some support was also expressed for the retention of draft paragraph 8 (1)(c). In addition to allowing for a slightly broader scope of application of the draft convention, it was suggested that failure to include the provision could result in the somewhat complicated situation for the carrier where a single voyage with ports of call in different contracting and non-contracting States could result in subjecting only some of the cargo on board to coverage by the draft convention. Further advantages of retaining draft paragraph 8 (1)(c) were said to be greater clarity that the parties could apply the draft convention by virtue of a choice of law, and further, that in those jurisdictions that had a court of cassation, the application of the draft convention by virtue of choice of law would enable it to review the case under the draft convention as a matter of law.

Conclusions reached by the Working Group regarding draft article 8:

128. After discussion, the Working Group decided that:

- The brackets around the words “port of loading” and “port of discharge” in draft paragraphs 8 (1)(a) and (b) should be removed and the text retained; and
- Draft paragraph 8 (1)(c) should be deleted from the text of the draft convention.

Draft article 9. Specific exclusions and inclusions

129. The Working Group was reminded that two alternative texts of draft article 9 had been submitted for its consideration (see A/CN.9/WG.III/WP.61, para. 23 and A/CN.9/WG.III/WP.70, para. 6). It was indicated that the aim of the two drafting proposals was to improve the clarity of the text as set out in A/CN.9/WG.III/WP.56, while not affecting the substance of the draft provision relating to specific exclusions from and inclusions in the scope of application of the draft convention. The first proposal would retain the substantive elements of the text in a different formulation, and the second would simplify paragraph (b) by stating that draft article 10 would not apply “(b) to contracts of carriage in non-liner transportation, except where the contract of carriage is documented only by a transport document or an electronic transport record that also evidences the receipt of the goods”.

130. It was explained that the text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, aimed at simplifying the provision by stressing the difference between liner and non-liner transportation. In response to a query, it was also explained that the suggested text of draft article 9 no longer referred specifically to volume contracts, since they were included as contracts of carriage by virtue of slightly adjusted definitions (see A/CN.9/WG.III/WP.61, para. 16), and because their nature as volume contracts was relevant only in regard to the freedom of contract provisions where they were mentioned, and not in respect of the scope of application provisions. Some doubts remained about the treatment of volume contracts in the provision as set out in A/CN.9/WG.III/WP.61, and it was thought that further consideration of the issue might be necessary.

131. Appreciation was expressed for the simplified version of draft article 9 proposed in A/CN.9/WG.III/WP.70, which was preferred by some. However, it was thought that the slightly greater detail of the provision set out in A/CN.9/WG.III/WP.61 would probably result in a greater likelihood of it being more accurately interpreted.

132. Some drafting adjustments were suggested resulting from concerns regarding common commercial usage of terms, including possible clarification of the treatment of the carriage of goods in the bulk and parcel trade, since it was thought that courts in the future might refer to the characteristics of a trade rather than to the transport documents or the underlying party relationships in determining the applicability of the draft convention. Concerns were reiterated over the failure to specifically mention contracts of affreightment and similar contracts. Finally, drafting suggestions were made to clarify the intention and application of the provisions set out in paragraph 2 (b)(i) and (ii).

Conclusions reached by the Working Group regarding draft article 9:

133. After discussion, the Working Group decided that:

- The text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, should replace the text of draft article 9 of the draft convention contained in A/CN.9/WG.III/WP.56.

Draft article 10. Application to certain parties

134. It was recalled that draft article 10 of the draft convention as set out in A/CN.9/WG.III/WP.56 aimed at providing protection under the draft convention to certain third parties when a contract, such as a charterparty in non-liner transportation, was not within the scope of application of the draft convention. It was also recalled that text intended to clarify draft article 10 was contained in paragraph 36 of A/CN.9/WG.III/WP.61, and the proposal that the Working Group consider text contained in paragraph 6 of A/CN.9/WG.III/WP.70 was withdrawn.

135. A concern was raised that draft article 10 did not deal with protection of third parties under the draft convention, but rather with the extension of the scope of application of the draft convention to third parties, and to an increase in their liabilities and responsibilities. It was added that, for example, draft article 34, which was referred to in square brackets in draft article 10, imposed certain liabilities on the documentary shipper. In response, it was noted that draft article 34 also entitled the documentary shipper to the rights and immunities of the shipper under draft chapters 8 and 14. A suggestion was made for an amendment to clarify the fact that provisions binding a third party bill of lading holder to a charterparty arbitration agreement would be respected.

Documentary or non-documentary approach

136. It was indicated that two alternative approaches could be taken to establish the parties to whom the draft convention would apply by virtue of draft article 10: one alternative based on the issuance of a transport document or an electronic transport record and another alternative based on listing the third parties in draft article 10 without requiring the issuance of a transport document or an electronic transport record. It was observed that while the text in A/CN.9/WG.III/WP.56 had adopted a documentary approach, the text of draft article 10 proposed in A/CN.9/WG.III/WP.61 had adopted a non-documentary approach. It was explained that the proposal for a non-documentary approach was based on the understanding that there had been a preference expressed earlier by the Working Group for the documentary approach unless the list of third parties that would be included in draft article 10 could clearly be established.

137. It was suggested that the adoption of a non-documentary approach in draft article 10 could better serve the future needs of commercial practice by removing its reliance on a document or an electronic record, and allowing for developments in electronic commerce. It was added that the concern to maintain a documentary requirement in draft article 10 appeared to have less urgency in the draft convention in light of the fact that the document referred to could also be non-negotiable. However, some hesitation was expressed with respect to abandoning the documentary approach in draft article 10 without careful consideration of the possible consequences of such a major change in the current system.

Retention of a reference to the person referred to in article 34

138. It was noted that draft article 10 in A/CN.9/WG.III/WP.61 contained in square brackets a reference to the documentary shipper as identified in draft article 34. Some preference was expressed for the inclusion of such a reference in the list of persons in draft article 10, since that person was not a party to the contract of carriage, but would assume certain obligations of the shipper, and should have a right to the protection offered by inclusion in draft article 10. However, the contrary view was also held that the documentary shipper assumed all of the liabilities and responsibilities of the shipper pursuant to draft article 34, and including a specific reference to the documentary shipper

in draft article 10 could cause difficulties in interpretation if the documentary shipper were treated differently from the shipper.

Variant A or Variant B in draft paragraphs 10 (a) and (b)

139. It was further noted that draft paragraphs 10 (a) and (b) in A/CN.9/WG.III/WP.61 contained two sets of bracketed language: Variant A referring to the original parties of the contract of carriage, and Variant B referring to the carrier and shipper. It was suggested that reference to “carrier” and “shipper” would be preferable as these terms were defined in the draft convention, while that was not the case for “original parties”. However, the view was also expressed that the terms “carrier” and “shipper” might create interpretative difficulties in light of the terms used in commercial practice, for example, in the case of charterparties, where the party was not the shipper or the carrier, but rather an original party to the contract.

Conclusions reached by the Working Group regarding draft article 10:

140. After discussion, the Working Group decided that:

- The text of draft article 10 contained in A/CN.9/WG.III/WP.61, paragraph 36, should replace the text of draft article 10 of the draft convention contained in A/CN.9/WG.III/WP.56;
- The consideration of retaining the reference to “the person referred to in draft article 34” in draft article 10 of the draft convention should be deferred until after the consideration of draft article 34; and
- The references to the original parties of the contract of the carriage (Variant A) should be retained in draft paragraphs 10 (a) and (b) and the references to carrier and shipper (Variant B) should be deleted.

Draft article 20. Liability of maritime performing parties

141. It was recalled that the insertion of a new paragraph 20 (5), as contained in A/CN.9/WG.III/WP.61, paragraph 44, had been suggested. It was indicated that the draft provision aimed at resolving certain difficulties relating to the interaction between draft article 8, on the general scope of application of the draft convention, and draft article 20, on the liability of maritime performing parties. In particular, the insertion of the draft provision was aimed at avoiding the application of the draft convention to those maritime performing parties that performed their duties completely in non-contracting States.

142. In response to a query, it was explained that the phrases “initially received” and “finally delivered” in draft paragraph 20 (5) were in line with text adopted in draft article 77 (see A/CN.9/591, para. 41), and that the references were intended as clarifications to avoid the application of the draft convention to maritime performing parties that carried the goods from a non-contracting State to another non-contracting State but a trans-shipment occurred at a port of a contracting State during the voyage.

143. In response to another query, it was further explained that draft paragraph 20 (5) made reference to “place” where the goods were received or delivered rather than “port” because a reference to “port” could result in leaving a gap in the scope of application during the maritime performing party’s custody of the goods in situations where the maritime performing party received or delivered the goods outside of the port area at an inland location.

144. It was suggested that the text of the draft convention should be considered with a view to identifying other references to maritime performing parties, and ascertaining whether draft paragraph 20 (5) should only exclude the application of draft article 20, or whether it should refer to the entire draft convention.

Conclusions reached by the Working Group regarding draft article 20 (5):

145. After discussion, the Working Group decided that:

- The text of draft paragraph 20 (5) contained in A/CN.9/WG.III/WP.61, paragraph 44, should be inserted in the draft convention; and that
- The Secretariat was requested to consider other references to the maritime performing party in the draft convention in order to ensure the appropriateness of the reference to the non-application of “this article”.

Draft article 94 regarding the validity of certain contractual stipulations

146. The Working Group was reminded of the content of draft article 94, which dealt with the mandatory nature of the draft convention with respect to the obligations and liabilities of the carrier or maritime performing party in paragraph 1, and in paragraph 2, the obligations and liabilities of the shipper, the consignor, the consignee, the controlling party, the holder and the documentary shipper referred to in draft article 34.

A/CN.9/WG.III/WP.56 or A/CN.9/WG.III/WP.61 version

147. The Working Group first considered the general question of whether it preferred the text of draft article 94 as set out in A/CN.9/WG.III/WP.56 or that set out in A/CN.9/WG.III/WP.61. The general view held was that the substance of both versions of the text was intended to be the same, but that the drafting of the text as found in paragraph 46 of A/CN.9/WG.III/WP.61 was clearer and was therefore preferable.

Draft paragraph 94 (2)

148. The Working Group was reminded of the content of draft paragraph 94 (2), which was in square brackets in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61, and which dealt specifically with the possible mandatory nature of the draft convention with respect to the obligations and liabilities of the shipper, consignor, consignee, controlling party, holder or documentary shipper referred to in draft article 34. The issues raised in this context for consideration by the Working Group were whether or not to retain the whole of the text of draft paragraph 94 (2), and if so, whether to delete or to maintain the phrases “[or increases]” in subparagraphs (a) and (b) thereof.

149. It was suggested that draft paragraph 94 (2) should be deleted in its entirety, since it was thought that, pursuant to commercial law, mandatory provisions were necessary only to protect certain parties, such as those with insufficient bargaining power, and the view was expressed that the parties included in draft paragraph 94 (2) were not in need of such protection. Other reasons were cited for the deletion of draft paragraph 94 (2), such as the view that the necessity for mandatory provisions to protect the shipper and other parties should be assessed on an article by article basis, rather than by way of a general provision such as that of draft paragraph 94 (2). Some support was expressed both for this latter view and for the deletion of draft paragraph 94 (2) in its entirety.

150. The Working Group also heard the view that draft paragraph 94 (2) should be retained, and the square brackets surrounding it should be deleted, since, it was suggested

that this provision was an appropriate counterweight to balance the similar provision in draft paragraph 94 (1) established with respect to the obligations and liabilities of the carrier. It was also suggested that not only did shippers and carriers deserve protection under the draft convention, but that consignees did, too, and that such consignees needed to be able to rely on the standards for shippers and carriers set out in the draft convention, without risking deviation from those standards. The view was also expressed that maintaining certain mandatory provisions in the draft convention also assisted with overall smooth and safe operations for the carriage of goods.

151. With regard to the phrase “[or increases]” which appeared in subparagraphs (a) and (b) of draft paragraph 94 (2), the view was expressed that it should be deleted, at least in the case of subparagraph (b), since it was not possible to increase the current unlimited level of the shipper’s liability in the draft convention. However, the contrary view was also expressed that the phrase should be maintained in the text and the square brackets deleted in order to protect shippers who were already exposed to unlimited fault-based liability from possible exposure to unlimited strict liability, due to contractual stipulations changing the standard for shipper’s obligations from fault-based liability to strict liability. Some support was expressed for each of these perspectives.

152. It was suggested that consideration of draft paragraph 94 (2) should be suspended until the Working Group had considered draft chapter 8 on shipper’s obligations later in the session. While caution was expressed that this course of action would not resolve all of the outstanding issues with respect to draft paragraph 94 (2) since its operation was not limited to shippers, it was thought that reviewing draft chapter 8 could nonetheless be of assistance in this regard.

Conclusions reached by the Working Group regarding draft article 94:

153. After discussion, the Working Group decided that:

- The text of draft paragraph 94 (1) could be maintained in the draft convention as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61; and
- Draft paragraph 94 (2) would be maintained as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61 for the moment, and that consideration of its text would be resumed following the Working Group’s consideration of draft chapter 8 on shipper’s obligations.

Draft article 95. Special rules for volume contracts

154. The Working Group was reminded that during its sixteenth session, it had requested the Comité Maritime International to prepare an explanatory document on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications (see A/CN.9/591, paras. 221 and 244), and that such a document had been prepared in response to that request (A/CN.9/WG.III/WP.66). The Working Group was also reminded of previous work that had taken place during its fifteenth session (see A/CN.9/576, paras. 52 to 104) with respect to the drafting of provisions on volume contracts, which had resulted in the current carefully crafted compromise text in A/CN.9/WG.III/WP.56. Finally, it was also noted that slightly revised text for the provisions on volume contracts was presented for the consideration of the Working Group in A/CN.9/WG.III/WP.61 (see para. 49), but that the slightly revised text was intended only as improved drafting, except where otherwise indicated (see A/CN.9/WG.III/WP.61, paras. 49 to 61).

Draft paragraph 95 (1)

155. Notwithstanding the broad agreement on the approach to freedom of contract in volume contracts achieved by the Working Group during its fifteenth session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of the paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1)(b) did not provide sufficient protection for the parties to such contracts.

156. Overall, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided a sufficient balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties.

Conclusions reached by the Working Group regarding draft paragraph 95 (1):

157. After discussion, the Working Group decided that:

- Draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61 was accepted, both in terms of approach and improved drafting.

Draft paragraph 95 (4)—Non-derogable provisions

158. The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95 (4) in paragraph 49 of A/CN.9/WG.III/WP.61.

159. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. The view was that the doctrine of overriding obligations could be used in some jurisdictions to override the provisions in the draft convention on the apportionment of liability when there were multiple causes for loss or damage, and that this would be a highly unsatisfactory outcome. Further, the view was expressed that a provision such as draft paragraph 95 (4) would have little practical effect regardless of its inclusion, since it was thought that it would have to include provisions that were clearly mandatory and not capable of being subject to derogation. Another view was expressed that full contractual freedom should be available to the parties to a volume contract, such that the only obligation from which there could be no derogation should be liability for intentional and reckless conduct.

160. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume

contract regime in the draft convention. The view was expressed that even if there were a danger that the doctrine of overriding obligations could be resurrected with respect to the draft convention, it would be more dangerous to leave the list of absolutely mandatory provisions to be ascertained by judicial interpretation of the draft convention. Further, it was felt that including a provision such as draft paragraph 95 (4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework.

List of provisions in draft paragraph 95 (4)

161. The Working Group also considered which provisions should be included in the list set out in draft paragraph 95 (4). Some views were expressed that only provisions with a public policy or public order component worthy of protection should be maintained in the list in draft paragraph 95 (4) as, for example, the draft article 16 seaworthiness obligation and the dangerous goods provision in draft article 33. Some doubts were expressed whether the draft article 30 obligation of the shipper to provide information and instructions belonged on the list in draft paragraph 95 (4). Further concerns were expressed as to whether the text referring to draft article 66 was worded as clearly as it could be. While it was thought that parties should not be able to derogate from liability for intentional acts, the articulation of that prohibition was not clear in the text of draft paragraph 95 (4), and could require refined drafting. Some suggestions were made to expand the list of provisions that appeared in draft paragraph 95 (4), for example, by including draft articles 11, 13, 14 (1) and 17. Finally, there was support for the view that all of the references currently in draft paragraph 95 (4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text, and the square brackets removed.

Conclusions reached by the Working Group regarding draft paragraph 95 (4):

162. After discussion, the Working Group decided that:

- The text of draft paragraph 95 (4) should be maintained in the draft convention as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61;
- The square brackets that appear in draft paragraph 95 (4) should be removed and the references contained in them retained; and
- The reference to draft article 66 should be maintained and appropriately clarified.

Draft paragraph 95 (5)(b)

163. The Working Group considered the modified text of draft paragraph 95 (5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract, as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. It was explained that the first sentence of draft paragraph 95 (5)(b) aimed at establishing the principle that third parties would not be bound by the terms of a volume contract under the draft convention unless they expressly consented to be bound by those terms. It was also explained that the second sentence of draft paragraph 95 (5)(b) dealt with matters relating to the proof of such express consent, and, in particular, aimed at avoiding that the acceptance of a document containing standard provisions could be interpreted as amounting to express consent to be bound by the terms of a volume contract that derogated from the draft convention.

164. While it was suggested that the second sentence of draft paragraph 95 (5)(b) should be deleted as unnecessary in light of its first sentence, strong support was expressed for the

retention of such second sentence as it provided an important safeguard to third parties by defining the minimum requirements for such consent.

165. In response to a query, it was indicated that third parties that did not express their consent to be bound by the terms of a volume contract pursuant to draft article 95 would receive protection under the general regime of the draft convention, and would not be bound by the terms of the volume contract that derogated from the draft convention. It was further indicated that, for example, when a volume contract limited the carrier's liability for an amount lower than the one set forth in the draft convention, the third party that had not expressed its consent to be bound by the terms of that contract would not be bound by the lower limitation level therein and would be able to recover the loss to the full amount allowed under the limitation level established by the draft convention. It was suggested, however, that the consequence of an absence of express consent by a third party to the terms of a volume contract should be made explicit in the text of the draft article.

166. Concerns were expressed that the second sentence of draft paragraph 95 (5)(b), on the requirements for the third parties to be bound by a volume contract, could give rise to difficulties of interpretation. It was suggested that the draft provision should more clearly state the two requirements contained therein, i.e., the existence of an obligation of the original party to inform the third party regarding the derogations from the draft convention; and that it was not sufficient for the requirement of express consent that it be set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

167. It was further suggested that draft paragraph 95 (5)(b) should not allow a party that caused the failure of express consent by the third party, for example, by failing to notify the third party of the derogations from the draft convention, to benefit from its own failure by invoking those provisions of the draft convention that would have been displaced by the derogation. It was further explained that, for instance, in a case when the parties to a volume contract had agreed to a limitation of liability for the loss of the goods higher than the one in the draft convention, and the carrier had omitted to inform the third party of that derogation, the carrier should not be able to invoke the lower limit set forth in the draft convention but should be held to the terms agreed in the volume contract, despite the lack of third party consent.

Conclusions reached by the Working Group regarding draft paragraph 95 (5)(b):

168. After discussion, the Working Group decided that:

- The policies underlying draft paragraph 95 (5)(b), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, were acceptable; and
- The Secretariat should prepare a new draft of draft paragraph 95 (5)(b) taking into account the views expressed above.

Draft paragraph 95 (5)(c)

169. The Working Group considered next the appropriateness of the text of draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, which placed the burden of proof that a derogation from the draft convention had been validly made on the party invoking the derogation set forth in the volume contract. It was explained that the scope of the draft provision had been expanded in comparison with the same provision contained in the last sentence of draft paragraph 95 (6)(b) of A/CN.9/WG.III/WP.56 so as to extend the rule on the burden of proof to any party

claiming the benefit of the derogation. Support was expressed for the new text of draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61.

Conclusions reached by the Working Group regarding draft paragraph 95 (5)(c):

170. After discussion, the Working Group decided that:

- Draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, was accepted.

Draft article 96. Special rules for live animals and certain other goods

171. It was suggested that draft article 96 should be deleted from the draft convention since trade of live animals was a specialized trade that traditionally fell outside of the Hague and Hague-Visby Rules. In response, it was noted that the Working Group had already decided to retain the draft provision (see A/CN.9/572, para. 109). It was further suggested that certain drafting modifications could be prepared bearing in mind the suggestions contained in paragraphs 63 to 67 of A/CN.9/WG.III/WP.61.

Conclusions reached by the Working Group regarding draft article 96:

172. After discussion, the Working Group decided that:

- The substance of draft article 96, as it appeared in paragraph 62 of A/CN.9/WG.III/WP.61, was acceptable, bearing in mind any necessary drafting modifications.

Obligations of the shipper—Chapter 8

173. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations at its thirteenth and sixteenth sessions (see A/CN.9/552, paras. 118 to 161, and A/CN.9/591, paras. 104 to 187, respectively). It was also recalled that proposals concerning the obligations of the shipper had been presented for the consideration of the Working Group at its current session (see A/CN.9/WG.III/WP.67 and A/CN.9/WG.III/WP.69).

174. The Working Group agreed with the suggestion that it should consider shippers' obligations on the basis of the proposed revised text contained in the documents presented along the lines of what were thought to be the key outstanding issues:

(a) Whether draft article 29 on the carrier's obligation to assist the shipper by providing information and instructions should be modified to become the shipper's right to request and obtain reasonable information or to become a general provision based on mutual cooperation between the shipper and the carrier, and whether draft article 18 should be retained in light of that decision;

(b) Whether the application of draft article 29 should be broadened to include application to draft article 30, and possibly to draft article 33;

(c) The appropriate articulation of the obligation in draft paragraph 30 (b) on the shipper's compliance with rules, regulations and other requirements of authorities;

(d) The treatment in the draft convention of consequential damages for delay on the part of both the shipper and the carrier; and

(e) Any additional issues regarding the obligations of the shipper that were of concern to the Working Group.

Draft article 29. Carrier's obligation to provide information and instructions

175. The Working Group heard that there were three variants of draft article 29 offered for its consideration in paragraph 14 of A/CN.9/WG.III/WP.67, Variants A, B and C, and an additional text of draft article 29 set out in paragraph 3 of A/CN.9/WG.III/WP.69, which was identical to Variant C, but for the title of the provision and for the use of the word "cargo" rather than "goods".

Variant A, B or C of draft article 29

176. While the view was offered that Variant A did not appear to be substantively different from Variant B, there was little support in the Working Group for Variant A, which was text as it appeared in A/CN.9/WG.III/WP.56.

177. Variant B was the preferred text of a number of delegations for various reasons. Although it was framed as a right of the shipper, Variant B was said to adequately reflect the idea favoured by the Working Group at its previous session (see A/CN.9/591, paras. 121 to 127) that the provision should focus on the mutual cooperation of the shipper and the carrier in the provision of information and the successful completion of the contract of carriage. It was thought that this was particularly evident given the references in draft article 29 to draft articles 28 and 30, which contained the primary obligations of the shipper, and thus indicated that the carrier must provide necessary assistance to the shipper in order to enable it to fulfil those obligations. It was suggested that the phrase "within the carrier's knowledge and as may be specified by the shipper" should be inserted in Variant B after the word "information". There was some support for the view that the requirement that the carrier provide the information sought in Variant B should be limited to some extent, but the view was expressed that the insertion of the suggested text could render it too easy for the carrier to avoid assisting the shipper by providing the necessary information.

178. There was also support expressed for Variant C of draft article 29. The view was expressed that Variant C was a more general provision that was a better reflection of the view favoured by the Working Group at its last session as discussed in the paragraph above. Some concern was expressed regarding the notion of the "good faith" obligation in Variant C which, while common in some legal systems, might be regarded as merely hortatory in others.

179. However, the view was also expressed that Variant B and Variant C did not differ substantially, and some held the view that it was difficult to choose one over the other. It was generally agreed that Variant C was broader and more general than Variant B, but the concern was expressed that Variant C might be such a general and basic responsibility that it did not sufficiently specify any legal right or obligation. It was thought that Variant B accomplished that task better, and that it presented a middle position between the articulation of firm obligations and the general responsibility of both parties to cooperate. In addition, some views were expressed that if the Working Group did not accept a specific limitation on the information that a carrier would be required to obtain pursuant to Variant B, or if the reference to draft article 30 in Variant B were deleted (see paras. 182 to 184 and 186 below), that Variant C would be the better text for draft article 29.

180. It was suggested that given the importance of the mutual obligation for the shipper and the carrier to cooperate in supplying information for the completion of the contract of carriage, it might be better to give that obligation more prominence in the draft chapter. It

was thought that it might be possible to accomplish this by means of incorporating the content of draft article 29 into draft paragraph 28 (1). Another drafting suggestion was made to broaden the current reference in Variant C from “information and instructions required for the safe handling and transportation of goods” which might be interpreted too restrictively as referring only to draft paragraphs 30 (a) and (b) (see paras. 183 and 184 below).

181. An additional view was expressed that draft article 31 was the basis of the shipper’s liability, and that as long as that key provision applied the standard of fault-based liability on the shipper for breach of its obligations under draft articles 28 and 30, there was no need for draft article 29 and it should be deleted. While outright deletion of draft article 29 did not receive support, there was strong support for the view that the discussion in the Working Group regarding draft articles 29 and 30 was dependent on draft article 31 containing an appropriate fault-based liability standard with respect to the obligations of the shipper. In addition, it was observed that draft paragraph 17 (3)(h) was of relevance to the discussion, since it relieved the carrier of all or part of its liability when the carrier could prove that the loss of, or damage to, the goods occurred as a result of the acts or omissions of the shipper.

Reference in draft article 29 to draft article 30

182. It was proposed that the application of draft article 29 should be broadened to include reference to draft article 30, and possibly to draft paragraph 33 (2). The view was expressed it might be difficult to limit the actual text of draft article 30 through specific drafting, but that subjecting the provision to the mutual obligations of draft article 29 would be an appropriate technique through which to limit the breadth of the obligations of the shipper in draft article 30.

183. Some doubts were expressed regarding the appropriateness of inserting a reference to draft article 30 into draft article 29. The view was expressed that reference to draft article 28 in draft article 29 was appropriate, since draft article 29 was intended to provide the shipper with any assistance needed in terms of information from the carrier so that the shipper could fulfil its obligation to properly ready the goods for carriage. It was thought that the shipper’s obligations set out in draft article 30 concerned information that was largely, if not exclusively, in the domain of the shipper, and thus the carrier could not assist in obtaining the information. In particular, it was noted that paragraphs (a) and (c) of draft article 30 referred to the handling and the characteristics of the goods, and the view was expressed that these were matters with which the carrier could grant little assistance. There was some support for that view.

184. However, some concerns were raised with respect to specific paragraphs in draft article 30. Some support was expressed for the inclusion of paragraph (a) in draft article 29, but there was stronger support for the inclusion of a reference to draft paragraph 30 (b) only. It was thought that the paragraph (b) reference to “the intended carriage” clearly required that some information be provided by the carrier to the shipper in order to enable the shipper to fulfil its duties under the paragraph. A concern was raised that inserting a reference to draft paragraph 30 (b) into draft article 29 would result in excessively regulating the requirement set out in paragraph (b), such that it could result in an endless circle of the shipper and the carrier blaming each other for failures to provide information. It was suggested that this example, in particular, indicated that the more general version of draft article 29 set out in Variant C above (see above, paras. 179 and 180) was preferable to Variant B in order to avoid such difficulties arising from excessive detail.

Retention of draft article 18

185. The view was expressed that, to some extent, the Working Group's decision regarding whether to choose Variant A, B or C of draft article 29 was related to its decision regarding whether or not to retain draft article 18 in the text of the draft convention. However, it was recalled that the Working Group had decided at its last session to delete draft article 18, pending the receipt of instructions by a few delegations (see A/CN.9/591, paras. 184 to 187). Although it was suggested that if the Working Group decided to retain the general provision in Variant C of draft article 29, it might want to consider whether it should retain the more specific articulation of the carrier's liability for failure to provide information and instructions set out in draft article 18, the Working Group decided to delete draft article 18 from the draft convention.

Conclusions reached by the Working Group regarding draft articles 29 and 18:

186. After discussion, the Working Group decided that:

- The Secretariat should be requested to revise the text of draft article 29 based on the approach taken in Variant C in paragraph 14 of A/CN.9/WG.III/WP.67, with certain adjustments to the drafting to take into consideration the concerns expressed in the discussion above; and
- Draft article 18 should be deleted from the text of the draft convention.

Draft article 30. Shipper's obligations to provide information, instructions and documents

187. The Working Group was reminded that three alternative texts of draft paragraph 30 (b) had been submitted for its consideration: Variants A and B in paragraph 20 of A/CN.9/WG.III/WP.67, and the version presented in paragraph 6 of A/CN.9/WG.III/WP.69. It was explained that Variant A was the text of draft paragraph (b) as it appeared in A/CN.9/WG.III/WP.56, and that the text in paragraph 6 of A/CN.9/WG.III/WP.69 differed slightly from that of Variant B in both the chapeau for draft article 30 and the text of paragraph (b) itself.

Chapeau of draft article 30

188. It was explained that the text of the chapeau of draft article 30 contained in A/CN.9/WG.III/WP.69, paragraph 6, included after the word "documents" the phrase "related to the goods". There was general approval for the insertion of that phrase into the chapeau of draft article 30 as rendering the obligations it contained more specific and more appropriate in terms of scope.

Text of draft paragraph 30 (b)

189. Some preference was expressed for Variant A of draft paragraph 30 (b) since it provided a simple drafting approach for a provision that was said to become very complex when any further specificity was sought. However, concerns were expressed that Variant A was too broad and too unclear, and that more detail was needed in order to appropriately circumscribe the shipper's information obligations.

190. It was explained that while a fault-based liability on the part of the shipper as set out in draft article 31 would assist in narrowing the breadth of the shipper's obligations in draft article 30, it was thought that further refinements should also be made to draft paragraph 30 (b). It was explained that the text of draft paragraph 30 (b) as contained in paragraph 6

of A/CN.9/WG.III/WP.69 intended to specify that the information sought from the shipper in compliance with rules and regulations by government authorities would likely be sought under two alternative scenarios: either the shipper would be required by applicable law to provide it, or the carrier would advise the shipper in a timely fashion of the information required. Further it was thought that the shipper would not be required to provide the information if it was already reasonably available to the carrier.

191. While general support was expressed for the more specific text contained in draft paragraph 30 (b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69, some concerns were raised with respect to its structure. It was suggested that if the reference to “applicable law” in draft subparagraph (i) was intended to refer to mandatory rules of public law, the view was expressed that this should not be listed as an alternative to subparagraph (ii), since public law rules would apply regardless of whether or not they were mentioned in the draft convention. Further, questions were raised regarding what types of scenarios were envisioned pursuant to draft subparagraph (i). In response, it was clarified that this was intended to satisfy, for example, certain security requirements such as those requiring the carrier to provide the manifest information, which would have to be obtained from the shipper, to the customs authorities of a given country twenty-four hours in advance of loading the vessel for importation into that country.

192. Several drafting issues were also raised with respect to the text of draft paragraph 30 (b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69. Concern was raised regarding the use of the phrase “government authorities” as being too narrow, and it was suggested that a different phrase such as “local authorities”, “public authorities” or merely “authorities” would be more appropriate. Further, some concerns were raised about the specification of “rules and regulations”, and it was thought that that text might need to be revisited. In addition, several concerns were raised about the use of the phrase “applicable law”, which could be said to refer to the law of the contract of carriage, or to rules of public law, and it was suggested that greater clarity could be attained, perhaps by deleting the phrase altogether. Further, the question was raised whether the text, “the shipper is required by applicable law” was appropriate, since any law was unlikely to specify who was required to provide the information in issue. In addition, it was suggested that “timely makes known to” could be replaced by “timely notifies”, and that reference could also be made to the “intended voyage”, in keeping with the text in Variant A.

193. In addition, in light of the above discussion in the Working Group, the importance of retaining a fault-based liability regime for the shipper pursuant to draft article 31 was reiterated by several delegations.

Conclusions reached by the Working Group regarding draft paragraph 30 (b):

194. After discussion, the Working Group decided that:

- The text of draft paragraph 30 (b) should be based upon that contained in A/CN.9/WG.III/WP.69, paragraph 6; and
- The Secretariat should be requested to make the necessary modifications to the text in light of the concerns raised in the paragraphs above.

Draft article 33. Special rules on dangerous goods

Requirement for similar obligation to draft article 29

195. The Working Group was reminded that concerns had been raised during its sixteenth session regarding whether the paragraph in draft article 33 dealing with the obligation of

the shipper to mark or label dangerous goods in accordance with the applicable local rules depending on the stage of the carriage could place too heavy a burden on a shipper if it was not aware of the intended voyage (see A/CN.9/591, para. 163). It was suggested at that time that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its obligations pursuant to draft article 33. It was proposed that the text of a new draft paragraph 33 (4) as set out in paragraph 31 of A/CN.9/WG.III/WP.67 could be inserted into the provision in response to those concerns.

196. In light of the Working Group's decision to revise the text of Variant C of draft article 29 based on a general obligation of mutual cooperation between the shipper and the carrier (see para. 14 of A/CN.9/WG.III/WP.67), it was suggested that the text of draft paragraph 33 (4) would not be appropriate, since that text was intended to reflect the more specific obligations in Variant B of draft article 29. There was general support in the Working Group for the view that appropriately drafted text based on the approach in Variant C of draft article 29 would render the insertion of draft paragraph 33 (4) unnecessary.

197. However, some concern was expressed that, since draft subparagraph 30 (b)(ii) on the obligation of the carrier to timely make its information needs known to the shipper (as set out in para. 6 of A/CN.9/WG.III/WP.69) was still thought to be necessary in spite of the adoption of a provision along the lines of Variant C of draft article 29, it was thought that further clarification of the obligation in draft article 33 might also be necessary. In light of this possibility, it was suggested that draft paragraph 33 (4) should be inserted into the text in square brackets for future consideration by the Working Group, or, in the alternative, that some qualification along the lines of draft paragraph 30 (b) that limited the shipper's obligation could be inserted in the appropriate paragraph of draft article 33. In response to those concerns, it was said that the text of draft paragraph 30 (b) was a much broader obligation than that in draft article 33, and that it was therefore necessary to more specifically qualify it, and not merely rely on the general obligation of mutual cooperation articulated in Variant C of draft article 29.

Conclusions reached by the Working Group regarding draft paragraph 33 (4):

198. After discussion, the Working Group decided that:

- Draft paragraph 33 (4) would be unnecessary and could be deleted, provided that the redrafted text of draft article 29 based on the approach taken in Variant C (of para. 14 of A/CN.9/WG.III/WP.67) was sufficient to address concerns regarding the mutual provision of information necessary for the shipper to fulfil its obligations in draft article 33.

Draft article 31. Basis of shipper's liability: Delay

199. It was recalled that the Working Group had last considered the shipper's liability for delay at its sixteenth session (see A/CN.9/591, paras. 133 and 143 to 147) and that written proposals on this topic had been submitted for the consideration of the Working Group (see A/CN.9/WG.III/WP.67, para. 22, and A/CN.9/WG.III/WP.69, paras. 8 to 14). It was indicated that delay was an important pending issue in the chapter on shipper's obligations, as it gave rise to complex problems.

200. There was support within the Working Group for retaining the provisions of the draft convention dealing with carrier and shipper liability for delay. It was indicated that such provisions, which did not exist in earlier instruments such as the Hague Rules, would provide an important contribution to modernizing the law of carriage. It was also recalled that timeliness had a prominent importance in liner transportation and in modern logistics

arrangements in the commercial world. It was also indicated that other persons in the transactions, especially the consignee, should be protected from any losses caused by the shipper or the carrier. It was indicated that the Working Group had already completed its consideration of carrier liability for delay at its thirteenth session (see A/CN.9/552, paras. 18 to 31), and that such liability was regulated under draft article 22, with the exception of the level of limitation of such liability, which was dealt with in draft article 65 in the chapter on limitation of liability. It was therefore indicated that the Working Group should not re-open the discussion on that draft article.

201. There were nevertheless strong objections to the inclusion of consequential damages for delay for both shippers and carriers in the draft convention. It was indicated that such inclusion might create enormous, open-ended liability exposure for shippers. For instance, it was explained, a shipper's failure to provide a document might prevent the unloading of a single container loaded with goods of small value, and this in turn might prevent the entire ship of containers from arriving and unloading at its port of destination. In that case, it was added, while reasons of fairness would suggest that the carrier should be able to recover from that shipper the damages for delay for which the carrier was responsible to other shippers with containers on board, if the shipper was to be held fully liable to the carrier for all damages caused by its delay of the vessel, its liability could not only have a devastating financial impact on it but would also be uninsurable. It was added that the difficulties surrounding the establishment of a reasonable and logical liability limit that could be applied to the shipper's liability for damages due to delay, as well as of a liability regime that allowed for insurability of the potential risks associated with damages for delay, supported the deletion of liability for delay on the part of the shipper from the draft convention. It was further indicated that, in order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree, since holding carriers liable to shippers for delay exposed them to significant potential liabilities in the same manner as holding shippers liable to carriers would.

202. Furthermore, it was said that in order to maintain a fair balance in the draft convention, it was essential to include a mirror provision establishing liability for a shipper who caused the delay and exposed a carrier to losses resulting from delay claims against it by other shippers, and that because carrier liability for delay damages would be limited, such shipper liability should also be subject to a reasonable limitation. However, it was added that efforts to develop an acceptable limitation on shipper liability for damages for delay had proven to be an extremely difficult task, since a limitation based on the freight paid by the offending shipper was deemed to be unreasonably low by carrier interests, while shipper interests found other formulations, such as full responsibility for damages for delay to all other shippers on the vessel, unreasonably high. It was also indicated that a carrier should be fairly protected against any losses it incurred for delay damages caused by a shipper, albeit the resultant liability on one shipper could be significant. It was concluded that the only equitable resolution to this dilemma would be to remove the concept of liability for damages for delay from the draft convention with regard to shippers and, unless they agreed in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well. It was therefore suggested that draft article 22 should be amended to reflect that the carrier's liability for economic loss due to delay would be limited to those cases where the carrier had agreed to such liability.

203. It was recalled that a drafting proposal had been submitted to the Working Group (see A/CN.9/WG.III/WP.69, paras. 8 to 14), under which the shipper would have no liability for consequential damages arising from delay, and the carrier's liability would be limited accordingly. It was explained that such a result might be achieved by amending

and deleting various references to delay in the draft convention, and by inserting a new draft article 36 bis (see A/CN.9/WG.III/WP.69, para. 14), whose scope was to prevent a possible interpretation of “damage or loss of goods” under the draft convention encompassing damage or loss caused by delay other than physical damage or loss. In response to a query, it was explained that the consequential damages caused by delay that would not be recoverable under the proposed text of the draft convention included damages for pure economic loss as well as damages that could be said to arise from partial economic loss such as, for example, market price fluctuation during the period of time in which the delay occurred. It was further explained that the carrier, as well as the shipper, would continue to be held liable for physical loss or damage to goods under draft article 17, as well as in those cases in which the parties had concluded an express agreement on the delivery date.

204. In reply, it was indicated that the suggested approach would amount to depriving the parties of any remedy for economic loss that might be available under national law. While support was expressed for the concerns about the difficulties in drafting a satisfactory text, it was therefore suggested that the ideal solution to address the liability for delay under the draft convention would not consist of limiting such liability for the carrier, but to leave the matter under the domain of national law for all types of loss due to delay. It was further suggested that in order to fully exclude claims for economic loss under the proposal, it might not be sufficient to simply eliminate references to “delay” in the draft convention, but it might also be necessary to include a provision barring any claim in this regard by the carrier against the shipper. As a drafting suggestion, it was proposed that such a draft provision could be inspired by draft article 4, which might require some redrafting of draft article 36 bis contained in A/CN.9/WG.III/WP.69, paragraph 14.

205. The Working Group considered at length the above suggestions. It was further indicated that leaving the rules on liability for delay to national law would not only fail to unify the law on the matter, but would also perpetuate the existing unfair practice, pursuant to which the carrier inserted clauses exonerating it from liability for economic damages for delay in bills of lading, while the shipper had no corresponding safeguard. It was further indicated that the greatest level of unification of the law on this matter would be desirable, as this would improve not only legal predictability but also the insurability of the risk, while leaving the matter under different domestic legal regimes would run counter to those goals. A view was also expressed that the carrier’s and the shipper’s liability for delay need not be considered together, since the carrier’s liability for delay touched upon the primary obligation of the carrier to deliver the goods, while the same liability for the shipper touched upon secondary obligations of the same. It was also said that, while problematic, delay should not be too easily discarded as a basis of liability. For example, the shipper’s liability for delay could be limited as it would likely be fault-based, the burden of proof would be allocated to the claimant according to ordinary rules, and the action could be subject to a short limitation period, possibly of one year. In support of a provision in the draft convention on the liability for delay, it was also said that finding an equitable solution for limitation of liability for delay, albeit difficult, was not an impossible task, since indeed certain domestic legislation contained rules relating to the shipper’s liability for delay, which was, for example, limited with relation to the weight of the goods shipped. It was added that, under an alternative approach, the limitation of the shipper’s liability for delay could be linked to the freight paid, although problems with that approach were pointed out, as, for example, in the case where the measure would be the freight paid on a container of low value goods that had delayed the arrival of other containers of very high value goods. A view was expressed that a rule on the carrier’s liability for delay could be included even though there was no rule on the shipper’s liability for delay.

206. In response, the view was expressed that, while legal unification was indeed a desirable result, insurability of the risk depended not on the uniformity of the rule, but rather on the limitation of the amount of liability. The Working Group was urged not to underestimate the difficulty of that task. In the search for a possible solution, the Working Group was invited to consider the types of damages that might be covered in a system of liability for delay under the draft convention. In this respect, it was said that, while physical damages would always be recoverable, damages for pure economic loss and damages for partial economic loss due to market variations in the value of the goods during the period of delay should fall outside the scope of application of the draft convention. It was suggested that the parties should be allowed to derogate from draft article 22, on the liability of the carrier for delay, insofar as it related to damages pertaining to economic loss, through the exercise of their freedom of contract. It was specified that under such provision the carrier would be liable for delay unless there was contractual agreement otherwise. However, concerns were raised that, depending on the final text of draft article 94, such freedom of contract could also be used to increase the shipper's liability for delay, and that such an outcome would go against the intended scope of the draft provision.

Conclusions reached by the Working Group regarding liability for delay:

207. After discussion, the Working Group decided that:

- The consideration of the liability for delay in the draft convention should continue at a future session, after consideration of the issues presented;
- The submission of written submissions on the matter for consideration at its next session was strongly encouraged; and
- The consideration of any further issues of concern to the Working Group with respect to the obligations of the shipper was suspended pending the future consideration of delay.

Proposal on bills of lading consigned to a named person

208. The Working Group was reminded that a proposal had been made in A/CN.9/WG.III/WP.68 for the inclusion in the draft convention of provisions on bills of lading consigned to a named person. It was stated that while the entire scheme of the draft convention was based solely on negotiable and non-negotiable transport documents and electronic transport records, in practice, another type of transport document was used whose characteristics fell somewhere between those two categories: the bill of lading consigned to a named person. It was noted that this document was in common use in some legal systems, although it went by different names depending on the jurisdiction and that it was subject to different rules, sometimes even within the same jurisdiction. Further, although it was thought that the legal framework established in the draft convention made the inclusion of the bill of lading consigned to a named person superfluous, it was thought that some provision should be made for their treatment in the draft convention, since commercial practice could not be expected to change immediately upon the entering into force of any new regime. The Working Group agreed to limit its consideration of this proposal at its current session to the two main issues of whether to include such provisions in the draft convention, and how to define bills of lading consigned to a named person, leaving other issues for future discussion.

Should bills of lading consigned to a named person be included?

209. The view was expressed that if the framework of the draft convention was thought to be inclusive of all necessary types of documents, allowing for this unusual intermediate document with uncertain characteristics could be seen as encouraging its use, and that it would be better to put an end to such anomalies. As such, a preference was expressed that specific provision should not be made in the draft convention for bills of lading consigned to a named person, and that they should instead be subjected to the general scheme of negotiable or non-negotiable documents.

210. However, the opposite view was also expressed that bills of lading consigned to a named person should be included in the draft convention, since subjecting them to at least some uniform rules in this fashion could have the welcome result of decreasing the uncertainty of law with respect to their use. Some views were expressed that although bills of lading consigned to a named person were not used in their specific jurisdictions, it was recognized that this intermediate form of document was in use elsewhere, and that including provisions with respect to them in the text of the draft convention could assist in making the draft convention more effective and more efficient in those jurisdictions. Support was expressed for this view based on the commercial practicality of including such documents if they were in use, and assuming that their inclusion would provide additional commercial certainty.

Conclusions reached by the Working Group regarding the inclusion of bills of lading consigned to a named person:

211. After discussion, the Working Group decided that:

- Provisions on bills of lading consigned to a named person should be included in the draft convention.

Definition of bills of lading consigned to a named person

212. It was proposed in paragraph 12 of A/CN.9/WG.III/WP.68 that the bill of lading consigned to a named person should be defined as “a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods”. It was explained that the intention of the proposal was to treat such bills of lading as non-negotiable documents within the ambit of the draft convention, and that the document should carry with it the requirement that it must be shown or surrendered to the carrier when the possessor of the document wanted to exercise any right under the contract of carriage evidenced by the document, or the so-called “presentation rule”. The final necessary element of the definition was thought to be that the “presentation rule” should be stated on the document itself in order to indicate the element of negotiability of the document. It was thought that there was an appropriate combination of elements in the definition to allow it to fit with current commercial practice, in which parties could agree on the requirement of presentation of a non-negotiable document, and that standard form bills of lading consigned to a named person typically contained a statement of the “presentation rule”.

“indicates”

213. It was explained that the word “indicates” had been used in the definition rather than a more specific word such as “stated” in order to provide greater flexibility and to allow various documents to be interpreted as falling within the definition. While there was some support for the text of the definition as presented, some concern was expressed that the word “indicates” was too flexible and broad, and that it would allow documents that had

not been intended as bills of lading consigned to a named person to nonetheless be treated as such. A proposal was made to replace the word “indicates” with a more precise word, such as “specifies”.

214. Another suggestion was made to clarify the definition by inserting the phrase “under the law governing the document” after the word “indicates”, similar to the definition of “negotiable transport document” in draft paragraph 1 (o). Given the possibility of unclear text appearing on a document such as “the carrier can require the surrender of this document upon delivery of the goods”, it was thought that it was important that the definition should be interpreted according to the applicable law governing the document. Some hesitation was expressed that the insertion of a phrase with respect to the applicable law would unduly restrict the definition and thus the interpretation of which documents would fall within that category, particularly since judicial treatment of bills of lading consigned to a named person was not uniform. In response, it was suggested that the flexibility inherent in the word “indicates” would remain, but that insertion of a phrase on the applicable law would provide some necessary structure for the exercise of that discretion.

Conclusions reached by the Working Group regarding the definition of bills of lading consigned to a named person:

215. After discussion, the Working Group decided that:

- The definition of bills of lading consigned to a named person was not entirely satisfactory, as the word “indicates” was too flexible; and
- The Secretariat should prepare alternative definitions that avoided suggesting that a particular phrase must be found in the transport document in order for it to be a bill of lading consigned to a named person and that took into account the possible need for a reference to the law governing the transport document.

Transport documents and electronic transport records—Chapter 9

216. The Working Group was reminded that it had most recently considered the chapter of the draft convention on transport documents and electronic transport records at its eleventh session (see A/CN.9/526, paras. 24 to 61). It was also recalled that proposals concerning transport documents and electronic transport records had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.62 and A/CN.9/WG.III/WP.70). Further, it was noted that the text of the provisions set out in A/CN.9/WG.III/WP.62 was the current text of the draft convention as found in A/CN.9/WG.III/WP.56, without modification, while A/CN.9/WG.III/WP.70 suggested alternative text with respect to draft article 37 and draft paragraph 40 (3).

217. The Working Group agreed with the suggestion that it should consider the chapter on transport documents and electronic transport records using an article-by-article approach, since it was the first time that it was considering the chapter during its second reading of the draft convention. Further, it was observed that while reference in the course of discussion was often made to “transport documents” only, it was understood that reference was made equally to “electronic transport records”.

Draft article 37. Issuance of the transport document or the electronic transport record

218. The Working Group was reminded that the historical antecedents of draft article 37 were article 3 (3) of the Hague and Hague-Visby Rules, where the carrier issued the bill of lading to the shipper on the shipper's demand, and article 14 (1) of the Hamburg Rules, which provided for the issue of the bill of lading to the shipper, and, by way of the definition of the "shipper", the consignor. It was noted that the principal innovation of draft article 37 of the draft convention was the recognition that the "consignor" was not necessarily the same as the "shipper", for example, in the case of an FOB seller that was the "consignor" and an FOB buyer that was the "shipper". While it was acknowledged that in most cases the shipper and the consignor would be cooperating in light of the contract of sale, it was possible that a dispute would arise, and it would therefore be important which documents had been received by each party. It was explained that draft article 37 was intended to regulate those situations where a dispute had arisen by entitling the consignor to receive a transport document evidencing receipt only, while the shipper or the documentary shipper was entitled to receive a negotiable transport document in order to protect its interests until payment was made under the contract of sale.

219. It was observed that the proposed text of draft article 37 in A/CN.9/WG.III/WP.70 was substantively different from that currently in the draft convention. The approach taken in the text set out in A/CN.9/WG.III/WP.70 was that the consignor, and not the shipper, would effectively control the goods, and that the shipper would not control the goods until it was so permitted by the consignor.

220. Concern was expressed regarding the approach taken in draft article 37 of the current text of the draft convention. It was thought that under an FOB contract of sale, the FOB seller, or consignor, would not receive sufficient protection under draft article 37 because it would receive only a receipt rather than a negotiable document. It was suggested that there were two problems with draft article 37: the receipt obtained by the consignor had no legal status, and that one of the functions of a bill of lading was as evidence of receipt of the goods. In addition, it was said that in some jurisdictions, the person delivering the goods to the carrier had an independent right to obtain a negotiable transport document, and that the consignor in an FOB sale should receive the negotiable document as security for goods when it delivered them to the carrier. As such, a preference was expressed by some for the version of draft article 37 contained in A/CN.9/WG.III/WP.70.

221. However, the opposite view was expressed that the approach set out in draft article 37 of the current text of the draft convention was appropriate in the case of an FOB sale. Pursuant to paragraph (a) of draft article 37, the consignor had an independent entitlement to obtain a receipt from the carrier indicating that the goods had been delivered for carriage. Under paragraph (b) of draft article 37, the shipper was entitled to obtain the appropriate transport document from the carrier, and it was intended to be the choice of the shipper whether the transport document issued by the carrier was negotiable or non-negotiable, unless it was the custom in the trade not to issue a document at all. It was thought that reference in paragraph (b) to "the person referred to in article 34", or the documentary shipper, adequately protected the FOB seller or consignor. While under an FOB sale, the FOB seller would usually act on behalf of the FOB buyer, that was not the case under the contract of carriage, where the FOB seller had an independent right to obtain the transport document. The only way for the carrier to know that the FOB seller, or consignor, was entitled to the negotiable transport document rather than the FOB buyer, or shipper, was if the shipper instructed the carrier that the draft article 34 documentary shipper, i.e. the FOB seller, should receive the negotiable transport document. Further, the shipper, or FOB buyer, would be under an obligation to notify the carrier in this regard

under the terms of the contract of sale. Under this mechanism, the FOB seller, or consignor, would receive the negotiable transport document and was thought to be adequately protected. It was thought that this was an appropriate approach, and that the parties to the sales contract should build protection for their interests into that contract, and should not look to the parties to the contract of carriage to provide such protection.

222. There was support for the view that the documentary shipper should have an independent right to receive a transport document under paragraph (b) of draft article 37 rather than relying on the terms of the contract of sale for such protection. Therefore, a preference was expressed for the approach as set out in draft article 37 of the draft convention over that set out in A/CN.9/WG.III/WP.70, which was said to be imprecise regarding the identity of the consignor, given the broad definition of “consignor” in draft article 1 (i), which included anyone who actually delivered the goods to the carrier, even, for instance, a truck driver. Further, it was said that the approach in A/CN.9/WG.III/WP.70 appeared to create a novel and complex system where the consignor obtained the receipt for the goods and could then exchange it for a negotiable transport document, and that this approach was not necessary to provide the FOB seller with a document in its own right to protect itself.

223. A number of drafting suggestions were made aimed at the clarification of draft article 37. It was generally agreed that the text in paragraph (a) should be clarified to indicate that it referred to a mere receipt and not to a transport document or a receipt, bearing in mind that the definition of “transport document” in draft article 1 (n) included a receipt. There was also agreement that reference should be made in paragraph (b) to both negotiable and non-negotiable transport documents and electronic transport records, and that it could be clarified that it was the choice of the shipper whether the carrier issued a negotiable or a non-negotiable transport document. It was thought that the phrase “expressly or impliedly” was probably unnecessary in draft paragraph (b), and it was suggested that it be deleted. It was observed that that phrase was repeated in various provisions in the text of the draft instrument, and it was agreed that regard would be had to each such reference and whether it was necessary in each particular instance.

Conclusions reached by the Working Group regarding draft article 37:

224. After discussion, the Working Group decided that:

- The approach taken in the text of draft article 37 was acceptable; and
- The text of draft article 37 should be modified by the Secretariat to include: an appropriate reference in draft paragraph (a) to indicate that it referred to receipts; an indication in draft paragraph (b) that it was the shipper’s right to choose which document it wanted the carrier to issue; reference to non-negotiable transport documents should be included in draft paragraph (b); and the use of the phrase “expressly or impliedly” should be reviewed for possible deletion throughout the text of the draft convention.

Draft article 38. Contract particulars

225. It was indicated that the goal of draft article 38 was to set out the minimum mandatory requirements of the contract particulars. It was recalled that in informal discussions, suggestions for additional items and for drafting adjustments to the text of the provision had been noted for the consideration of the Working Group (see A/CN.9/WG.III/WP.62, paras. 12 to 18).

226. Broad support was expressed in the Working Group for the text of draft article 38, as contained in A/CN.9/WG.III/WP.56.

227. It was indicated that the list of mandatory requirements should be limited as much as possible to strictly necessary items. It was added that the parties were free to agree on further requirements in the contract particulars should their commercial needs require them. The Working Group was, however, informed that a number of possible additional mandatory items had been mentioned in informal consultations on the chapter (see A/CN.9/WG.III/WP.62, para. 14). They included the name and address of the shipper or consignor; the name and address of the consignee; the places of receipt and discharge and the ports of loading and unloading; the number of originals of the transport document; a statement, if applicable, that the goods would or could be carried on deck; and an indication of the dangerous nature of the goods.

228. It was suggested that the words “as furnished by the shipper” should be added in draft paragraph 38 (a). It was further suggested that the words “before the carrier or a performing party receives the goods” in draft paragraphs 38 (b) and (c) should be deleted since the information might be also usefully provided after the carrier or a performing party received the goods but before the goods were loaded on the vessel. It was thought that the element of timeliness of the information could be inserted by way of a reference to the information furnished by the shipper in accordance with draft article 30.

229. It was further added that the word “and” at the end of draft paragraph 38 (c)(i) should be replaced by the word “or”. It was explained that such amendment would better reflect trade practice, under which the shipper provided the carrier with either the number of packages, the number of pieces, or the quantity of the goods, or with the weight of the goods, and that it would be an unnecessary burden to require the inclusion of both elements. In response, it was indicated that the provision was intended to require the carrier to include both information on the number of packages and the weight in the contract particulars only when the shipper had so requested and had provided the corresponding information. It was observed that this could also be accomplished by way of the insertion of the word “if” rather than the word “as” in subparagraph (c)(ii).

230. It was suggested that a reference to the number of originals of the negotiable transport document should be inserted in draft article 38. It was indicated that such a reference would protect third party holders of the negotiable transport document by indicating how many originals were in circulation. It was noted that, while the practice of issuing multiple originals of negotiable transport documents should be discouraged, the suggested provision could nevertheless be useful as long as the undesirable practice continued. It was also suggested that reference to the consequences of failing to include information on the number of originals of the negotiable transport document could be included in draft article 40.

231. It was suggested that reference to the places of receipt and discharge and the ports of loading and unloading should be inserted in draft article 38, as those places and ports were relevant to determine the scope of application of the draft convention as well as for the purpose of the applicability of the provisions on jurisdiction and arbitration. It was also suggested that a reference to the dangerous nature of the goods should be included for reasons of public order, as well as to ensure that the shipper fulfilled its obligation to provide information under draft article 33. It was further suggested that reference to carriage of the goods on deck should also be inserted in the same draft article. However, those suggestions did not gather sufficient support in the Working Group.

232. It was indicated that the chapeau of draft article 38 should be revised to ensure consistency with the agreed content of draft article 37 insofar as its reference to transport document or electronic transport record.

Conclusions reached by the Working Group regarding draft article 38:

233. After discussion, the Working Group decided that:

- The words “as furnished by the shipper” should be added in draft paragraph 38 (a);
- The words “before the carrier or a performing party receives the goods” in draft paragraphs 38 (b) and (c) should be substituted by a reference to the information required in draft article 30;
- A reference to the number of originals of the negotiable transport document should be inserted in draft article 38; and
- The Secretariat should prepare a revised version of draft article 38 bearing in mind the considerations expressed above including possible modification of the reference to draft article 37 contained in the chapeau.

III. Other business

Scheduling of eighteenth, nineteenth and twentieth sessions

234. It was noted that, subject to the approval of the Commission at its thirty-ninth session, the eighteenth session of the Working Group would be held in Vienna from 6 to 17 November 2006 (see A/60/17, para. 241), and that the nineteenth session of the Working Group would be held in New York from 16 to 27 April 2007. It was further noted that, subject to the approval of the Commission at its fortieth session, the twentieth session of the Working Group would be held in Vienna from 15 to 25 October 2007.

Planning of future work

235. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda, for treatment in the order indicated, for the completion of its second reading of the draft instrument:

Eighteenth session (Vienna, 6 to 17 November 2006, subject to approval):

- Jurisdiction and arbitration;
- Transport documents and electronic transport records (*continued*);
- Delay and outstanding matters regarding shipper’s obligations (*continued*);
- Limitation of liability, including draft article 104 on amendment of limitation amounts;
- List of potential topics to be deferred for future consideration in another instrument, such as a model law;
- Rights of suit and time for suit; and
- Final clauses, including relationship with other conventions and general average.

236. The Working Group expressed its strong satisfaction with the steady progress made on the draft convention. In view of the number and complexity of the issues awaiting finalization in the draft convention, the Working Group expressed the view that it would require additional time to conclude it. The Working Group agreed that it was on target to complete its second reading of the draft convention at the end of 2006 and the final reading at the end of 2007.

**N. Preparation of a draft convention on the carriage of goods
[wholly or partly] [by sea]: proposal by Finland, submitted to the
Working Group on Transport Law at its seventeenth session
(A/CN.9/WG.III/WP61.) [Original: English]**

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Finland submitted the text of a proposal concerning scope of application, freedom of contract and related provisions in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Scope of Application, Freedom of Contract and Related Provisions

1. Previous discussions

1. Scope of application, freedom of contract and related provisions have been discussed in previous sessions of the Working Group, particularly in the fourteenth session (Vienna 2004) and the fifteenth session (New York 2005). In the sixteenth session (Vienna 2005) no discussion took place in view of the fact that pending matters would be properly prepared and channelled through the UNCITRAL secretariat for the seventeenth session (New York 2006). However, during the sixteenth session the importance of understanding the implications of the volume contracts regime on small or unsophisticated volume shippers was noted, as further specified in that particular session.

2. Due to the above-mentioned starting points, reference can be made to the following UNCITRAL documentation:

- A/CN.9/572, Report of Working Group III on the work of its fourteenth session (Vienna 2004), paragraphs 81-109;
- A/CN.9/576, Report of Working Group III on the work of its fifteenth session (New York 2005), paragraphs 10-109; and
- A/CN.9/591, Report of Working Group III on the work of its sixteenth session (Vienna 2005), paragraph 244.

3. The Working Group reached several conclusions in the fourteenth session (Vienna 2004) as further specified in the respective report (A/CN.9/572), among them the following:

- The draft convention (instrument) should be mandatorily applicable to traditional shipments;
- Traditional charter parties, volume contracts in the non-liner trade, slot charters in the liner trade, and towage and heavy lift contracts should be excluded from the application of the draft instrument;
- Third parties (where the contract of carriage between the shipper and the carrier is not within the scope of application of the draft convention) should be protected where the identification of such parties should be made by reference to a transport document, considering, however, that the third parties deserving protection should be established clearly, not yet closing the categories;
- The Working Group was not opposed to the inclusion of a provision on ocean liner service agreements on a non-mandatory basis where particular care should be dedicated to, for example, the protection of the interests of small shippers and of third parties; and
- An optimum placement of an ocean liner service agreement provision within the draft convention (instrument) should also be considered.

4. As to the question of scope of application, in the discussions in the fourteenth session three alternative approaches were introduced: the documentary approach, the contractual approach and the trade approach. It was also noted that another

aspect relevant to the scope issue was whether a given contract of carriage had been freely negotiated between the parties or not. The conclusion reached by the Working Group was that a compromise could be achieved by using a combination of the documentary approach, the contractual approach and the trade approach. The drafting proposals made after this conclusion have been compromises on those alternative grounds. Nevertheless, drafting has proved to be difficult in spite of broad consensus as such in this respect.

5. An informal drafting group prepared a redraft reproduced in the report (A/CN.9/572) under paragraph 105. It was noticed that the same informal drafting group had not had sufficient time to consider the matters of ocean liner service agreements and the mandatory coverage of the draft instrument.

6. When having pursued discussions on the questions of structure, substance and drafting between the sessions of the Working Group, it emerged that further clarifications were necessary on all the above-mentioned matters. Ocean liner service agreements were now understood to be volume contracts. Nevertheless, the non-mandatory position of volume contracts was still to be clarified. These outlines were taken up in the fifteenth session (New York 2005).

7. The Working Group reached several conclusions in the fifteenth session (New York 2005) as further specified in the respective report (A/CN.9/576), among them the following:

(a) Ocean liner service agreements should be included within the scope of application of the draft convention as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder;

(b) Certain conditions concerning volume contracts in liner transportation were laid down for derogation from the mandatory provisions to take place, and the derogation scheme could form the basis for further discussions, however, taking into consideration the specific requirements of clarity, sufficient differentiation and non-abuse;

(c) In view of volume contracts in liner transportation, the seaworthiness obligation, and liability arising from unseaworthiness could nevertheless not be derogated from as would also possibly be the case in view of some of the provisions concerning shipper's obligations and liability;

(d) The above-mentioned derogation possibilities would cover third parties also, but only under specific conditions; this point was to be raised in connection with the discussions on jurisdiction and arbitration;

(e) As to the mandatory protection of third parties, the requirement of documents was established, however, making efforts to reconcile such an approach and an approach where the third parties were specified; should this fail, both alternatives should be kept for the time being for further discussions; and

(f) A one-way mandatory system concerning the carrier should be maintained and the system should include maritime performing parties.

8. There were several other matters that needed to be decided upon in the fifteenth session as shown in the report (A/CN.9/576).

9. The discussions in the fifteenth session (New York 2005) were based on a draft prepared by an informal drafting group. The end result after the fifteenth session is reflected, with minor technical adjustments, in A/CN.9/WG.III/WP.56. The conclusions of

the Working Group are, however, found in the report (A/CN.9/576) of the fifteenth session.

10. It was pointed out that further work was needed in order to establish an acceptable text. After the fifteenth session it has also become clear that the drafting has to many parts been found complex. It has been observed that contracts of carriage which are within the draft convention and contracts of carriage which are outside the draft convention according to article 9 of A/CN.9/WG.III/WP.56 are difficult to understand. This is specifically the case with volume contracts. Further, the protection of third parties in article 10 of A/CN.9/WG.III/WP.56 is difficult to understand, particularly in relation to article 9 of A/CN.9/WG.III/WP.56. The non-mandatory approach in article 95 of A/CN.9/WG.III/WP.56 to volume contracts used in liner transportation also needs further drafting and debate.

11. In view of this background it has been felt necessary to develop the provisions of scope of application and freedom of contract as well as related matters.

12. Several changes compared with A/CN.9/WG.III/WP.56 are proposed as follows. The numbers of the articles are the same (but a new definition increases the lettering in article 1).

2. Multimodality

13. It is at this point intended or a possibility that the draft convention will cover certain aspects of multimodal transport. The basis is found in draft articles 1 (a) and 27 of A/CN.9/WG.III/WP.56. According to draft article 27, the multimodal regulation only covers loss of or damage to the goods or delay in their delivery.

14. The multimodal approach may affect different parts of the draft convention. This connection has been noted also, but only to some points, in discussing scope of application, freedom of contract and related provisions. The particular points are found in the report (A/CN.9/572) of the fourteenth session (Vienna 2004), paragraph 103, and the fifteenth session (New York 2005), paragraph 108.

15. The proposal does not seem to create particular problems in view of the partially multimodal nature of the draft convention. No additional provisions are included due to multimodal aspects. Should the necessity arise based on arguments not taken into consideration, additional drafting might then become necessary.

3. Proposed text with commentaries

16. Article 1. Definitions

For the purposes of this Convention:

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

(b) “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

(c) “Liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

(cc) “Non-liner transportation” means any transportation that is not liner transportation.

...

17. There are some adjustments to the text as it appeared in A/CN.9/WG.III/WP.56. The term “volume contract” (b) is a contract of carriage and this is now included in the definition. In this definition the word “goods” has been substituted for the word “cargo” in order to coordinate with the language of the draft convention. According to the report (A/CN.9/591) of the sixteenth session (Vienna 2005), paragraph 244, an explanatory document would be prepared on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications. The Comité Maritime International (CMI) has expressed its willingness to assist in the preparation of such document. For this reason there is no detailed information of volume contracts in this document. Reference is made to the document prepared by the CMI as presented to the Working Group.

18. Efforts to clarify the basic provisions on scope of application have resulted in the need not only to define non-liner transportation, but also liner transportation. This will be self-explanatory once dealing with article 9.

19. *Article 8. General scope of application*

1. *Subject to article 9, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading and the port of discharge are in different States, if:*

(a) *The place of receipt or port of loading is located in a Contracting State;*

or

(b) *The place of delivery or port of discharge is located in a Contracting State.*

References to [places and] ports mean the [places and] ports agreed in the contract of carriage.

2. *This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.*

20. The bracketed language in the chapeau of paragraph 1 of draft article 8 of A/CN.9/WG.III/WP.56 “[of a sea carriage]” and “[of the same sea carriage]” is proposed to be deleted. The bracketed language was included in order to avoid the concerns of some delegations. The concern consisted of the possibility that there would, for example, be two separate domestic sea carriages within two separate states in which case the port of loading for the first carriage would be in a different state than the port of discharge of the second sea carriage. Such a carriage should not fall under the draft convention. Instead of including the bracketed language in the draft convention, it is proposed that this particular clarification would rather be made in the commentaries to be written on the basis of the adopted text.

21. In the Chapter on jurisdiction it has been proposed that the port of loading and the port of discharge would be added as connecting factors as basis for jurisdiction in claims against the carrier. This connecting factor is included in the report (A/CN.9/591) of the sixteenth session (Vienna 2005), paragraph 73, as further specified in the proposed article 75 (c) under that paragraph. Once such connecting factors are adopted, it seems appropriate to include the port of loading and the port of discharge as factors that also decide the application of the draft convention. It is also coordinated with the text in the chapeau of paragraph 1 above. Consequently, it is proposed that the brackets for port of loading and port of discharge in paragraph 1 (a) and (b) of draft article 8 of A/CN.9/WG.III/WP.56 should be removed.

22. The bracketed language in paragraph 1 (c) of draft article 8 of A/CN.9/WG.III/WP.56 (“The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract”) is proposed to be deleted due to particular difficulties in deciding the relevance of such a reference. These difficulties have been noted in the report (A/CN.9/576) of the fifteenth session (New York 2005), paragraphs 61 and 62. Even without such a particular reference, parties are naturally always entitled to incorporate the text of the draft convention as part of their contract, as has been customary by the use of “paramount clauses.” Problems of interpreting such references and the draft convention text as contractual stipulations may arise, but those problems might be outside the discussions of the Working Group.

23. *Article 9. Specific exclusions and inclusions*

1. *This Convention does not apply to the following contracts of carriage in liner transportation:*

(a) *Charterparties, and*

(b) *Contracts for the use of a ship or of any space thereon, whether or not they are charterparties.*

2. (a) *Subject to paragraph (b), this Convention does not apply to contracts of carriage in non-liner transportation.*

(b) *This Convention applies in non-liner transportation if:*

(i) *There is no charterparty or contract for the use of a ship or any space thereon, whether or not such contract is a charterparty, between the parties, and*

(ii) *The evidence of the contract of carriage is a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods.*

Background

24. Draft article 9 of A/CN.9/WG.III/WP.56 includes problematic drafting. There is first an exclusion in paragraph 1, but then, nevertheless, an inclusion in paragraph 2 and a “conditional” inclusion in paragraph 3. There is the addition of “on-demand carriage” included in paragraph 2 to show that such carriage is included in the scope of application of the draft convention even if it is not a question of liner transportation, as is the case when applying the Hague and the Hague-Visby Rules. Volume contracts are specified in paragraph 3. Volume contracts are framework contracts whereby a series of shipments has been contemplated. Individual shipments shall be arranged separately and they can be

either in liner or similar trade, or in tramp trade. Paragraph 3 of draft article 9 of A/CN.9/WG.III/WP.56 aims to make the draft convention apply to framework volume contracts through what is applicable on the basis of each individual shipment.

25. The starting point for understanding proposed article 9 above is found in, as before, article 8 where reference is made to the draft convention being applicable to contracts of carriage, as defined in article 1 (a).

26. The proposed text now puts emphasis on liner transportation and non-liner transportation in order to provide a clearer understanding than before on what is excluded from the scope of application. The definition of non-liner transportation (including the definition of liner transportation) has already been discussed by the Working Group, and there seems to be a good possibility to rely on the trade approach. The new drafting approach in article 9 makes it necessary to define both liner transportation and non-liner transportation in article 1.

Paragraph 1 of proposed article 9

27. Paragraph 1 excludes certain situations in liner transportation, such as charterparties used in liner transportation. This is a drafting matter. The substance does not seem to have caused dissent in the previous discussions in the Working Group.

Paragraph 2 of proposed article 9

28. Proposed paragraph 2 (a) above excludes all contracts in non-liner transportation. There is no particular reference to charterparties, but it has been considered totally natural that all charterparties in non-liner trade fall under the reference in proposed paragraph 2 (a) above.

29. In order not to decrease the scope of application from what is applied according to the Hague and the Hague-Visby Rules, there is a need to include a certain part of non-liner transportation in the scope of application of the draft convention. This is the so-called “on-demand” carriage which has been discussed in the Working Group before. On this point there does not seem to be any dissent in the Working Group either, except on the drafting. The approach in proposed paragraph 2 (b) above is intended to create a better understanding of when the draft convention is applicable than the wording found in paragraph 2 of draft article 9 of A/CN.9/WG.III/WP.56 without there being an intention to change the substance. The proposal above dictates two comments. First, there must not be a charter party or similar contract between the parties, as specified in proposed paragraph 2 (b)(i) above. Second, in proposed paragraph 2 (b)(ii) above it is required that there is a transport document or an electronic transport record that is both evidence of the contract of carriage and of the carrier’s or a performing party’s receipt of the goods. There are thus two requirements in paragraph 2 (b)(ii).

30. There is further discussion under the next heading on volume contracts concerning proposed paragraph 2.

Volume contracts

31. The proposed text does not repeat paragraph 3 of draft article 9 of A/CN.9/WG.III/WP.56. As (framework) volume contracts by definition are contracts of carriage, as specified in proposed article 1 (b) of article 9 above, the application of the draft convention to such contracts can be decided on the basis of the proposed new

wording of article 9 as such. If one looks at the proposed text above, it is possible to conclude that the list of exclusions of certain contracts in liner transportation in paragraph 1 does not cover volume contracts. Thus, volume contracts are contracts of carriage and if they are contracts of carriage in liner transportation they are covered by the draft convention. On the other hand, according to proposed paragraph 2 (a) of article 9 above, contracts of carriage in non-liner transportation are excluded from the scope of application of the draft convention. Volume contracts that are used for the purposes of non-liner transportation would thus be excluded.

32. A contract for the use of the ship or of any space thereon referred to in proposed paragraph 1 (b) of article 9 does not cover volume contracts in liner transportation and there should be no risk of misunderstandings due to the new proposed text.

33. The fact that the draft convention does apply to those volume contracts specified above and shipments under it does not mean that the provisions of the draft convention automatically would be mandatory. The mandatory or non-mandatory nature of the draft convention is decided according to articles 94, 95 and 96, as proposed below.

34. The issue of mixed volume contracts (both liner or “on-demand” and non-liner for the individual shipments under the volume contract) has not been considered commercially an essential point of departure. Should such a situation arise there would be a possibility to understand the new proposed text in a way that the draft convention applies to a mixed volume contract where the individual shipment is in liner transportation (or based on “on-demand” carriage), while it does not apply to a mixed volume contract where the individual shipment is in non-liner transportation otherwise than on the basis of “on-demand carriage”.

35. Certain further issues of interpretation may arise.

36. *Article 10. Application to certain parties*

Notwithstanding article 9, if there is a charterparty or other contract of carriage excluded from the application of this Convention pursuant to article 9, then the following paragraphs apply:

(a) This Convention applies as between the carrier and the consignor, consignee, controlling party, holder, or [person referred to in article 34] that is not [Variant A: an original party to the excluded contract of carriage] [Variant B: a shipper to the excluded contract of carriage],

(b) This Convention does not apply as between the [Variant A: original parties] [Variant B: carrier and the shipper] to the excluded contract of carriage.

37. Draft article 10 of A/CN.9/WG.III/WP.56 has been considered unclear. The aim of draft article 10 is to provide protection to certain third parties on a mandatory basis where, nevertheless, the contract, such as a charterparty in non-liner transportation, between the carrier and the shipper is not covered by the draft convention. The basic approach is the same as in the Hague and the Hague-Visby Rules, but in the draft convention it is not possible to tie the protection of a third party to a bill of lading or similar document of title.

38. As mentioned above under the heading “1. Previous discussions”, the Working Group has discussed the protection of third parties not only as to the proper drafting, but also on the basis of two main alternatives. One alternative is based on combining the protection with the possession of a transport document or an electronic transport record as shown in draft article 10 of A/CN.9/WG.III/WP.56. The other alternative is based on the

notion that the protected third party is directly specified without there being a necessity to require a transport document or an electronic transport record.

39. In making this new proposal, further efforts have been made to clarify draft article 10 as it stands in A/CN.9/WG.III/WP.56. Those efforts have been found not to be sufficiently successful. As the conclusions reached so far by the Working Group provide a possibility to go back to the specification of third parties should the approach including a document or an electronic transport record not be satisfactory (cited from heading 1. “Previous discussions”: “... the requirement of documents was established, however, making efforts to reconcile such an approach and an approach where the third parties were specified; should this fail, both alternatives should be kept for the time being for further discussions”), this new proposal does include the other alternative which is based on specifying the third parties that should be protected. It has been found to be a better alternative to go forward than the alternative now found in draft article 10 of A/CN.9/WG.III/WP.56.

40. Should the Working Group, nevertheless, establish that a transport document or an electronic transport record must be referred to, the only proposed alternative at this stage is the one now found in draft article 10 of A/CN.9/WG.III/WP.56. It is not, however, the priority given in this new proposal.

41. In proposed article 10 (a) above, the protected third parties have been specified. These specifications have been put forward to the Working Group before when discussing the two main alternatives mentioned. However, there are brackets concerning the person referred to in draft article 34. This is the documentary shipper. His position might be comparable with that of the shipper rather than a third party to be protected. A documentary shipper’s position might nevertheless not be the same as that of a shipper and it might be necessary to maintain the language now within brackets, pending further discussions.

42. In proposed article 10 (b) above it is stated for clarity’s sake that the draft convention does not apply as between the original parties to the excluded contract of carriage. The original parties are in general terms the “shipper” and the “carrier”, or in chartering terms “charterer” and “owner”, the latter possibly specified. Two variants are proposed, one (A) referring to the original parties, the other (B) referring to the carrier and the shipper. In view of the terminology just mentioned it might be preferable to choose variant A.

43. Both variants A and B in proposed article 10 (b) might be unclear in a particular situation: a charterparty between X (carrier) and Y has been concluded. A bill of lading has been issued by X to Y. The latter circulates the bill of lading to Z and then Y repurchases the bill of lading from Z. Y’s position as third party or not might be unclear in some jurisdictions. The question is whether the draft convention should provide solutions to all legal problems. Perhaps this particular situation could be left for interpretation. The Working Group might nevertheless want to discuss the matter further. The two variants suggested above might have at least some implications in this respect, even if they do not explicitly resolve the issue.

44. *Article 20. Liability of maritime performing parties*

...

5. *This article does not apply unless the place where the goods are initially received by the maritime performing party or the place where the goods are finally delivered by the maritime performing party is situated in a Contracting State.*

45. In proposed article 8 above, there are requirements in geographic terms for the draft convention to apply. Article 8 functions in relation to the carrier, but the application of the draft convention to a maritime performing party cannot follow exactly the same basis due to the fact that under article 8 the maritime performing party may perform totally outside contracting states. It has been thought that for the draft convention to apply to maritime performing parties there should be a particular connecting factor geographically to a contracting state as well. This is a new proposal and paragraph 5 of article 20 has been thought to be the proper place for the provision.

46. *Article 94. General provisions*

1. *Unless otherwise specified in this Convention, any stipulation in a contract of carriage is void to the extent that it:*

(a) *Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;*

(b) *Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or*

(c) *Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.*

[2. *Unless otherwise specified in this Convention, any stipulation in a contract of carriage is void to the extent that it:*

(a) *Directly or indirectly excludes, limits, [or increases] the obligations under this Convention of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34; or*

(b) *Directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34 for breach of any of their obligations under this Convention.]*

Paragraph 1 of proposed article 94

47. In the chapeau of paragraph 1 the word “stipulation” has been substituted for the word “provision” as it refers to contract. In paragraph 1 the word “it” has been removed to the chapeau in order to avoid repeating it under (a), (b) and (c). The reference in the chapeau to a stipulation being void is clarified so that the stipulation is void to the extent that it is in conflict with the mandatory provisions of the draft convention.

Paragraph 2 of proposed article 94

48. The mandatory nature of the draft convention in view of the shipper’s obligations and liability is still undecided. Another option might, for example, be to make a reference in each provision concerning its mandatory or non-mandatory nature. The brackets are maintained at this point. As the shipper’s position is affected by other provisions than those found in chapter 8, the wording “under this Convention” has been substituted for the wording “chapter 8” in the proposed paragraphs 2 (a) and (b) above. However, the placing of that reference might still have to be clarified.

49. *Article 95. Special rules for volume contracts*

1. *Notwithstanding article 94, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those set*

forth in the Convention provided that the volume contract contains a prominent statement that it derogates from this Convention, and

(a) Is individually negotiated, or

(b) Prominently specifies the sections of the volume contract containing the derogations.

2. A derogation under paragraph 1 must be set forth in the volume contract and may not be incorporated by reference from another document.

3. A carrier's public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 is not applicable to [rights and] obligations stipulated in articles 16 (1)(a) and (b), [30] and [33] and liability arising from the breach thereof, nor is paragraph 1 applicable to article [66][on the loss of the right to limit liability].

5. (a) Paragraph 1 applies between the carrier and the shipper;

(b) Paragraph 1 applies between the carrier and any other party that has expressly consented to be bound by the terms of the volume contract that derogate from this Convention. The express consent must demonstrate that the consenting party received information that prominently states that the volume contract derogates from this Convention and the consent shall not be set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

(c) The burden is on the party claiming the benefit of derogation to prove that the conditions for derogation have been fulfilled.

Background

50. Due to the new approach to volume contracts in article 9 above, drafting changes are necessary in article 95, but these changes do not reflect any changes in substance, except for what is stated below. There are two major drafting proposals. First, it has been possible to simplify the wording in paragraph 1. Second, it has been possible to delete paragraph 4 of draft article 95 as it stands in A/CN.9/WG.III/WP.56. Consequently, the new proposed text above has a different numbering of paragraphs from paragraph 4 onwards.

51. There is a substantive change in proposed paragraph 4 above, but pending further discussions. There is also a substantive change in proposed paragraph 5 (c) above. Both of these changes are further explained below.

Paragraph 1 of proposed article 95

52. The bracketed language in A/CN.9/WG.III/WP.56 “[is agreed to in writing or electronically]” has been deleted in proposed paragraph 1 above, as that requirement is already included in articles 3 and 5.

53. The word “duties” as found in A/CN.9/WG.III/WP.56 is proposed to be deleted as it has been deemed to be synonymous with “obligations” which is also included in the text.

54. The drafting may need adjustments in view of coordinating the language in proposed paragraph 1 with the language in paragraph 2 of article 76 on jurisdiction as expressed in the report (A/CN.9/591) of the sixteenth session (Vienna 2005) paragraph 73.

Paragraph 2 of proposed article 95

55. The word “contract” has been changed to the words “volume contract”.

Paragraph 3 of proposed article 95

56. There has been some discussion whether paragraph 3 of draft article 95 of A/CN.9/WG.III/WP.56 is necessary. Some sources have maintained that it adds no value to regulating the status of volume contracts in article 95. On the other hand, there are sources strongly wanting to maintain paragraph 3 as it stands in A/CN.9/WG.III/WP.56. The reason is that it is considered very important to ensure that there is full disclosure to shippers about derogation and that the derogation is not hidden. Particularly in view of U.S. law it has been maintained that this law permits what are called time-volume rates in a carrier’s public schedule of prices, which rates might be construed as volume contracts under the general definition of volume contracts that the Working Group has developed. All references in paragraph 3 are necessary.

57. In view of the fact that the sources considering paragraph 3 unnecessary have based their opinion on the fact that the provision does not add anything, while the sources wanting to maintain paragraph 3 have provided arguments of substance, it has been considered proper to propose that paragraph 3 as it stands in A/CN.9/WG.III/WP.56 should be maintained. This is also true for the bracketed language within paragraph 3. It is proposed that the brackets should be removed and the text maintained. Maintaining proposed paragraph 3 above seems to create no negative effect, but the paragraph obviously clarifies the position in some jurisdictions.

Paragraph 4 (formerly paragraph 5) of proposed article 95

58. This paragraph includes the super-mandatory provision according to which derogation is not possible under any circumstances. It is proposed that technically paragraph 5 (a) and (b) of draft article 95 of A/CN.9/WG.III/WP.56 should be combined, and the word “rights” has been put within brackets. Reference to rights might be unnecessary, as there is separate wording for article 66.

59. Compared with paragraph 5 of draft article 95 of A/CN.9/WG.III/WP.56, the super-mandatory provisions concerning the shipper are proposed to be decreased to articles 30 and 33, but these provisions are bracketed pending further discussions. The articles are partly connected with strict liability for the shipper. The final solution depends partly on the decisions of the Working Group concerning chapter 8. Reference to article 66 is also bracketed pending further discussions.

Paragraph 5 (formerly paragraph 6) of proposed article 95

60. The drafting of this paragraph has been improved, but no change in substance is intended, except for (c) (formerly the last sentence in paragraph 6 (b) of draft article 95 of A/CN.9/WG.III/WP.56). It is simultaneously proposed that the text in the first brackets in paragraph 6 (b) of draft article 95 of A/CN.9/WG.III/WP.56, now proposed paragraph 5 (b), should be deleted for reasons explained under paragraph 1 above. The second brackets in paragraph 6 (b) of draft article 95 of A/CN.9/WG.III/WP.56, now

proposed paragraph 5 (b), should be removed and the text maintained to ensure that a third party has proper possibilities to understand the derogations and provide a proper consent. The word “information” has been substituted for the words “a notice”.

61. Proposed paragraph 5 (c) is new. The last sentence in paragraph 6 (b) of draft article 95 of A/CN.9/WG.III/WP.56 should not only cover burden of proof as between the carrier and any other party than the shipper, but also as between the carrier and the shipper. The proposal above corrects this. It is also proposed that the brackets as found in paragraph 6 (b) should be removed in this respect. As it is possible that derogations take place either way (for the benefit of the carrier or the shipper) it is not correct to place the burden of proof merely on the carrier, but rather on the party claiming the benefit of derogation. This is reflected in proposed paragraph 5 above.

62. *Article 96. Special rules for live animals and certain other goods*

Notwithstanding [Variant A: chapters 5 and 6 of this Convention and the obligations of the carrier][Variant B: articles 94 and 95], the terms of the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except when the claimant proves that the loss of or damage to the goods or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 19 or of a maritime performing party done recklessly and with knowledge that such loss or damage would probably occur or recklessly and with knowledge that the loss due to the delay would probably result, or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

63. In the chapeau of draft article 96 of A/CN.9/WG.III/WP.56 there is a reference in accordance with proposed variant A above. This reference is partly unclear and partly unnecessary. In view of the reference made in paragraph 1 of draft article 95, similar language could be used resulting in proposed variant B above in the chapeau of article 96. Variant B also includes a reference to article 95, as it is commercially viable that there are volume contracts in the live animal trade.

64. In the chapeau, a second word “obligation” has been added as compared with the wording in draft article 96 of A/CN.9/WG.III/WP.56.

65. In article 96 (a) the language is clarified by now proposing that the “claimant” shall prove intentional or particular reckless causing of loss.

66. The bracketed language in draft article 96 (a) of A/CN.9/WG.III/WP.56 should be maintained and the brackets removed. The protection of the carrier against unfair liability for live animals is necessary, but it has been thought fair that intentional or particular reckless causing of loss is not only limited to the carrier himself, but that it also covers any person referred to in draft article 19. In these cases the carrier would be liable.

67. In article 96 (a), it is further proposed that, instead of referring to intentional or particular reckless causing of delay as in A/CN.9/WG.III/WP.56, there would be a

reference to intentional or particular reckless causing of loss due to delay. This proposal is thought to better be in line with the references to loss of or damage to the goods than the text found in A/CN.9/WG.III/WP.56.

**O. Preparation of a draft convention on the carriage of goods
[wholly or partly] [by sea]: transport documents and
electronic transport records: document presented for
information by the United States of America, submitted to the
Working Group on Transport Law at its seventeenth session
(A/CN.9/WG.III/WP62) [Original: English]**

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of the United States of America submitted to the Secretariat the document attached hereto as an annex with respect to transport documents and electronic transport records in the draft convention on the carriage of goods [wholly or partly] [by sea]. The delegation advised that the text was intended to facilitate consideration of the topic of transport documents and electronic transport records in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

I. Introduction

1. During the period since the Working Group's sixteenth session, delegates and observers had an opportunity to participate in informal discussions on the principal issues arising under chapter 9 ("Transport documents and electronic transport records") of the draft convention on the carriage of goods [wholly or partly] [by sea], which is annexed to A/CN.9/WG.III/WP.56 (hereafter cited simply by article number). A number of delegates have exchanged preliminary views on these issues, both in response to an informal questionnaire that was made available to all delegates and observers and during an informal seminar in London arranged by the Italian delegation (23-24 January 2006) and open to delegates, observers and others. For the convenience of the Working Group, this document summarizes these preliminary views.

II. Draft article 37. Issuance of the transport document or the electronic transport record

2. Draft article 37 of the draft convention provides:

"Upon delivery of the goods to the carrier or performing party:

"(a) The consignor is entitled to obtain a transport document or, subject to article 5 (a)¹ an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and

"(b) The shipper or, if the shipper instructs the carrier, the person referred to in article 34,² is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5 (a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one."

3. The corresponding provision of the Hague and Hague-Visby Rules, article 3 (3), provides in relevant part simply that:

"After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading ..."

4. Article 14 (1) of the Hamburg Rules similarly provides:

"When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading."

5. The principal innovation of draft article 37 is based on the recognition that the "consignor" (defined in draft article 1 (i) as the "person that delivers the goods to the carrier or a performing party for carriage") is not necessarily the "shipper" (defined in draft article 1 (h) as the "person that enters into a contract of carriage with a carrier"). An FOB

¹ Draft article 5 (a) requires the consent of the parties before electronic transport records can be used.

² Draft article 34 refers to the party sometimes described as the "documentary shipper", i.e., a person identified as the "shipper" in the contract particulars who does not qualify as the "shipper" under the definition in draft article 1 (h).

seller, for example, may fulfil its obligations under the sales contract by delivering the goods to a carrier that has previously concluded a volume contract with the buyer. The seller is the “consignor” but the buyer (having contracted with the carrier) is the “shipper.” Under the Hague and Hague-Visby Rules, it appears that in this context only the shipper/buyer would be entitled to a bill of lading,³ but in practice both the consignor/seller and the shipper/buyer have a legitimate interest in receiving some sort of transport document. The former may well need a receipt to justify payment under the sales contract; the latter may need a transport document to control the goods.

6. During the preparatory work of the Comité Maritime International (CMI), there was some controversy as to whether the shipper or the consignor should be entitled to demand a transport document from the carrier. This conflict was ultimately resolved by recognizing that the two parties have different needs that can be served by different types of transport documents. The proposed text therefore permits the consignor to obtain the type of transport document that it needs—a receipt that is not necessarily evidence of the contract of carriage, not necessarily a document of title, and not necessarily negotiable. The proposed text permits the shipper, as the carrier’s contractual counterpart, to obtain the type of transport document that gives it control over the goods (and the performance of the contract of carriage), subject to a contrary agreement in the contract.

7. During the Working Group’s spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 25.)

8. During informal discussions since the Working Group’s last session, roughly two-thirds of the delegates addressing this issue supported draft article 37 substantially as drafted. Some expressed the view that when the consignor/seller delivers the goods to a carrier that has contracted with the shipper/buyer, the consignor/seller delivers the goods to a person acting on the behalf of the shipper/buyer—and thus loses control of the goods to the shipper/buyer. Accordingly, the consignor/seller is entitled only to a receipt proving that delivery has been completed; it is not entitled to a transport document giving further control of the goods.

9. The delegates participating in informal consultations who opposed draft article 37 objected that in commercial practice the consignor/seller retains control of the goods, by means of a suitable transport document, until it is paid the purchase price for the goods (often under a documentary credit) when it tenders the transport document. Those delegates would amend draft article 37 to give only the consignor the right to demand a transport document.

10. One delegate suggested that, to overcome these difficulties, the carrier should be permitted to require the surrender of the transport document or electronic transport record issued to the consignor under draft article 37 (a) as a precondition to issuing an appropriate transport document or electronic transport record to the shipper under draft article 37 (b). This would seem to accord with the current practice in a number of jurisdictions under which a carrier demands the surrender of a dock receipt or mate’s receipt before issuing a negotiable bill of lading. But some questioned whether this would unduly elevate the significance of the receipt issued under draft article 37 (a). If a negotiable transport

³ Neither the Hague Rules nor the Hague-Visby Rules explicitly define the term “shipper” but draft article 1 (a)’s “carrier” definition implicitly recognizes that the “shipper” is the party that enters into a contract of carriage with the carrier. The result under the Hamburg Rules is uncertain because article 1 (3) combines the concepts of draft article 1 (h) and draft article 1 (i) of the draft Convention.

document is viewed as the figurative “key to the warehouse”, would the non-negotiable receipt become the “key to the key to the warehouse”?

11. Some delegates participating in the informal consultations suggested drafting improvements. (1) One delegate suggested that the chapeau be amended to read “Upon *or after* delivery of the goods to the carrier or performing party” to recognize the common situation in which the consignor delivers the goods to the carrier but does not wish to receive a transport document until after the goods have been loaded on the vessel. (2) Another delegate questioned whether the phrase “expressly or impliedly” in paragraph (b) is necessary. (3) Finally, one delegate suggested that it might be appropriate to specify that a shipper is entitled in any event to obtain at least a non-negotiable transport document or electronic transport record, even if the shipper and the carrier have agreed not to use negotiable transport documents or electronic transport records. During the London seminar arranged by the Italian delegation, it was generally thought that this change would be desirable.

III. Draft article 38. Contract particulars

12. Draft article 38 provides:

“1. The contract particulars in the transport document or electronic transport record referred to in article 37 must include:

“(a) A description of the goods;

“(b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;

“(c) (i) The number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods and

“(ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods;

“(d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;

“(e) The name and address of the carrier; and

“(f) The date

“(i) on which the carrier or a performing party received the goods, or

“(ii) on which the goods were loaded on board the ship, or

“(iii) on which the transport document or electronic transport record was issued.

“2. The phrase “apparent order and condition of the goods” in paragraph 1 refers to the order and condition of the goods based on:

“(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and

“(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.”

13. The corresponding provision of the Hague and Hague-Visby Rules, article 3 (3) (a)-(c), is similar to article 38 (1) (a)-(d). Article 15 (1) of the Hamburg Rules has a much longer list of mandatory items that must be included in a transport document.⁴

14. The mandatory items included in article 38 (1) have not been substantially controversial. Indeed, during the informal discussions since the Working Group's last session every delegate addressing this issue supported article 38 substantially as drafted, although there was some support for expanding the list slightly. Various delegates suggested that one or more of the following items might be added:

- The name and address of the shipper or consignor (compare article 15 (1) (d) of the Hamburg Rules);
- The name and address of the consignee (but perhaps only if that information is furnished by the shipper or consignor) (compare article 15 (1) (e) of the Hamburg Rules);
- The places of receipt and discharge and the ports of loading and unloading (compare article 15 (1) (f) and (g) of the Hamburg Rules);
- The number of originals of the transport document (compare article 15 (1) (h) of the Hamburg Rules);
- A statement, if applicable, that the goods will or may be carried on deck (compare article 15 (1) (m) of the Hamburg Rules and draft article 26 (3) of the draft convention); and
- An indication of the dangerous nature of the goods, if applicable (which might be included in draft paragraph 1 (a), addressing the description of the goods).

Stronger support was expressed for the view that draft article 38 (1)'s list should not be expanded, but should be limited to only those items that are absolutely necessary.

⁴ Article 15 (1) of the Hamburg Rules provides:

"1. The bill of lading must include, inter alia, the following particulars:

- "(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;
- "(b) The apparent condition of the goods;
- "(c) The name and principal place of business of the carrier;
- "(d) The name of the shipper;
- "(e) The consignee if named by the shipper;
- "(f) The port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
- "(g) The port of discharge under the contract of carriage by sea;
- "(h) The number of originals of the bill of lading, if more than one;
- "(i) The place of issuance of the bill of lading;
- "(j) The signature of the carrier or a person acting on his behalf;
- "(k) The freight to the extent payable by the consignee or other indication that freight is payable by him;
- "(l) The statement referred to in paragraph 3 of article 23;
- "(m) The statement, if applicable, that the goods shall or may be carried on deck;
- "(n) The date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
- "(o) Any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6."

15. During previous discussions, the Working Group addressed some drafting issues. During the spring 2003 session, for example, a concern was expressed that the phrase “*as furnished by the shipper before the carrier or a performing party receives the goods*” might be read as placing a heavy burden on the shipper. (See A/CN.9/526, para. 28.) The intention was not to place any burden on the shipper but to clarify that the carrier’s obligation to issue the required documents containing the specified information was dependent on the shipper’s furnishing the specified information. Perhaps the phrase “*if furnished by the shipper*” would be more appropriate. It was also observed, however, that the phrase “*as furnished*” is appropriate because it stresses that the contract particulars should include the information in the same form as the shipper furnished it.

16. During informal discussions since the Working Group’s last session, several drafting suggestions were made with respect to these three paragraphs. Several delegates suggested that draft paragraph 1 (a), covering the description of the goods, should be qualified in the same way as draft paragraphs 1 (b) and (c)—with the phrase “*as furnished by the shipper before the carrier or a performing party receives the goods*” (or whatever alternative is accepted). This suggestion was widely supported at the informal seminar in London. One delegate suggested that the separate paragraphs be combined under a chapeau containing the agreed phrase, thus minimizing duplication. Another suggested that the phrase “*as furnished*” was appropriate for draft paragraphs 1 (b) and (c)(i) but that “*if furnished*” was more appropriate for draft paragraph 1 (c)(ii). (This suggestion was based on the assumption that the consignor should always know the leading marks and the number of packages, but may not know the weight.) One delegate suggested that the agreed phrase should mention the “consignor” (recognizing that if the “consignor” and the “shipper” were not the same person, the “consignor” was more likely than the “shipper” to provide the required information). Finally, it was suggested that addressing the timing issue was too cumbersome. The words “*before the carrier or a performing party receives the goods*” should thus be deleted from the phrase.

17. The remaining draft paragraphs prompted fewer drafting suggestions. One delegate wondered whether draft paragraph 1 (d) referred to the goods inside a container and suggested that the provision be modified to clarify that the carrier need state only the apparent order and condition of the container at the time the carrier or a performing party receives it for shipment (in case this was not sufficiently clear from draft paragraph (2)). One delegate suggested that draft paragraph (f) should require the carrier to indicate the significance of the date of the transport document (i.e., whether it was the date of receipt under draft sub-paragraph (i), the date of loading under (ii), or the date of issuance under (iii)).

18. No delegate that expressed a view in informal consultations favoured express sanctions for carriers that fail to provide mandatory information, but the view was expressed that a carrier should not be permitted to benefit from a breach of its obligation under this article (e.g., by qualifying for a lower package limitation). One delegate suggested that a carrier’s failure to provide the required information should create a presumption that the accurate information would support the party claiming against the carrier. (Compare draft article 40 (4) in this regard.) Another delegate suggested that a carrier’s breach of its obligation under this article would constitute a breach of contract, thus permitting an action for contract damages that could be proven.

IV. Draft article 39. Signature

19. Draft article 39 provides:

“1. A transport document must be signed by the carrier or a person having authority from the carrier.

“2. An electronic transport record must include the electronic signature of the carrier or a person having authority from the carrier. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.”

20. During the Working Group’s spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 32.) Since then, it has been revised to conform to the Working Group’s conclusions in light of the recommendations of the Experts’ Group that addressed electronic commerce issues. A further suggestion was made that the Working Group may wish to consider whether “signature” should be defined as, for example, in article 14 (3) of the Hamburg Rules, which provides:

“The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.”

21. During the informal discussions since the Working Group’s last session, every delegate addressing this issue supported draft article 39 substantially as drafted.

22. The only contentious issue was whether a definition of “signature” was necessary. Some delegates supported the inclusion of a definition along the lines of article 14 (3) of the Hamburg Rules or article 5 (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes.⁵ A clear majority of those participating in informal discussions said that no definition was necessary.

23. No delegate participating in informal discussions favoured the inclusion of express sanctions for carriers that fail to sign transport documents.

24. One delegate made the drafting suggestion that the expression “by the carrier or a person having authority from the carrier” in draft paragraph (1) should be amended to read “by or on behalf of the carrier” and the expression “of the carrier or a person having authority from the carrier” in draft paragraph (2) should be amended to read “of the carrier or a person acting on behalf of the carrier.” (Compare article 15 (1) (j) of the Hamburg Rules.)

V. Draft article 40. Deficiencies in the contract particulars

25. Draft article 40 provides:

“1. The absence of one or more of the contract particulars referred to in article 38 (1), or the inaccuracy of one or more of those particulars, does not of itself

⁵ Article 5 (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes defines “signature” as “a handwritten signature, its facsimile or an equivalent authentication effected by any other means”.

affect the legal character or validity of the transport document or of the electronic transport record.

“2. If the contract particulars include the date but fail to indicate its significance, then the date is considered to be:

“(a) If the contract particulars indicate that the goods have been loaded on board a ship, the date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship; or

“(b) If the contract particulars do not indicate that the goods have been loaded on board a ship, the date on which the carrier or a performing party received the goods.

“[3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]

“4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the transport document or electronic transport record is either prima facie or conclusive evidence under article 43, as the case may be, that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party.”

26. During the CMI’s preparatory work, various suggestions were made as to possible sanctions that might be imposed on a carrier that failed to date the transport document at all. Suggested sanctions included “a large fine”, “loss of recourse to the P&I club”, “loss of the right to limit liability”, and liability in “a separate action for any resulting loss.” (See 2000 CMI Yearbook, p. 184.) It was ultimately concluded that other forces ensured that transport documents are dated. The only issue requiring attention, therefore, was the problem of ambiguous dates.

27. Draft article 40 (3), which is bracketed, is the most controversial portion of this article. (It may be the most controversial provision in the chapter.) During the first reading of this material, the prevailing view in the Working Group was that draft paragraph 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep draft paragraph 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date. (See A/CN.9/526, para. 60.)

28. The theory of draft article 40 (3) recognizes that the registered owner may have no direct connection with a particular cargo owner. Indeed, it may be a lender that became the registered owner solely to maintain a security interest in the vessel. But the registered owner should nevertheless know (directly or indirectly) who is booking cargo on its ship, and thus be able to redirect the suit to the appropriate party—the carrier. In some ways, those jurisdictions that recognize *in rem* liability for cargo claims indirectly accomplish a similar result.

29. Alternative approaches can be imagined to deal with the problems created by a transport document's failure to identify the carrier. For example, the carrier might lose the benefit of the time bar (recognized in draft chapter 15) or the time bar period might begin to run only when the carrier is properly identified. In addition, the carrier might be required to reimburse the claimant for any expenses incurred in locating the carrier. It was even suggested that the carrier might lose the benefit of the package limitation if the transport document violates draft article 38 (1) (e). But all of these alternatives deal only with the indirect consequences of having a difficult time identifying the carrier. None of them offers any practical assistance in identifying the carrier. Draft article 40 (3), in contrast, provides a direct incentive for the readily identifiable party most likely to know the identity of the true carrier to share that key information.

30. During informal discussions since the Working Group's last session, all of the delegates addressing the issue supported draft article 40(1), (2) and (4) in substance as currently drafted.

31. Draft article 40 (3) continues to be highly controversial. A few of the delegates participating in informal consultations support draft article 40 (3) in substance, but suggest ways in which it could be improved. One delegate suggested strengthening draft article 40 (3) to give greater protection to the shipper. The provision could create an irrebuttable presumption that the registered owner is the carrier (which would be consistent with the general rule that a person is bound by the acts of another person with apparent authority under certain circumstances). If there must be a rebuttable presumption, it was suggested that the registered owner can overcome the presumption that it is the carrier only if (1) it fully identifies the true carrier and (2) the true carrier accepts that it is the carrier.

32. A majority of the delegates addressing this issue in informal consultations opposed draft article 40 (3) for a variety of reasons. Most found it inappropriate to presume that the registered owner is the carrier when it may have had no real connection with the carriage. Indeed, under the current draft the registered owner may have had no connection whatsoever with the carriage. Suppose that "the contract particulars ... indicate that the goods have been loaded on board a named ship", but in fact the goods were never carried on that ship. Should draft article 40 (3) be limited to cases in which the goods were in fact loaded on board a named vessel? Or the registered owner may have had no connection with the portion of the carriage on which the loss occurred. Why should the loading of the goods on a ship for carriage on the sea leg of a multimodal transaction create any presumption as to the identity of the carrier for the inland legs? Those opposing draft article 40 (3) argue as a matter of principle that the shipper should bear the responsibility of knowing the identity of the party with which it contracted. Even third-party consignees, which did not themselves contract with the carrier, should force their contracting party—the shipper—to reveal the identity of the carrier rather than forcing the registered owner to do so.

33. Delegates that participated in informal consultations also pointed out a host of practical problems with the current draft. For example, it is unclear what is meant by "fail[ing] to identify the carrier." Draft article 38 (1) (e) requires the contract particulars to include "the name and address of the carrier." Must both be included to avoid draft article 40 (3)? If the contract particulars include the name of the carrier without the address, has there been a "fail[ure] to identify the carrier"? Is an "identity of carrier" clause sufficient to identify the carrier? Should a standard-form "identity of carrier" clause in fine print be allowed to contradict other information on the transport document? Other problems abound. Does draft article 40 (3) accept the possibility of multiple carriers (as many national legal systems do)? The relationship between the first two sentences is also unclear. The first sentence establishes a rebuttable presumption (that the registered owner

is the carrier) and the second sentence describes one way to rebut the presumption. Is the second sentence intended to specify the only way in which the presumption may be rebutted? Or may the registered owner rebut the presumption by proving that someone other than a bareboat charterer is the true carrier? For example, may the registered owner rebut the presumption by proving that a time charterer is the true carrier? And if so, must the time charterer accept responsibility as “carrier” before the registered owner is released from liability? Even if the Working Group accepts draft article 40 (3), it seems clear that a number of drafting issues will need to be considered.

34. One delegate participating in informal consultations suggested that draft article 40 (3) may no longer be necessary as a practical matter because other forces will operate to solve the problem. (1) Competitive pressures have already improved the clarity of transport documents. (2) Requirements in the ICC’s Uniform Customs and Practices for Documentary Credits make transport documents that fail to identify the carrier unacceptable to banks and thus unacceptable to shippers that seek payment under a documentary credit. (3) Draft article 38 (1) (e) of the draft already requires the inclusion of the carrier’s name and address. (4) The regime of draft article 49 provides a strong incentive for a carrier to include its name and address in the transport document.

VI. Draft article 41. Qualifying the description of the goods in the contract particulars

35. Draft article 41 provides:

“The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38 (1) (a), 38 (1) (b) or 38 (1) (c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

“(a) For non-containerized goods

“(i) If the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

“(ii) If the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

“(b) For goods delivered to the carrier or a performing party in a closed container, unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate, the carrier may include a qualifying clause in the contract particulars with respect to

“(i) the leading marks on the goods inside the container, or

“(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

“(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

“(i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or

“(ii) the carrier can show that there was no reasonable means of checking the weight of the container.”

36. This article is drafted on the assumption that the shipper is always entitled to obtain a transport document or electronic transport record reflecting the information that it provided to the carrier. (During informal discussions since the Working Group’s last session, including at the informal London seminar, all of the delegates addressing the issue accepted this assumption.) The issue here concerns when the carrier may qualify the shipper’s information or provide additional information that may contradict the shipper’s.

37. During the Working Group’s spring 2003 session, several suggestions were made for further consideration. Some of those suggestions have already been incorporated in the text. Others that the Working Group may wish to consider include:

- Language along the lines of draft article 41 (a)(ii) could be included in draft paragraph (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate.
- A carrier that decides to qualify the information mentioned on the transport document could be required to give the reasons for the qualification.
- The draft convention could deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper.
- When the carrier acting in bad faith voluntarily agrees not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

(See A/CN.9/526, para. 37.) During informal discussions since the Working Group’s last session, each of these suggestions received at least some support.

38. Although most of the delegates addressing the issue in informal consultations supported the substance of draft article 41, there were a number of caveats and drafting suggestions. One delegate suggested that it was necessary to distinguish between cases in which a carrier *may* qualify the information provided by the shipper (in order to protect itself from liability for cargo damage) and cases in which a carrier *must* qualify the information provided by the shipper (in order to protect third parties). This proposal received substantial support at the informal London seminar. Another delegate suggested that it might be possible to delete draft paragraph (b) and apply draft paragraph (a) to containerized goods. (Alternatively, language along the lines of draft article 41 (a)(ii) could be included in draft paragraph (b).) Those attending the informal London seminar agreed that draft paragraphs (a) and (b) should be considered in conjunction with each other, also addressing any possible gaps (for example, with respect to containerized cargo in an open container or with respect to the description of cargo in a closed container).

Several delegates thought it would be helpful to clarify the allocation of burdens of proof (although one delegate suggested that this issue be left to national law).

39. Some delegates participating in informal consultations questioned the use of the concept of “good faith”, which they reported was not used in their legal system. Even if the concept of “good faith” is retained, some delegates found it problematic in this context. In considering whether to distinguish between cases in which a carrier *may* qualify the information and cases in which a carrier *must* qualify the information (a possible distinction mentioned in the previous paragraph), it would be helpful to consider that the concept of “good faith” might operate differently in the two cases.

VII. Draft article 42. Reasonable means of checking and good faith

40. Draft article 42 provides:

“For purposes of article 41:

“(a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable.

“(b) The carrier acts in “good faith” when issuing a transport document or an electronic transport record if

“(i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and

“(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.

“(c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith.”

41. During the Working Group’s spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 43.) During informal discussions since the Working Group’s last session, all of the delegates addressing the issue supported draft article 42 in substance as currently drafted (although one delegate made the drafting suggestion that draft paragraph (b) should be phrased in terms of “bad faith” instead of “good faith”).

VIII. Draft article 43. Prima facie and conclusive evidence

42. Draft article 43 provides:

“Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is:

“(a) Prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and

“(b) Conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars

“[(i)] if a negotiable transport document or a negotiable electronic transport record has been transferred to a third party acting in good faith [or

“(ii) Variant A of paragraph (b) (ii)

“if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars.]

“(ii) Variant B of paragraph (b)(ii)

“if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]”

43. During the Working Group’s spring 2003 session, the substance of draft paragraphs (a) and (b)(i) were generally accepted. (See A/CN.9/526, paras. 44-48.) During informal discussions since the Working Group’s last session, including at the informal London seminar, all of the delegates addressing the issue supported the substance of draft paragraphs (a) and (b)(i) as currently drafted.

44. Draft paragraph (b)(ii) has been more controversial. (See A/CN.9/526, paras. 44-48.) Since the Working Group’s spring 2003 session, two new variants have been introduced for draft paragraph (b)(ii). Under the narrower variant B, a non-negotiable transport document or electronic transport record can be conclusive evidence only if the consignee has purchased and paid for the goods in reliance on the contract particulars. For example, the shipper and the carrier may use a non-negotiable transport document because the goods will not be resold en route. The sales contract may provide for payment when the shipper tenders this transport document to the consignee because it proves that the goods have in fact been shipped. Thus the consignee would rely on the contract particulars to pay for the goods. But if essentially the same transaction were conducted with a letter of credit, variant B would not protect the bank that advanced the money for the purchase price to the consignee and took a security interest in the goods. The broader variant A would extend protection to the bank that relied on the contract particulars to advance money to the consignee.

45. During informal discussions since the Working Group’s last session, including at the informal London seminar, it appeared that views on draft paragraph (b)(ii) ran the full gamut. A majority of the delegates addressing the issue supported the broader variant A. Indeed, one delegate would support an even broader version in which every third party was protected (at least under some non-negotiable transport documents) regardless of whether it paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars. The minority was divided between those delegates who favoured the narrower variant B and those who opposed both variants (on the ground that only negotiable documents should be allowed to constitute conclusive evidence).

46. Two delegates participating in informal consultations suggest that the text should be revised to deal directly with the non-negotiable transport documents sometimes known as “straight” or “recta” bills of lading. This suggestion received substantial support at the informal London seminar.

IX. Draft article 44. Evidentiary effect of qualifying clauses

47. Draft article 44 provides:

“If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause.”

48. Draft article 44 is the key provision of the entire chapter because it provides the conditions under which most of the other articles have practical meaning. Draft articles 41 and 42, for example, specify when the carrier is allowed to qualify the description of the goods in the contract particulars. But draft article 44 then specifies when a qualification has practical meaning, permitting the qualification to supersede the prima facie or conclusive evidence that would otherwise exist under draft article 43. Moreover, draft article 37’s fundamental obligation to issue a transport document or electronic transport record and draft article 38’s obligation to include within it a description of the goods is meaningful in practice to the extent that the description has any effect, which ultimately turns on draft article 44.

49. During the Working Group’s spring 2003 session, it was suggested that draft article 44 “was too much in favour of the carrier” because it allowed the carrier to rely on its qualifying clauses without regard to its treatment of the goods. (See A/CN.9/526, para. 50.) An alternative text for containerized cargo (from footnote 154 of A/CN.9/WG.III/WP.56 and previously in footnote 146 of A/CN.9/WG.III/WP.32) would permit the carrier to rely on qualifying clauses only when the carrier could demonstrate a chain of custody by delivering a container in substantially the same condition in which it had been received:

Alternative draft of article 44

“1. If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under article 43, to the extent that the description of the goods is qualified by the clause, when the clause is “effective” under paragraph 2.

“2. A qualifying clause in the contract particulars is effective for the purposes of paragraph 1 under the following circumstances:

“(a) For non-containerized goods, a qualifying clause that complies with the requirements of article 41 will be effective according to its terms.

“(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 41 will be effective according to its terms if

“(i) The carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and

“(ii) There is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that

“(1) A container was opened for the purpose of inspection,

“(2) The inspection was properly witnessed, and

“(3) The container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection.”

50. The Working Group's discussion of this issue at the spring 2003 session is reported at A/CN.9/526, paragraphs 49-52. Delegates may also wish to consider the commentary on this issue in A/CN.9/WG.III/WP.21 at paragraphs 150-154.

51. During informal discussions since the Working Group's last session, a clear majority of the delegates expressing a view on this issue supported draft article 44 substantially as drafted. The minority's views in favour of the alternative draft included in footnote 154, however, appear to be strongly held. One delegate argued that the principles of the alternative draft should be extended to non-containerized goods concealed by packaging.

X. Draft article 45. "Freight prepaid"

52. Draft article 45 provides:

"[If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee is liable for the payment of the freight. This article does not apply if the holder or the consignee is also the shipper.]"

53. This provision had originally been included in a proposed chapter on freight. (See draft article 9.4 (a) of A/CN.9/WG.III/WP.21; draft article 44 (1) of A/CN.9/WG.III/WP.32.) At the Working Group's spring 2004 session, when most of the proposed chapter on freight was deleted from the draft, the decision was taken to retain for future consideration the provision that now appears (in brackets) as draft article 45. Proponents suggested that the provision would give protection and clarity to third-party holders of a transport document. (See A/CN.9/552, paras. 163-164.)

54. During informal discussions since the Working Group's last session, most of the delegates addressing this issue supported draft article 45 substantially as drafted. One delegate suggested that draft article 45 might be expanded (1) to apply also in cases of non-negotiable transport documents and electronic transport records (particularly if non-negotiable transport documents and electronic transport records may constitute conclusive evidence under draft article 43 (b)(ii)), and (2) to give the "freight prepaid" statement *prima facie* effect when a claim is made against the shipper.

55. A few of the delegates participating in informal consultations instead expressed support for revising the article to conform in substance with article 16 (4) of the Hamburg Rules, which provides:

"A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15 [quoted in endnote 4], set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication."

56. This would have the effect of reversing the presumption. Under draft article 45 as drafted, the carrier's right to collect freight from the consignee is unaffected by the convention unless an affirmative statement (e.g., "freight prepaid") appears in the transport document. Under article 16 (4) of the Hamburg Rules, the convention defeats the carrier's

right to collect freight from the consignee unless an affirmative statement (e.g., “freight payable by consignee”) appears in the transport document.

57. Roughly half of the delegates addressing this issue in informal consultations favoured including draft article 45 in the draft convention because it solves two practical problems under current law. First, it clarifies the position of banks (and third parties generally). If a transport document contains the statement “freight prepaid”, a bank will never become liable for the freight. Second, if a carrier seeks to collect freight from a shipper under a “freight prepaid” document, this provision defeats the shipper’s unjustified defence that a “freight prepaid” document is a receipt issued by the carrier evidencing that the freight has in fact been paid. Another quarter of the delegates had no objection to including draft article 45 in the draft convention in substantially its current form, even if they did not think that such a provision was necessary.

58. Roughly a quarter of the delegates addressing this issue in informal consultations opposed the inclusion of draft article 45 in its current form. This group included those who would favour a provision along the lines of article 16 (4) of the Hamburg Rules and those who would simply leave the matter to national law.

59. Some of the delegates participating in informal discussions suggested drafting improvements that border on substantive change. The most significant of these involves the carrier’s assertion of a lien or a right of retention when a consignee or other third party claims the goods. The current draft confirms that the consignee or other third party does not have an obligation to pay the freight, but it does not explicitly address whether the carrier can retain the goods (which would have the practical effect of forcing the consignee or other third party to pay the freight in order to take delivery). This problem might be corrected by redrafting the first sentence of draft article 45 along the following lines:

“If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement “freight prepaid” or a statement of a similar nature, *then the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid.*”

60. The suggestion was also made that the draft should clarify (either here or in the definition of “freight”) that—for the purpose of this article—“freight” does not include demurrage and costs incurred by the carrier in relation to the goods during their carriage.

P. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: delivery to the consignee: proposal by Switzerland, submitted to the Working Group on Transport Law at its seventeenth session

(A/CN.9/WG.III/WP.63) [Original: English]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Switzerland submitted the text of a proposal concerning the carrier's right of retention of the goods in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Delivery to the consignee: Proposal by the delegation of Switzerland on the carrier's right of retention of the goods

I. Background

1. As referred to in the report of the sixteenth session of Working Group III (see A/CN.9/591, paras. 221 and 222), during the discussion of chapter 10 of the draft convention on the carriage of goods [wholly or partly] [by sea] on "Delivery to the consignee", the Swiss delegation proposed the introduction of a provision regulating the right of the carrier to retain the cargo for some specific reasons. Such a right would effectively mean that the carrier may suspend its obligation under draft articles 13, 48 (b) and 49 (a)(i) and (ii) to deliver the cargo to the consignee as long as the shipper and/or consignee are in breach of some of their obligations.

2. If no such provision is introduced in the draft convention, then it might be questionable whether and to what extent national law would still be able to maintain its own rules on retention of goods and/or on liens over cargo, as the silence of the draft convention regarding this issue might be read as having covered this issue by dealing with aspects of delivery in the detailed way currently proposed in draft chapter 10.

3. This is particularly the case since chapter 10 does implicitly provide for a right to retain the goods (and withhold or suspend delivery) in some specific instances. Those currently are:

Article 47

Right to refuse delivery, unless receipt is acknowledged (this, at least, is our reading of the current draft);

Article 48 (b) (Variant C)

Right to refuse delivery, unless consignee does produce proper identification.

4. Furthermore, the draft convention might be read to preclude any possibility for the parties to agree in the contract of carriage (as it is very frequently done in current practice) to a retention or lien clause, since the obligation under article 13 to deliver the goods at destination is made mandatory by virtue of article 94 (1) (a). Therefore, without clarification relating to the right to retain the cargo in specific situations in this draft convention, any traditional lien clause validity entered into under current legal regimes could become null and void.

5. Such a right to retain the goods (and to exercise a lien on the goods) is crucial to the carrier, as it is for any contracting party in a comparable legal relationship. It is a fundamental remedy and a form of security for payment for services, rendered in connection with that object. Other UNCITRAL Conventions foresee such rights of a contracting party, e.g. the United Nations Convention on Contracts for the International Sales of Goods in article 71. In the context of a contract of carriage, such a right secures the interest of the carrier to be fully paid before it performs the contract by delivering the goods to the consignee. The draft convention should allow such a practice also in the future.

6. The extent of the right to retain the cargo, and the way that this right of retention has to be exercised, is currently not harmonized and substantially depends on the applicable law, and in fact, on the applicable rules of conflict of law. The value of any lien clause, its extent, its validity and its practical enforcement is, therefore, substantially dependent on the applicable law as recognized at the place of the enforcement of such rights. In practice, this fact makes this right to retain highly coincidental and unpredictable.

7. It is the view of the Swiss delegation that a substantive provision on the right to retain the cargo for payment of freight (and other financial claims arising under the contract of carriage) should be introduced. It recognizes that, depending on the decision of the Working Group on the way to address the issue of the right to retain the goods and to exercise liens over the goods, other provisions of chapter on delivery (chap. 10) might be affected and should be adapted in the drafting process. The Swiss delegation, therefore, suggests that the Working Group should first take a decision on the principles and on the degree of detail of specification to be regulated in the instrument and, then, request the UNCITRAL Secretariat to provide a consolidated version, integrating the aspects of the right of the carrier to retain the goods in the different situations provided for in the draft convention.

8. It is the view of the Swiss delegation that such a provision should not enter into procedural issues or issues of property or real or proprietary rights. The draft provisions should provide a (non-mandatory) answer to the most important questions:

1. Is such a retention allowed?
2. Is the carrier allowed to sell the cargo?
3. Has the consignee or controlling party to be notified?

II. Proposed Variant A of draft article 52 bis

9. The proposal of this delegation uses as a basis for further discussion the draft provision of article 45 initially provided for in the chapter on freight (see A/CN.9/WG.III/WP.32), but later deleted by the Working Group (see A/CN.9/552, para. 164). This provision, as modified by this proposal, would read as follows:

Article 52 bis

1. Notwithstanding any agreement to the contrary, if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payment of:

- (a) Freight, dead freight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods;
- (b) Any damages due to the carrier under the contract of carriage; and
- (c) Any contribution in general average due to the carrier relating to the goods.

The carrier is entitled to retain the goods until such payment has been effected, or adequate security for such payment has been provided.

2. If the payment as referred to in paragraph 1 of this article is not, or is not fully, effected, the carrier is entitled to sell the goods [according to the procedure, if any, as provided for in the applicable national law] and to satisfy

the amounts payable to it [including the costs of such recourse] from the proceeds of such sale. Any balance remaining from the proceeds of such sale must be made available to the person entitled to the goods.

10. In this proposal, the brackets around the words “Notwithstanding any agreement to the contrary” of the old article 45 of A/CN.9/WG.III/WP.32 are deleted. It is suggested that, thereby, it is made clear that contractual clauses to the effect of describing the right to retain are allowed under the draft convention.

11. The draft provision as set out in Variant A above does not mention the duty of the carrier to notify cargo interests of its intention to enforce its rights of retention and sale. It is suggested that such a provision should be added.

12. Furthermore, the language of the second paragraph of Variant A above should be aligned to draft article 51 (2) and (3) of the draft convention (use of proceeds), or, alternatively, the latter paragraphs should be made applicable to the right of retention.

13. When discussing the chapter on freight in earlier sessions of the Working Group, the provision on the right to retain the goods was not discussed in much detail. However, it became clear that this provision raises issues which are quite complex and, to a certain extent, entail aspects of the law relating to real rights and to procedural laws. It is the position of the Swiss delegation that this fact should not cause UNCITRAL and its Working Group to refrain from attempting to regulate issues of the enforcement of such a right to retain, and thereby allow the commercial parties to be able to deal with this issue in a predictable manner.

III. Proposed Variant B of draft article 52 bis

14. As an alternative to a draft provision in line with Variant A above, the Working Group might want to restrict the draft convention by simply allowing the applicable law and/or the parties to provide for a right to retain the goods. Such a provision could read as follows:

Article 52 bis

Nothing in this Convention affects a right conferred to the carrier or [maritime] performing party pursuant the contract of carriage or the applicable law to exercise a right to retain the goods until payments of sums payable to the carrier are fully effected.

IV. Right to retain in cases of articles 47 and 48 (b)

15. Independent from a decision on the two variants above, the Working Group may want to consider a provision which clarifies the right to retain in the cases of draft articles 47 and 48 (b). Such a provision could read as follows:

The carrier may retain the goods and refrain from delivering the goods to the consignee

(a) Provided that the consignee has not acknowledged receipt of the goods pursuant to article 47; or

(b) Provided that the consignee does not provide identification pursuant to article 48 (b).

Alternatively, these two possibilities for the carrier to refuse delivery could be added as a new paragraph (c) under draft article 51 (1).

Q. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: comments of the European Shippers' Council, submitted to the Working Group on Transport Law at its seventeenth session
(A/CN.9/WG.III/WP.64) [Original: French]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the European Shippers' Council submitted to the Secretariat the document attached hereto as an annex containing its comments regarding the draft convention on the carriage of goods [wholly or partly] [by sea]. The text is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

1. The European Shippers' Council is the organization which represents the interests of European commercial and industrial companies as users of all modes of transport. "Shippers" are primarily producers or distributors of goods, which they market and distribute to their customers. Sea carriage is the main mode of transport which they use for international transactions.

2. In preparation for the session of Working Group III to be held in New York in April 2006, the Council will set out its position on the main agenda items for the session, with reference to document A/CN.9/WG.III/WP.56.

3. This document also contains an analysis of the articles that the Working Group was unable to study or on which it was unable to reach a conclusion during its previous session in Vienna.

Right of suit

4. The Council welcomes the fact that this issue is addressed in the draft instrument because, in practice, it is very often the case that an exporting shipper which has relinquished its transport document (for example, deposited it in a bank as a letter of credit) finds that its right of suit against the sea carrier is contested when it seeks compensation for damage to goods that have not been paid for by the consignee (bankrupt buyer, unpaid letter of credit, etc.). The current rule based on the holding of the transport document is too rigid and often leads to inequitable outcomes.

5. Article 67

From this point of view, the Council prefers the wording of variant B. The approach of formulating a general rule allows for greater simplicity and clarity and avoids the problem of an incomplete list, as in variant A. The concept of "legitimate interest" makes it possible to take into account the commercial contract (International Rules for the Interpretation of Trade Terms, Incoterms), as well as the factual circumstances.

6. Article 68

The Council is in favour of this article, which allows a shipper that has relinquished its bill of lading nonetheless to bring proceedings against the carrier or a performing party. However, the Council wishes to stress that the negative proof required in this case might be difficult to provide.

Chapter 15. Time for suit

7. Article 69

With respect to the limitation period for instituting proceedings, one year appears too short. While this period is derived from maritime tradition, that tradition dates back a long time and the periods provided for in more recent conventions such as the Hamburg Rules and the Montreal Convention are longer. In practice, disputes are increasingly being settled within the framework of insurance. It would be more sensible to allow the parties an additional year to resolve disputes amicably before having recourse to the courts or to arbitration.

Regarding the means of abatement of actions, the Council prefers the modern solution of limitation and the wording in variant B.

8. Article 70

This article is standard and meets with our approval if it avoids the idea of a “last day”, which may give rise to too much controversy.

9. Article 71

It seems more logical for shippers, who form the majority of claimants, to have the right to request an extension of the limitation period. In any case, an extension should have to be accepted by both parties. The Council rejects the idea that the carrier may unilaterally extend the limitation period.

10. Article 72

Since this is the draft of an international convention intended to standardize the law, paragraph (a) is not needed and should be deleted. With regard to paragraph (b), we prefer variant A since the period it provides for is shorter than that provided for in variant B (ii).

Only variant A is needed in the article.*

11. (Article 73)

12. Article 74

The Council welcomes the principle that an action may be instituted against a bareboat charterer. However, it would be desirable to avoid referring to national law, in order to maintain legal certainty. The Council is therefore in favour of deleting paragraph (a). Only paragraph (b) is needed; subparagraphs (i) and (ii) could be combined.

Limitation of liability

13. In the Council’s view, the issue of limitation of liability cannot be dissociated from that of defences of liability. The Council would like to point out that, when the Hamburg Rules were drafted, the fact that no exceptions were included was taken into account in setting low amounts for the calculation of the maximum limitation of liability. Since the draft convention reintroduces the concept of exceptions, the Working Group should, when considering this point, increase the amounts significantly, even though the average values of goods have probably increased over recent decades.

14. Article 64

Paragraph 1 presents no problems.

The Council favours variant B of paragraph 2 because of its clear formulation. Nevertheless, we would like to avoid referring to national law, in the interests of simplicity but also to achieve greater legal certainty. Regarding paragraphs 3 and 4, it would be desirable to retain the term “container” rather than to use the term “article of transport”, which has no precise meaning in practice.

15. Article 65

Liability for loss caused by delay

16. The Council would like to draw the Working Group’s attention to the fact that shippers are most often the victims of losses involving service deficiencies (goods being

* *Translator’s note:* The amendments proposed here would entail a consequential amendment to the chapeau.

left on the quay, skipping of ports of call, delivery delays) rather than actual damage, which general containerization has helped to reduce considerably. The Council therefore calls upon the drafters to eschew ready-made solutions arising from a tradition that, though worthy of respect, is now completely out of step with the realities of sea carriage.

17. The Council requests that damage to or loss of goods caused by delay be compensated for in the same way as the damage mentioned in article 64.

18. As far as economic loss caused by delay is concerned, the methods for calculating limitation should not be based on the amount of freight but on the general rules for limitation of liability.

The reference to freight is no longer meaningful today, given the volatility and variability of freight rates (for example, the 2005-2006 rate for freight from Europe to Asia is less than US\$ 200 per 20-foot container, whereas the rate for freight from Asia to Europe is US\$ 1200 per 20-foot container).

Rather than [x] times the quantity of freight, the Council encourages the drafters to be more innovative and to propose a rule based on [x] per cent of the units of account used for damage in article 64.

We suggest that the drafters discard variants A and B and that they draft a specific article for material damage and another for non-material damage.

Article 66

19. The Council wishes to emphasize that timely delivery is one of the carrier's obligations under the draft convention. Paragraph 1 is therefore sufficient and paragraph 2 is redundant.

Chapter 9. Transport documents and electronic transport records

20. The Council takes due note of articles 37 to 43. It has no specific comments to make on these articles, which reflect current judicial practice.

21. Regarding the signature of the transport document or of the electronic transport record, the Council believes that, in the light of the identification requirements in article 38, the expression "as agent"* should be replaced by "as carrier". This would make the situation clear.

22. The wording of article 44, which relates to the scope of the qualifying clause set out by the carrier, should be more precise. The Council wishes to emphasize that a qualifying clause never releases the carrier from its obligations with respect to the goods.

It would be desirable for the draft convention to provide for a simpler formula and to stipulate that qualifying clauses must be "precise and well founded" in order to be effective.

Scope of application and contractual freedom

23. The Council favours a broad scope of application which guarantees predictable legal solutions—an essential condition for the stability of international trade flows.

* *Translator's note:* The expression "as agent" appears in article 12.

The Council cannot agree with the general scope of application set out in article 8 because of the wording of article 9 (1)(d), which puts forwards the (new) principle that “volume contracts” fall outside the scope of application of the draft convention.

The new definition of “volume contract” in article 1 does not on its own justify an exclusion from the scope of application of the instrument, as was the case for the ocean liner service agreement (OLSA), a theoretical concept which seems to have been abandoned.

24. The Council believes that the great majority of transport operations should, on principle, be covered by the draft convention.

Apart from contracts under charterparties, which are excluded, other contracts covering many types of transport operation carried out at prices that are negotiated and fixed for a given period should, on principle, be included within the scope of the convention. There is nothing exceptional about these contracts; in fact, they are common and in everyday use.

25. This category of contract includes:

- The “service contract”, as defined in the United States Ocean Shipping Reform Act (OSRA) of 1998. These contracts, use of which is limited in practice to carriage to or from the United States of America, contain only provisions relating to the technical conditions for execution of the contract (volume commitment, guaranteed freight rates, penalty for breach of commitment, minimum validity of commitment, etc.). In practice, service contracts are commonly signed for a volume commitment of 10 containers per year, or even fewer;
- Ocean liner service agreements (OLSA). This type of contract is still unknown in international trade practice but seems to have the same characteristics as the service contract;
- Any other contract simply defined by validity for a given period, quantities for carriage (with or without a volume commitment), specific operational conditions, where appropriate, and, in all cases, freely negotiated prices.

26. The Council nevertheless envisages a framework in which derogation from some of the rules in the future instrument is possible, but must be specifically negotiated between the two parties and subject to strict limits.

27. The possibility of derogation should be dependent not on a circumstance-specific type of contract (volume contract or OSRA*) but on a particular type of transport. In fact, the possibility of derogating from the instrument should be related to the need to organize a specific legal structure to cover:

- Carriage of a large quantity of goods (e.g. a quantity that may justify a “part cargo”);
- Carriage under specific operational conditions (e.g. use of a private dock where a free in and out (FIO) clause is appropriate, or mandatory delivery periods with penalties for delay);
- Carriage that has been the subject of valid negotiations between the parties.

28. This particular situation occurs almost exclusively in cases of carriage involving “conventional” ships. Within this specific framework, it is desirable, for example, to allow

* *Translator’s note:* The French text says “OSRA” here, but “OLSA” may have been meant.

the parties to derogate from the usual rules for the organization of handling under FIO clauses and free in and out, stowed (FIOS) clauses. This is the basis for article 14 (2). That article and article 11 (6) should be clearly limited to this type of situation.

29. The Council wishes to stress that under no circumstances should the parties be authorized to derogate from the material elements of the contract of carriage, particularly through provisions that result in the liability of the carrier being reduced or even eliminated (see articles 14 (2) and 95). The Council therefore requests that the scope for derogation be clearly defined and limited to cases provided for in the draft convention itself.

30. The “volume contract”, as defined in chapter 1, is far from meeting these criteria, as is the “service contract”. The criteria used to define them cover almost all business relationships between a shipper and a carrier and thus are not of an exceptional nature justifying derogation from the instrument. A large quantity and specific operational conditions, rather than the concept of a specified quantity in a large number of shipments during an agreed period, give grounds for derogation from the draft convention under a specially negotiated contract.*

Contractual freedom

31. The Council notes that the spirit of the new convention gives primacy to the contract and to contractual freedom. The Council, as a matter of policy, favours the contractual approach and the freedom to enter into contracts on a bilateral basis. However, the it wishes to qualify this policy in view of the economic ties that usually exist between parties to a contract for liner carriage.

32. It should be noted that there is a kind of structural imbalance between the parties in the maritime industry, to the detriment of shippers.

33. Despite the fact that liner owners enjoy an advantage that goes beyond the rights conferred by general law in terms of antitrust immunity, they generally have a much more advantageous negotiating position than shippers. Only a very small minority of very large shippers can actually negotiate with shipowners on equal terms. In practice, the vast majority have no real negotiating power with regard to the material elements of the contract of carriage. The Council therefore feels that there are no grounds for calling into question the protection afforded to shippers under previous conventions.

34. This situation can be illustrated by the new article 14 (2), which provides that the carrier may ask the shipper to perform operations for which, under current law, the carrier is expressly liable. This possibility, combined with the provisions of article 95, could allow a carrier to be released from liability during loading or discharging simply because it had secured the shipper’s signature of a “contract” on the basis of a “low freight rate”. We are certain that this possibility will be of great benefit to non-vessel operating cargo carriers (NVOCCs) and other large “freight forwarders” pushing for the maximum extension of contractual freedom.

35. In the Council’s views loading and discharging are part of the carrier’s substantive obligations, and there can be derogation from them only in exceptional circumstances such

* *Translator’s note:* This sentence is unclear in the original French. The translation gives what is assumed to be the intended meaning.

as those referred to above. The same is true for the times of take-over and delivery, which are too sensitive to be left entirely to the (free?) choice of the parties.

36. The possibility of unrestricted derogation from the instrument will also disrupt international trade because in cases involving, for example, cost and freight (CFR) contracts, cost, insurance and freight (CIF) contracts or carriage and insurance paid to (CIP) contracts, consignees may be at risk of “inheriting” a contract of carriage governed by substandard provisions.

37. In fact, the terms under which the consignee consents to a contract that derogates from the draft convention, which are mentioned in article 95 (6)(b), provide no guarantees at all. To what extent can a consignee that is urgently awaiting goods (which it has probably already paid for) really refuse to apply substandard clauses, assuming it is sufficiently well informed to understand those clauses and their significance? Contrary to what the members of the Working Group may think, shippers generally have only a poor knowledge of maritime law and by no means have the legal analysis skills ascribed to them.

Comments on FIO/FIOS clauses

38. In response to the concerns of certain members of the Working Group regarding the legal consequences of “FIO(S)” clauses, which might explain the retention of article 14 (2), the Council would first like to point out that these clauses do not exist in the container transport sector, which today represents more than 90 per cent of total liner carriage. Second, in practice, these clauses pertain only to the distribution of the handling cost in the freight rate and do not affect the fact that it is the carrier who organizes the handling and thus should be liable for it. (N.B. Most freight rates for transport by containers are equivalent to such clauses. This results in the carrier billing the shipper for terminal handling charges (THC) to cover the terminal and loading expenses. Nonetheless, the carrier, which is the handler’s only contracting partner, must remain liable for damages that occur during the container handling.)

39. FIO(S) clauses can actually exist in “conventional” transport, for the transport of very large batches of goods. In such cases, the party organizing the loading or discharging operations should be liable for those operations (conclusion of the contract with the handler).

40. This situation is thus governed either by a contract of carriage (bill of lading including a reference to FIO(S)) or by a “volume contract” negotiated for a series of operations.

This type of operation is sufficiently marginal to be provided for by specifying the scope of application of article 14 (2).

Obligations of the shipper

41. The use of specific provisions to underline shippers’ obligations is consistent with the trend towards holding all transport actors accountable. The Council fully subscribes to this approach and even considers that the possibility of minimizing liability under a contrary agreement, as permitted by the contractual freedom provided for in article 95, would be unacceptable. However, the Council believes that the liabilities of each party should be limited to that party’s sphere of activity and competence, and that the liabilities

under the draft convention should be strictly limited to the contractual framework, as is the case for the obligations of the carrier.

42. Thus, under article 28, the shipper is responsible for packing the goods in such a way that they will withstand the intended carriage. Similarly, in the case of containerization, the shipper is responsible for loading the goods into the container. These obligations are entirely justified.

43. The Council is concerned not about shippers being held liable in the areas referred to above, but about the fact that the shipper's liability appears to be governed by general law and, therefore, to be unlimited. In this situation, unilateralism accentuates the lack of balance in a draft convention that is already unfavourable to shippers. To achieve a better balance, it would be desirable for shippers to be subject, under the convention, to a liability regime equivalent to that envisaged for carriers, with a limitation of liability, since the obligations of the shipper are determined in the contractual framework.

The grounds for treating the shipper and the carrier differently are questionable and can be explained only by the existence of a long tradition of imbalance between shipowners and maritime transport users, in both economic and legal terms. This imbalance can be seen, for example, with respect to the obligation set out in article 30.

44. With reference to the obligation set out in subparagraph (b), there is a real possibility of a shipper making, in good faith, an erroneous statement about its goods or trade information and subsequently being found in breach of risk assessment provisions that are now linked to anti-terrorist security laws and being ordered to provide unlimited compensation to the sea carrier because, for example, its ship is detained for several days in port by the customs authorities of the country of destination.

45. Some small and medium enterprises may be unable to pay the financial penalty imposed. In the context of the obligation set out in article 30 (b), the draft convention should provide that, in cases where loss is caused to the carrier because of an inaccurate declaration with regard to its goods, the shipper's liability may be limited (to [x] times the amount of freight, for example).

46. Another question is whether the shipper's liability for breach of its obligations is fault-based liability or strict liability.

The draft convention also says nothing about limitation periods and the competence of the courts that will hear actions against shippers.

The principle of equity requires that, in matters of liability, the situation of the shipper should not be more unfavourable than that of the carrier.

47. Note: the proposed wording of the new article 33 is "biased" and is therefore unbalanced.

Article 33 (1) uses pejorative terms such as "illegal" and "unacceptable [danger] to the environment"—which emotionally charged language—to refer to failures by a shipper, which are always possible. The same comment applies to article 15. At no time is such language used in defining the obligations of the carrier in chapter 5.

48. Furthermore, article 33 (2), which sets out the obligations to label goods to identify the type of danger they pose, does not specify whether compliance with this obligation is verified at the time the goods are handed over to the carrier or whether the shipper is supposed (how?) to maintain the labelling until delivery, which would be an unacceptable

obligation. Penalties for failure to comply with this obligation may arise only from the shipper's contractual responsibility and should therefore be limited.

49. The current wording, which stipulates that the shipper's liability is unlimited, shows once again that the draft convention in its current form is systematically biased against shippers.

Right of control

Article 54 et seq.

50. The Council would like to see recognition of the principle whereby the shipper retains the right of control of the goods until they are delivered. In practice, the organization of long and complex door-to-door transport operations increasingly often places shippers in the position of having to modify their instructions during carriage in order to adapt to any risks, including commercial risks.

Requests for modifications are currently solely dependent on commercial negotiation and, in fact, are entirely subject to the carrier's goodwill, owing to the imbalance in the relationship between the carrier and the shipper.

Article 54 et seq. should therefore provide for this type of situation to be organized and managed within a legal framework and should state that the contract of carriage does not deprive the shipper of the right to dispose of its goods.

51. To enable the indisputable implementation of this principle, the Council would favour amending article 54 so that, instead of referring to the right to give the carrier instructions in respect of the goods, it clearly asserts the principle whereby the shipper (or the controlling party, as well as the lawful holder of the bill of lading) retains an automatic and unilateral right in respect of the goods until they are delivered or the bill of lading is transferred (as opposed to amendment of the contract itself, which is in essence bilateral) and may give instructions in respect of the transport operation.

52. Article 54 could be amended to read as follows:

“The right of control means the right of the shipper to vary the contract of carriage and the right, under the contract, to give the carrier instructions in respect of the arrangements for carriage of the goods during the period of its responsibility (...).”

53. Regarding article 55 and the exercise of the right of control, the Council regrets that the amended text now limits this right to the controlling party and no longer to the shipper, regarded a priori as the controlling party.

54. The former wording on this point (article 54 in document A/CN.9/WG.III/WP.32) was preferable, as it was based on business practice. In addition, the obligation to mention any variation in the transport document (article 55 (2)) indicates a lack of awareness of practical realities. It is actually once the shipper has relinquished the transport document that the problem of control of the goods arises and that the shipper needs a precise legal framework for giving swift instructions that modify the transport operation.

55. In practice, when a bank is the holder of the transport document because the document functions as a payment instrument, it may be necessary to give the carrier swift instructions in respect of the goods. In such cases, the solutions mentioned in article 55 (2), based on the transfer of the transport document, are inappropriate where swift action is needed. The lawful third party holder of the transport document (for example, the bank),

which is often not concerned about the transport arrangements, should be distinguished from the controlling party, while preserving the rights of the third party holder.

56. The Council therefore suggests that the drafters provide for mechanisms for the swift exercise of the right to modify instructions to the carrier, not limited to the standard transfer of the transport document.

57. It would also be desirable to include an additional paragraph specifying that the holder of the transport document (which is no longer the shipper) may instruct the carrier, by any secure written means, to execute instructions which shall be given to it by a specifically designated party and which the carrier shall execute when it has received confirmation from the shipper or from the last controlling party of whose designation it was officially notified.

58. The Council believes that article 55* is a key element of this new mechanism. For this reason it rejects variant A, subparagraph (c) of which makes it very difficult in practice to implement article 54 (a), (b) and (c).

It is quite possible—and this is taken into account in the decision of the shipper or the controlling party—that a modification of the instructions could entail additional costs. However, provided these costs are reasonable, they need not be an impediment.

The Council is of the view that the wording of variant B is more effective.

59. This wording establishes the principle of the carrier's obligation to act (subparagraph (a)), but also places limits on the right conferred by article 54.

The Council recognizes that any request must be reasonable and compatible with the constraints of shipping. It therefore suggests that the word “interfere” in subparagraph (c) of variant B be qualified by the addition of a word such as “significantly”.

The Council considers that additional expenses resulting from a change of instructions, should not constitute grounds for the carrier to refuse to execute the new instructions. The corollary to this principle is the obligation, set out in paragraph 2, to reimburse additional expenses (see also paragraph 3 (a) and (b)), which is needed to enable a shipper to request a carrier to take an operational and/or financial “risk”, with the shipper providing security for the consequences of taking the risk.

60. Similarly, it is logical for the carrier to be liable for the consequences of refusing to comply with the instructions referred to in article 54 (article 57, variant B, paragraph (4*)). Likewise, it is logical for a carrier which complies with new instructions nevertheless to remain responsible for complying with the usual obligations of the carrier under a contract of carriage.

The possibility of (reasonable) changes should be incorporated in the carrier's obligations.

The current wording resembles a sort of inverse deviation clause in reverse. In order to articulate clearly this dual liability (liability for damage caused by a refusal to accept new instructions, as well as the ordinary liability of the carrier once it has accepted the modification of the instructions), the wording of article 57 needs to be more precise.

* *Translator's note*: The French text says “article 55” here but the comment appears to refer to article 57.

* *Translator's note*: The French text refers to “variant B, paragraph 4”, but paragraph 4 is not part of variant B.

The Council wishes to underline once again that this new legal instrument, which is needed in business practice, should not be weakened by the simultaneous offer of the possibility of derogation from it, which amounts to an amendment to the contract.

In this respect, article 60 is counterproductive.

Transfer of rights

61. The Council welcomes the recognition of electronic transport records as a means of transferring rights that is equivalent to the traditional transfer of the transport document.

However, we consider article 62 (2) to be particularly dangerous because the current position of the Working Group is that it tends to give contractual freedom precedence over the function of protecting shippers that has to date been fulfilled by international maritime conventions.

This article may result in the consignee having to take on the derogating contractual commitments undertaken by the consignor.

Thus, a shipper that has negotiated an economical freight rate and has accepted the obligations set out in article 14, which are ordinarily the responsibility of the carrier, will transfer this obligation to the consignee (holder of the transport document) if the transport document contains an ad hoc clause, even if the clause (i.e. a FIO clause) is added merely in the form of a watermark.

62. The article in question illustrates perfectly the reasons why the Council opposes the position of certain members of the Working Group that derogation from all the fundamental rules of international maritime law should be allowed when there is a “contract” between the shipper and the carrier.

63. If article 62 (2) is retained in its present form, it should be clarified or even reconsidered, since it seems to impose on a holder that is not the shipper more obligations than rights, even if such holder has not participated in the negotiation of the contract. The controlling party is thus at risk of having to assume the liabilities imposed on the shipper (payment of dead freight, demurrage, etc.) as well as those that are ordinarily imposed on the carrier but which have been assumed by the shipper (article 14).

Period of responsibility

64. The Council considers that the wording of article 11 constitutes a significant step backwards compared with the advances reflected in article 4 of the Hamburg Rules and the provisions of the most recent international transport conventions.

First of all, the Council notes a weakening of the principle governing the responsibility of the carrier, namely custody of the goods, a concept which made it possible to define accurately the period between the start and the end of custody of the goods.

The weakening of this rule, which has a direct impact on the responsibility of the carrier, again proceeds from the desire to provide systematically for the possibility of derogation from all the material elements of international maritime law.

The Council opposes this position all the more strongly because article 11 (2) and (3) allows the time and location to be determined not only by the contract of carriage—which in practice is never open to question—but also by the customs or usages in the trade. Custody would then become a residual concept.

65. Article 11 (6) again raises the issue of the validity of contractual freedom. It is comprehensible if it is intended to take adequate account of the statistically infrequent but nonetheless real practice of concluding contracts of carriage that are not especially repetitive to cover operations that are unusual because of the large quantity of goods being transported at one time (carriage almost exclusively by conventional ship) and that give grounds for the negotiation of a FIO(S) clause. This is a situation similar to tramping, where loading is often carried out by the shipper, and it is therefore logical to take this into account in determining the time at which the carrier's period of responsibility begins (the same applies to arrival).

However, the Council is totally opposed to any attempt to allow the carrier, in the context of liner carriage (by container ship in 99 per cent of cases), to delay taking over the goods by invoking the combined effects of articles 14 (2) and 11 (6) and reiterates its opposition to contractual freedom that is specifically intended to benefit the sea carrier.

66. Last, but by no means least, the provision allowing the carrier to evade its responsibility as intermodal carrier—the possibility under article 12 of hiding behind the legal status of “freight forwarder”—de facto destroys any possibility of ensuring that a carrier performing door-to-door transport assumes overall responsibility. The Council knows from experience about preprinted clauses in bills of lading (adhesion contracts) whereby carriers attempt to limit the period of their responsibility.

If we accept this provision, “contractual freedom” will in future allow even a carrier performing door-to-door transport to assume no responsibility at all for it. The Council cannot accept this return to practices that pre-date the Hague Rules and the uncertainty that arise from them, and requests that the wording of article 12 be modelled on article 4 of the Hamburg Rules.

Delivery to the consignee. Articles 46 to 52

67. The Council is pleased to note that the Working Group has undertaken to find legal solutions to specific situations that were previously subject to little or no regulation. The affirmation of the consignee's obligation to accept delivery is logical and indisputable, and the provisions of article 46 et seq. which govern this area are welcome, subject to certain important reservations concerning the points set out below.

It should be noted that the consignee may, in certain cases, be unable to accept delivery of the goods at the agreed time for reasons relating to the law of the country of destination, such as customs law.

It would therefore be desirable—in so far as the consignee or the controlling party is identified and is unable to accept delivery—for the liability of the carrier or of the performing party (the square brackets should be deleted) to continue to apply until the delivery can be effected.

68. As concerns article 48, the use of which should be minimal, we prefer variant A of paragraph (b).

69. Article 49 has a wider scope and has been given full consideration by the Council.

The Council favours provisions that are likely to solve practical problems relating to the delivery of goods. In that context, it supports the wording of the article, especially subparagraphs (a)(i) and (ii) and (b).

70. With a view to resolving two recurrent operational problems, the Council requests the Working Group to take into account cases where the actual consignee does not hold the transport document (for example, a blank order bill of lading) and where the transfer of the document is delayed either because of the means of paying for the goods (letters of credit, payment against documents) or because of a late transfer.

71. It may be in the interests of such a consignee to take delivery to avoid demurrage charges or simply because of an urgent need for the goods.

The carrier should be allowed to deliver the goods to the consignee—which is likely to appear under “notify”—without producing a transport document, subject to the agreement of the holder (for example, the bank) and of the shipper (or of the controlling party when it is not the shipper). It would be desirable to amend article 49 (a)(i) to this effect.

It would also be desirable to add a clause aimed at preventing the possibility of the carrier incorporating into its transport documents a provision authorizing it to deliver goods upon surrender of what it reasonably believes to be an authentic bill of lading. In such a case, it would be logical to make the carrier liable for the erroneous delivery by placing upon it the obligation to carry out checks that are more than merely “reasonable” with respect to its own transport documents, which may be counterfeit.

**R. Preparation of a draft convention on the carriage of goods
[wholly or partly] [by sea]: proposal by Japan, submitted to
the Working Group on Transport Law at its
seventeenth session**

(A/CN.9/WG.III/WP.65) [Original: English]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Japan submitted the text of a proposal concerning the scope of application provisions in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Introduction

1. Draft article 8 (1) (c) provides that this draft convention applies to international contracts of carriage if *“the contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract.”*
2. This article was discussed at the 15th session of the Working Group and views were divided on whether to retain or delete it. The arguments for the retention of this provision are based on the following grounds: the same rule can be found in article 10 (c) of the Hague-Visby Rules, which widens the application of the uniform rule, especially for cross-traders carrying goods through States not party to the Convention (see A/CN.9/576, para. 61). This delegation believes that the above argument in support of the retention is not persuasive in light of the difference between the draft convention and the Hague-Visby Rules, and that the provision could lead to several legal difficulties when it is introduced.

Historical background

3. Draft article 8 (1) (c) has its origin in article 10 (c) of the Hague-Visby Rules, which was copied by the Hamburg Rules. It is worth noting that a similar rule cannot be found in other existing transport conventions. Because the provision is exceptional and unique, it would be helpful to know the historical background of the Visby Amendment, which first introduced such a rule, in order to evaluate the necessity of draft article 8 (1) (c). It will reveal that draft article 8 (1) (c) would expand the scope of the draft convention far beyond that which was intended in the Visby Amendment.
4. The original Hague Rule had a very limited scope of application: it was only applicable to bills of lading issued in any of the Contracting States. As a result, the Hague Rules do not necessarily apply, for instance, even in such a case where the carriage is to a Contracting State (the bills of lading are issued in a non-Contracting State) and the law chosen by the parties is the law of the Contracting States. It was recognized during the drafting process of the Visby Amendment that the scope should be expanded in order to remedy such insufficient application.
5. At the final stage of the Diplomatic Conference for the Visby Amendment, there existed two competing proposals as follows:
 - (1) The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if: (a) the bill of lading is issued in a Contracting State, or (b) the carriage is from a port in a Contracting State, or (c) the contract contained in, or evidenced by, the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.
 - (2) The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another, under which bill of lading the port of loading, of discharge or one of the optional ports of discharge, is situated in a State party to the Convention, whatever may be the law governing such bill of lading

and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

6. As a result of the vote in the 6th plenary session on February 21, 1968, proposal (1) was adopted (See the *Travaux Préparatoires* of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 25, 1924, the Hague Rules and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules, CMI, 1997, pp. 714-741).

7. It is noteworthy that the choice at the Visby Conference was whether to expand the coverage to (1) outbound carriage and contracts governed by the law of the Contracting State (in addition to the bill of lading issued in a Contracting State which was already covered by the Hague Rules) or (2) to both inbound and outbound. No one intended that the Convention should apply to such a carriage from non-contracting state to non-contracting state, as is suggested by the delegates who support article 8 (1) (c) of the current draft.

8. One might argue that wider application of the draft convention is always desirable and there is no reason to oppose the further expansion whatever the intention of the Visby Amendment was. It is true if and only if such an expansion has no counter-effect. Unfortunately, it would create unnecessary difficulties.

Various difficulties arising out of article 8 (1) (c)

9. A number of delegates have expressed their concern arising out of draft article 8 (1) (c). Those concerns include the following:

- (1) First, it should be noted that there is no common understanding of the nature of the Hague-Visby Rules 10 (c). In some jurisdictions, the provision is understood as a choice of law rule which enables the application of the Convention by the force of law. In other jurisdictions, it is considered that the provision simply confirms the practice of “substantive incorporation” which refers to the contract parties’ voluntary incorporation of the provisions of the Convention into the contract (known as a “paramount clause”). The nature of the provision is often discussed in connection with questions such as whether the Convention directly applies without regard to the choice of law rules of the forum. The same debate would be retained when draft article 8 (1) (c) is retained.
- (2) In addition, different from the Hague-Visby Rules, the draft convention includes in the chapters on jurisdiction and arbitration many provisions which are classified as procedural rules. Those provisions are also applicable when the parties agree that the draft convention governs the contract if draft article 8 (1) (c) is retained. It is quite a strange deviation from the universally-accepted rule that the procedural matters are governed by *lex fori*.
- (3) The application of the draft convention to the maritime performing party would add further complications. Suppose that the carrier (Non Vessel Operating Carrier) undertook the carriage from a non-Contracting State to a non-Contracting State and the maritime performing party (an ocean carrier) actually carried the goods by sea. Suppose further that the carrier and the shipper agree that this draft convention, or the law of any State giving effect to it, is to govern the contract. If draft article 8 (1) (c) is retained, then the draft

convention would apply in the above hypothesis and the maritime performing party would be under the coverage of the draft convention. It is a questionable result that the maritime performing party which performed its duties during a voyage between non-Contracting States is subject to the rules of the draft convention including a direct action by the cargo interest simply because the carrier agreed to apply the draft convention.

- (4) Finally, it was also observed that draft article 8 (1) (c) would give the parties an opportunity to escape from the mandatory regulation or even public order of the Contracting State when they choose to apply the draft convention to such contracts that otherwise are subject to the law of the Contracting States. Although this is not the specific concern of this delegation, it was pointed out that article 10 (c) of the Hague-Visby Rules had created in certain countries difficulties at the constitutional level (see, A/CN.9/576, para. 61).

10. In the face of the above difficulties, one cannot easily assert that draft article 8 (1) (c) is desirable simply because it broadens the application of the draft convention. Article 8 (1) (a) and (b) of the current draft already provide a sufficiently broad geographic scope of application compared with the Hague-Visby Rules, and there is no necessity to expand it further.

Conclusion

11. Based on the above reasons, this delegation proposes the deletion of draft article 8 (1) (c).

**S. Preparation of a draft convention on the carriage of goods
[wholly or partly] [by sea]: volume contracts: document
presented by the Comité Maritime International, submitted
to the Working Group on Transport Law at its seventeenth session
(A/CN.9/WG.III/WP.66) [Original: English]**

Note by the Secretariat

At its sixteenth session, the Working Group agreed that to further expedite the preparation of the draft convention on the carriage of goods [wholly or partly] [by sea], an explanatory document should be prepared regarding the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications of those provisions. In response to the suggestion that the Comité Maritime International (CMI) should be requested to assist in the preparation of such a document, the CMI expressed its willingness to assist the Working Group in that regard (see A/CN.9/591, para. 244).

Annex

Volume Contracts

I. Introduction

1. At the sixteenth session of the Working Group, wide support was expressed for the preparation of an explanatory document on the treatment of volume contracts in the draft convention to further illustrate their legal and practical implications. It was also suggested that the Comité Maritime International (CMI) should be requested to assist in the preparation of such document (see A/CN.9/591, para. 244). This paper is submitted in response to that request.

2. We base ourselves on the draft convention as contained in A/CN.9/WG.III/WP.56, but have also seen and taken into account a final draft proposal by Finland which is to be published as a working paper for the seventeenth session as A/CN.9/WG.III/WP.61 and which proposes alternative drafts of articles 1 (b) and (c), 8, 9, 10, 20, 94, 95 and 96.

Definition of “Volume Contract”

3. A “volume contract” is defined in article 1 (b) of the draft convention as contained in A/CN.9/WG.III/WP.56 as meaning:

“a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.”

It is proposed in A/CN.9/WG.III/WP.61 that the beginning of this definition is amended to read:

“a contract of carriage that provides for a specified quantity of goods ...”.

Background and existing international regulation

4. The notion of volume contracts, which provide for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time, is well established in the dry bulk and oil trades, where they are often described as contracts of affreightment (CoAs) or tonnage contracts. They are commonly used, for example, by FOB buyers under a long term sales contract who wish to secure their tonnage requirements and manage the freight risk. BIMCO issued a standard volume contract of affreightment for the transportation of bulk dry cargoes, code-named VOLCOA, in 1982,¹ which reflects the terms commonly used in the trade. This form provides for an agreed period of the contract, the total quantity to be shipped and the quantity per shipment. It also provides that each and every voyage thereunder shall be governed by the terms and conditions of a voyage charterparty as per an attached pro forma. INTERTANKO issued a standard form tanker contract of affreightment, INTERCOA 80, in 1980 (which is adopted by BIMCO). This form provides for an agreed contractual period, the quantity to be shipped per year and a quantity per shipment. Each voyage is to be performed subject to the terms of a charterparty on the INTERTANKVOY 76 form. Volume contracts which contain

¹ Revised and reissued in November 2004 as the standard contract of affreightment for dry bulk cargoes code-named GENCOA.

provisions similar to those reflected in the VOLCOA and INTERCOA forms are outside the scope of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. They are therefore not currently subject to an international mandatory regime. Subject to draft article 9 (3), which is considered in paragraph 8 below, the draft convention set out in A/CN.9/WG.III/WP.56 does not alter the current position (see A/CN.9/572, para. 89).

5. However, individual shipments made under a volume contract may currently be subject to a mandatory regime. Article V of the Hague and Hague-Visby Rules provides that *“if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention.”* Similarly, article 2(3) of the Hamburg Rules provides that *“where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.”* In addition, article 2 (4) of the Hamburg Rules provides, *“if a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment”*. Consequently the Hague, the Hague-Visby or the Hamburg Rules, as the case may be, might apply to bills of lading issued under the charterparty governing each voyage under a volume contract or directly under the volume contract itself.

II. A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61

Exclusions

6. Draft article 9 (1) (d) in A/CN.9/WG.III/WP.56 provides that the draft convention does not apply to volume contracts, except as provided in draft article 9 (3). A/CN.9/WG.III/WP.61 makes a distinction between liner and non-liner transportation. Draft article 9 (2) (a) as set out in A/CN.9/WG.III/WP.61 provides that, subject to draft article 9 (2) (b), the draft convention does not apply to contracts of carriage in non-liner transportation. A volume contract in non-liner transportation thus remains excluded from the scope of application of the draft convention except in situations covered by draft article 9 (2) (b). In liner transportation, draft article 9 (1) as set out in A/CN.9/WG.III/WP.61 only excludes:

“(a) charterparties, and (b) contracts for the use of a ship or of any space thereon, whether or not they are charterparties.”

Volume contracts in liner transportation are considered to be contracts of carriage which would not fall within this exclusion and which would accordingly remain within the scope of application of the draft convention (see A/CN.9/WG.III/WP.61, para. 31).

7. The intention of draft article 10 of the draft convention in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61 is to maintain the current position, at least under the Hague and Hague-Visby Rules, as regards what may loosely be described as third parties (see A/CN.9/572, para. 96 and A/CN.9/WG.III/WP.61, para. 37). It may however be noted that draft article 10 in A/CN.9/WG.III/WP.56 is a provision similar to article 2 (3) of the Hamburg Rules. Draft article 10 preserves the position described in paragraph 5 above as regards bills of lading, but extends the mandatory regime to apply to non-negotiable transport documents and electronic transport records.

8. Draft article 9 (3) (a) in A/CN.9/WG.III/WP.56 applies the draft convention to the terms that regulate each shipment under a volume contract (to the extent that draft

articles 8, 9 and 10 so specify) and is similar to article 2 (4) of the Hamburg Rules. Draft article 9 (3) (b) on the face of it goes further and applies the draft convention to the terms of the volume contract itself, but only to the extent that its terms may regulate a shipment under the volume contract. The intention of this provision is explained in paragraph 65 of A/CN.9/576. Paragraph 24 of A/CN.9/WG.III/WP.61 refers to the problems arising from the drafting of draft article 9 in A/CN.9/WG.III/WP.56 and the commentary goes on to say that the proposed text of draft article 9 in A/CN.9/WG.III/WP.61 is intended to provide a clearer understanding of what is excluded from the scope of application of the draft convention. The intention behind the exception to the exclusion in draft article 9 (2) (b) is explained in paragraph 29 of A/CN.9/WG.III/WP.61.

9. The exclusion from the scope of application of the draft convention of volume contracts in non-liner transportation as outlined above applies equally to volume contracts in trades other than the dry bulk and oil trades. It may be, however, that in some trades sea waybills or other non-negotiable transport documents may be used to which the Hague and Hague-Visby Rules might not apply. Currently, subject to article 2 (3) and (4) of the Hamburg Rules, both the volume contract itself and shipments thereunder may in some trades fall outside the mandatory regimes. However, as noted in paragraph 7 above, the draft convention brings non-negotiable transport documents and electronic transport records within its scope of application.

Service contracts

10. As regards liner transportation, much of the discussion in the Working Group has been focused on the treatment of service contracts and similar arrangements. This expression is neither used nor defined in the draft convention in A/CN.9/WG.III/WP.56 or in A/CN.9/WG.III/WP.61. “Service contract” is however defined in section 3 (19) of the United States Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998 (together, the U.S. Shipping Acts) as meaning:

“a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.”

The expressions “common carrier” and “ocean common carrier” are also defined in the U.S. Shipping Acts.² A service contract as so defined is considered to be within the definition of a volume contract in draft article 1 (b) of the draft convention on the basis that “over a fixed time period” implies a series of shipments.

11. An explanation of the regulatory regime for carriage to and from the United States established by the U.S. Shipping Acts is outside the scope of this paper. It is briefly referred to in paragraphs 19 and 20 of the proposal by the United States of America set out in A/CN.9/WG.III/WP.34. In practice, we understand that in the liner trade to and from the

² At common law, a common, or public, carrier by sea holds itself out as willing to carry for reward for anyone that wants to use its services. A common carrier is subject to a stringent legal regime, which is normally mitigated by the common carrier, which is free to limit its liability by contract, subject to the constraints imposed by the current mandatory regimes.

United States, volume contracts almost always fall within the definition of service contracts. Outside the United States, we understand that volume contracts are normally entered into in the liner trade only when a shipper wishes to safeguard security of space or regularity of service. In the liner trade to and from the United States, it is possible in service contracts which fall within the definition in the U.S. Shipping Acts to stipulate rates of freight which fall outside the carrier's rates as set out in its published tariffs. It is therefore necessary to enter into a service contract to obtain this commercial benefit. Outside the United States, this can be achieved by a straightforward rate agreement.

Derogation

12. Draft article 95 of the draft convention sets out special rules for volume contracts which are subject to the draft convention under article 9 (3) (b), in A/CN.9/WG.III/WP.56 or, as provided in A/CN.9/WG.III/WP.61, to which the draft convention applies because volume contracts in liner transportation do not fall within the contracts excluded by article 9 (1). But for draft article 95, the mandatory provisions of the draft convention would apply to shipments thereunder, or under A/CN.9/WG.III/WP.61 to the volume contract itself, from which, under article 94, neither the carrier nor a maritime performing party may derogate. The freedom of the shipper under draft article 94 (2) remains open for further consideration.

13. Draft article 95 sets out the conditions under which, and the extent to which, a volume contract which is subject to the draft convention may by its terms derogate from the draft convention's mandatory provisions. Support for this principle and the general structure of draft article 95 has been expressed by the Working Group (see A/CN.9/576, para. 82). However, neither the definition of a volume contract in draft article 1 (b) nor of a service contract under the U.S. Shipping Acts refers to a minimum quantity of cargo or containers to be shipped thereunder. The concern has therefore been expressed that service contracts covering a small number of shipments of relatively small quantities of goods, which derogate from the mandatory regime, could disadvantage small or unsophisticated shippers with unequal bargaining power to that of the carrier, possibly by sub-service contracts made under an overarching framework contract.³ It should, however, be noted that no shipper can be forced to accept a volume contract. A shipper is always entitled to obtain from the carrier an appropriate negotiable transport document or electronic transport record under draft article 37 (except as provided in draft article 37 (b)).⁴ Moreover, the freedom to derogate under draft article 95 applies to volume contracts to which the draft convention applies which fall within the definition in draft article 1 (b) and not only to volume contracts which are service contracts within the definition in the U.S. Shipping Acts. Draft article 95 could apply to volume contracts used, or which may in future be used, in trades other than to and from the United States. The current practice in trades outside the United States has been referred to in paragraph 11. The conditions under which a volume contract may derogate from the mandatory terms of the draft convention are to be further considered by the Working Group (see A/CN.9/576, paras. 85, 89 and 99).

14. Draft article 95 (6) (b) in A/CN.9/WG.III/WP.56 (draft art. 95 (5) (b) in A/CN.9/WG.III/WP.61) provides for a derogation which complies with the conditions in

³ See generally the comments from UNCTAD set out in A/CN.9/WG.III/WP.46 and the concerns referred to in paragraph 100 of A/CN.9/572, and the comments thereon, and in paragraph 244 of A/CN.9/591.

⁴ This article will be considered further by the Working Group at the seventeenth session.

draft article 95 (2) and (5) (draft arts. 5 (1), (2) and (4) in A/CN.9/WG.III/WP.61) to be binding on a third party that has expressly consented to be bound by the terms of the volume contract. Thus the protection of such third party lies in the terms on which such consent must be demonstrated. This provision is also to be considered further by the Working Group (see A/CN.9/576, para. 104).

Exclusive choice of court agreements

15. Specific provisions relating to an exclusive choice of court agreement contained in a volume contract which is subject to the draft convention, and whether such an agreement is to be binding on a third party, are contained in draft article 76 (2) and (3) as set out in paragraph 73 of A/CN.9/591 and were accepted by the Working Group at the sixteenth session, although with some reservations regarding the notice to third parties under draft article 76 (3) (see A/CN.9/591, para. 84).

Summary

16. It would appear that the draft convention attempts to strike a balance as regards volume contracts. On the one hand, it extends the scope of the mandatory regime to cover volume contracts in liner transportation, whilst broadly retaining the present position in non-liner transportation. On the other hand, it allows the parties to a volume contract in liner transportation, subject to certain safeguards, freedom to derogate to a defined extent from its mandatory provisions in order to accommodate current commercial practice in certain trades and the possible development of commercial practice in the future, and, subject to further safeguards, to bind third parties to such derogation. The Working Group is to give further consideration to these safeguards.

T. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: shipper's obligation: drafting proposal by the Swedish delegation, submitted to the Working Group on Transport Law at its seventeenth session (A/CN.9/WG.III/WP.67) [Original: English]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Sweden submitted to the Secretariat the paper attached hereto as an annex with respect to shipper's obligations in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Swedish delegation advised that the paper was intended to facilitate consideration of the topic in the Working Group by proposing revised text for chapter 8 of the draft convention regarding shipper's obligations. The Swedish delegation further advised that the revised text and commentary in the attached annex was prepared in light of the consideration of the topic of shipper's obligations by the Working Group during its sixteenth session, and on the basis of further informal consultations with other delegations. The Working Group may wish to consider the text in the attached annex in its further consideration of chapter 8 of the draft convention on shipper's obligations.

Annex

Shipper's obligations: chapter 8 of the draft convention on the carriage of goods [wholly or partly] [by sea]

I. Introduction

1. During the summer of 2005, the delegation of Sweden distributed an informal questionnaire on shipper's obligations to interested delegations. The purpose of the questionnaire was to facilitate the discussion in the Working Group on the subject and to investigate whether there was room for compromise regarding certain questions in the text of the UNCITRAL draft convention on the carriage of goods [wholly or partly] [by sea] (the draft convention). Replies to the informal questionnaire were submitted by 19 delegations in total. One reply was submitted as a joint document from three different delegations. On the basis of these replies the delegation of Sweden produced a compromise proposal. The proposal was reproduced as document A/CN.9/WG.III/WP.55. Shipper's obligations were then discussed during the sixteenth session of WG III (Transport law) in Vienna, from 28 November to 9 December 2005. The discussions were based on the draft text in A/CN.9/WG.III/WP.56 and on the text proposed in A/CN.9/WG.III/WP.55. The deliberations and decisions are reproduced in the report of the sixteenth session (A/CN.9/591, paras. 104-187). On the basis of that discussion in the Working Group and on further informal consultations, the delegation of Sweden has now found it suitable to submit a new paper containing a refined proposal on shipper's obligations.

II. Title of the chapter

2. It was agreed during the sixteenth session of the Working Group that the title of the chapter should make reference to the shipper's obligations to the carrier (see paras. 108 and 120 of A/CN.9/591). The reason for this is to clarify that chapter 8 of the draft convention does not deal with the liability of the shipper with respect to third parties, for example, to seamen who get injured by the goods. General tort law will instead govern this liability. Another issue is that the carrier might in an action against the shipper claim compensation for what it has had to pay to the injured seamen as an employer (see further the discussion of draft article 28 below).

3. A title which the Working Group might want to consider is:

Shipper's obligations to the carrier

III. Draft article 28. Delivery ready for carriage

4. Draft article 28 contains a general obligation to deliver the goods ready for carriage. During the sixteenth session, it was agreed that the expression "unless otherwise agreed" should be moved to the beginning of the first sentence (see paras. 110 and 120 of A/CN.9/591). It is not clear from the report whether this also meant that the words "in the contract of carriage" should be deleted. It could be argued that these words are superfluous since the present text does not require a written agreement for the parties in order to derogate from the obligation in the provision.

5. Concerns were also raised during the session that the word “injury” might imply that the draft provision also regulates the relationship between the shipper and third parties, such as the seamen on board the ship (see para. 119 of A/CN.9/591). The purpose of draft article 28 is not to grant third parties any right of direct action against the shipper, and as a consequence of this, the word “injury” ought to be deleted. But, as indicated above, draft article 28 should not only cover situations where the ship or other equipment belonging to the carrier is physically damaged. For example the provision should also cover situations where the carrier in a recourse action is claiming compensation for what he has had to pay to his employees or other persons, who have been injured because of bad stowage of the goods by the shipper. Therefore it seems appropriate also to include the word “loss” in the first sentence. It should also be noted that the word “loss” is already included in draft article 31 on liability of the shipper.

6. Regarding the second sentence of draft article 28 as it appeared in A/CN.9/WG.III/WP.56, the Working Group decided to retain the sentence, but to simplify the text, possibly along the lines in the proposal in footnotes 116 and 435 of A/CN.9/WG.III/WP.56. However, the problem with using the words “goods ... delivered in ... a container” is that according to the definition in draft article 1 (w) the term “goods” includes both the merchandise and the container when supplied by the shipper. In order not to create a contradiction in the text, it is proposed that the second sentence should only cover the situation where the container or trailer is supplied by the carrier and consequently is not a part of the goods. A solution to this problem could be to substitute the expression “packed by the shipper” in the text of footnotes 116 and 435 with the expression “supplied by the carrier”. It would follow implicitly from the text that the goods must be stowed by the shipper in or on the trailer.

7. In addition, it was also suggested during the sixteenth session that in certain language versions of the text, the words “unless otherwise agreed” in the first sentence would modify the obligations in both the first and the second sentence. In order to avoid this, the first and the second sentence could be placed in different paragraphs.

8. It was also noted that there might be a need for harmonizing the expression “container or trailer” with the language elsewhere in the convention. In draft article 64 (3) the expression “container, pallet, or similar article of transport used to consolidate goods” is used. However, it is important here to note that the two provisions fulfil different purposes. While the purpose of draft article 64 (3) is to clarify how the limitation shall be calculated when the goods are consolidated in a container or on a pallet, the purpose of draft article 28, second paragraph, is to emphasize that the obligation in paragraph 1 also includes that wares, merchandise and articles inside a container or trailer, to which the carrier has no immediate access and therefore no possibility to check, must be stowed, lashed and secured properly. Other types of articles used to consolidate goods, such as open pallets, should therefore not be included in the second paragraph.

9. The Working Group might wish to consider the following text:

Article 28. Delivery for carriage

1. *Unless otherwise agreed [in the contract of carriage], the shipper must deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause loss or damage.*

2. *In the event the goods are delivered in or on a container or trailer [packed by the shipper] [supplied by the carrier], the obligation in paragraph 1 extends to the stowage, lashing and securing of the goods in or on the container or trailer.*

IV. Draft article 29. Carrier's obligation to provide information and instructions; and Draft article 18. Carrier's liability for failure to provide information and instructions

10. During its sixteenth session, the Working Group agreed to retain draft article 29, but to draft it in more general terms focussing on the cooperation between shipper and the carrier in preventing loss and damage to as well as from the goods (see para. 127 of A/CN.9/591). The obligation of the carrier in draft article 29 is to be seen as a secondary one in relation to the shipper's obligation under draft article 28. According to draft article 29 the carrier is under the obligation to assist the shipper in order to make it possible for the latter to fulfil its obligation to prepare the goods for the transport. One of the problems with the text as it now stands is that it imposes an obligation on the carrier, while the chapter as a whole deals only with the shipper's obligations. This was noted already in the discussion of the chapter at the thirteenth session of the Working Group from 3 to 14 May 2004 (see A/CN.9/552, para. 126). A solution to this problem could be to replace the obligation of the carrier with a general right for the shipper to request and obtain information from the carrier. It would then become clear from the text that the carrier has an implicit obligation to cooperate with the shipper in this respect and that this obligation is secondary to the obligation of the shipper under draft article 28.

11. Regarding the obligation of the shipper to provide information, instructions and documents, it was noted during the sixteenth session of the Working Group that the text in draft article 30, especially paragraph (b), is very broad and that a shipper failing to provide a single document could be exposed to unforeseeable and enormous losses (see para. 133 of A/CN.9/591). However, one way of balancing a broad text like the existing one in draft article 30 is to extend the right for the shipper to request and obtain information and instructions reasonably necessary for fulfilling the obligations under draft article 28 to draft article 30 as well, at the same time as the liability of the shipper is changed into a general fault-based one. This would mean that in a situation where the shipper is not sure whether the carrier will need a special kind of document, it will have the opportunity to request and obtain that information from the carrier. If the answer from the carrier is negative, then the shipper will not be liable for any loss or damage due to the fact that the document was not provided. If this approach is chosen, it is proposed that the Working Group may wish to reverse the order of the existing draft articles 29 and 30 in an effort to reduce the shipper's obligations regarding information, instructions and documents by obligating the carrier to provide instructions on the request of the shipper.

12. The information that the shipper has the right to request and obtain should be limited to what is reasonably available to the carrier. This means that the shipper cannot ask for information, which requires an extensive investigation by the carrier. An alternative could be to include the words "within the carrier's knowledge". Such a wording would, however, indicate that the carrier has no obligation at all to provide information that he has no knowledge of, even if it would be easy for him to investigate the matter. Also, the instructions that the shipper would have the right to request and obtain ought to be limited to what is reasonably necessary.

13. Another alternative would be to include a more general provision stating that the shipper and the carrier have a mutual obligation to cooperate regarding information and instructions required for the safe handling and transportation of the goods. The advantage of such a provision would be that it emphasizes the duty of the parties to cooperate. However, at the same time there is a risk that such a general provision would be regarded by the courts as a mere declaration having no legal effect.

14. The Working Group might wish to consider the following text as Variants B and C of the existing text of draft article 29 in A/CN.9/WG.III/WP.56, which would be considered Variant A of the draft article:

Article 29 [30]. Information and instructions from the carrier

[Variant A]

The carrier must provide to the shipper, on its request [and in a timely manner] such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28. [The information and instructions must be accurate and complete.]

[Variant B]

The shipper has the right to request and obtain from the carrier in a timely manner such reasonably available information and instructions as are reasonably necessary in order to comply with its obligations under articles 28 and 30 [29].

[Variant C]

The carrier and the shipper shall respond in good faith to reasonable requests from the other for information and instructions required for the safe handling and transportation of the goods, which information and instructions are in such party's possession and not otherwise reasonably available to the requesting party.]

15. As a consequence of the discussion above, draft article 18 on the carrier's liability for failure to provide information and instructions ought to be deleted. There seems to be little or no need for a special sanction here because of the fact that the obligation of the carrier in this respect is secondary to the obligations of the shipper under draft article 28. This means for example that if the shipper is not able to provide information and instructions due to the fact that the carrier did not cooperate, the former will not be liable for damages caused by the goods to the ship or other equipment belonging to the carrier.

16. Another reason for the deletion of draft article 18 is that, as it now stands, it interferes with the general provision on the carrier's liability in draft article 17. For example, if the goods are damaged during the transport, the carrier might defend himself pursuant to draft article 17 by proving that the goods were actually stowed by the shipper and that the stowage caused the damage to the cargo (see draft article 17 (2) and (3) (i)). The burden of proof would then shift to the shipper, who would have to prove that the bad stowage was due to the fact that it followed the instructions from the carrier (see draft article 17 (2) (a)). In other words, this situation is already governed by draft article 17 and is the existence of an additional rule in draft article 18 that might be applicable could cause confusion.

V. Draft article 30. Shipper's obligation to provide information, instructions and documents

17. In the report of the sixteenth session, it was noted that paragraph (b) should be placed within square brackets, that the phrase in the chapeau "in a timely manner, such accurate and complete" should be considered in the same fashion as the similar text in draft article 29 and that drafting improvements should bear in mind A/CN.9/WG.III/WP.55 as well as other international instruments (see paras. 129 and 135 of A/CN.9/591). It was further decided by the Working Group that the future discussion of

the basis of the shipper's liability in draft article 31 should be taken into consideration in future drafts of draft article 30, and that the reference to draft article 38 (1) (b) and (c) should be extended to (a) (see para. 135 of A/CN.9/591).

18. In paragraph 20 of A/CN.9/WG.III/WP.55, it was proposed that the phrase in paragraph (a) "except to the extent that the shipper may reasonably assume that such information is already known to the carrier" and the phrase in paragraph (c) "unless the shipper may reasonably assume that such information is already known to the carrier" should be deleted. As observed in the report of the sixteenth session of the Working Group, the consequence of the fact that paragraphs (a) and (c) would ultimately be subject to a fault-based liability scheme pursuant to draft article 31 (except for the liability for the accuracy of information), could be that there would be no need for the phrase "reasonably assume" and that it therefore could be deleted (see para. 130 of A/CN.9/591).

19. As noted above, the general problem with draft article 30, especially paragraph (b), is that the text is very broad and that it might expose the shipper to onerous liability. At the same time, it seems difficult to narrow the scope of the provision. It does not seem possible in practice to try to draft the obligations of the shipper in draft article 30 in specific terms since the information, instructions and documents needed may vary substantially between different types of carriage of goods. One way of doing this in paragraph (b) might be to limit the information, instructions and documents the shipper has to provide to reasonably available information, instructions and documents made known to the shipper by the carrier, unless it is prescribed by rules and regulations of government authorities that the shipper shall provide the information (see Variant B). However, such a regulation could contradict the fact that in many situations, the shipper is the one who has the best knowledge of what documents are needed in order to satisfy the customs authorities. As indicated above regarding draft article 29, a practical solution to this problem could be to try to limit the liability of the shipper by making it generally a fault-based liability with an ordinary burden of proof and possibly also by excluding most of the liability for delay or to limit the compensation to a certain amount, instead of trying to narrow the scope of paragraph (b).

20. On the basis of this discussion the Working Group might wish to consider the following text:

Article 30 [29]. [Shipper's obligation to provide information, instructions and documents] [Obligation of shipper and carrier to provide information, instructions and documents]

The shipper must provide to the carrier in a timely manner such information, instructions, and documents that are reasonably necessary for:

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;

[Variant A of paragraph (b)]

(b) Compliance with rules and regulations and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;] and

[Variant B of paragraph (b)]

(b) The carrier's compliance with rules and regulations of government authorities that are applicable to the shipment if the shipper is required by applicable law to provide such information, instructions and documents or such information, instructions and documents are timely made known to the

shipper by the carrier. Except as required by applicable law, the shipper is not obligated under this paragraph to provide information, instructions and documents that are otherwise reasonably available to the carrier;] and

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38 (1) (a), (b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic record is to be issued, if any.

VI. Draft article 31. Basis of shipper's liability

21. A majority of the delegations during the sixteenth session of the Working Group favoured the view that the liability should be based on fault with an ordinary burden of proof, like in article 12 of the Hamburg Rules and article 4 (3) of the Hague-Visby Rules (see para. 138 of A/CN.9/591). That approach means that the carrier will have to prove that the loss or damage was due to the fault of the shipper. As indicated above, this would compensate for the fact that the shipper has an unlimited liability. It would also reflect the fact that the carrier is usually in a much better position to establish what has occurred during the voyage. Such a regulation would also correspond better with the rule in draft article 17 (2) and (3) (i), that the carrier, if goods are damaged, will have to prove, for example, the fact that the shipper actually stowed the goods and that this caused the damage.

22. Another way of reducing the exposure of the shipper to great risks is to remove the shipper's liability for delay. It was proposed during the sixteenth session that liability for "delay" should be deleted from the draft text (see paras. 143-146 of A/CN.9/591). However, other delegations spoke in favour of keeping the liability for delay. A deletion would call into question the rationale for creating a strict liability for submitting incorrect information, since inaccurate information was said to be the most common cause for delay. It is suggested that the effect of deleting the word "delay" is not that the shipper will not be liable for delay at all. The shipper will still be liable for delay that occurs as a consequence of physical damage according to the convention. If, for example, the goods damage the ship, the carrier will be entitled also to compensation for delay due to the damage. The effect of deleting the word "delay" is instead that the liability for delays that are not connected with physical damage would be left to national law. Such a solution would not correspond with the existing regulation in article 3 (5) of the Hague Rules and article 17 (1) of the Hamburg Rules regarding the liability for inaccurate information. A compromise solution to this problem might be to delete the word "delay" and leave the question of liability for delay (where the delay is not a consequence of a physical damage) to national law, except for in draft article 30 (c). In the proposed text, the word "delay" is put within square brackets.

23. The Working Group decided during its sixteenth session that there should be strict liability for inaccurate information under draft article 30 (c). This means that the shipper will be deemed to have guaranteed the accuracy of the information in the documents that it provides to the carrier, while the liability for not providing a document will still be based on fault. Such a liability will correspond with article 3 (5) of the Hague Rules and article 17 (1) of the Hamburg Rules. It must be noted here that in order to fully correspond with the Hague-Visby and Hamburg Rules, the liability in paragraph 2, as indicated above, should include delay.

24. As a consequence of the fact that the Working Group decided that chapter 8 of the draft convention should only deal with the relationship between the shipper and the carrier and not with third parties, paragraph 3 of draft article 31 in A/CN.9/WG.III/WP.56 should be deleted.

25. The Working Group might wish to consider the following text:

Article 31. Basis of shipper's liability

1. *The shipper is liable to the carrier for loss, [or] damage [or delay] caused by the goods and for breach of its obligations under articles 28 and [29] 30, provided such loss, [or] damage [or delay] was due to the fault of the shipper or of any person referred to in article 35.*

2. *Notwithstanding paragraph 1 the shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information and documents that must be provided according to article [29] 30 (c). The shipper must indemnify the carrier against all loss, [or] damages [or delay] arising out of or resulting from the information and documents not being accurate.*

VII. Draft article 32. Material misstatement by the shipper

26. It was agreed during the sixteenth session that draft article 32 should be deleted from the draft convention (see para. 156 of A/CN.9/591).

VIII. Draft article 33. Special rules on dangerous goods

27. The Working Group decided during its sixteenth session to insert the words “or become” in paragraph 1 of draft article 33 in order to make the rule more complete (see paras. 159 and 161 of A/CN.9/591).

28. Regarding paragraph 2, it was noted that the shipper might have difficulties to fulfil his obligation to mark or label the goods in accordance with existing rules, regulations and requirements of authorities because of the fact that it does not have knowledge about how the exact voyage is to take place or what transport modes are to be used. To a certain extent this problem is already solved by the fact that the obligation applies to the “intended carriage”. If, for example, the carrier suddenly decides to transport the goods through another country or by another type of transport mode than originally planned, the shipper cannot be made liable for that the goods are not labelled according to the regulations applicable to that new transport mode in that country. However, the existing text does not solve the problem when the voyage is never agreed upon, but leaves it to the carrier to decide. As a practical solution to this problem it is proposed that a new paragraph 4 could be inserted giving the shipper the right to request and obtain reasonably available information and instructions from the carrier in order to comply with its obligations. This proposed text has been inserted in square brackets below, and is intended, as is the proposed text of draft article 29, to underline the fact that the carrier and the shipper must cooperate so that the carrier must, on request, inform the shipper about the voyage. An alternative approach could also be to make reference to draft article 33 (3) in Variant B of draft article 29.

29. Furthermore, in paragraphs 2 and 3 of draft article 33, the text has been adjusted in order to reflect the decision of the Working Group during its sixteenth session (see paras. 166 and 170 of A/CN.9/591). The references to performing parties have been

deleted regarding liability (the shipper may still inform the performing party instead of the carrier), and the words “directly or indirectly” in paragraphs 2 and 3 have been deleted. The word “delay” could also be deleted as a way of limiting the exposure of the shipper to a great liability. As noted in paragraph 168 of A/CN.9/591, as an alternative to the words “such shipment”, the words “such failure to inform” could be used in the text. This would underline the fact that there must exist causation between the failure to inform and the loss, damage or delay. However, note also the view expressed in the Working Group during its sixteenth session that the phrase “such shipment” was intended to preserve the approach taken in article 13 (2) (a) of the Hamburg Rules, in order to reflect the serious nature of the shipper’s obligation (see para. 168 of A/CN.9/591).

30. As a consequence of the fact that the obligation to inform the carrier about the dangerous character of the goods is the most important one in this provision, it is proposed that this rule should form paragraph 2 instead of paragraph 3. The Working Group may also wish to discuss whether the definition of “dangerous goods” ought to be moved to draft article 1 of the draft convention. Neither of these proposed solutions was explicitly discussed during the sixteenth session.

31. The Working Group might wish to consider the following text:

Article 33. Special rules on dangerous goods

1. “Dangerous goods” means goods which by their nature or character are[, or become], or reasonably appear likely to become, a danger to persons or property or the environment.
2. The shipper must inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or the performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for all loss, [or] damages [or delay] arising out of or resulting from such [shipment][failure to inform].
3. The shipper must mark or label the dangerous goods in accordance with any rules, regulations or other requirements of authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for all loss, [or] damages [or delay] arising out of or resulting from such failure.
- [4. The shipper has the right to request and obtain from the carrier such reasonably available information and instructions as are reasonably necessary in order to comply with its obligations under paragraph 3.]

IX. Draft article 34. Assumption of shipper’s rights and obligations

32. The Working Group here decided to insert the text proposed in paragraph 39 of A/CN.9/WG.III/WP.55, but to substitute the phrase “receives the transport document or the electronic transport record” with the phrase “accepts that its name appears on the transport document or the electronic transport record as the shipper” (see para. 175 of A/CN.9/591).

33. As a consequence of this the text should read:

Article 34. Assumption of shipper's rights and obligations

1. *If a person identified as "shipper" in the contract particulars, although not the shipper as defined in paragraph 1 (h), accepts that its name appears on the transport document or electronic transport record as the shipper, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 14.*
2. *Paragraph 1 of this article does not affect the responsibilities, liabilities, rights or immunities of the shipper.*

X. Draft article 35. Vicarious liability of the shipper

34. The Working Group here decided to insert the text proposed in paragraph 41 of A/CN.9/WG.III/WP.55 in the draft convention (see para. 180 of A/CN.9/591).

35. It was also noted during the discussion at the sixteenth session of the Working Group that there might be a need for adjusting paragraph 2 of the text in A/CN.9/WG.III/WP.55 to accommodate any changes made to draft article 14 (2) regarding "free in and out (stowed)" (FIO(S)) clauses. Later, during the discussions on delivery of goods it was clarified that the combined effect of draft articles 11 (6) and 14 (2) is that the shipper is liable for any loss due to its failure to effectively fulfil its obligations according to the FIO(S) clause, while the carrier will retain responsibility for other matters during loading and discharge (see para. 204 of A/CN.9/591). As a consequence of this there seems to be little need for paragraph 2 of draft article 35. Only in a situation where the parties treat the FIO(S) clause as a mere payment clause—i.e. the loading or discharge of the goods is paid for by the shipper, but still performed by the carrier—does the paragraph seem to have some sort of meaning. But, in a situation like this it would follow from general principles of contract law that the carrier cannot make the shipper liable for loss or damage. Paragraph 2 could therefore be deleted.

36. Provided paragraph 2 of the text as set out in paragraph 41 of A/CN.9/WG.III/WP.55 is retained, the question arises whether the text should be adjusted. It was suggested during the discussion that the word "on the carrier's side" is superfluous since the term "performing party" is defined in the draft convention as persons acting on behalf of the carrier (see para. 179 of A/CN.9/591). However, the words here seem to fulfil the purpose of differentiating between performing parties on shipper's side and performing parties on the carrier's side. The paragraph is only applicable to the carrier's performing parties. The text has been clarified slightly to "acting on behalf of the carrier" rather than "on the carrier's side".

37. It was also suggested during the sixteenth session that the word "vicarious" in the title ought to be changed in order to ensure linguistic uniformity between the different language versions of the draft convention. An alternative to the existing title might be "Liability for acts and omissions of other persons".

38. On the basis of the discussion above, the Working Group might wish to consider the following text:

Article 35. Liability for acts and omissions of other persons

1. *The shipper is liable for the acts and omissions of any person, including subcontractors, employees and agents, to which it has delegated the performance of its responsibilities under this chapter as if such acts or omissions were its own. Liability is imposed on the shipper under this article only when the act or omission of the person concerned is within the scope of that person's contract, employment or agency.*

[2. *Notwithstanding paragraph 1, the shipper is not liable for acts and omissions of the carrier, or a performing party acting on behalf of the carrier, to which it has delegated the performance of its responsibilities under this chapter.*]

XI. Draft article 36. Cessation of shipper's liability

39. The Working Group decided to retain draft article 36, but to reconsider it in the light of the decision taken with respect to draft article 94 (2). However, the word "or" at the end of paragraph (a) should be moved to the end of paragraph (b).

40. In that case, the provision should read:

Article 36. Cessation of shipper's liability

If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain time, such cessation is not valid:

(a) *With respect to any liability under this chapter of the shipper or a person referred to in article 34;*

(b) *With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts; or*

(c) *To the extent that it conflicts with article 63.*

**U. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: proposal by the Netherlands, submitted to the Working Group on Transport Law at its seventeenth session
(A/CN.9/WG.III/WP.68) [Original: English]**

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of the Netherlands submitted the text of a proposal for the inclusion of provisions on bills of lading consigned to a named person in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Proposal by the Netherlands on bills of lading consigned to a named person

I. Introduction

1. In the draft convention on the carriage of goods [wholly or partly][by sea], reference is made to negotiable transport documents and non-negotiable transport documents (and, of course, to their electronic variants). In A/CN.9/WG.III/WP.56, these two types of documents are defined in draft articles 1 (o) and (p). Subsequently, the draft convention develops rules relating to each type of document.

2. However, in practice a transport document is also used, the legal effect of which is in many jurisdictions somewhere *between* that of a negotiable and a non-negotiable transport document: the bill of lading consigned to a named person.¹ This document may be referred to by different names, such as “straight bill of lading”, “nominative bill of lading”, “recta bill of lading”, etc.²

3. The law governing bills of lading consigned to a named person is far from uniform. Must the consignee present this document to the carrier in order to obtain delivery of the goods at the place of their destination? Is this document a document of title? Are its contents conclusive evidence towards the consignee? Does this document embody rights towards the carrier? In case of transfer of rights from the shipper to the consignee, which method may or must be used?

4. These types of questions are answered differently in various jurisdictions. There may be different views within the same jurisdiction. Although the bill of lading consigned to a named person has long been in use, the uncertainty of law relating to this document still causes litigation in several jurisdictions. Further, the case law resulting from such litigation is not always of assistance to achieve uniformity.

5. It may be argued that the new provisions in the draft convention make the bill of lading consigned to a named person superfluous. All of its commercial functions, arguably, can be performed under the new provisions (such as those on delivery, right of control and transfer of rights) by either an ordinary non-negotiable transport document (such as a sea waybill), or an ordinary negotiable transport document (such as an order bill of lading) endorsed by the shipper to a named person.

6. It may, however, not be expected that the average user of a bill of lading consigned to a named person will make an explicit choice for either of these alternatives. Once the draft convention has entered into force, it is more probable that shippers that are accustomed to requesting carriers to issue a bill of lading and to consign it to a named person will continue doing so. As a consequence, the use of this transport document would in future become subject to the rules applying to non-negotiable transport documents

¹ Most jurisdictions regard this document as a special type of *non-negotiable* transport document. There are, however, also jurisdictions that consider the bill of lading consigned to a named person as a special type of *negotiable* transport document.

² Because these words may have certain legal connotations under national law, this proposal is as neutral as possible and refers to this type of transport document as a “bill of lading consigned to a named person”

generally,³ which may not be the intention of the parties. Of course, they may contractually deviate from the rules⁴ in the draft convention and adjust their document to their specific commercial needs. But, would this occur in the ordinary course of business? In light of the present lack of uniformity of the law relating to bills of lading consigned to a named person, these doubts are justified. If these assumptions are right, the eventual result might be that the new convention would increase the uncertainty of law in respect of the use of bills of lading consigned to a named person instead of diminishing such uncertainty.

7. It is clear that such a result must be avoided: it is the aim of any trade law convention to provide for uniformity and certainty of law where possible and achievable. Therefore, in the view of the Netherlands delegation, it is desirable that the draft convention should treat bills of lading consigned to a named person as a separate category of documents and should try, in the interests of uniformity and certainty of law, to provide for some rules relating to this type of transport document.

8. Following this line of thinking, the legal areas that, in our view, deserve attention when discussing possible rules on bills of lading consigned to a named person are:

- (a) Delivery of the goods to the named consignee;
- (b) Allocation of the right of control and its transfer;
- (c) Evidentiary effect of the document; and
- (d) Transfer of rights.

II. Specific proposals

9. Before addressing these legal areas, however, attention must be paid to a proper definition of the bill of lading consigned to a named person. The draft convention does not give much assistance, since it makes no reference to bills of lading at all. Under national law, the bill of lading is also often left undefined. The draft instrument, however, defines in article 1 (o) “negotiable transport document” as a document indicating that the goods have been consigned to order or to bearer. It follows that a document indicating that the goods have been consigned to a named person belongs *within the scope of the draft instrument* to the category of non-negotiable documents.

10. Further, under transport law, a key function of the bill of lading is that it legitimates a person who either is indicated in the document by name (either directly named or named as endorsee), or has become the bearer of the document (when the document is consigned to bearer directly or is endorsed in blank) as the person who is entitled to exercise any right under the contract of carriage evidenced by the document. This legitimating function carries with it the requirement that the document must be shown or surrendered to the carrier when the possessor of the document wants to exercise that right. Therefore, the presentation rule seems a second and key element of the definition of the bill of lading consigned to a named person.

11. A sea waybill is also a non-negotiable document that normally is consigned to a named person. In order to distinguish the bill of lading consigned to a named person from

³ See paragraph 9 hereunder.

⁴ It is assumed that the provisions relating to the legal effect of transport documents will not be of a mandatory nature.

such sea waybill, and fully in line with its legitimating function, the definition should, thirdly, include that the presentation rule must be stated in the document itself.

12. For the reasons outlined above, in the proposals hereunder the bill of lading consigned to a named person is described as:

“a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods”.

13. It follows that, if a transport document is made out to a named person and the presentation rule is not in some form or another stated in such document, all the provisions under the draft convention for non-negotiable transport documents apply to such document, even if such document is called a “bill of lading”.^{5, 6}

14. When the bill of lading consigned to a named person is described as suggested in the previous paragraph, the provisions on delivery in draft articles 48 and 49 are no longer appropriate for this type of document. Therefore, hereunder follows a proposal for a new draft article 48 bis that should apply to the bill of lading consigned to a named person. This new article combines those elements from draft articles 48 and 49 that, in our view, are relevant to the use of this type of document.

15. New draft article 48 bis. “Delivery when non-negotiable transport document that requires surrender is issued”

When a non-negotiable transport document has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following paragraphs apply:

(a) The carrier must deliver the goods at the time and location referred to in article 11 (4) to the consignee upon surrender of the non-negotiable document and production of proper identification by the consignee. The carrier may refuse delivery if any of these two requirements are not met. In the event that more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(b) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery because the consignee is unable to produce proper identification or does not surrender the document, the carrier must so advise the shipper. In such event, the shipper must give instructions in respect of delivery of the goods. If the carrier, after reasonable effort, is unable to identify and find the shipper, then the person referred to in article 34 is deemed to be the shipper for the purpose of this paragraph. The carrier that delivers the goods upon instruction of the shipper under this paragraph is

⁵ It is believed that the requirement that the presentation rule must be indicated in the document follows the current practice. When a carrier is requested by the shipper to consign the bill of lading to a named person, a carrier will use its standard bill of lading form. In the absence of a legally uniform definition of the bill of lading, these standard forms, almost without exception, include contractually the presentation rule because the legitimating function of the document is a key element for the relation between the carrier and the cargo-interested party. Over the past few years, most of the banks have also become proponents of on the inclusion of the presentation rule in bills of lading.

⁶ It is realized that this description may include transport documents that are receipts only. In our view, this is not objectionable. If a receipt includes a presentation rule, it is given such a status that, if needed, the proposed provisions can be applied, mutatis mutandis, to such receipts as well.

discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

16. The corresponding provision for the electronic version of the document may then become:

New draft article 48 ter. “Delivery when non-negotiable electronic transport record that requires surrender is issued”

When a non-negotiable electronic transport record has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following paragraphs apply:

(a) The carrier must deliver the goods at the time and location referred to in article 11 (4) to the person named in the electronic record as the consignee and that has exclusive control of the electronic record. Upon such delivery the electronic record ceases to have any effect or validity. The carrier may refuse delivery if the person claiming to be the consignee is unable to produce proper identification and to demonstrate in accordance with the procedures referred to in article 6⁷ that it has exclusive control of the electronic record.

(b) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery in accordance with paragraph (a), the carrier must so advise the shipper. In such event, the shipper must give instructions in respect of delivery of the goods. If the carrier, after reasonable effort, is unable to identify and find the shipper, then the person referred to in article 34 is deemed to be the shipper for the purpose of this paragraph. The carrier that delivers the goods upon instruction of the shipper under this paragraph, is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the person to whom the goods are delivered is able to demonstrate in accordance with the procedures referred to in article 6 that it has exclusive control of the electronic record.

17. As to the right of control, draft article 56 of the draft convention provides that in case of a non-negotiable transport document this right may be transferred to any third party, including the (initial) consignee. This way, banks may become in control of the goods. In respect of the bill of lading consigned to a named person, however, the presentation rule carries with it the requirement that any transfer of the right of control can only take place between the shipper and the consignee named in the document. A bank that is in possession of a bill of lading consigned to a named person (other than the bank itself) cannot, positively, exercise a right of control. It has only, negatively, the power to prevent anyone else from exercising the right of control during the carriage of the goods. A further consequence of the presentation rule is that the transfer of the right of control and the transfer of the document must take place simultaneously.

18. Based on the above, it is proposed that a new paragraph is added to draft article 56. This new paragraph combines those elements from the other paragraphs of draft article 56 that, in our view, are relevant to the use of bills of lading consigned to a named person.

⁷ Draft article 6 has to be amended so as to reflect the proper procedures for the use of a non-negotiable electronic record that indicates that it must be surrendered in order to obtain delivery of the goods.

19. New paragraph to article 56

When a non-negotiable transport document or a non-negotiable electronic transport record has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following rules apply:

(a) *The shipper is the controlling party. Upon transfer of the document, or upon transfer of the electronic record in accordance with the procedures referred to in article 6 to the named consignee, that person becomes the controlling party and the shipper loses its right of control. If more than one original of the document was issued, all originals must be transferred in order to effect a transfer of the right of control.*

(b) *In order to exercise its right of control, the controlling party must produce proper identification and, if the carrier so requires, must produce the non-negotiable document to the carrier, or in case of an electronic record must demonstrate in accordance with the procedures referred to in article 6, that it has exclusive control of the electronic record. If more than one original of the document was issued all originals shall be produced, failing which the right of control cannot be exercised.*

(c) *Any instruction referred to in article 54 (c) given by the controlling party, upon becoming effective in accordance with article 57, must be stated on the non-negotiable document or in the non-negotiable electronic record.*

20. As to the evidentiary effect of the bill of lading consigned to a named person that is in the hands of this person, the choice is between:

(i) Following the ordinary rule for non-negotiable transport documents: the document is prima facie evidence in accordance with article 43 (a), or

(ii) Emphasizing the additional security that the bill of lading consigned to a named person gives this person and to provide it with the additional benefit of the document becoming conclusive evidence towards the carrier.

In this paper no specific choice is made as between these alternatives. The next paragraph includes only suggestions with regard to drafting.

21. If the choice is made for option (i) in the paragraph above, no new text is needed because this option is already covered under article 43 (a). If, however, the choice is made for option (ii), new text is needed that either may be Variant C of article 43 (b)(ii) or may become an addition to this provision as article 43 (b)(iii). Such new text may read as follows:

New paragraph of article 43 (b) that either replaces the Variants of (b)(ii) or is added as a new (b)(iii)

“If a non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods has been issued, if such document or record has been transferred to the consignee acting in good faith.”

22. As to transfer of rights under a bill of lading consigned to a named person, the main question is whether this document embodies rights or not. Normally, a non-negotiable document does not. In several jurisdictions, however, the bill of lading consigned to a named person is regarded as a document of title. A general rule on documents of title is that the document itself embodies the rights that the holder of the document is able to exercise. A related matter is the question of what method to use to transfer rights under a

bill of lading consigned to a named person. These kind of issues have a highly doctrinarian character, about which, sometimes even within the same jurisdiction, differences of opinion exist. In addition, the matter of whether a certain transport document is a document of title, is left outside the scope of the draft convention. Therefore, we recommend that the issue of transfer of rights under a bill of lading consigned to a named person be left to national law. Which law applies in such case is determined in article 63 that, pursuant of its chapeau, also applies to bills of lading consigned to a named person, as described in the proposals in this paper.

V. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: shipper's obligation: proposal by the United States of America, submitted to the Working Group on Transport Law at its seventeenth session

(A/CN.9/WG.III/WP.69) [Original: English]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of the United States of America submitted to the Secretariat the text of a proposal with respect to shipper's obligations in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Shipper's obligations: Chapter 8 of the draft convention on the carriage of goods [wholly or partly] [by sea]

I. Introduction

1. In preparation for the seventeenth session of Working Group III in April 2006, at which time chapter 8 (Shipper's obligations) of the draft convention will be discussed, the United States submits these comments. The U.S. comments in this paper will be limited to (1) a response to certain of the proposals in the recent submission of the delegation of Sweden (A/CN.9/WGIII/WP.67) and (2) the U.S. position on the treatment of delay.

II. Draft article 29. Carrier's obligation to provide information and instructions

2. The United States supports the conclusion reached by the Working Group in Vienna that draft article 29 should be redrafted to focus on the mutual obligation of the carrier and shipper to cooperate with each other in good faith with respect to the sharing of information that is related to and necessary for the parties to perform their respective obligations under the draft convention. However, we do not believe that the obligation to respond to requests for information should extend to information and instructions that are already known or reasonably available to the requesting party, based on independent sources of information.

3. We therefore support Variant C in the Swedish submission (para. 14 in A/CN.9/WG.III/WP.67), and suggest that the title to the article be changed to reflect the mutual nature of the obligation. The article would read as follows:

Article 29. Obligation of shipper and carrier to provide information and instructions.

The carrier and the shipper shall respond in good faith to reasonable requests from the other for information and instructions required for the safe handling and transportation of cargo, which information and instructions are in such party's possession and not otherwise reasonably available to the requesting party.

III. Draft article 30. Shipper's obligation to provide information, instructions, and documents

4. As was expressed by a number of delegations at the Vienna session, we are very concerned with the scope and breadth of the obligations set forth in draft article 30 (b) (compliance with laws). Specifically, we have a serious concern that the scope of the draft article 30 (b) obligation in Variant A of the Swedish submission (para. 20 of A/CN.9/WG.III/WP.67) is unduly broad, as it is not clear whether the obligation created by this paragraph extends to legal obligations applicable to the shipper or to the carrier. It is further unreasonable to expect that a shipper would have specific knowledge of every law and requirement applicable to the carrier that exists in foreign jurisdictions.

5. If the Working Group concludes that an obligation to comply with-laws-obligation should be included in the draft convention, then the United States believes that this obligation must be narrowed significantly. Our suggestion for achieving a more workable requirement is to limit the obligation of the shipper to provide information that relates to the goods and that is needed only for the carrier's compliance with rules and regulations that apply to the shipment, to the extent that the shipper is required to provide such information by law or the information needed by the carrier is timely made known to the shipper. In addition, we believe that the shipper should not be required to provide such data if the information is otherwise reasonably available to the carrier. We believe that this proposal places reasonable parameters on what is otherwise an overly broad and ambiguous obligation that is susceptible to multiple interpretations.

6. Accordingly, the United States strongly prefers Variant B of the Swedish submission, with some minor changes, as shown below:

Article 30. Shipper's obligation to provide certain information, instructions and documents

The shipper must provide to the carrier in a timely manner such information, instructions, and documents related to the goods that are reasonably necessary for:

...

(b) The Carrier's compliance with rules and regulations of government authorities that are applicable to the shipment if (i) the shipper is required by applicable law to provide such information, instructions and documents; or (ii) the carrier timely makes known to the shipper the information, instructions and documents it requires. Except as required by applicable law, the shipper is not obligated under this paragraph to provide information, instructions and documents that are otherwise reasonably available to the carrier; and

IV. Reversal of the order of draft articles 29 and 30

7. The delegation of Sweden has suggested that one way to address the very broad scope of Variant A of draft article 30 (b) (see para. 14 in A/CN.9/WG.III/WP.67) would be to expand the carrier's draft article 29 obligation to provide information so that the shipper can comply with its draft article 28 obligations also to cover the information the shipper needs to comply with its draft article 30 obligations. This would mean reversing the order of articles 29 and 30 (para. 11 in A/CN.9/WG.III/WP.67). This is a new proposal that has not been previously discussed. Placing draft article 29 after draft article 30 has the effect of broadening the information to be provided by the carrier. We do not support this change. The draft convention is a delicate balance between shippers' and carriers' obligations, and, in our view, this is not an appropriate place to add one more obligation to the carrier's side.

V. Draft article 31. Basis of shipper's liability/delay

8. The United States strongly believes that consequential damages for delay should be excluded from the draft convention for both shippers and carriers. Including delay in the draft convention for shippers potentially creates enormous, open-ended liability exposure for shippers. Deletion of delay from the draft convention is also supported by the difficulties surrounding the establishment of a reasonable and logical liability limit that

could be applied to shipper delay damages, as well as establishing a liability regime that allows for insurability of the potential risks associated with delay damages. In order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree. Just as holding shippers liable to carriers under the draft convention for delay exposes them to significant potential liabilities, so too does holding carriers liable to shippers for delay. Carriers could be exposed to claims for damages in connection with delays that are beyond the control of the carrier (e.g., delay in obtaining a berth due to port congestion, inability to release cargo due to terminal congestion, late delivery due to a shortage of truckers or a shortage of rail equipment). Subjecting carriers to liability for delay damages invites a significant increase in claims and related litigation, thereby increasing not only the time and expense of defending and/or settling the claims, but also higher insurance costs which will surely follow from the increased risk and unknown level of claims. The potential economic impact on the industry is such that the inclusion of carrier liability for delay in the draft convention could discourage carriers in some trades from offering door-to-door intermodal services in order to avoid such claims. We believe that the issue of delay and the consequential damages that typically result from such an event are more appropriately addressed by the commercial parties on a case-by-case basis.

9. Should the Working Group decide to retain carrier liability for consequential damages for delay in the draft convention, the U.S. delegation is of the view that, in order to maintain a fair balance, it is essential to include a mirror liability for a shipper who causes carrier delay and exposes a carrier to losses resulting from delay claims against it by other shippers. Because carrier liability for delay damages would be capped, such shipper liability should also be subject to a reasonable limitation.

10. The U.S. delegation has spent considerable time trying to develop an acceptable limitation on shipper liability for delay damages and found it to be an extremely difficult task. A limitation based on the freight paid by the offending shipper is thought by carrier interests to be unreasonably low, while shipper interests find other formulations unreasonably high. A carrier should be fairly protected against any losses it incurs for delay damages caused by a shipper, albeit that the resultant liability on one shipper could be significant. We have therefore concluded that the only equitable resolution to this dilemma is to remove the concept of delay damages from the draft convention for shippers and, unless they agree in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well.

11. Finally, with respect to whether the shipper's liability should be subject to a fault-based regime or a strict liability regime, the United States believes that a breach of the shipper's obligations under draft articles 28 and 30 (a) should be subject to a fault-based standard, whereas a failure to provide accurate information should be subject to strict liability. We are uncertain as to whether a shipper should be held strictly liable for a failure to provide information required by draft article 30 (b). On the one hand, a fault-based standard might be appropriate because strict liability would create a significant departure from existing maritime law, and it could be unfair to hold the shipper strictly liable for failure to provide information when the failure was not its fault. On the other hand, strict liability might be appropriate for a breach of article 30 (b) because carriers are dependent on shipper-provided information to comply with legal requirements, and non-compliance may result in liability for the carrier.

12. Therefore, the United States urges the Working Group to consider the following proposal for draft article 31:

Article 31. Basis of shipper liability

1. The shipper is liable to the carrier under the contract of carriage and to any maritime performing party for loss or damage caused by the goods and for breach of its obligations under article 28 and paragraph[s] 30 (a) [and (b)], provided such loss or damage was caused by the fault of the shipper or of any person referred to in article 35.*

2. Notwithstanding paragraph 1, the shipper is deemed to have guaranteed the accuracy [and timeliness] at the time of receipt by the carrier of the information and documents that have to be provided according to paragraph[s] 30 [(b)] and (c). The shipper must indemnify the carrier against all loss or damage arising or resulting from such information, instructions and documents not being accurate [or provided on a timely basis].*

13. Removing shipper and carrier liability for delay would require the following conforming changes to chapter 6 of A/CN.9/WG.III/WP.56:

- (1) Draft article 22 would be deleted and replaced with the following:

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon. If delay in delivery causes loss not resulting from physical loss of or damage to the goods carried, the carrier may be held liable for such loss only if the carrier has expressly agreed to be liable for such loss resulting from delay.

- (2) Draft articles 24 (2) and 66 (2) would be deleted in their entirety.

- (3) Draft article 65 would be revised to read as follows:

Compensation for physical loss of or damage to the goods caused by delay is subject to article 64. The carrier shall not be liable for economic or other consequential loss caused by delay, except as provided in article 22.

- (4) References to delay would need to be deleted from the following provisions:

- Draft article 17 (1) – four references to delay to be deleted
- Draft article 17 (2) – seven references to delay to be deleted
- Draft article 17 (4) – one reference to delay to be deleted
- Draft article 20 (1) – one reference to delay to be deleted
- Draft article 20 (2) – one reference to delay to be deleted
- Draft article 21 (1) – two references to delay to be deleted

* U.S. agreement to the removal of shipper's liability for damages caused by delay from the draft wording of articles 31 and 33 is expressly conditioned upon the elimination of the mandatory carrier liability for consequential damages for delay under article 22 of A/CN.9/WG.III/WP.56. The U.S. views carrier liability for consequential damages for delay as directly related to the issue of shipper liability for delay. If the Working Group decides not to eliminate such carrier liability, the U.S. position is that shipper liability for delay must be reinserted, subject to a reasonable limitation.

- Draft article 21 (3) – two references to delay to be deleted
- Draft article 25 (1) – one reference to delay to be deleted
- Draft article 26 (2) – three references to delay to be deleted
- Draft article 26 (4) – one reference to delay to be deleted
- Draft article 27 (1) – two references to delay to be deleted
- Draft article 64 (2) – three references to delay to be deleted.

14. Finally, if delay is removed completely from the draft convention for both the shipper and carrier, we believe that a new article should be added to the chapter on shipper's obligations that would clarify that the liability of the shipper for "loss or damage" does not encompass delay. This new article is proposed immediately below:

Article 36 bis. Delay

Damages recoverable from the shipper by the carrier under this chapter for any loss or damage, for a breach of any obligation established hereunder, or under an indemnity or guarantee provided for in this chapter, shall not include damages for delay of a vessel or in delivery of goods loaded on a vessel other than physical damage caused by delay.

VI. Draft article 33. Dangerous goods

15. The references to "delay" should be removed from draft articles 33 (2) and 33 (3), subject to the same understanding set forth in the footnote with respect to draft article 31.

16. Draft article 33 (4) of the Swedish submission (see para. 31 of A/CN.9/WG.III/WP.67), which is a new proposal that has not been discussed before should be deleted in our view, as it would unnecessarily broaden the carrier's obligation. This issue would also appear to be adequately addressed by the proposal for draft article 29 set out in paragraph 3 above.

W. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: proposals by the Italian delegation, submitted to the Working Group on Transport Law at its seventeenth session (A/CN.9/WG.III/WP.70) [Original: English]

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Italy submitted to the Secretariat the text of proposals with respect to transport documents and electronic transport records and scope of application, freedom of contract and related provisions in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of the proposals is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Transport documents and electronic transport records

1. The Italian delegation has carefully considered document A/CN.9/WG.III/WP.62 presented for information by the delegation of the United States of America and, mindful of the discussion that took place during the informal seminar hosted by the Italian delegation in London on 23 and 24 January 2006 in respect of, *inter alia*, draft article 37¹ and of draft article 40 (3),² makes the following proposals.

Article 37. Issuance of the transport document or the electronic transport record

2. Although article 23 of the Uniform Customs and Practices for Documentary Credits 1993 (UCP 500) requires that bills of lading indicate the name of the carrier, it is felt that that provision is not of an easy interpretation and, therefore, does not sufficiently protect the FOB Seller. It is therefore suggested that draft article 37 (b) as it appeared in A/CN.9/WG.III/WP.56 be amended as follows:

(b) The shipper or, if the shipper so instructs the carrier, the consignor or the person referred to in article 34, is entitled to obtain from the carrier, against production of the transport document or transfer of the electronic transport record, an appropriate negotiable transport document, or, subject to paragraph 5 (a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one.

¹ Summary of the discussion on the first day of the informal seminar in respect of draft article 37: To this point it was asked what would happen in situations where the consignor had no right to obtain a negotiable transport document as the present draft suggests, but needs one for documentary credit. Furthermore, the question was raised whether the introduction of two different obligations to issue documents would entail a risk of conflict of documentation. In response it was pointed out that the focus here is when the consignor and the shipper are in some sort of conflict. The draft article protects the carrier by instructing the carrier to rely on the contract with the shipper in case of conflict. Issuance to a documentary shipper, if in accordance with draft article 37, relieves responsibility vis à vis the shipper.

² Summary of the discussions on the first day of the informal seminar in respect of draft article 40 (3): The discussions could be categorized into three groups. On one hand, the claimant is not offered any protection in this respect and draft article 40 (3) is deleted. On the other hand, draft article 40 (3) could be kept in its present form. However, there was general support amongst those participating in the informal seminar for the view that a middle way should be sought as a possible solution that could receive broad support in the Working Group. As possible middle ways the following were suggested:

- Make the immediate contracting party liable, e.g. the agent signing the contract.
- The name on the transport document should be presumed to be the carrier. The period used to rebut this presumption should suspend the time bar.
- The time bar should be suspended if the claimant files a wrong suit and is not informed of the correct defendant.
- The carrier should be deprived of the right to limit liability.

The participants in the informal seminar were encouraged to consider possible additional alternative ways to address the issue for consideration by the Working Group.

Article 40 (3). Deficiencies in the contract particulars

3. It is suggested that the square brackets around this paragraph be deleted and that the text as it appeared in A/CN.9/WG.III/WP.56 be amended as follows:

3. *If the contract particulars fail to ~~identify~~ **indicate the name and address of the carrier** but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it ~~proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer.~~ **identifies the carrier who issued the transport document in which its name and address should have been indicated.** ~~[If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]~~ **The period mentioned in article 69 shall not run from the date of institution of judicial [or arbitral] proceedings against the registered owner until the lapse of 90 days from the date when the registered owner has identified the carrier.***

4. It is thought, also, that the person identified by the owner as the carrier must have some link, albeit indirect, with the transport document.

5. The objection that the registered owner may not be the carrier and may even be a financing institution does not seem to have great merits, because in such case the registered owner may obtain appropriate guarantees from the operator. It must be considered that there are situations where the registered owner is liable irrespective of it being the operator of the ship or not. This is the case under the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1992).

Scope of application, freedom of contract and related provisions

6. The Italian delegation supports the proposal by Finland in document A/CN.9/WG.III/WP.61 but submits for the consideration of the Working Group the possible simplification of draft articles 9 and 10. The alternative texts suggested are the following:

Article 9. Specific exclusions

Subject to article 10 this Convention does not apply:

(a) To the following contracts of carriage in liner transportation:

(i) [Contracts documented by] charter parties, and

(ii) Contracts for use of a ship or of any space thereon, whether or not [documented by] [they are] charter parties;

(b) To contracts of carriage in non-liner transportation, except where the contract of carriage is documented only by a transport document or an electronic transport record that also evidences the receipt of the goods.

Article 10. Limits to the specific exclusions

This Convention applies as between the carrier and any party other than the shipper to the contracts of carriage excluded by article 9.

Note: This text provisionally covers only the alternative pursuant to which the issuance of a document is not required.

V. POSSIBLE FUTURE WORK

A. Note by the Secretariat on possible future work in the area of electronic commerce

(A/CN.9/604) [Original: English]

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I. Introduction

1. At its thirty-eighth session, the Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law.¹ In that note, the Secretariat had summarized the work undertaken by other organizations in various areas related to electronic commerce (A/CN.9/579). It was pointed out that the range of issues currently being dealt with by various organizations were indicative of the various elements required to establish a favourable legal framework for electronic commerce.

2. It was then pointed out that the UNCITRAL Model Law on Electronic Commerce,² the UNCITRAL Model Law on Electronic Signatures,³ as well as the Convention on the Use of Electronic Communications in International Contracts,⁴ which the Commission approved during that session, provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues. The Secretariat noted that more needed to be done to enhance confidence and trust in electronic commerce, such as appropriate rules on consumer and privacy protection, cross-border recognition of electronic signatures and authentication methods, measures to combat computer crime and cybercrime, network security and critical infrastructure for electronic commerce and protection of intellectual property rights in connection with electronic commerce, among various other aspects. It was further noted that there was no single international document providing guidance to which legislators and policymakers around the world could refer for advice on those various aspects. The task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if such a comprehensive reference document were to be formulated.⁵

3. The Commission welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. There was general agreement that it would be useful for the Secretariat to prepare a more detailed study, in cooperation and in consultation with the other international organizations concerned, for consideration by the Commission at its thirty-ninth session, in 2006. Such an overview, with proposals as to the form and nature of the reference document that would be envisaged, would be useful to allow the Commission to consider possible areas in which it could itself undertake legislative work in the future, as well as areas in which legislators and policymakers might benefit from comprehensive information, which did not necessarily need to take the form of specific legislative guidance. It was agreed that, in considering that matter, the Commission should bear in

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, paras 213-215.

² For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.99.V.4).

³ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8).

⁴ For the text of the Convention, see the Annex to General Assembly resolution 60/21, of 23 November 2005.

⁵ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 213.

mind the need to ensure appropriate coordination and consultation with other organizations and to avoid duplicating or overlapping work.⁶

4. As regards the range of issues to be considered in such a detailed overview, the following areas were suggested: transfer of rights in tangible goods or other rights through electronic communications, intellectual property rights, information security, cross-border recognition of electronic signatures, electronic invoicing and online dispute resolution. The Commission's attention was also drawn to the recommendations for future work that had been made by the Working Group (see A/CN.9/571, para. 12). It was agreed that those recommendations should also be considered in the context of the detailed overview to be prepared by the Secretariat, to the extent that some of them were not reflected in the explanatory notes to the Convention on the Use of Electronic Communications in International Contracts, which the Secretariat has prepared pursuant to the Commission's request (see A/CN.9/608 and Addenda 1-4), or in separate information activities undertaken by the Secretariat, such as monitoring the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and compiling judicial decisions on the matters dealt with in those Model Laws.⁷

5. The present note is submitted pursuant to the Commission's request. It identifies the issues proposed to be considered for inclusion in a comprehensive reference document. This note explains the relationship between the various issues and the Commission's area of work and offers suggestions on possible ways of dealing with them.

6. This note should be read in conjunction with the note A/CN.9/579, on current work by other organizations in the area of electronic commerce, which was submitted to the Commission's thirty-eighth session, and note A/CN.9/598, paragraphs 15 to 34, of the current session, which contains update information on the same matter. With a view to avoiding repetition, and in compliance with the General Assembly guidelines on limitation of documentation, this note omits references already contained in those two notes.

II. Possible topics for a comprehensive reference document in the area of electronic commerce

A. Authentication and cross-border recognition of electronic signatures

1. The issues

7. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. This may give rise to fears about possible misuse or fraud due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as "electronic signatures".

8. One such technique makes use of pairs of mathematically related "keys" (i.e. large numbers produced using a series of mathematical formulae) to generate an electronic signature (called "digital signature"), and verify that it originates from the purported

⁶ Ibid., para. 214.

⁷ Ibid., para. 214.

signatory. One of the keys (the “private key” kept secret by the signatory) is used for creating a digital signature or transforming data into a seemingly unintelligible form, while the other one (the “public key” made known to the addressee) is used for verifying a digital signature or returning the message to its original form. However, since a public- and private-key pair has no intrinsic association with any person, the addressee needs additional assurance about the usefulness of the public key to identify the signatory. One type of solution to this problem is the use of one or more third parties to associate an identified signatory or the signatory’s name with a specific public key. These third parties are generally referred to as a “certification service providers”, and in a number of countries their functions are being organized hierarchically into what is often referred to as a “public-key infrastructure” (PKI). However, other solutions may include, for example, certificates issued by relying parties.

9. In practice, suppliers of certification services issue certificates with various levels of reliability, according to the purposes for which the certificates are intended to be used by their customers. Depending on their respective level of reliability, certificates and electronic signatures may produce varying legal effects, both domestically and abroad. For example, in certain countries, even certificates that are sometimes referred to as “low-level” or “low-value” certificates might, in certain circumstances (e.g. where parties have agreed contractually to use such instruments), produce legal effect.

10. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss and upon whose representations the user relied. These matters are often dealt with at a contractual level; through certification practices statements and general conditions of contract of certification service providers. With a view to promoting the development of an industry still in its infancy, and to protect it against potentially threatening exposure to claims for consequential damages, some jurisdictions admit limitations or exclusions of liability, where the levels of security and policies are made known to the users and there is no negligence on the part of certification authorities. However, the extent to which certification service providers may disclaim liability for loss or damage caused by service failure, or may limit their liability in those cases, is likely to vary from country to country.

11. Alongside “digital signatures” based on public-key cryptography, there exist various other devices, also covered in the broader notion of “electronic signature” mechanisms, which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures, and other methods, such as clicking an “OK-box”.

12. Article 12 of the UNCITRAL Model Law on Electronic Signatures encourages States to promote cross-border recognition of electronic signatures. Paragraph 1 of that article reflects the basic principle that the determination of whether and to what extent a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was issued but on its technical reliability. Paragraph 2 of that article provides the general criterion for the cross-border

recognition of certificates without which suppliers of certification services might face the unreasonable burden of having to obtain licences in multiple jurisdictions. The threshold for technical equivalence of foreign certificates is based on testing their reliability against the reliability requirements established by the enacting State pursuant to the Model Law, regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature originates.

13. Article 12, paragraphs 2 and 3, of the Model Law on Electronic Signatures deal exclusively with the cross-border reliability test to be applied when assessing the reliability of a foreign certificate or electronic signature. However, in the preparation of the Model Law, it was borne in mind that enacting States might wish to obviate the need for a reliability test in respect of specific signatures or certificates, when the enacting State was satisfied that the law of the jurisdiction from which the signature or the certificate originated provided an adequate standard of reliability. As to the legal techniques through which advance recognition of the reliability of certificates and signatures complying with the law of a foreign country might be made by an enacting State (e.g. a unilateral declaration or a treaty), the Model Law contains no specific suggestion.

2. Justification and proposed approach

14. The lack of common standards for cross-border recognition of electronic signatures and other authentication methods is considered to be a significant impediment to cross-border commercial transactions. Two main problems exist in the given context. On the one hand, technological measures and systems for electronic signatures, in particular digital signatures, are currently much too diverse to enable uniform international standards. On the other hand, fears about fraud and manipulation in electronic communications have led some jurisdictions to establish rather stringent regulatory requirements, which in turn may have discouraged the use of electronic signatures, in particular digital signatures.

15. Wide accession to the recently adopted United Nations Convention on the Use of Electronic Communications in International Contracts, which provides in its article 9 for the functional equivalence between electronic signatures and traditional types of signature, may go a long way towards facilitating cross-border use of electronic signatures. Nevertheless, notarization of electronic documents and electronic signatures in government or other official records are areas in which governments may be inclined to retain national standards capable of hindering or barring recognition of foreign electronic signatures.

16. The issues described above have been under consideration by a number of international organizations, including OECD (see A/CN.9/579, paras. 43-46; A/CN.9/598, paras. 27-28); the European Union (A/CN.9/579, para. 34; A/CN.9/598, para. 21); APEC (A/CN.9/579, paras. 22-26; A/CN.9/598, para. 17), and the Commonwealth secretariat (A/CN.9/598, para. 20). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for interoperability and cross-border use of electronic signatures.

17. The Commission may wish to consider that it would be useful to include the issues of authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

B. Liability and standards of conduct for information service providers

1. The issues

18. Information service providers play an essential role in the functioning of the Internet. Typically, they act as intermediaries who transmit or host third party content but do not take part in the decision to disseminate particular material. Liability may arise from theories of direct and indirect or contributory infringement in national tort law, criminal law, and intellectual property law. Most cases arise from the fact that service providers take part in the technical process of transmitting or storing information for third party content of any kind.

19. Responsibility for unlawful content or unlawful acts of their users is related to the opportunity and extent of control that information service providers are able to exert. The possibilities of storage and transmission of data files in data networks have multiplied the opportunities of unlawful behaviour and reduced chances of detection and control. Hence, imposing general liability for service providers would amount to establishing duties to monitor and filter all transmitted or stored content—a burdensome task for information service providers for technical and economic reasons as well as unacceptable for other reasons. As a result, many countries have perceived a need for limiting liability of information services.

20. However, the interest in limiting liability of service providers has to be weighed against the interests of rightholders and injured parties in enforcing their rights and holding all contributing parties responsible. It does not seem to be necessary that the approaches be identical: they may differ depending on the particular circumstances and legal traditions in any given country. But they should be interoperable if global networks and electronic commerce are to develop smoothly.

21. An additional set of legal issues relates to the possible liability of information service providers for failures that occur during transmission of messages (delivery delay or loss of information), or for malfunctioning of data storage systems (loss of stored data or unauthorized access by third parties). Typically, these matters would be dealt with at a contractual level, through general conditions of contract of information service providers. However, the extent to which information service providers may disclaim liability for loss or damage caused by service failure, or may limit their liability in those cases, is likely to vary from country to country.

2. Justification and proposed approach

22. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

23. The issues described above, or aspects thereof, have been under consideration by a number of international organizations, including ITU (A/CN.9/579, paras. 13-15; A/CN.9/598, paras. 24-26); OECD (see A/CN.9/579, paras. 43-51), the European Union (A/CN.9/579, paras. 32-36); APEC (A/CN.9/579, paras. 22-26; A/CN.9/598, paras. 15-17), the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policy makers interested in establishing a sound legal framework for the provision of information services.

24. The Commission may wish to consider that it would be useful to include the issues of liability and standards of conduct for information service providers in a comprehensive reference document.

C. Electronic invoicing and legal issues related to supply chains in electronic commerce

1. The issues

25. It is now widely recognized that replacing trade and transport-related paper documents with electronic communications may generate significant savings and efficiency gains in international trade. Electronic equivalents of paper-based invoices play a key role in this process. If the invoices received by a buyer can be processed electronically, there will be efficiencies in working-capital management. This is especially true for geographically dispersed operations, which may need some time just to move paper documents from one place to another, but often it is true even for businesses with a single location. For instance, both buyer and supplier may benefit if the buyer is able to take advantage of discounts for early payment, which becomes much more likely when the presentment and payment cycle is reduced by weeks, perhaps to a single day or “real time”.

26. However, the cost savings and efficiency gains from electronic invoicing depend to some extent on uniformity. Since the mid-1990s, many suppliers have established their own, separate systems, allowing their customers to review invoices on line; this is uniform for the supplier, but not for the buyer. A buyer may be willing to invest the necessary resources to conform to a major supplier’s electronic invoices system, but is likely to find implementation of several incompatible systems of several suppliers daunting, and may resist even price incentives to be transformed from the selective customer of multiple suppliers into the hostage of one.

27. Some improvement in uniformity for buyers may be achieved by a company—frequently either a bank or a member of a corporate group—that acts as consolidator for several suppliers, although usually it is not this advantage that is emphasized, but rather the usual outsourcing benefits of cost savings, reduced capital commitment or improved efficiency for the suppliers. Some corporate groups are able to consolidate the invoices of their subsidiaries, perhaps in multiple currencies, on a netting basis, and then provide each buyer a single invoice in a single currency, again radically reducing the need for working capital. Further, banks that provide financing against invoices are able to do so more efficiently as uniformity is increased. Plainly, the greatest efficiencies for suppliers, buyers and banks would result from uniform systems across large areas, but market forces may favour uniformity less strongly than such barriers as national borders and regulations disfavour it.

28. Government involvement in electronic invoicing standards may advance related areas of electronic commerce law, such as retention of records and electronic signatures: if invoices recognized for tax purposes are electronic, then electronic record retention must be addressed, and if those invoices must be signed or stamped by the supplier, then electronic signatures or other electronic authentication must be addressed. States have established very different requirements that have made it difficult for uniform approaches to electronic invoicing that have the potential for significant cost savings to be adopted by businesses even in a single industry. These included the potential for electronic invoices to be rejected by national tax agencies, as well as concerns about cross-border recognition of electronic signatures, to the extent that they are required for the validity of an electronic invoice. Indeed, several countries that have introduced legislation to enable electronic invoicing have either expressly mandated that electronic invoices be signed electronically—sometimes even prescribing the type of signature to be used—or indirectly required the use of an authentication method by subjecting electronic invoices to a minimum level of control over the authenticity and integrity of the invoice data.

2. Justification and proposed approach

29. The introduction of electronic invoices and related aspects of electronic supply chains poses a number of technical and business management challenges. From a legal point of view, however, it seems that there are mainly two orders of possible problems: (a) how to ensure the authenticity and integrity of the electronic invoice; and (b) how to meet record-retention requirements. These issues are not novel to UNCITRAL, as they were dealt with in the provisions on electronic signatures and electronic equivalents of “original” documents and retention of electronic records in the UNCITRAL Model Law on Electronic Commerce (articles 8 and 10, respectively). The conditions for functional equivalence between electronic records and paper-based “original” documents have more recently been spelled out in article 9, paragraphs 4 and 5, of the United Nations Convention on the Use of Electronic Communications in International Contracts. Nevertheless, a satisfactory solution to these issues, in an international context, would require, *inter alia*, a functioning system of cross-border recognition of electronic authentication methods.

30. A number of organizations have been working towards the formulation of standards for electronic invoicing and the development of electronic supply chains or related matters, in particular the UNECE (A/CN.9/598, paras. 31-32); WCO (A/CN.9/579, para. 52) and the European Union (A/CN.9/579, para. 38). Despite these efforts, it appears that the legal obstacles to the introduction of paperless supply chains at international scale would persist as long as the basic principles of the UNCITRAL Model Law on Electronic Commerce have not been universally implemented.

31. The Commission may wish to consider that it would be useful to include the issues of electronic invoices and electronic supply chains as part of its consideration of legal issues related to authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

D. Transfer of rights in tangible goods and other rights through electronic communications

1. The issues

32. Developing electronic equivalents of traditional, mainly paper-based, methods for transferring or creating rights in tangible goods or other rights may face serious obstacles

where the law requires physical delivery of goods or of paper documents for the purpose of transferring property or perfecting security interests in such goods or in the rights represented by the document. The particular problem presented by electronic commerce is how to provide a guarantee of uniqueness (or singularity) equivalent to possession of a document of title or negotiable instrument. Techniques such as those based on a combination of time-stamping and other security techniques have come close to providing a technical solution to the problem of singularity. But until an entirely satisfactory solution has been found, electronic equivalents of paper-based negotiability may have to rely on “central registry” systems, in which a central entity manages the transfer of title from one party to the next

33. Legal obstacles arising from the existence of writing and signature requirements and the probative effect of electronic communications have already been settled in articles 5 to 10 of the UNCITRAL Model Law on Electronic Commerce. Matters pertaining to contract formation in an electronic environment are settled in articles 11 to 15 of the Model Law. Also, issues related to the use of electronic means of identification to meet signature requirements have been addressed in article 7 of the UNCITRAL Model Law on Electronic Commerce and are further dealt with in the draft UNCITRAL Model Law on Electronic Signatures. More recently, “writing”, “signature” and “original” requirements were addressed in article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts

34. More significant seems to be the difficulty in establishing the functional equivalence between the transfer or creation method in a paper-based environment and its electronic analogous. Where the law requires physical delivery of goods for the purpose of transferring property or perfecting security interests in such goods, a mere exchange of electronic messages between the parties would not be sufficient for effectively transferring property or perfecting security interest, however evident the parties’ intention to transfer the property or perfect the security interest might have been. Therefore, even in jurisdictions where the law recognizes the legal value and effectiveness of electronic messages or records, no such message or record could alone effectively transfer property or perfect a security interest without an amendment of the law governing transfer of property or perfection of security interests.

35. The prospects for developing electronic equivalents of acts of transfer or perfection might be more positive where the law has at least in part dispensed with the strict requirement of physical delivery, for instance, by attributing to certain symbolic acts the same effect as the physical delivery of certain goods. One such example may be where the law attributes to the transferee or secured creditor the constructive possession of the goods transferred or pledged by virtue of an act of the parties that confers on the transferee the means for claiming control over the goods. Conceivably, the law could attribute the same effect to the entry of the transfer agreement into a registry system administered by a trusted third party or to an acknowledgement sent by the party in physical possession of the goods that these are held to order of the transferee or the secured creditor.

36. As noted in earlier studies by the Secretariat,⁸ surmounting the issues of writing and signature in an electronic context does not solve the issue of negotiability which has been said to be “perhaps the most challenging aspect” of implementing EDI in international

⁸ A/CN.9/WG.IV/WP.69 (*Yearbook of the United Nations Commission on International Trade Law* (UNCITRAL Yearbook), vol. XXVII: 1996 (Sales No.: E.98.V.7), part two, chap. II, sect. B), para. 55; A/CN.9/WG.IV/WP.90 (UNCITRAL Yearbook, vol. XXXII: 2001 (Sales No.: E.04.V.4) part two, chap. II, sect. F), para. 35.

trade practices.⁹ Rights in goods represented by documents of title are typically conditioned by the physical possession of an original paper document (the bill of lading, warehouse receipt, or other similar document). Analyses of the legal basis for the negotiability of documents of title have indicated that “[t]here is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents”.¹⁰ This conclusion is also essentially valid for rights represented by negotiable instruments. Moreover, “the legal regime of negotiable instruments ... is in essence based on the technique of a *tangible original paper document*, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document”.¹¹

37. Thus, it has been said that one challenge in developing law to accommodate electronically transmitted documents of title “is to generate them in such a way that holders who claim due negotiation will feel assured that there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefor is genuine, that it is negotiable, and that there is a means to take control of the electronic document equivalent in law to physical possession”.¹²

38. The development of electronic equivalents to documents of title and negotiable instruments would therefore require the development of systems by which transactions could actually take place using electronic means of communication. This result could be achieved through a registry system, where transactions would be recorded and managed through a central authority, or through a technical device that ensures the singularity of the relevant data message. In the case of transactions that would have used transferable or quasi-negotiable documents to transfer rights which were intended to be exclusive, either the registry system or the technical device would need to provide a reasonable guarantee as to the singularity and the authenticity of the transmitted data.

2. Justification and proposed approach

39. The establishment of electronic equivalents to paper-based registration systems raises a number of particular problems. They include the satisfaction of legal requirements of record-keeping, the adequacy of certification and authentication methods, possible need of specific legislative authority to operate electronic registration systems, the allocation of liability for erroneous messages, communication failures, and system breakdowns; the incorporation of general terms and conditions; and the safeguarding of privacy. To some extent, most of these issues are akin to issues discussed above in connection with authentication and cross-border recognition of electronic signatures (see paras. 7-13) or with liability and standards of conduct of information service providers (see paras. 18-21) above.

40. The Organization of American States (OAS) has pursued a number of initiatives related to the transfer of rights in tangible goods in recent years that involve the potential

⁹ See Jeffrey B. Ritter and Judith Y. Gliniecki, “International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms”, *Harvard Journal of Law and Technology*, vol. 6 (1993), p. 279.

¹⁰ *Ibid.*

¹¹ See K. Bernauw, “Current developments concerning the form of bills of lading—Belgium”, *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems*, A. N. Yannopoulos, editor (The Hague, Kluwer Law International, 1995), p. 114.

¹² Donald B. Pedersen, “Electronic data interchange as documents of title for fungible agricultural commodities”, *Idaho Law Review*, vol. 31 (1995), p. 726.

use of electronic communications. In 2002 the OAS adopted the Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by the Road (Negotiable)¹³ at its 6th Inter-American Specialized Conference on Private International Law (CIDIP VI¹⁴), held in Washington D.C. A key objective for creating this uniform bill of lading was to unify contract law in this area so as to enhance the predictability in the legal process related to the transportation of import and export goods when the mode of transportation is by road.¹⁵ OAS has further adopted a Model Inter-American Law on Secured Transactions,¹⁶ including an appendix on electronic documents and signatures. Issues related to electronic equivalent of maritime transport documents are also under consideration by UNCITRAL Working Group III (Transport Law), in the context of the negotiations of a draft new instrument on the carriage of goods wholly or partly by sea. Apart from these initiatives, the issues described above do not seem to be currently considered by other international organizations.

41. The Commission may wish to consider that the above constitutes an additional reason for including the issues of authentication and cross-border recognition of electronic signatures in a comprehensive reference document.

E. Unfair competition and deceptive trade practices in electronic commerce

1. The issues

42. Another policy concern is to limit fraudulent, misleading and unfair commercial practices in electronic commerce. Electronic communication permits new forms of advertising and marketing that may pose new threats to the interests of consumers as well as the functioning of the competition process. Unfair competition law will protect these interests but legal evaluation of practices in conventional commerce cannot always be transferred to the digital environment.

43. Main features of electronic commerce on the Internet, such as interactivity, uniformity of format, and distribution in networks, allow for a convergence of mass communication and individualized communication, leading to constant renewal of forms of marketing and advertising. Advertising on the Net includes forms of banner advertising with remuneration calculated on the basis of page impressions or ad clicks. Other forms of advertisements include information that load between two content pages, either as small format pop-ups or full-page advertisements. Depending on the manner they are used, such

¹³ Inter-American Uniform Through Bill of Lading for the International Carriage of goods by the Road (Negotiable), available at <http://www.oas.org/DIL/CIDIP-VI-billofloading-Eng.htm>.

¹⁴ Conferencias Especializadas Interamericanas sobre Derecho Internacional Privado.

¹⁵ See, "Summary" at http://www.oas.org/DIL/CIDIP-VI-billofloading-Eng_summary.htm. Two areas of this convention deal with electronic issues. First, Article 2 defines a "Writing" as including "a written document, a telegram, telex, telephonic facsimile (fax), electronic data interchange, or a document created or transferred by electronic means" [emphasis added]. Additionally, article 18.1 of this treaty provides for the possibility of electronic signatures, as well as other signature types, if authorized by applicable law.

¹⁶ http://www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm. This Model Law was approved by the Plenary meeting of delegates on 8 February 2002 as resolution CIDIP-VI/RES.5/02, which can be accessed at [http://www.oas.org/main/main.asp?sLang=E&sLink=](http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/dil/)
<http://www.oas.org/dil/>. The Model Law itself may be accessed (in Spanish and English) at http://www.oas.org/dil/Annex_cidipviRES.%205-02.pdf. (Last visited, 12 April 2006.)

techniques may raise issues of the separation of advertising from editorial parts of media, or may mislead customers and users to purchase services not originally intended. Unfair practices may also involve search engines, which have become the main service for users to cope with the enormous amount of information present on the Net, or use of hyperlinks for misappropriation or deceptive comparative advertising.

2. Justification and proposed approach

44. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

45. The issues described above have been under consideration by a number of international organizations, including OECD,¹⁷ the European Union (A/CN.9/579, para. 35); APEC (A/CN.9/579, para. 24; A/CN.9/598, para. 16), the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for consumer protection in electronic commerce, in particular in developing countries.

46. The Commission may wish to consider that it would be useful to include issues of unfair competition and deceptive trade practices in electronic commerce in a comprehensive reference document.

F. Privacy and data protection in electronic commerce

1. The issues

47. Data protection and privacy are concepts that have been acknowledged in most parts of the world, sometimes even on a constitutional law level. However, the level of protection as well as the legal instruments used to enforce it still vary considerably. With the advent of the computer there was a “first wave” of data protection initiatives in the seventies. With the spreading use of the Internet and the increased technical potential for collecting and transmitting data in electronic commerce, the protection of personal data has gained renewed attention. Practices like data mining or data warehousing as well as the placement of “cookies” are widely used in electronic commerce.

¹⁷ See the OECD, Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce of 8-9 October 1998, http://www.oecd.org/LongAbstract/0,2546,en_2649_34267_1865273_119672_1_1_1,00.html (10.3.2006).

48. Data protection and privacy rules may serve the interests of user as well as of business but also have to be weighed against conflicting interests. The lack of consumer trust and confidence in the privacy and security of online transactions and information networks is seen as an element possibly preventing economies from gaining all of the benefits of electronic commerce. On the other hand, regulatory systems restricting the flow of information can have adverse implications for global business and economies.

49. The key elements in the international discussion on principles of data protection are concerned with consent to data collection, adequate relation to the purpose, time limitation of storage, adequate level of protection in third countries to which transmission takes place, information and correction claims for users, and enhanced protection for sensitive data. New issues and restrictions on data protection arise from international security concerns, which have led to legislative actions directed at data retention. With a growing stock of international rules these do not only become more heterogeneous but also make it more difficult for companies to comply. As these standards consider conflicting interests the delineation of the field of application of these instruments as well as which of the interests protected will prevail in a specific case is gaining growing importance.

2. Justification

50. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

51. The issues described above have been under consideration by a number of international organizations, including OECD,¹⁸ the European Union (A/CN.9/579, para. 32); APEC (see A/CN.9/579, paras. 22-23; A/CN.9/598, para. 17), the Council of Europe (see A/CN.9/579, para. 30); the Commonwealth secretariat (A/CN.9/579, para. 27; A/CN.9/598, paras. 18-20) and the ICC (A/CN.9/579, paras. 53-56). Not all organizations deal with every aspect of these issues and the perspective from which each organization discusses them is not necessarily identical. This variety of sources and diversity of approaches does not facilitate the task of legislators and policymakers interested in establishing a sound legal framework for consumer protection in electronic commerce, in particular in developing countries.

52. The Commission may wish to consider that it would be useful to include the issues of privacy and data protection in electronic commerce in a comprehensive reference document.

¹⁸ See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, applicable on 23 September 1980, http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html. See further the OECD "Privacy Policy Generator" (http://www.oecd.org/document/39/0,2340,en_2649_34255_28863271_1_1_1_1,00.html).

G. Other elements for a sound legal framework for electronic commerce

1. Protection of intellectual property rights

53. Modern means of communication have had a significant impact in the way some intellectual property rights are defined and have challenged traditional enforcement mechanisms.

54. Copyright has been closely intertwined with the features of the production, reproduction, and distribution of works from the outset. Hence, the advent of a uniform digital format as well as digital networks poses a challenge for the specific characteristics of copyright as to subject matter, scope of rights, and enforcement as new technological possibilities and related innovative business models develop. All kinds of protected materials are now distributed and traded over digital networks. The first challenge for the legal framework is to adapt to new technological and economic developments. This concerns the scope of rights with respect to digital distribution as well as the extent of limitations to copyright. Also, certain kinds of information goods may obtain increased importance in a digital environment calling for increased protection. The protection of databases can be seen as an example. Digital networks pose a threat to traditional distribution channels and economic models as well as to existing systems of collective management. Finally, moral rights that were not in the focus of the earlier phases of computerization, which emphasized software protection, are now increasingly gaining importance with respect to the creation and distribution of works over the Internet.

55. Trademarks have an important function in commerce that is equally present in electronic commerce. While there is consensus that trademark law should apply to electronic commerce the same way as to traditional means of communication problems arise from the fact that the provisions of trademark law and protection of related signs are not tailored to the features of the new medium. Pertinent issues include: use of trademarks as meta tags, sale of trademarks as keywords, linking and framing. Further issues deriving more from “conventional” use of trademarks and related to the issue of cross-border communication as opposed to the territorial nature of trademark systems include the acquisition as well as infringement of trademark rights through use of signs on the Internet.

56. Another illustration of the impact of electronic commerce on the traditional system for protecting intellectual property rights concerns domain names. Domain names are a necessity of today’s user-friendly information retrieval in the Internet. The economic value of a concise and characteristic domain cannot be underestimated. Due to this, many conflicts over certain Internet-domains have arisen. Patent law is another area affected by modern means of communication, with software patents playing an increasing role in electronic commerce.

57. States interested in developing an appropriate legal framework for electronic commerce would be well advised to consider carefully the intellectual property implications of the use of modern information and communication technologies. WIPO is the driving force in the international field for developing a framework for the protection of intellectual property. Due to the technical development much of the activity is now related to the digital environment. WIPO has a comprehensive working agenda on all aspects of intellectual property in electronic commerce. The organization’s expertise and universal membership ensures the broad acceptability of the international standards set by WIPO.

2. Consumer protection in electronic commerce

58. Domestic rules on consumer protection are typically based on concerns about information asymmetries as well as a lack of negotiating power on the side of the consumer. While media such as the Internet offer convenient alternatives to traditional purchase methods, one of the main barriers to electronic commerce taking off has been the lack of consumer confidence due to uncertainties in the use of electronic media for contracting.

59. Information asymmetries are exacerbated in electronic commerce, as consumers lack vital information concerning the product, which the consumer cannot inspect physically. Consumers also have virtually no information concerning vendors and have little means to verify their identities and the standing of their business. Moreover, the features of the technical means used for the transaction may not be familiar to the consumer resulting in unintended communications. Also, there are fears that as the vendor provides the technical system it may be able to construe key features in its favour leaving the consumer in a weaker position in the transaction process. Legal uncertainties in cross-border transactions arise with respect to the applicable law and efficient ways to assert consumer claims.

60. The issues described above may affect domestic and international electronic commerce in many ways. Lack of appropriate rules, guidelines or voluntary codes of conduct, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

3. Unsolicited electronic communications (spam)

61. New technical means of communication, such as e-mail messaging, have also exacerbated the problems posed by unsolicited commercials. A number of countries have adopted legal instruments to combat spam. The first problem confronting anti-spam legislation is a definition of and delineation between legitimate commercial messaging and undesired spamming. Enforcement of legal anti-spam measures has proven problematic, due to the number of enforcement agencies and the variety of their powers, limitations on gathering information and sharing information as well as producing the necessary evidence, and limited enforceability across borders due to lack of national jurisdiction over cross-border spam and of appropriate measures for cross-border enforcement at the operational level.

4. Cybercrime

62. Use of modern information and communication technologies has provided new means for criminal, fraudulent or indecent activities, such as embezzlement of funds, slander, industrial espionage, violation of trade secrets or dissemination of child pornography. At the same time, new types of criminal conduct have emerged, such as identity theft, dissemination of computer viruses, or intentional breakdown of computer and information services. Besides their criminal character, all these activities may

significantly affect international trade by causing physical loss or moral damage to individuals and business entities and by undermining business and consumer confidence in electronic commerce. The establishment of an effective legal framework for preventing and persecuting computer crime and cybercrime, for example, as provided for in the Convention on CyberCrime adopted by the Council of Europe¹⁹ and its Protocol,²⁰ is therefore an essential component of domestic and international strategies to promote electronic commerce.

III. Proposed nature of future work

63. The Commission may wish to consider that it would be useful to include the issues described in Part II, sections A to F, as well as other related issues in a comprehensive reference document. The document would describe in some detail the issues discussed above and the solutions being offered or proposed by the various organizations that have worked in this area. The Secretariat proposes that the legislative guidance document should take a narrative and neutral approach to issues dealt with by other organizations and should not be intended as a comparative evaluation of the solutions proposed by them. Neither should the document offer its own advice as an alternative to or substitute for the advice of other organizations.

64. The Secretariat proposes a different approach as regards issues related to intellectual property rights, which are described in Part II, paragraphs 53-57 above, and which have been extensively treated at a universal level under the auspices of WIPO. In respect of those issues, the Commission may wish to consider that it would be worth mentioning them in any comprehensive reference document that the Commission might wish to prepare, although in a somewhat summary form, with a view to drawing the attention of legislators and policymakers to the importance of establishing an appropriate legal framework for the protection of intellectual property rights in electronic commerce.

65. As regards issues related to consumer protection, unsolicited commercial communications, cybercrime and computer crime, which are described respectively in Part II, paragraphs 64 and 65 above, the Secretariat proposes to treat those topics in a similarly abbreviated manner that would highlight their importance and refer to ongoing and completed work by the relevant organizations.

¹⁹ The CyberCrime Convention, ETS 185, entered into force on 1 July 2004. It is intended to develop a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate criminal legislation and fostering international cooperation. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

²⁰ The Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature supplements, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime as regards the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS 189). It was opened for signature in Strasbourg on 28 January 2003. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

B. Note by the Secretariat on insolvency law: possible future work

(A/CN.9/596) [Original: English]

1. At its thirty-eighth session (2005), the Commission had before it a number of proposals (A/CN.9/582 and Add.1-7), on which it heard presentations, for future work in the area of insolvency law, specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency.
2. After discussion, some preference for the topics of corporate groups, cross-border protocols and post-commencement financing was expressed.¹ The Commission agreed that to facilitate further consideration and obtain the views and benefit from the expertise of international organizations and insolvency experts, an international colloquium should be held, similar to the UNCITRAL/INSOL International/International Bar Association Global Insolvency Colloquium (Vienna, 4-6 December 2000), which had been a key part of the work on the development of the UNCITRAL Legislative Guide on Insolvency Law (see A/CN.9/495). The Commission agreed that in preparing the programme and determining the priorities for a colloquium, to be held in Vienna from 14 to 16 November 2005, the Secretariat should take into account the discussion of the various topics in the Commission.²
3. Approximately 95 participants from 36 countries attended the colloquium, including representatives of Governments and international organizations, such as the OECD and the World Bank, and lawyers, accountants, bankers, judges and insolvency practitioners.
4. Based upon the exchange of views and information that took place amongst participants, the present note provides an evaluation and synthesis of the Colloquium proceedings and recommendations for possible future work that might be undertaken by the Commission.

I. Treatment of corporate groups in insolvency

5. The Colloquium heard that the business of corporations is increasingly conducted through the medium of a corporate group. A corporate group may be described loosely as a number of separate entity companies that are linked together by some form of common control or ownership, and they are employed in both domestic and international situations. The reasons for the use and popularity such groups are many and varied, ranging from the need for an "organisational" structure to the need to lessen the incidence of taxation. Other reasons include the need for diversification and risk management, the need to establish operating entities in a foreign jurisdiction, the need to facilitate a merger or takeover, and the need to provide for the requirements of a sophisticated financial structure.
6. Corporate groups might conduct their affairs in such a way that some or all of the members of the group may be jointly liable for the external debts of individual members or subject to group guarantees given in respect of the external liabilities of individual

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 210

² *Ibid.*

members and may transact business between one another that results in internal debts and liabilities between individual members of the group.

7. The structure of a corporate group may be simple or highly complex, particularly if the group is engaged in international trade. A corporate group will be more complex if it has become involved in joint venture arrangements, special purpose corporate vehicles ('SPV'), offshore trusts and partnerships and the like. If this complexity is disturbed by the onset of financial difficulty affecting one or more of the members of a group, problems arise simply because the group is constituted by members that each have a separate legal personality and existence. Absent legislative or judicial intervention, that situation requires that each entity be separately considered and, if necessary, separately administered in insolvency.

8. Considerations relevant to facilitating an understanding of how corporate groups work in practice were identified as including: the accounting treatment of corporate groups; the corporate regulatory requirements concerning corporate groups; the fiscal or taxation motives behind the development of a corporate group; and the sophistication of finance and lending techniques that are employed in relation to groups. Further considerations, relevant to the present treatment of corporate groups in insolvency in a variety of jurisdictions, would include: describing what is meant by a "corporate group" (or similar term); the circumstances under which a case could be commenced in respect of two or more members of a group; and the formal remedies or relief that might be available in respect of insolvent or near insolvent members of a group, for example, procedural consolidation, substantive consolidation, extension of liability, reorganisation involving more than one debtor and miscellaneous remedies (such as dealing with inter-group debts and liabilities, and the application of subordination principles).

9. The Colloquium noted that the topic raised questions of the treatment of corporate groups in insolvency both domestically and internationally in a cross-border context. The view was widely shared that addressing the issue in a cross-border context would be difficult without first considering domestic issues and achieving a common understanding. The view was also shared that if future work were to be undertaken, care should be taken to ensure that it did not interfere with the high incidence and increasing sophistication of corporate group structures, nor interfere in or create uncertainty with respect to commercial transactions that were entered into with corporate groups (often regardless of the absence or presence of legislation directed at the possible insolvency of or within a group) and also avoid the prospect or possibility of propelling corporate groups toward sanctuary in some foreign "safe haven".

10. The Colloquium heard how different aspects of an insolvency regime were applied to corporate groups in different countries and considered whether provisions might be required to address issues particular to those corporate groups. That discussion identified a number of issues relevant to the treatment of corporate groups, including the following.

(a) In a domestic setting

11. It was noted that because the use and meaning of key terms (e.g. corporate group, control, parent corporation, subsidiary corporation, holding corporation, related or associated corporation) differed between countries, definitions would need to be considered to ensure that a common understanding of the subject matter could be reached. That consideration could also include the extent to which entities other than corporate group members (such as Special Purpose Vehicles, joint ventures, offshore trusts and partnerships and other similar devices) should or may be treated as part of a corporate group.

12. Commencement of insolvency proceedings against a corporate group was discussed and a number of different questions noted, including the applicable test; how that test would be applied to a corporate group (whether to each member of a corporate group or to the group as a whole); whether an application for commencement may be made in respect of more than one debtor; whether a parent (or other member) of a group may apply in respect of every member of the group, including itself; who could apply for commencement (including, for example, commencement by a regulatory body such as a securities or corporate regulatory agency); and how liabilities such as inter-company indebtedness and cross-guarantee liabilities would be treated.

13. Other issues concerning commencement included: the powers (for example, procedural consolidation) that might be given to a court at the time of commencement in respect of some or all of the members of a corporate group; whether the same administrator could be appointed in respect of each group member; how issues of potential conflict (for example, because of cross-guarantees between members of a group, inter-group debts, wrongdoing in respect of one member by another) should be addressed; whether legislation specific to corporate groups might be required in the case of insolvency laws that permitted management to remain in office in insolvency proceedings; and whether special provisions were required with respect to application of a stay or suspension in the case of a corporate group or in respect of post-commencement finance for a corporate group (or two or more of its members).

14. Possible reorganization of a corporate group or members of a corporate group also raised a number of issues including: whether two or more members of a corporate group could be reorganized through a single reorganisation plan and if so, what special provisions might be required, for example, with respect to the nature and content of a plan; safeguards; convening and conducting creditors meetings in respect of a plan; treatment of creditor claims; voting of creditors; and approval of a plan.

15. Issues relating specifically to corporate groups in insolvency concerned the possible liability of one member of a corporate group (for example, the parent) for the debts and liabilities of an insolvent member of the group and the different approaches that might be taken, including imposing strict liability for all the debts and liabilities of a member of a group, regardless of the circumstances in which they were incurred; imposing liability arising from acquiescence in permitting or directing a member of a group to incur debts when it was or was likely to become insolvent; imposing liability with respect to the conduct of the affairs of the group in such a way that some classes of creditors might be prejudiced (for example, liability to employees of the member); or imposing liability where valid grounds exist for reaching the assets of another member of a corporate group.

16. A further issue of particular relevance to corporate groups and their treatment in insolvency was that of consolidation and whether a domestic insolvency law should provide for consolidating or combining the affairs of two or more members of a group so that there was one pool of assets and one pool of creditors, and the circumstances in which an order for such consolidation might be made.

(b) In an international setting

17. Participants noted the importance of the UNCITRAL Model Law on Cross-Border Insolvency to reorganization of corporate groups in cross-border insolvency cases, in particular the provisions dealing with coordination and cooperation. However, it was also noted that the Model Law did not specifically address a number of other issues relevant to cross-border insolvency of corporate groups, including: how commencement of proceedings could be addressed where the parent or the majority of members of a group

were incorporated in one jurisdiction, but other members were incorporated in another jurisdiction or jurisdictions; whether “centre of main interests” in respect of a corporate group and its members needed to be defined in the light of interpretation of that concept in recent cross-border insolvency cases; and the special provisions that might be necessary to ensure the availability of post-commencement finance that involved a corporate group with members in more than one jurisdiction and to foster cooperation between jurisdictions in the case of an international corporate group insolvency. Attention was drawn to the difficulty of reorganizing a corporate group without substantial coordination in a cross-border insolvency case. A further issue was how harmonisation and coordination of international and regional responses to corporate groups and insolvency could be encouraged.

18. On the basis of the discussion at the colloquium, it may be concluded that corporate groups are an increasingly important vehicle for world trade and that the problems being encountered with respect to insolvency of one or more members of corporate groups, both domestically and in an international context, would support further work being undertaken by the Commission. That work might take the form of a text that would provide possible legislative guidance to States wishing to address issues specific to the treatment of corporate groups in both domestic and cross-border insolvency.

II. Post-commencement financing

19. The colloquium discussed the importance of post-commencement financing to the success or failure of reorganization, particularly with respect to ensuring that the debtor’s business could be continued and payments for critical goods and services, supplies, wages, insurance and rent made. Participants noted that there was an emerging consensus on the need to provide statutory authority for the provision of post-commencement finance, as reflected in the treatment of that topic in recent international work on insolvency, including by the International Monetary Fund, the Asian Development Bank, the World Bank, and most recently in the UNCITRAL Legislative Guide on Insolvency Law, which included a chapter of commentary and recommendations on the topic.

20. Participants discussed some of the structural impediments that existed with respect to obtaining such financing in domestic insolvency cases. These included: lack of statutory authority; personal liability of an insolvency representative or directors and officers of the debtor for incurring the debt that such financing would entail; application of avoidance provisions; problems associated with providing priority to post-commencement finance; and a preference for liquidation over reorganization that made the issue of such finance difficult to address. It was noted that only a handful of insolvency laws authorized post-commencement financing and even fewer provided any type of priority for the repayment of such finance. A note of caution was sounded with respect to the relevance of a regime to facilitate post-commencement finance in developing countries where the necessary types of finance might not be available.

21. Participants heard about recent national legislative developments with respect to some of these issues and noted that changes were being effected, although slowly.

22. A number of cross-border insolvency cases were discussed and the difficulties with respect to financing, particularly where corporate groups were involved, were evident. Differences existed with respect to the priority accorded to post-commencement finance in different jurisdictions, as well as with respect to providing security for post-commencement finance. There were questions of applicable law, and of whether

post-commencement finance obtained by a debtor could be used by another member of the same corporate group and whether non-debtor members of a corporate group could borrow money post-commencement and permit the debtor to use those funds. Participants underlined the need to provide certainty and predictability for lenders in those situations.

23. Based on the discussion, it may be concluded that while the UNCITRAL Legislative Guide on Insolvency Law addresses some of the issues identified, particularly with respect to authorisation, the issue of post-commencement financing in cross-border insolvency of corporate groups could be further considered, building upon the work in the Legislative Guide, as well as upon the work of UNCITRAL in cross-border insolvency. Initially, that work could form an important component of work that might be undertaken with respect to treatment of corporate groups in insolvency; any additional aspects of the topic could be considered when that work is completed.

III. Cross-border insolvency protocols and court-to-court communication

24. The colloquium heard reports on instruments that had been developed to facilitate the conduct of cross-border insolvency cases, in particular the IBA Concordat and the American Law Institute/International Insolvency Institute Court-to-Court Communication Guidelines and on the status of adoption of the UNCITRAL Model Law on Cross-Border Insolvency. It was emphasized that the Model Law provides the legislative framework for cooperation and coordination in cross-border insolvency cases and the authority, in article 27(d), for the approval or implementation by courts of agreements concerning the coordination of proceedings. A number of cross-border cases involving the use of such agreement or protocols were presented, with particular attention being paid to the types of issues typically covered; how such protocols could facilitate court-to-court communication and cooperation; and the difficulties that had been encountered with the negotiation and use of protocols. Cases where such protocols were not used, but would have facilitated conduct of the case were also discussed, and examples given of why such tools were not always available. It was noted that language problems could be encountered where protocols were being negotiated between countries from different language groups and that the availability of information on cross-border cases and developments in practice, particularly with respect to coordination and cooperation, was essential to facilitate the development that practice, especially in countries that had not had cross-border cases and therefore had not had occasion to use such protocols.

25. It should be noted that appropriate statutory authorization, such as adoption of the UNCITRAL Model Law and in particular, articles 25-27, is required in order to encourage and facilitate cooperation in cross-border insolvency cases and, in particular, to facilitate the use of cross-border protocols. However, while the Model Law provides that fundamental authorization, it does not provide detail, other than in article 27 and some further discussion in the Guide to Enactment, on the practicalities of how that cooperation could be implemented.

26. On the basis of the discussion, it could be concluded that existing legal and judicial experience with respect to the negotiation, use and content of protocols could usefully be made available in some form to the international legal community. The availability of that experience would build upon, complement and provide further impetus for the enactment of the legislative framework provided by the Model Law, facilitating implementation of the coordination and cooperation authorized by articles 25-27 and the development and use of protocols. Issues to be addressed in that work could include: facilitating and guiding

communications among courts (e.g. notice to parties, participation by parties and disclosure of substantive issues to parties) and standards for the substance of a protocol (e.g. control and protection of assets, coordinating disposition of assets, post-commencement finance, priority of claims, filing and classification of claims, distribution to creditors and effecting reorganization). Examples of protocols that had been negotiated could also be made more widely available.

IV. Directors' and officers' responsibilities in insolvency and pre-insolvency

27. The colloquium heard that an increasing number of widely publicized insolvency cases were focussing on issues related to director and officer responsibilities and liabilities and the outcomes of those cases pointed to the lack of certainty and predictability in this area. Reports from international organizations on their work in this area highlighted some of the issues and problems encountered. To date, that work had focussed on providing guidance on issues arising in the context of insolvency, rather than on establishing prescriptive rules. Diversity of national approaches to relevant issues and the complexity of those issues, particularly when considering appropriate responses to different types of companies (e.g. small and medium enterprises as opposed to multinational enterprises), as well as the relevance of law other than insolvency law and the importance of social policy, were amongst the reasons for the adoption of that approach. It was pointed out, for example, that while small and medium enterprises typically were characterized by a family relationship between the owner, directors and management, often involving personal guarantees of financial obligations, that characterization was not true for large public enterprises. Accordingly, the abilities and motivations of directors in various types of enterprise structure would differ, as would the economic factors driving the enterprises, particularly as between different types of markets and economies, making a universal, rule-based approach to issues of responsibility and liability hard to achieve. It was noted that national legislation addressing relevant issues was framed in a domestic context around various social policy issues that would also need to be factored into any discussion of a possible unified approach. It was also noted that the topic raised certain issues that were still controversial in a number of countries and international forums, in particular the extent to which directors should be responsible and accountable to creditors, in addition to shareholders.

28. Based on the discussion, it could be concluded that while guidance might be useful in this area to assist both debtors and creditors with determining what constituted acceptable or unacceptable behaviour in proximity to insolvency, certain issues that might need to be addressed in providing such guidance remain controversial and there are concerns about the maturity of the topic for developing that guidance at this time.

V. Insolvency and commercial fraud

29. The colloquium heard a report on work currently being undertaken by UNCITRAL with respect to identifying the common features of fraudulent schemes, including in the context of insolvency, and on UNCITRAL's participation in a study being undertaken by the United Nations Office of Drugs and Crime (UNODC) on fraud and criminal misuse and falsification of identity, including a component on commercial fraud.

30. It was observed that both of those projects focussed on issues of commercial fraud broadly, particularly on identifying what constituted fraud, detecting its occurrence and

combating fraud, and did not address the aftermath of fraud and its impact in insolvency on the employees, creditors and other parties in interest.

31. The Colloquium heard suggestions for specific considerations in the insolvency context, including the allowance and ranking of penalties; minimization of interference by the criminal authorities with the reorganization process; the classification of claims by defrauded investors; the treatment of claims of creditors assisting in a fraud; treatment of intercompany claims between members of a multinational corporate group when fraud is committed by a debtor that becomes subject to an insolvency proceeding; the rights of an estate administrator to recover assets in connection with commercially fraudulent activities; and the forfeiture of assets of insolvent companies.

32. It was noted that the UNCITRAL Legislative Guide on Insolvency Law did not directly address issues relating to fraud in the context of insolvency, except briefly in the context of subordination of claims and the treatment of penalties and fines, although Working Group V had discussed the question during development of the Legislative Guide. The colloquium acknowledged the relevance of questions of fraud to the administration and outcome of insolvency proceedings. It was noted, however, that the issues identified concerned not only legislative approaches to the treatment of issues of fraud in the insolvency context (whether occurring before or during insolvency and whether addressed in the insolvency law or some other law), but also the activities of regulatory authorities that might impact upon the administration of insolvency.

33. On the basis of the discussion, it could be concluded that the work already being undertaken by UNODC on fraud, including commercial fraud, and by UNCITRAL with respect to commercial fraud, should be reviewed to determine the extent to which issues related to fraud in insolvency matters were to be addressed or could be addressed in that context, before considering possible future work on that topic.

VI. Proposal for future work

34. The Secretariat proposes that:

(a) The treatment of corporate groups in insolvency is now sufficiently developed for the topic to be referred to a working group for consideration. A meeting of Working Group V (Insolvency Law) has tentatively been scheduled for 11-15 December 2006 in Vienna;

(b) Post-commencement financing should initially be considered as a component of work to be undertaken on insolvency of corporate groups; the working group could also consider any proposals for work on additional aspects of this topic;

(c) The topic of cross-border protocols could be put on the agenda of a working group, but the initial work of compiling practical experience with respect to negotiating and using cross-border insolvency protocols could be developed through consultation with judges and insolvency practitioners. A preliminary progress report on that work could be presented to the Commission for further consideration at its next session; and

(d) Work being undertaken by other organizations in relation to the topics of directors' and officers' responsibilities in insolvency and pre-insolvency, and insolvency and commercial fraud should be monitored to facilitate consideration, at some future date, of work that might be undertaken by the Commission.

**C. Note by the Secretariat on developments in insolvency law:
Adoption and interpretation of the UNCITRAL Model Law on
Cross-Border Insolvency and developments in interpretation
of “centre of main interests” in the European Union**

(A/CN.9/597) [Original: English]

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I. Introduction

1. This note reports on developments occurring since document A/CN.9/580 of 15 April 2005 in the area of cross-border insolvency law, including with respect to the adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and interpretation of the term “centre of main interests” in cases in the European Union under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR).

2. The cases interpreting provisions of the ECR are included in this paper as they may prove to be of assistance to interpretation of analogous provisions of the Model Law. The jurisprudence in the EU remains somewhat unsettled with respect to, for example, interpretation of the term “centre of main interests” and the Commission may wish to ask the secretariat to continue monitoring the decisions of courts of the European Union with a view to facilitating interpretation of the Model Law.

II. Developments in cross-border insolvency

(a) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency

3. Legislation based on the Model Law has now been adopted by Eritrea; Mexico;¹ Serbia and Montenegro (both jurisdictions²); Japan;³ South Africa;⁴ Romania;⁵ Poland;⁶ the British Virgin Islands;⁷ the United States of America⁸ and the United Kingdom of Great Britain and Northern Ireland.⁹ In 2000, the United Kingdom enacted legislation enabling the Model Law to be implemented by regulation. Those regulations, the Cross-Border Insolvency Regulations, came into effect on 4 April 2006 (the regulations do not apply in Northern Ireland). A number of countries have draft legislation based upon the Model Law under consideration, including Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law, as well as provisions based on the ECR.

¹ Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000 (Mex.).

² Serbia: Law on Bankruptcy Proceedings 2004, Part XII International Bankruptcy; Montenegro: Law on Business Organization Insolvency, February 2002.

³ Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000).

⁴ Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

⁵ Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

⁶ Law on Insolvency and Restructuring of 28 February 2003.

⁷ Insolvency Act, 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.

⁸ United States Bankruptcy Code, chapter 15.

⁹ Insolvency Act 2000.

(b) Developments in interpretation of the Model Law

4. The following is a brief summary of recent decisions under Chapter 15 of the United States Bankruptcy Code, which implements the UNCITRAL Model Law on Cross-Border Insolvency and entered into force on 17 October 2005. Those cases are included in this paper to provide information on implementation and interpretation of the Model Law in jurisdictions where it has been adopted. It is expected that these cases will also be included in UNCITRAL's Case Law on UNCITRAL texts (CLOUT) system.

5. *Ian Thow* (United States, 2005).¹⁰ Ian Thow officially filed the first petition under Chapter 15 of the United States Bankruptcy Code ("Chapter 15 petition") in the Seattle, Washington, on 2 November 2005, seeking recognition in the United States of a foreign main proceeding pending in British Columbia, Canada. The United States court recognized the proceedings in British Columbia as foreign main proceedings on the basis that virtually all of the debtor's assets and creditors were located in British Columbia, which was therefore his centre of main interests. The court made orders under section 1521 of the Bankruptcy Code that (a) continuation and commencement of individual actions concerning the debtor's assets and execution against the debtor's assets were stayed; (b) the right to transfer or encumber or otherwise dispose of the debtor's assets in the United States was suspended; (c) the debtor should make himself and pertinent records available for inspection and examination by the Canadian trustee; (d) the debtor's assets in the United States that would be property of the debtor's estate under the Bankruptcy Code should be administered by the Canadian trustee; and (e) the debtor should cooperate with the Canadian trustee with respect to its rights and duties under the order. The court reserved its decision on choice of law issues relating to the assets comprising the debtor's estate.

6. *TriGem Computer Inc.* (United States, December 2005).¹¹ After experiencing financial difficulties, TriGem, one of the world's largest makers of computers, became the subject of a reorganization case under South Korean law. Since TriGem also had creditors in the United States, the Receiver appointed for TriGem in the Korean reorganization proceedings filed a Chapter 15 petition on behalf of TriGem, principally to have the automatic stay enjoin litigation that was pending against TriGem in the United States. On 7 December 2005, the United States court recognized the Korean reorganization proceeding filed by TriGem's corporate parent as a "foreign main proceeding" under Chapter 15 and enjoined creditors from proceeding against TriGem's United States assets. The evidence presented to the court that the Republic of Korea was TriGem's centre of the main interests consisted of the sworn statement of the foreign representative to the effect that TriGem's head office, branch offices and business, research and training centres were all located in various parts of the Republic of Korea.

7. *La Mutuelle Du Mans Assurances IARD* (United States, December 2005).¹² The United Kingdom branch, *La Mutuelle Du Mans Assurances IARD* (MMA), of a French insurer was the subject of insolvency proceedings under the Companies Act of 1985 of Great Britain, pursuant to which the court had approved a scheme of arrangement on 28 October 2005. MMA filed a Chapter 15 petition in New York on 11 November 2005 to gain time to make payouts under the approved scheme and to prevent creditors from suing it or attaching its assets in the United States. Having found that the debtor's centre of main

¹⁰ U.S. Bankruptcy Court for the Western District of Washington (unpublished order).

¹¹ U.S. Bankruptcy Court for the Central District of California, case no. 2:05-bk-50052-tD, December 7 2005 (unpublished order).

¹² U.S. Bankruptcy Court for the Southern District of New York (Judge Burton R. Lifland), 7 December 2005.

interests was in the United Kingdom, not France, the court recognized the foreign proceedings as foreign main proceedings under Chapter 15 and permanently enjoined creditors from moving against MMA's assets. The court made a number of orders concerning conduct of the proceedings, including that "[t]he scheme of arrangement sanctioned by the U.K. High Court in the foreign proceeding shall be given full force and be binding on all persons and entities in the United States."

(c) Developments in interpretation of "centre of main interests" under the ECR

8. The following brief summary reflects a selection of decisions on interpretation in the EU of the term "centre of main interests". The Model Law does not define the term "centre of main interests", but article 16 (3) contains a rebuttable presumption that it will be the debtor's registered office or, in the case of an individual, its habitual residence. Article 3 (1) of the ECR contains a similar presumption regarding the registered office and Recital 13 indicates that the centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.¹³

9. *Shierson v. Vlieland-Boddy* (United Kingdom, July 2005).¹⁴ This case clarified the point at which a debtor's centre of main interests is to be determined. The court of first instance decided that the time for consideration of the centre of main interests was the time of the decision to open proceedings. On appeal, however, the Court of Appeal held that the relevant time was when the court was first required to decide whether to open insolvency proceedings. The key date should therefore be the time of the first hearing of the bankruptcy petition or, where there has been an application for permission to serve the petition outside the jurisdiction or for interim relief in advance of the hearing of the bankruptcy petition, the hearing of that application. The Court also held that if a debtor moved to another EU country deliberately trying to avoid insolvency proceedings by altering its centre of main interests, there was nothing to prevent this, provided that the Court was satisfied that any such relocation by the debtor was based on substance and had the necessary element of permanence.

10. *Re TXU Europe German Finance BV* (United Kingdom, October 2004).¹⁵ This case addressed whether it is possible to place companies incorporated in other parts of the EU into creditors' voluntary liquidation in the United Kingdom. Notwithstanding the wording of section 73 (1) of the Insolvency Act 1986 and section 735 (1) of the Companies Act 1985 (which suggest that a foreign company cannot be wound up voluntarily), the court, following the case of *Re BRAC Rent-A-Car International Inc.*, held that under the ECR it is possible for a foreign company to be wound up voluntarily when its centre of main interests is in the United Kingdom, provided the company has the capacity under its domestic law to pass the relevant resolution. In this case, the court accepted foreign legal advice that such a resolution could be passed under the law of Ireland and the Netherlands, the relevant places of incorporation.

11. *Aircraft* (Czech Republic, April 2005).¹⁶ This case involved conflicting decisions by different courts in two Member States, both opening main proceedings. A creditor applied to open insolvency proceedings at the Prague Regional Court (Czech Republic). Pending that court's decision, the debtor applied for insolvency proceedings at the Regional Court

¹³ For further information on these and other relevant cases see www.eir-database.com.

¹⁴ Court of Appeal, Civil Division, 28 July 2005; [2005] EWCA Civ. 974.

¹⁵ [2005] BPIR 209.

¹⁶ Prague Regional Court, 26 April 2005, 78 K 6/05-127.

of Hamburg (Germany), asserting that his centre of main interests was in Hamburg. Before the Regional Court of Hamburg issued its decision, the Prague Regional Court appointed a provisional administrator. After the Regional Court of Hamburg issued a decision opening a main proceeding, the Prague Regional Court also issued a decision opening a main proceeding, on the ground that the centre of main interests of the debtor was situated in the Czech Republic: the debtor's private domicile was in the Czech Republic and he conducted professional activities in the tourism sector almost every day by recommending his products to travel agencies in the local newspapers. The Prague Regional Court stated that in order to establish which proceedings had priority, the moment to consider was the date of the first decision issued on the case. Since it had issued two decisions (one ordering the debtor to express his opinion on the creditor's application, and one appointing a provisional trustee) prior to the decision of the German court opening proceedings, the Prague court took the view that the German proceedings were to be considered secondary proceedings. The debtor has appealed against the decision of the Prague court and the creditor against the decision of the Hamburg court.

12. *Silvalux Sarl* (Luxembourg, April 2004).¹⁷ This case involved the determination of the centre of main interests of a company, registered in France with a subsidiary in Luxembourg. The court found that the centre of main interests of the company was in Luxembourg, on the grounds that registered mail sent to the head office in France was returned with the notation that the addressee did not reside at the address indicated and the employees of the company were registered with the social security authority in Luxembourg.

13. *UK Rover Group* (United Kingdom, May 2005).¹⁸ The High Court found it had jurisdiction to make administrative orders in relation to the affairs of 8 national wholly owned sales subsidiaries of the English company MG Rover Overseas Holding Ltd, which had their places of incorporation in different EU countries. The court based its decision on the following findings of fact. Firstly, the management of the national sales companies invariably included at least one director resident in the United Kingdom, and no other nationalities were common to the boards of the national sales companies. In addition, five of the national sales companies had a board with a majority of United Kingdom residents and the staff structure was such that all senior staff of the national sales companies were appointed by direct specific authorization from the international headquarters in the United Kingdom. Secondly, as to the financial structure, each of the national sales companies operated under an annual budget submitted and approved by the headquarters in the United Kingdom; the headquarters played the key role in budget setting, financial scrutiny and funding; and no national sales company could describe itself as having autonomy. Thirdly, in terms of trading, the evidence clearly established that no national sales company had an autonomous and independent existence. Finally, the general overview was that the national sales companies clearly together formed a subsidiary network within part of an international group structure.

14. *AvCraft* (Germany, June 2005).¹⁹ The factories of AvCraft Aerospace GmbH, the German subsidiary of AvCraft Aviation of Leesburg, Va., were situated in Oberpfaffenhofen (Germany). The German court found that the debtor's centre of main interests was in Oberpfaffenhofen as that was where the raw materials were delivered and where the legal and economic network, in particular with respect to suppliers, was promoted and developed. All the relevant entrepreneurial activities, such as purchases,

¹⁷ Tribunal de Luxembourg, 15 April 2005 (II No. 365/05).

¹⁸ High Court of Justice, Chancery Division, 11 May 2005.

¹⁹ AG Weilheim i.OB, 22 June 2005 (IN 260/05).

management of personnel, accounting and the overall key business were also carried out there. The court rejected the presumption in the ECR that the place of registration of the debtor, in this case Dublin, would be its centre of main interests.

15. *Hukla* (Germany, August 2004).²⁰ The court found that the centre of main interests of the debtor (an Austrian marketing company) was in Germany, notwithstanding that its place of registration was Vienna. The Austrian company had to be considered a commercial unit of the German company, as it lacked economic independence and its move to Austria some years before the opening of the insolvency proceedings was for tax reasons and reasons related to retail-trade facilities. In reaching this conclusion, the Court took into account several factors: the management of the mother company, situated in Germany, provided strategic and operational guidance for the activities of the Austrian subsidiary; the budget of the Austrian company was regularly submitted to the management of the German company for approval; the organization and supervision of the marketing activity carried out by the sales representatives of the Austrian company took place in German; and most relevant commercial books and documents were kept in Germany.

16. *Collins & Aikman* (United Kingdom, July 2005).²¹ The English court considered an application for administration orders in respect of 24 companies of the *Collins & Aikman Corporation Group* (whose headquarters was in the United States of America), incorporated in different EU countries. It found that, according to article 3, abs. 1 (the presumption as to centre of main interests) of the ECR, it had jurisdiction over all of the companies on the grounds that: the manager entrusted with coordinating all cash management functions for the European companies was based in England; all cash co-ordination functions, principally concerning payment approval of daily cash calls made by individual plants, were based in England; the pooling bank accounts for the EU operations were held with a bank in London; human resources for Europe were coordinated from England; information systems for Europe were run from England; the engineering design for Europe was based in England; the majority of the sales functions in relation to the European operations were dealt with from England; and the strategic decision making in relation to the European operations had been largely undertaken by a committee based in England and consisting of majority of United Kingdom executives.

17. *Dental Technician* (Germany, April 2005).²² The German court stated that, in order to avoid legal uncertainty, the time for consideration of the centre of main interests was the time of the submission of the petition, and not the time when the debts were incurred. The court left open the questions of whether the time for assessing the centre of main interests could be when the decision opening the proceedings was made and of which judge was competent in the event the debtor had moved its centre of main interests after the submission of the petition, but before the decision was made. As to the criteria for determining the debtor's centre of main interests, the court observed that, as far as an employee was concerned, the domicile or place of habitual residence was relevant. In the case at hand, both the domicile and the place of habitual residence of the debtor were in England; the debtor carried out his professional activity as a dental technician in England and had shown no intention of going back to Germany; by the time of the submission of the petition, he had already taken steps to finalise his professional and personal affairs in Germany; he had a valid address in England and conducted his business correspondence from there; and he administered personal assets located in Germany from England.

²⁰ Offenburg District Court, 2 August 2004.

²¹ High Court of Justice, 15 July 2005, [2005] EWHC 1754 (Ch).

²² AG Celle, 18 April 2005 (29 IN 11/05).

D. Note by the Secretariat on commercial fraud: ongoing and possible future work

(A/CN.9/600) [Original: English]

1. The Commission may wish to recall its consideration of the subject of commercial fraud at its thirty-fifth to thirty-eighth sessions, from 2002 to 2005.¹
2. At its thirty-fifth session in 2002, the Commission heard that fraudulent practices of an international character had a significant adverse economic impact on world commerce and regularly affected legitimate commercial institutions. It was also observed that fraudulent practices that affected international commerce had not been sufficiently addressed by international bodies, particularly with respect to their commercial aspects. The view was expressed that the Commission combined a governmental perspective with an internationally recognized expertise in international commerce and a tradition of collaboration with other international organizations, and that the Commission was well positioned to consider the phenomenon of commercial fraud. Although reservations were expressed regarding the scope of any project in this area, especially in light of limited resources, it was decided that the Secretariat should prepare a study of commercial fraud for the Commission to consider whether further work was appropriate and feasible.²
3. In order to assess the extent and implications of commercial fraud and consider possible recommendations regarding future action, in December 2002, the Secretariat convened a meeting of experts who regularly encounter and combat commercial fraud and who represented different regions, perspectives, and disciplines. Following from that meeting, the Secretariat prepared and issued a note on possible future work relating to commercial fraud (A/CN.9/540) as requested by the Commission at its thirty-fifth session. The note concluded that available evidence suggested that commercial fraud constituted a serious and potentially increasing threat to international commerce. The note also considered factors in defining or describing commercial fraud, concluding that a precise definition was not currently feasible but that it would be useful to identify and detail common patterns of fraudulent commercial conduct. Finally, the note also suggested that there was an important independent commercial dimension to commercial fraud in addition to that of criminal law enforcement, and made several recommendations to the Commission in regard to future work.
4. At its thirty-sixth session in 2003, the Commission considered the note of the Secretariat (A/CN.9/540). It agreed with the recommendation that an international colloquium should be organized to permit an exchange of views from various interested parties, including those working in national Governments, intergovernmental organizations and relevant private organizations on the private law aspects of commercial fraud. It was also noted that the colloquium would provide an opportunity to promote an exchange of views with the criminal law and regulatory sectors that combat commercial fraud and to identify matters that could be coordinated or harmonized. In addition, the Commission considered that it would be useful for a study to be conducted by the Commission on Crime Prevention and Criminal Justice (the United Nations Crime Commission) through

¹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 279-290; *ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, paras. 231-241; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 108-112, and *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, paras. 216-220.

² *Ibid.*, *Fifty-seventh Session, Supplement No. 17* and corrigendum (A/57/17 and Corr.3), paras. 279-290.

the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime (UNODC), in consultation with the UNCITRAL Secretariat.³

5. A colloquium on international commercial fraud was held in Vienna from 14 to 16 April 2004. The speakers, panellists, and participants at the colloquium consisted of experts from each of the several practice areas examined, representing as broad a spectrum of approaches to the problem of commercial fraud as possible, and included approximately 120 participants from 30 countries. It was agreed at the colloquium that any doubts had been dispelled as to the widespread existence of commercial fraud and its significant worldwide impact, regardless of a country's economic development or system of government. It was also agreed that education and training played significant roles in fraud prevention and that it might be particularly useful to identify common warning signs and indicators of commercial fraud. It was further agreed at the colloquium that local cooperative efforts between law enforcement bodies and the private sector seemed particularly effective and should be encouraged. While some progress was made towards fashioning a description of commercial fraud, it was generally thought that additional work would be necessary to formulate a definition, characterization or precise description. In particular, it was suggested that serious consideration should be given to developing a means of gathering and publicizing statistics and information about commercial fraud and that public information about types of fraud, typical patterns, and links to other sources of information would be of considerable value in the fight against commercial fraud (see A/CN.9/555, paras. 3, 4, 25-28, and 62-71).

6. At its thirty-seventh session in 2004, the Commission considered the report of the Secretariat on the colloquium (A/CN.9/555), and agreed that the Secretariat should facilitate, whenever appropriate, the discussion of examples of commercial fraud in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, with a view towards education, training, and prevention, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. Further, it was thought that national and international organizations interested in fighting commercial fraud could be invited to circulate such material among their members in order to help test and improve those lists. While it was not proposed that the Commission itself or its intergovernmental working groups be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in this regard.⁴

7. At its thirty-eighth session in 2005, the Commission's attention was drawn to resolution 2004/26 adopted by the Economic and Social Council (ECOSOC) on 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes". That resolution envisaged the convening of an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity, and to develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The resolution also recommended that the

³ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 240-241.

⁴ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

Secretary-General designate UNODC to serve as secretariat for the intergovernmental expert group, in consultation with the Secretariat of UNCITRAL.⁵

8. Also at its thirty-eighth session, the Commission heard that UNODC organized an intergovernmental expert group meeting from 17 to 18 March 2005, and that the results of the meeting had been reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005; see E/CN.15/2005/11). The Commission was advised that participants at that meeting had indicated that fraud was a serious concern for their Governments and represented a problem that was rapidly expanding, both in the range of frauds being committed and their geographical scope and diversity, owing in part to developments in technology. Participants had agreed that a study of the problem should be undertaken, based on information received from Member States of the United Nations Crime Commission in response to a questionnaire on fraud and the criminal misuse and falsification of identity to be circulated by UNODC. The Commission was also informed that the UNCITRAL Secretariat had participated in the expert group meeting and the Commission expressed its support for the assistance of the UNCITRAL Secretariat in the UNODC project.⁶

I. UNCITRAL work on common features present in typical fraudulent schemes

9. In light of the suggestion of the Commission at its thirty-seventh session to consider the preparation of lists of common features present in typical fraudulent schemes, the Secretariat held a meeting of experts on commercial fraud from 12-14 October 2005 to consider issues related to the formulation of a list of such common features, including the character and content of the list, and its optimal use in education and training, with a view to the prevention of commercial fraud.

10. Pending the Commission's ultimate consideration and approval of the materials for dissemination, it was thought that the intended purposes of the project were threefold:

(a) To formulate materials that would identify patterns and characteristics of commercial fraud in a manner that would encourage the private sector to mobilize its resources to combat commercial fraud in an organized and systematic manner;

(b) To assist governmental bodies in understanding how they might help the public and private sector to address the problem of commercial fraud; and

(c) To assist the criminal law sector in understanding how best to engage the private sector in the battle against commercial fraud.

11. It was emphasized in the meeting of experts that the overall objective of the project was to create an easily accessible and understood document that would set out indicators to assist in the exposure of behaviour that could constitute commercial fraud, so that it would lend itself to fraud prevention via widespread circulation. It was thought that the intended audience for the materials could include business persons, individuals, regulators, professionals, law enforcement officers, civil and criminal litigants, and potentially courts in civil and criminal cases involving commercial fraud. It was highlighted that the nature of the materials or document envisioned was not a legislative text nor a legal text, but

⁵ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

⁶ Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 218-219.

rather that it would fall into the category of materials that contained useful guidance and reference materials for users.

12. While it was recognized that a definition of commercial fraud would be desirable for the purposes of identifying that activity, it was emphasized that a descriptive definition, rather than a strictly legal definition, was more appropriate in light of the objectives and the intended breadth of the project, and to ensure its flexibility. Discussions are continuing regarding the required elements of that description so as to render it appropriate in all legal systems, but it is thought that the following elements should be reflected in any definition of commercial fraud:

- (a) An element of deceit or inaccurate information;
- (b) An economic dimension and scale;
- (c) The use or misuse and compromise or distortion of commercial systems with the potential of international impact; and
- (d) A loss of value.

13. It was suggested that the indicators or common features should be prefaced by an introduction or commentary, which could state the purpose of the materials and their intended target audience, which could explicitly include both developed and developing countries, as well as setting out information on the background and methodology of the project. The materials themselves could consist of the discrete treatment of a number of different indicators or characteristics of commercial fraud, but each of the indicators taken alone would not be understood to definitely indicate the presence of commercial fraud. Instead, the presence of a single indicator would send a signal that commercial fraud was a possibility, while the presence of several of the indicators would heighten that concern. A brief description would follow the identification of each indicator, which would then be followed by more detailed descriptions and examples in order to further identify the various nuances of behaviour and form intended to be included. The examples would be drawn from various different areas of legal practice, and would include various types of victims, in order to demonstrate that they are intended for universal application in a commercial context. It was agreed that it would be useful to provide advice, warnings, or recommendations for each type of indicator, as appropriate, and that, since many of the indicators may or should overlap, cross references to other related indicators should be included.

14. It was suggested that a viable format for the preparation of common features of fraudulent schemes might be the following:

- (a) A simple name by which the topic could be known and identified;
- (b) A brief description accompanied by specific examples of the type of behaviour included;
- (c) A more detailed explanation of each aspect of the behaviour;
- (d) Warnings, advice, or recommendations; and
- (e) Cross-references to related topics.

15. Various topics were also considered appropriate for treatment along the lines of the approach outlined in the paragraph above. While it was recognized that continued work on the indicators was likely to unearth other topics worthy of treatment, a preliminary list of topics could include the following:

- (a) Irregular documents;
- (b) Misuse of names;
- (c) Misuse of technical terms;
- (d) Frustration of due diligence;
- (e) Disproportionate returns;
- (f) Questionable or unknown source of repayment;
- (g) Overly complex transactions;
- (h) Fraud based on personal affinity or relationships;
- (i) Undue secrecy;
- (j) Over- or under-qualified employees;
- (k) Certain employee incentives;
- (l) Inconsistencies in transactions;
- (m) Irrational or illogical aspects;
- (n) Undue influence or inducements;
- (o) Inappropriate request for information disclosure;
- (p) Fraud perpetrated in the course of an insolvency;
- (q) Misuse of motives; and
- (r) Ensnalement.

16. It was also suggested that explanatory appendices to the materials could be helpful to future users. While caution was expressed regarding available resources to prepare or maintain such appendices, it was thought that the following suggestions could be considered for inclusion as appendices:

- (a) A glossary of commonly-used terms, covering terms that are exclusively used in frauds and terms that have legitimate uses as well as fraudulent ones;
- (b) An explanation of how to effectively perform due diligence in order to prevent being a victim of commercial fraud;
- (c) Links to or a list of the URLs of legitimate websites posting warnings and information about commercial fraud;
- (d) A database of fraudulent transactions that have been encountered in the past from countries around the world;
- (e) A database of profiles of victims of commercial fraud; and
- (f) A quiz or checklist to assist organizations or individuals in understanding whether they may be at risk.

II. UNODC fraud study

17. The progress of the work on the study on fraud and the criminal misuse and falsification of identity has been reported by UNODC to the United Nations Crime Commission at its fifteenth session (Vienna, 24-28 April 2006; see E/CN.15/2006/11).

18. As reported in that document, at its meeting in March 2005, the intergovernmental expert group agreed that the study should consider information and materials provided by the experts themselves, data available from governmental sources, including relevant and appropriate policy, legislative, research and other materials, and, where relevant and feasible, information from commercial and other intergovernmental or non-governmental sources. It was agreed that a questionnaire in two basic parts, one dealing with fraud and the other with identity fraud, should be prepared and disseminated by the UNODC secretariat to Member States of the United Nations Crime Commission to obtain information on fraud and the criminal misuse and falsification of identity.

19. The questionnaire, as amended and finalized, was attached to a note verbale dated 15 September 2005 and disseminated by the UNODC secretariat to Member States of the United Nations Crime Commission, and to the experts who had attended the meeting of the intergovernmental expert group for their consideration, with a view to their submitting to the group data, observations or conclusions in specific subject areas of the study.

20. The UNCITRAL Secretariat worked with the UNODC secretariat in the drafting of the questionnaire, and in October of 2005, with a view to collecting information from commercial and other private-sector sources, disseminated the questionnaire to the governmental and non-governmental organizations and other non-State invitees to the Commission sessions, as well as to leading corporations in various industries throughout the world, that were thought to have an interest in either responding directly to the questionnaire, or in forwarding the questionnaire to its membership for response.

21. The UNODC secretariat has reported that it will proceed with the drafting of the study in due course in conjunction with its intergovernmental expert group. It is anticipated that the final substantive report will be submitted to the United Nations Crime Commission at its sixteenth session in 2007, and may also be submitted to the Commission for consideration at a future session.

III. Proposal for future work

22. The Commission may wish to request that:

(a) The Secretariat continue its work in conjunction with experts and other interested organizations with respect to identifying the common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future session; and

(b) The Secretariat continue to assist and cooperate with UNODC in its study on fraud and on criminal misuse and falsification of identity, and that it keep the Commission informed of the progress of that work.

VI. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the users guide (A/CN.9/SER.C/GUIDE/1/Rev.1), published in 2000 and available on the Internet at www.uncitral.org.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat
P.O. Box 500
Vienna International Centre
A-1400 Vienna
Austria

Telephone (+43-1) 26060-4060 or 4061
Telex: 135612 uno a
Telefax: (+43-1) 26060-5813
E-mail: uncitral@uncitral.org

They may also be accessed through the UNCITRAL homepage on the Internet at www.uncitral.org.

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.

VII. TECHNICAL ASSISTANCE TO LAW REFORM

**Note by the Secretariat on technical assistance
(A/CN.9/599) [Original: English]**

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I. Introduction

1. Pursuant to a decision taken at the twentieth session (1987) of the United Nations Commission on International Trade Law (UNCITRAL),¹ technical assistance activities is one of its priorities. These activities promote awareness and adoption of the legal texts produced by the Commission and are particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. Commercial law reform, based on harmonized international instruments, has a clear impact on the ability of enterprising persons in all States to participate in international trade which plays an important part in achieving sustainable development and social stability. The technical assistance activities of the Secretariat can thus contribute to the economic integration efforts of developing countries.

2. This note lists the activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its thirty-eighth session in 2005 (A/CN.9/586 of 1 April 2005), reports on the development of resources to assist technical assistance activities and indicates possible future activities.

II. Texts of the United Nations Commission on International Trade Law

3. Through its mandate to prepare and promote the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law, including sales; dispute resolution; government contracting; banking, payments and insolvency; transport; and electronic commerce, UNCITRAL plays an important role in developing the legal framework for international trade and investment. Those instruments are widely acceptable, offering solutions appropriate to different legal traditions and to countries at different stages of economic development.

4. Those instruments include:

(a) In the area of sales, the United Nations Convention on Contracts for the International Sale of Goods² and the United Nations Convention on the Limitation Period in the International Sale of Goods;³

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ (a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the UNCITRAL Arbitration Rules,⁵ the UNCITRAL Conciliation Rules,⁶ the UNCITRAL Model Law on

¹ *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

² 11 April 1980, United Nations, *Treaty Series*, vol. 1489, p. 3; *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.82.V.5), part I.

³ *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I; United Nations, *Treaty Series*, vol. 1511, pp. 77 and 99; UNCITRAL *Yearbook 1980*, part three, chap. I, sect. C.

⁴ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁵ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57; UNCITRAL *Yearbook 1976*, part one, chap. II, sect. A.

International Commercial Arbitration,⁷ the UNCITRAL Notes on Organizing Arbitral Proceedings,⁸ and the UNCITRAL Model Law on International Commercial Conciliation;⁹

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services,¹⁰ the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects¹¹ and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects;¹²

(d) In the area of banking and payments, the United Nations Convention on International Bills of Exchange and International Promissory Notes,¹³ the UNCITRAL Model Law on International Credit Transfers,¹⁴ the United Nations Convention on Independent Guarantees and Standby Letters of Credit¹⁵ and the United Nations Convention on the Assignment of Receivables in International Trade;¹⁶

(e) In the area of insolvency, the UNCITRAL Model Law on Cross-Border Insolvency¹⁷ and the UNCITRAL Legislative Guide on Insolvency Law;¹⁸

(f) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules),¹⁹ and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;²⁰ and

(g) In the area of electronic commerce, the UNCITRAL Model Law on Electronic Commerce,²¹ the UNCITRAL Model Law on Electronic Signatures²² and the United

⁶ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)* chap. V, sect. A, para. 106; *UNCITRAL Yearbook 1980*, part three, chap. II.

⁷ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)* Annex I; *UNCITRAL Yearbook 1985*, part three, chap. I.

⁸ *UNCITRAL Yearbook 1996*, part three, chap. II.

⁹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, Annex I; *UNCITRAL Yearbook 2002*, part three.

¹⁰ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, Annex I; *UNCITRAL Yearbook 1994*, part three, chap. I.

¹¹ United Nations publication, Sales No. E.01.V.4, A/CN.9/SER.B/4.

¹² *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/57/17)*, annex I.

¹³ *UNCITRAL Yearbook 1988*, part three, chap. I; General Assembly resolution 43/165, annex.

¹⁴ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

¹⁵ New York, 11 December 1995, United Nations, *Treaty Series*, vol. 2169, p. 163; *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)* annex I.

¹⁶ *UNCITRAL Yearbook 2002*, part three; General Assembly resolution 56/81, annex.

¹⁷ *UNCITRAL Yearbook 1992*, part three, chap. I.

¹⁸ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 55.

¹⁹ Hamburg, 31 March 1978 United Nations, *Treaty Series*, vol. 1695, p. 3; *Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

²⁰ A/CONF.152/13, annex.

²¹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I.

²² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II.

Nations Convention on the Use of Electronic Communications in International Contracts.²³

III. Technical assistance to law reform

5. In its resolution 60/20 of 23 November 2005, the General Assembly reaffirmed the importance, in particular for developing countries, of the technical assistance work of the Commission in the field of international trade law and reiterated its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

6. In the same resolution, the General Assembly stressed the importance of bringing into effect the conventions emanating from the work of the Commission to further the progressive harmonization and unification of private law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions. The UNCITRAL Secretariat is prepared to provide technical assistance and advice to States considering signature, ratification or accession to UNCITRAL conventions, as well as to States that are in the process of revising their trade legislation.

7. Technical assistance activities undertaken by the UNCITRAL Secretariat include: organizing briefing missions and seminars and participating in conferences to familiarize participants with UNCITRAL texts and their use; undertaking law reform assessments to assist governments, legislative organs and other authorities in developing and other countries to review existing legislation and assess their need for law reform in the commercial field; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting international development agencies, such as the UNDP and the World Bank, to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing group training activities to facilitate the implementation and interpretation of modern commercial legislation based on UNCITRAL texts by judiciaries and legal practitioners.

A. Technical assistance activities

8. Participation by the UNCITRAL secretariat and experts in the following technical assistance activities to promote the use and adoption of UNCITRAL texts and in some instances to assist with drafting the enacting legislation was financed by the Trust Fund for UNCITRAL Symposia:

(a) Belgrade, Serbia and Montenegro (18-19 June 2005), seminar on insolvency law held in cooperation with the European Centre for Peace and Development of the University of Peace (12 participants);

(b) Beijing, China (28-30 June 2005), international workshop organized by the University of Science and Technology and the Beijing Municipal Congress to consider new draft legislation on privately financed infrastructure projects (60 participants);

²³ New York, November 2005, General Assembly resolution A/RES/60/21, annex.

(c) Cairo, Egypt (12-13 September 2005), participation at the regional conference “25 Years United Nations Convention on Contracts for the International Sale of Goods (100 participants);

(d) Singapore (22-23 September 2005), participation at the regional conference to celebrate the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods and the 20th anniversary of the UNCITRAL Model Law on International Commercial Arbitration (180 participants);

(e) Minsk, Belarus (13-14 October 2005), UNCITRAL seminar on the United Nations Convention on Contracts for the International Sale of Goods (110 participants);

(f) Seoul, Republic of Korea (27 October 2005), UNCITRAL seminar on international trade law organized by the Ministry of Justice and the Korean International Trade Law Association (100 participants) and Cheju Island, Republic of Korea (29 October 2005) international trade law conference organized by the Korean International Trade Law Association and Cheju National University (130 participants);

(g) Geneva, Switzerland (31 October-4 November 2005), symposium organized by the UNCTAD/WTO International Trade Centre on “Multilateral trade treaties and developing economies—improving working methods and enhancing national regulatory frameworks” (60 participants);

(h) Sharm El Sheikh, Egypt (19-21 November 2005), international conference organized by the Cairo Regional Centre for International Commercial Arbitration on “The Vital Role of State Courts in Arbitration” (150 participants);

(i) Bratislava, Slovakia (23-24 January 2006), First Inter-Governmental Mediation Workshop organized by Conflict Management International and the Government of the United Kingdom (45 participants);

(j) Bogota, Colombia (27-29 March 2006), international seminar on insolvency and procurement sponsored by UNCITRAL, the Bogota Chamber of Commerce, the Colombian Foreign Office, INSOL International, the Colombian Ministry of Trade, Industry and Tourism, Pontificia Universidad Javeriana, Universidad del Rosario and Universidad Externado de Colombia (300 participants).

9. Participation by the UNCITRAL secretariat and experts in the following technical assistance activities was financed in part by the Trust Fund for UNCITRAL symposia and in part by the co-organizer:

(a) Santa Cruz de la Sierra, Bolivia (27-29 July 2005), participation at international forum on commercial law organized by the Chamber of Industry, Commerce and Services (80 participants);

(b) Rio de Janeiro, Brazil (6-11 August, 2005), lectures on UNCITRAL at the XXXII Course of International Law for the Inter-American Juridical Committee of the Organization of American States (45 participants);

(c) Chiang Mai, Thailand (26-28 September 2005), workshop on insolvency and secured transactions law organized in conjunction with the Office of Justice Affairs, Ministry of Justice, Thailand for Viet Nam, Cambodia, Myanmar and Lao People's Democratic Republic (43 participants);

(d) Cotonou, Benin (21-23 February 2006), participation at UNCTAD/WTO International Trade Centre seminar on the participation of Benin in multilateral trade treaties (25 participants);

(e) Cairo, Egypt (22-23 March 2006), Fourth United Nations Forum on Online Dispute Resolution, held under the auspices of the Cairo Regional Centre for International Commercial Arbitration and in collaboration with the Center for Information Technology and Dispute Resolution, University of Massachusetts, United States of America, the United Nations Expert Group on ODR, the Minister of Communications and Information Technology, the Arab League and UNCITRAL.

10. Participation of members of the UNCITRAL secretariat in the following activities where UNCITRAL texts were presented for examination and possible adoption or use was financed either by the organizers, another organization or in some cases, partially or totally, with resources from the United Nations regular travel budget:

(a) Presentations on the work of UNCITRAL for the International Trade Law postgraduate course sponsored by the International Training Centre of the International Labour Organization (ILO) and the Institute of European Studies (Turin, Italy, 5 April 2005);

(b) Symposium on recent developments concerning Unidroit, Loyola University (New Orleans, United States of America, 5-9 April 2005);

(c) Conference on “Tendencies in International Security Interests Law” (Bern, Switzerland, 6 May 2005);

(d) Meeting of the Unidroit Committee of Governmental Experts on the preparation of a draft convention on harmonized substantive rules regarding securities held with an intermediary (Rome, Italy, 9-20 May 2005);

(e) Workshop on international commercial law standards in Oman organized by the Commercial Law Development Program of the Department of Commerce, United States (Muscat, Oman, 10 May 2005);

(f) Meeting to discuss finalization of World Bank Reports on Observance of Standards and Codes (ROSC) methodology on insolvency and creditor rights (Washington, United States of America, 31 May-2 June 2005);

(g) 8th biennial International Federation of Commercial Arbitration Institutions (IFCAI) conference on “Tendencies in International Security Interests Law” (Washington, United States of America, 3-4 June 2005);

(h) WTO workshop on accession to the Agreement on Government Procurement (Geneva, Switzerland, 5-8 June 2005);

(i) Presentation on arbitration and e-commerce organized by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (Belgrade, Serbia and Montenegro, 15 June 2005);

(j) African and Arab Regional Conference on Electronic Transaction Security—Digital Signature and PKI (Tunis, Tunisia, 19-23 June 2005);

(k) Lecture on the United Nations Convention on the Carriage of Goods by Sea, 2005 International Summer Academy (Internationaler Verband der Tarifeure) (Sopron, Hungary, 23-24 June 2005);

(l) 60th Anniversary of the Great Victory, the United Nations and International Law (Moscow, Russian Federation, 26-29 June 2005);

(m) Assembly of Member States of the International Development Law Organization (IDLO) (Rome, Italy, 28 June 2005);

- (n) Working Group for the preparation of a new law on arbitration and mediation (Ljubljana, Slovenia, 31 August-2 September 2005);
- (o) 7th UN/CEFACT Forum (Lyon, France, 24-29 September 2005);
- (p) Presentations on procurement and the United Nations Convention on Contracts for the International Sale of Goods, 2005 International Bar Association Regional Conference (Prague, Czech Republic, 26 September-2 October 2005);
- (q) Annual meeting of the Slovenian Lawyers Association group considering legislative issues on conciliation/mediation and arbitration (Portoroz, Slovenia, 14-16 October 2005);
- (r) 99th session, ECE Working Party on Road Transport (Geneva, Switzerland, 16-18 October 2005);
- (s) Presentation on the UNCITRAL Legislative Guide on Insolvency Law for the New York Bar Association Continuing Legal Education Program "International Insolvency: What you need to know about representing multi-national companies" (New York, United States of America, 28 October 2005);
- (t) Meeting between UNCITRAL, Unidroit, the Hague Conference on Private International Law, the IMF and the World Bank on potential coordination of technical assistance work (Washington, United States of America, 1-2 November 2005);
- (u) Seminar on security interests, University of Tokyo Law School; briefing for the Ministry of Justice on the United Nations Convention on Contracts for the International Sale of Goods; seminar on security interests for the Bank of Japan (Tokyo, Japan, 1-2 November 2005);
- (v) Panel presentation on the UNCITRAL Legislative Guide on Insolvency Law for the 79th annual meeting of the National Conference of Bankruptcy Judges (San Antonio, United States of America, 3-4 November 2005);
- (w) Conference to celebrate the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), University of Pittsburgh (Pittsburgh, United States of America, 4-5 November 2005);
- (x) UNCTAD Advanced Seminar on Managing Investment Disputes, (Washington, United States of America, 3-11 November 2005);
- (y) Conference "Paris, Place de Droit" on the convergence of legal systems (Paris, France, 15-17 November 2005);
- (z) Presentation on the United Nations Convention on the Use of Electronic Communications in International Trade, World Society of Information Systems parallel event (WSIS) (Tunis, Tunisia, 16-18 November 2005);
- (aa) Finnish Arbitration Association seminar (Helsinki, Finland, 25 November 2005);
- (bb) Conference on development of legislation on international commercial arbitration organized by the Committee on International Affairs and Inter-Parliamentary Relations of the Legislative Chamber of the Parliament, the Cabinet of Ministers, the Chamber of Commerce and Industry of Uzbekistan and the University of World Economy and Diplomacy in cooperation with UNDP (Tashkent, Uzbekistan, 4-7 December 2005);
- (cc) Symposium organized by ICSID, OECD and UNCTAD on investment protection arbitration (Paris, France, 11-13 December 2005);

(dd) Coordination meeting with Unidroit and the Hague Conference on Private International Law (The Hague, The Netherlands, 14 December 2005);

(ee) Lecture on UNCITRAL's work in electronic commerce, International Development Law Organization (Rome, Italy, 16-19 December 2005);

(ff) Seminar on transport documents, rights of suit and time for suit in relation to the preparation of a draft convention on the carriage of goods [wholly or partly][by sea] organized by the Italian delegation to UNCITRAL Working Group III (Transport) (London, UK, 23-24 January 2006);

(gg) 2nd session of the Unidroit Advisory Board on the preparation of a model law on leasing (Rome, Italy, 5-8 February 2005);

(hh) Round Table discussion on draft legislation on mediation sponsored by the International Finance Corporation and Ministry of Justice (Skopje, Former Yugoslav Republic of Macedonia, 10 February 2006);

(ii) Colloquium organized by the *Journal de Droit International* on interim measures in arbitration (Paris, France, 12-14 February 2005);

(jj) Consultations at the request of UN/ECE on a draft Electronic Data Interchange (EDI) protocol to the CMR Convention (Brussels, Belgium, 27 February-2 March 2006);

(kk) Lectures on electronic commerce for the University of Bologna (Bologna, Italy, 27 February-3 March 2006);

(ll) Conference of the Academy of European Law on Cross-Border Security for Credit (Trier, Germany, 9-10 March 2006);

(mm) Conference on Judicial Strategies for the Application of Egyptian E-signature Laws organized by the Commercial Law Development Program, United States Department of Commerce (Cairo, Egypt, 8-9 March 2006).

11. The use and adoption of UNCITRAL texts has also been promoted through contact with Permanent Missions to the United Nations in Vienna, Geneva and New York, as well as directly with relevant officials in some States. In particular, the Secretariat has been actively promoting adoption of the United Nations Convention on Contracts for the International Sale of Goods.

12. Members of the UNCITRAL secretariat have also conducted or participated in a number of activities in Vienna, including:

(a) Presentation on UNCITRAL activities for the Suomalainen Lakimiesyhdistys (Finnish Law Society) (8 April 2005);

(b) Presentation on UNCITRAL activities for students from The Dickinson School of Law, Penn State University, United States (18 July 2005);

(c) Presentation on UNCITRAL activities for judges from the Korean National Judicial Research and Training Institute (25 July 2005);

(d) Participation in a seminar on financial sector regulation and selected financial transactions organized by the IMF Legal Department and the IMF Institute (22 March 2006).

13. The UNCITRAL secretariat has provided assistance from Vienna with legislative drafting and other advice in many instances, including the following:

- (a) China: advice on draft legislation on privately financed infrastructure projects for the municipality of Beijing;
- (b) Georgia: advice on a draft Arbitration Act, based on the UNCITRAL Model Law on International Commercial Arbitration;
- (c) Greece: advice on draft legislation on cross-border insolvency based on the UNCITRAL Model Law on Cross-Border Insolvency;
- (d) Macedonia: advice on a draft law on conciliation based on the UNCITRAL Model Law on International Commercial Conciliation;
- (e) Malaysia: advice on a draft Arbitration Act, based on the UNCITRAL Model Law on International Commercial Arbitration;
- (f) Peru: advice regarding revision of the law on arbitration;
- (g) Rwanda: assisting the International Law Institute with the drafting of commercial legislation for Rwanda (from March 2006);
- (h) Serbia: assistance with drafting a Law on Mediation (from 2004 and ongoing);
- (i) Slovenia: advice on arbitration and conciliation legislation;
- (j) Commonwealth Telecommunications Organization: assistance with drafting arbitration and conciliation rules for a dispute resolution centre (from December 2004);
- (k) Economic Commission for Europe: advice on the TIR Convention;
- (l) European Commission: technical comments on the United Nations Convention on Assignment of Receivables in International Trade in the context of the Convention on the Law Applicable to Contractual Obligations (Rome I).

14. Since the last session, a number of additional activities were organized around the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods and the 20th anniversary of the UNCITRAL Model Law on International Commercial Arbitration, including in Egypt, Singapore and Pittsburgh, United States of America as noted above in paragraphs 8 and 10. Proceedings of the event held in Vienna in March 2005 have been published as a special number of the Journal of Law and Commerce.

B. Technical assistance resources

15. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical assistance activities, particularly with respect to dissemination of information on its work and texts. These resources are being developed to further improve the ease of dissemination of information and ensure that it is current and up to date.

(a) CLOUT

16. The Commission may wish to note the continuing work under the system established, pursuant to a Commission decision in 1988, for the collection and dissemination of case law on UNCITRAL texts (CLOUT). The system consists of the preparation of abstracts of court decisions and arbitral awards relating to UNCITRAL texts, compilation of the full texts of those decisions and awards, as well as of the

preparation of research aids and analytical tools. As at the date of this note, 54 issues of CLOUT had been prepared for publication, dealing with 604 cases, relating mainly to the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration.

17. The Commission may also wish to note that an updated CLOUT search engine is being developed in order to facilitate retrieval of published case law on the UNCITRAL website.

18. CLOUT continues to be an important tool of the overall training and technical assistance activities undertaken by UNCITRAL and the wide distribution of CLOUT in both paper and electronic formats, in all of the six official languages of the United Nations, promotes the uniform interpretation and application of UNCITRAL texts by facilitating access to decisions and awards from many jurisdictions. A number of arbitration centres worldwide have expressed their willingness to cooperate with the Secretariat in order to publish awards on UNCITRAL texts in both the CLOUT system and the Digests.

19. The Digest of Case Law on the United Nations Sales Convention, published in December 2004, is being reviewed in order to improve its uniformity in approach and style. The first draft of the digest of case law relating to the Model Law on International Commercial Arbitration is in the process of being finalized and will be published soon.

(b) Website

20. In June 2005, the Secretariat launched a redesigned website. The website, available in the six official languages of the United Nations, contains all UNCITRAL documents currently available in the United Nations Official Documents System (ODS), as well as other information relating to the work of UNCITRAL.

21. The number of visitors to the UNCITRAL website has increased threefold since the launch of the new website. About half of the traffic is directed to pages in English, one quarter to pages in French and Spanish, and the remaining quarter to pages in Arabic, Chinese and Russian.

22. The website is being continuously expanded with new tools. Envisaged future additions include pages specifically designed for technical assistance and dynamic components, such as, for instance, a search engine for CLOUT cases (see above, paragraph 16).

23. The Secretariat has also initiated a major exercise, with the assistance of the Dag Hammarskjöld Library in New York and the United Nations Library in Geneva, to digitize all official documents of UNCITRAL issued since the establishment of the Commission. The digitized documents will be uploaded in the ODS and links to those documents will be made available on the UNCITRAL website.

(c) Library

24. The UNCITRAL Law Library was established in 1979 in Vienna. Since its establishment, the Library has been providing services not only to UNCITRAL delegates and to the staff of the Secretariat, but also to the staff of permanent missions and the staff of other Vienna-based international organizations. It has also provided research assistance to scholars and students from many countries.

25. The collection of the UNCITRAL Law Library focuses mainly on international trade law and currently consists of over 10,000 monographs; 150 active journal titles; legal and general reference material, including non-UNCITRAL United Nations documents, and

documents of other international organizations; and electronic resources (restricted to in-house use only). Lately, particular attention has been given to expanding the holdings in all of the six United Nations official languages.

26. The UNCITRAL Law Library maintains an on-line public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna and with the technical support of the United Nations Library in Geneva. The OPAC is available via the library page of the UNCITRAL website.

(d) *Publications*

27. UNCITRAL traditionally has two series of publications, in addition to official documents, which include the texts of all instruments developed by the Commission and the UNCITRAL *Yearbook*.

28. The Secretariat has developed a new visual identity (see UNCITRAL Legislative Guide on Insolvency Law and UNCITRAL *Yearbook 2002*) to be used for both hard copy and electronic publications, with increasing focus on the latter. A new book providing basic facts about UNCITRAL, which will include a CD-ROM of all UNCITRAL texts, will be published in 2006.

(e) *UNCITRAL Yearbook*

29. Pursuant to General Assembly Resolution 2421 (XXIII) of 18 December 1968, UNCITRAL has, since its inception, issued a *Yearbook* with the aim of making its work more readily available. The UNCITRAL *Yearbook* is currently published in both hard copy and CD-ROM in 4 languages (English, French, Spanish and Russian) and includes all working papers and Commission documents issued in a particular year, as well as summary records for those parts of the annual session of the Commission devoted to consideration and finalisation or adoption of a legislative text.

30. Over the last few years, the steady increase in UNCITRAL's work has meant a corresponding increase in the size of the *Yearbook* and delays in publication have occurred. The last edition published was the English version of the 2002 *Yearbook* (hard copy and CD-ROM), which was approximately 700 pages. The increased size of the *Yearbook* has also led to escalating costs, particularly with respect to the printed version.

31. The Commission may wish to note that the Secretariat will adopt the following approach with a view to reducing the costs of publishing the *Yearbook* and achieving more timely publication. The Commission may wish to comment on these issues.

(i) Simplify the procedures for collating and editing the documents. The current approach requires all documents to be collated and edited so that, for example, footnotes are consecutive throughout the *Yearbook* and references are consistent between different papers. This could be simplified so that the *Yearbook* would appear more as a collection of documents in the form in which they were originally issued (e.g. as a working paper or Commission document), thus saving on editing, additional translation and typesetting. This approach might also facilitate making the *Yearbook* available in Chinese and Arabic;

(ii) Encourage distribution of the *Yearbook*, including to depositary libraries, on CD-ROM only. It might be technically feasible to produce a single CD-ROM containing all language versions of the *Yearbook*.

(f) *Information*

32. To improve the availability of up to date information on the status and development of UNCITRAL texts, efforts have been made to ensure that press releases are issued when treaty actions are taken or information is received on the adoption of a model law. Those press releases are provided to interested parties by email and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna.

33. The Secretariat currently addresses approximately 1500 general inquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these inquiries can be answered by reference to the UNCITRAL website.

IV. Extrabudgetary funding

(a) **UNCITRAL Trust Fund for symposia**

34. In the period under review, contributions were received from Mexico and Singapore, to whom the Commission may wish to express its appreciation.

35. The ability of the Secretariat to implement the technical assistance component of the UNCITRAL work programme is contingent upon the availability of extrabudgetary funding, since the costs of technical assistance activities are not covered by the regular budget.

36. The UNCITRAL Trust Fund for symposia supports technical assistance activities for the members of the legal community in developing countries; participation of UNCITRAL staff, as speakers, at conferences where UNCITRAL texts are presented for examination and possible adoption; and fact finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

37. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the increasing demands from developing countries and States with economies in transition.

(b) **UNCITRAL Trust Fund to grant travel assistance to developing countries members of UNCITRAL**

38. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons. In the period under review, no contributions were received.

39. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

40. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

V. Future activities

41. Since the last report on technical assistance activities (A/CN.9/586 of 1 April 2005) the Secretariat has focused, *inter alia*, on the development of a work programme for its expanded technical assistance functions.

42. In this context, the Secretariat will hold a meeting with Permanent Missions in Vienna in April to brief member States on the objectives and planning of technical assistance and to strengthen the links with the Permanent Missions in Vienna so as to be able to quickly identify future legal assistance needs and requirements in various regions of the world. The Secretariat is also exploring the possibility of enhancing partnerships with other United Nations agencies and international organizations in order to further improve its capacity-building activities.

43. Finally, the Secretariat is considering the opportunity to develop a capacity-building programme on selected UNCITRAL instruments focusing on developing countries and countries in transition to enhance local capacity to master and apply UNCITRAL texts.

VIII. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Status of conventions and model laws (A/CN.9/601) [Original: English]

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet at www.uncitral.org.

IX. COORDINATION AND COOPERATION

Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law

(A/CN.9/598 and Add.1-2) [Original: English]

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I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.¹ Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.² Two reports of that nature have been prepared for consideration by the Commission at its thirty-ninth session in 2006 on procurement and security interests, contained in documents A/CN.9/598/Add.1 and A/CN.9/598/Add.2, respectively. Accordingly, those two topics are not addressed in this note.

3. This general report, prepared in response to resolution 34/142, is the second in a series which the Secretariat proposes to update and revise on an annual basis for the information of the Commission. It focuses on activities of international organizations primarily undertaken since preparation of the first paper (A/CN.9/584, May 2005) and related papers on electronic commerce (A/CN.9/579) and insolvency (A/CN.9/580/Add.1) and is based upon publicly available material and consultations undertaken with the listed organizations. This paper does not repeat information contained in the previous papers unless necessary to facilitate understanding of a particular issue.

4. The work of the following organizations is described in this report:

(a) United Nations bodies and specialized agencies

ITU	International Telecommunications Union
UNECE	United Nations Economic Commission for Europe
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organization

(b) Other intergovernmental organizations

ADB	Asian Development Bank
APEC	Asia Pacific Economic Cooperation Commonwealth Secretariat
EBRD	European Bank for Reconstruction and Development
EC	European Commission
Hague Conference	Hague Conference on Private International Law
OTIF	Intergovernmental Organization for International Carriage by Rail
OECD	Organization for Economic Cooperation and Development

¹ *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

² *Ibid.*, para. 100.

Unidroit	International Institute for the Unification of Private Law
World Bank	International Bank for Reconstruction and Development
WCO	World Customs Organization
(c) International non-governmental organizations	
CTO	Commonwealth Telecommunications Organization
INSOL	International Association of Restructuring, Insolvency and Bankruptcy Professionals
IBA	International Bar Association
ICC	International Chamber of Commerce
III	International Insolvency Institute

II. Harmonization and unification of international trade law

A. International commercial contracts

Hague Conference

5. The Twentieth Diplomatic Session of the Hague Conference on Private International Law, held from 14-30 June 2005 in The Hague, unanimously adopted a Convention on Choice of Court Agreements (“the Choice of Court Convention”) in international business-to-business cases. It is hoped that this instrument will complement the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”). The Choice of Court Convention addresses the obligation of a chosen court to hear the case, the obligation of a court not chosen in the original agreement to suspend or dismiss the case, and the obligation to enforce the judgment given by the chosen court. Specific rules clarify intellectual property and insurance issues as well as the treatment of damage awards and the relationship with other instruments. Currently, an Explanatory Report on the Convention is being prepared. Informal consultations on signature and ratification are under way.

Unidroit

6. Pursuant to the recommendation of the Governing Council of Unidroit, the Principles of International Commercial Contracts (PICC) are included as an on-going project in the work programme of the Institute.³ Subsequent to the adoption of the fourth edition of the PICC (May 2004), the Governing Council, at its eighty-fourth session (18-20 April 2005), preliminarily approved the following topics for inclusion in a future edition: unwinding of failed contracts, illegality, plurality of creditors and debtors, conditions and suretyship and guarantees. A new working group is scheduled to hold its first session from 29 May-2 June 2006 to consider inclusion of those topics.

³ For further information, see <http://www.unidroit.org/english/workprogramme/study050/main.htm>.

B. International transport of goods

1. Transport by sea

OECD

7. On September 2002, the OECD Council agreed that negotiations should commence on a new Shipbuilding Agreement to review and address factors distorting normal competitive conditions in the shipbuilding industry. In particular, the Agreement was to address government support measures, especially subsidies, pricing and other related practices. The target date for finalizing the negotiations was the end of 2005.⁴

8. While substantial progress was made in developing key elements of the draft Agreement, some serious difficulties remained, and in September 2005 delegates to the Special Negotiating Group (SNG), established to advance the multilateral negotiations, agreed to “pause” those negotiations in order to allow the parties to reflect on their positions, consult and observe developments in the market, possibly resuming when the environment for their success had improved.

UNCTAD

9. UNCTAD continued its participation at sessions of the UNCITRAL Working Group III (Transport Law), submitting comments providing technical analysis on the issues under consideration and highlighting implications for developing countries, with respect to the development of a new international convention to govern the carriage of goods by sea as well as multimodal transport including a sea-leg.

2. Transport by land

UNECE

10. UNECE is working on a Protocol to the Convention on the Contract for the International Carriage of Goods by Road⁵ (Geneva, 19 May, 1956) (CMR) (prepared by Unidroit), aimed at the introduction of electronic consignment notes. The draft Protocol has been prepared by Unidroit. At its 99th session in October 2005, the Working Party on Road Transport (SC.1) decided to establish an editorial committee to finalize the drafting of the text of the additional Protocol. The editorial committee, comprising both Unidroit and UNCITRAL, has been requested to prepare a new draft for adoption at the 100th session of SC.1 in October 2006, taking into account written and oral comments made by members of SC.1 and without modifying the substance of the Unidroit proposal.

OTIF

11. OTIF is currently seeking to widen the scope of the Convention concerning International Carriage by Rail (9 May 1980)⁶ and harmonize it with other transport legislation in order to make possible, in the longer term, through-carriage by rail under a single legal system regime from the Atlantic to the Pacific. The new COTIF, as modified

⁴ OECD set up a Special Negotiating Group in 2002 to draw up a new Shipbuilding Agreement, with support from all OECD members and major world shipbuilding economies outside OECD. Source: 2004 OECD annual report, available at: <http://www.oecd.org/dataoecd/28/49/31621929.pdf>.

⁵ Entry into force: 2 July 1961, United Nations, *Treaty Series*, vol. 399, p. 189. Source: <http://www.untreaty.org>.

by the Protocol of Vilnius (adopted on 3 June 1999, entry into force expected on 1 June 2006) will allow direct carriage under a single legal regime (Uniform Rules concerning the Contract for International Carriage of Goods by Rail—CIM) as long as at least either: (a) the place of taking over the goods or (b) the place designated for delivery, is situated in a Member State of COTIF and the parties to the contract of carriage so agree, for example, by using the CIM consignment note. OTIF will take on new tasks as soon as the 1999 Vilnius Protocol enters into force.

3. Inland waterway transport

UNECE

12. The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI Convention),⁷ adopted at a Diplomatic Conference organized jointly by CCNR, Danube Commission and UNECE (Budapest, 25 September–3 October 2000), entered into force on 1 April 2005. It currently has six Contracting Parties: Croatia, the Czech Republic, Hungary, Luxembourg, Romania and Switzerland. The CMNI Convention governs the contractual liability of parties to the contract for the carriage of goods by inland waterway and provides for the limitation of the carrier's liability.

4. Transport by air

UNCTAD

13. The carriage of goods by air is emerging as a field of increasing economic importance to developing countries. Liability arising from the carriage of goods by air is governed by several international conventions, namely the Warsaw Convention 1929,⁸ the Warsaw Convention as amended by a number of Protocols⁹ and supplemented by the Guadalajara Convention 1961¹⁰ (collectively known as “Warsaw system of conventions”), and the Montreal Convention 1999.¹¹ As a result of the co-existence at the international level of different uniform liability regimes, the international legal framework governing the carriage of goods by air is particularly complex. Against this background, UNCTAD is preparing a guide on aspects of air law, designed to assist developing countries in their understanding of the complex international framework of air law conventions, including in respect of effective uniform implementation of conventions at the national level. The guide is currently being finalized for publication and will in due course be available electronically at <http://www.unctad.org/ttl/legal>.

⁶ Entered into force on 1 May 1985.

⁷ Budapest, 22 June, 2001. Entered into force 1 April 2005.

⁸ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 12 October 1929, entry into force: 13 February 1933. Available at <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

⁹ The protocols are listed and available at http://www.icao.int/eshop/conventions_list.htm#Conventions.

¹⁰ Convention, Supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Guadalajara, 18 September 1961, entry into force: 1 May 1964. Available at <http://www.icao.int/icao/en/leb/guadalajara.pdf>.

¹¹ Convention on the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999, entry into force: 4 May 2003. Available at <http://www.icao.int/icao/en/leb/mtl99.pdf>.

5. Intermodal transport

UNECE

14. As a result of the current work of UNCITRAL on transport law, the UNECE Working Party on Intermodal Transport and Logistics had postponed work on the preparation of a civil liability regime applicable to European intermodal transport covering road, rail, inland water and short sea transport. In February 2005, the UNECE Inland Transport Committee requested the Working Party to continue to closely monitor and evaluate all pertinent activities in this field, particularly those of UNCITRAL and to prepare, if appropriate, proposals for solutions at the Pan-European level. At its 29-30 March 2006 session, the Working Party reviewed a study commissioned by the European Commission and considered whether to pursue work on a pan-European solution establishing uniform intermodal liability rules that concentrate the risk on one party and provide for liability of the contracting carrier for all types of losses irrespective of the modal stage where such loss occurs.¹² Such work would be carried out in close cooperation with intergovernmental organizations, such as ECMT and UNCTAD as well as with competent industry groups.

C. Electronic commerce and new technologies

APEC

15. In 2004, the Electronic Commerce Steering Group (ECSG) agreed to continue its activities to counter spam. It undertook a survey in 2005 on individual economies' approaches to spam, and considered possible cooperation with the APEC Telecommunication and Information Working Group. A preliminary summary of the APEC questionnaire on spam was presented to APEC in 2005.¹³

16. As part of its goal of building trust in e-commerce, ECSG is considering ways to better protect consumers from fraudulent and deceptive practices when buying goods and services online. Work is under way to help economies implement APEC's Voluntary Consumer Protection Guidelines for the On-line Environment.¹⁴ These cover international cooperation, education and awareness, private sector leadership, online advertising and marketing and the resolution of consumer disputes.

17. In 2005, the ECSG stated that it would continue its work on information privacy, spam, paperless trading, digital economy initiatives and would review the format of the Stocktake of Electronic Commerce Activities, a business-friendly inventory of the electronic commerce activities currently being undertaken by APEC forums.¹⁵ From 20 to 21 February 2006, APEC convened a Symposium on Information Privacy Protection in

¹² See, further, documents ECE/TRANS/162, para. 104 and TRANS/WP24/101, paras. 24-28, available at <http://www.unece.org/trans/main/sc3/sc3.html>. Report from the March session still to be issued.

¹³ APEC Data Privacy Subgroup, Preliminary Summary of Member Economy Responses to the APEC Questionnaire on Spam (Doc No. 5), http://www.apec.org/content/apec/documents_reports/electronic_commerce_steering_group/2005.html#DP51.

¹⁴ A copy of these guidelines is available at: http://www.apec.org/apec/documents_reports/electronic_commerce_steering_group/2004.html.

¹⁵ A copy of the Stocktake is available online at: http://www.apec.org/apec/apec_groups/som_special_task_groups/electronic_commerce.html.

E-Government and E-Commerce,¹⁶ and on 22 February 2006, a meeting of the Paperless Trading Sub-Group,¹⁷ alongside a meeting of the Data Privacy Sub-Group¹⁸ from 22 to 23 February 2006, in Vietnam. From 18 to 21 May 2006, the 2nd APEC E-Commerce Business Alliance Forum¹⁹ will be held in Qingdao, China to discuss key e-commerce issues to accelerate the overall development process of e-commerce in the Asia-Pacific region.

Commonwealth Secretariat

18. The Commonwealth Action Programme for the Digital Divide (CAPDD) (adopted in 2002) comprises the report and recommendations of the Commonwealth Expert Group on Information Technology. It aims to provide greater access to ICT for Commonwealth countries to bridge the digital divide. The renewed focus of CAPDD in 2005 has targeted developing policy and regulatory capacity; modernizing education and skills development; entrepreneurship for poverty reduction; promoting local access and connectivity and regional networks, local content and knowledge. A series of workshops on the digital divide was conducted in 2005.²⁰

19. Another area of focus is electronic governance for good governance. Training was delivered on developing e-Government and e-Business strategies for senior technical ICT staff in the public sector, at the legislative level, to assist member countries in conceptualizing e-Governance strategies and the adaptation and adoption of the Secretariat's e-Governance model laws. From 27 February to 3 March 2006, the Commonwealth Secretariat convened a Regional Programme on e-Governance for Senior Public Professionals in Nicosia, Cyprus.²¹

20. The Commonwealth Secretariat has published books on e-commerce, and some of the more recent publications²² include *Trusted Services and Public Key Infrastructure* (published in 2001), *Law in Cyber Space* (published in 2001), *Electronic Governance and Electronic Democracy: Living and Working in the Wired World* (published in 2001), *Breaking the Digital Divide: Implications for Developing Countries* (published in 2003), *Electronic Connectivity for Workgroups: Working in the Wired World* (published in 2005).

¹⁶ http://www.apec.org/content/apec/documents_reports/electronic_commerce_steering_group/2006.html#SYM.

¹⁷ http://www.apec.org/content/apec/documents_reports/electronic_commerce_steering_group/2006.html#PTS.

¹⁸ http://www.apec.org/content/apec/documents_reports/electronic_commerce_steering_group/2006.html#DPM.

¹⁹ http://www.apecsec.org.sg/apec/0506_E-CommerceForumExhibition.html.

²⁰ 18 March 2005, 2nd Co-ordinating Meeting on Commonwealth Action Programme for the Digital Divide, held in the United Kingdom; 14 June 2005, Consultation Workshop for Commonwealth Action Plan for Digital Divide (CAPDD), held in Malta; 11 August 2005, Commonwealth Action Plan for the Digital Divide Coordinating Committee Meeting, held in the United Kingdom; 5 September 2005, Digital Divide Programme hosted by CTO, held in Cameroon.

²¹ The workshop examined contemporary theory of governance in a digital world, as reflected in the innovative thinking in various countries. It also looked at the application of e-governance applied to specific jurisdictions, and e-governance principles that address the needs of participating governments.

²² For more information on publications, see http://publications.thecommonwealth.org/publications/html/DynaLink/cat_id/50/subcat_id/50/category_details.asp.

EC

21. A study in October 2003 by the Interdisciplinary Centre for Law and Information Technology at the request of the EC into the legal and practical issues concerning the implementation of the EU Directive on Electronic Signatures²³ found that most of the EU Member States had more or less consistently transposed the EU Directive on Electronic Signatures into national legislation, but that the actual use of electronic signatures in the EU was limited with the number of supervised and accredited certification service providers issuing qualified certificates in the EU varying from country to country. A new report from 2006²⁴ found that the need for the legal recognition of electronic signatures has been met by the transposition of the Directive into the legislation of the Member States and found no need to revise the Directive at this stage. Nonetheless, given the problems of mutual recognition of e-signatures and interoperability at a general level which has impacted negatively on the free circulation of electronic signatures, the Commission will organize a series of meetings with Member States and relevant stakeholders to address the following issues: differences in the transposition of the Directive; clarification of specific articles of the Directive; technical and standardization aspects; and interoperability problems.

Hague Conference

22. The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Apostille Convention) facilitates the circulation of public documents that emanate from one State party to the Convention and need to be produced in another State party. It does so by replacing the cumbersome and frequently costly formalities of a full legalisation process by the mere issuance of an Apostille. Recommendation Number 24 of the Special Commission of the Hague Conference on the Practical Application of, inter alia, the Apostille Convention requires that State parties and the Permanent Bureau “work towards the development of techniques for the generation of electronic Apostilles”. To that end, the Hague Conference on Private International Law and the Union of Latin Notaries organized the “First International Forum on e-Notarization and e-Apostilles” on 30 and 31 May 2005 in Las Vegas. The Forum unanimously confirmed that the spirit and letter of the Apostille Convention does not constitute an obstacle to the usage of modern technology and that the Convention’s application and operation can be further improved by relying on such technologies. As a result, the Forum encouraged the development and application of e-Apostilles and e-Registers.

23. A Second Forum will be held in 2006. In addition, the Hague Conference and the National Notary Association of the United States will be launching the e-APP (electronic Apostille Pilot Program). The purpose of the e-APP is to further strengthen the efforts towards the implementation and promotion of an effective, low-priced, safe and sound system of electronic Apostilles (e-Apostilles) and electronic Registers of Apostilles (e-Registers).

²³ http://europa.eu.int/information_society/eeurope/2005/all_about/security/electronic_sig_report.pdf.

²⁴ Report on the Operation of the Directive 1999/93/EC on a Community Framework for Electronic Signatures (2006) 120, final, 15 March 2006 available at: http://europa.eu.int/information_society/eeurope/i2010/docs/single_info_space/com_electronic_signatures_report_en.pdf.

ITU

24. ITU, a specialized agency of the United Nations, has the lead role in organizing the World Summit on Information Society (WSIS).²⁵ Envisaged in two phases, the first Summit was held in Geneva from 10 to 12 December 2003, where agreement was reached on the Declaration of Principles²⁶ (which set out the principles upon which to develop the global information society) and a Plan of Action²⁷ (which set out concrete action lines to advance the achievement of internationally-agreed development goals, including those in, inter alia, the Millennium Declaration,²⁸ by promoting the use of information and communications technologies (ICT) based products, networks, services and applications and helping countries overcome the digital divide). The second phase of WSIS was held in Tunis from 16 to 18 November 2005²⁹ focusing on implementing the agenda for development of achievable targets by 2015, and seeking consensus on unfinished business, inter alia, on the question of Internet governance.³⁰

25. During this second phase, spam was identified as a potential threat to the full utilization of the Internet and electronic commerce. ITU is implementing a series of activities on countering spam, in the shorter and longer term, to foster international cooperation, develop harmonized policy frameworks, and promote the exchange of

²⁵ The WSIS has as its primary aim the development of an inclusive and equitable information society. Following a proposal by the Government of Tunisia, the International Telecommunication Union adopted a resolution at its Plenipotentiary Conference in Minneapolis in 1998 to hold a World Summit on the Information Society (WSIS) and to place it on the agenda of the United Nations. The United Nations General Assembly (resolution 56/183) accorded the lead role for the preparatory work to ITU in cooperation with other interested organizations and partners.

²⁶ <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

²⁷ <http://www.itu.int/wsis/docs/geneva/official/poa.html>.

²⁸ Resolution 55/2, adopted 8 September 2000. The declaration may be found at: <http://www.un.org/millennium/declaration/ares552e.htm>.

²⁹ The Report of the Tunis phase of the World Summit on the Information Society, Tunis, Kram Palexpo, 16-18 November 2005 is available at <http://www.itu.int/wsis/docs2/tunis/off/9rev1.doc>. Among the topics of Internet governance discussed, the WSIS underlined the importance and necessity of international cooperation amongst law enforcement agencies in dealing with cybercrime, and developing necessary legislation for investigation and prosecution of cybercrime. The WSIS also resolved to deal with the problem of spam, calling upon stakeholders to adopt a multi-pronged approach to counter spam (please see para. 14 for more details on countering spam), and with the protection of privacy and personal information and data on the Internet. The WSIS reaffirmed its commitment to turning the digital divide into digital opportunity, and to ensuring harmonious and equitable development for all. The WSIS recognizes that Internet governance includes more than Internet naming and addressing, and that it includes public policy issues, such as, inter alia, critical Internet resources, the security and safety of the Internet, and developmental aspects and issues pertaining to the use of the Internet. It also includes social, economic and technical issues including affordability, reliability and quality of service.

³⁰ The paragraphs relating to internet governance in the Declaration of Principles may be found at: http://www.wgig.org/docs/Paragraphs_Internet_Governance.doc. A Working Group on Internet Governance (WGIG) has been established to: develop a working definition of Internet Governance; identify the public policy issues that are relevant to Internet Governance; and develop a common understanding of the respective roles and responsibilities of governments, existing international organizations and other forums as well as the private sector and civil society from both developing and developed countries. For more information about the WGIG, see <http://www.wgig.org/>.

information and best practices, as well as to provide support to developing countries in the field of spam.³¹ ITU issued two resolutions³² dealing with spam and also continues to maintain a website,³³ launched in 2004, which contains information concerning over forty countries that have taken anti-spam measures.

26. A survey was prepared for the WSIS Thematic Meeting on Cybersecurity, which took place from 28 June to 1 July 2005 and which found that regulators do not address the problem of spam in a substantive way. The paper recommended that legal rules specifically designed for spam should be adopted and existing laws on data protection and anti-fraud provisions should be aligned with anti-spam regulations.³⁴

OECD

27. In November 2004, OECD launched a new questionnaire intended to gather relevant information on the current usage of authentication across borders in OECD Member Countries. A synthesis report³⁵ was discussed at the meeting of the Working Party on Information Security and Privacy in May 2005 with the central aims being to: find examples of current offerings and actual implementation of authentication across borders; identify actual or potential barriers to current cross border use of digital signatures from the supplier/user perspective; and explore the extent to which cross border offerings of authentication meet or do not meet transaction needs. The “Report on the Use of Authentication across Borders”,³⁶ published in November 2005, found robust developments in relation to authentication in the public sector and, in general, non-discriminatory approaches to foreign signatures and services. It also found that public key infrastructure had become the method of choice for authentication. However, the report also found continuing problems in achieving interoperability due to the absence of recognition of foreign authentication services and lack of acceptance of credentials issued by other entities. The Report recommended the development of guidelines or best practices to facilitate interoperability, as well as the development of a framework for determining the prerequisites of authentication methods and initiatives to promote the use of authentication.

28. On 8 March 2006, OECD conducted a Workshop on the Future of the Internet.³⁷ The workshop, which brought together policy-makers, leading academics, private sector organizations, and civil society organizations to discuss the trends shaping the future of the Internet, explore the various approaches—technical, regulatory, and economic—that are being taken or can be taken to create new functionality for and increased trust in the

³¹ Information about ITU initiatives to counter spam may be found at: <http://www.itu.int/osg/spu/spam/intcoop.html>.

³² World Telecommunications Standardization Assembly, (WTSA) Resolution 51 on Combating Spam and Resolution 52 on Countering Spam by Technical Means.

³³ www.itu.int/osg/spu/spam/law.html.

³⁴ “A Comparative Analysis of Spam Laws: The Quest for a Model Law”, Background paper for the ITU WSIS Thematic Meeting on Cybersecurity, available at http://www.itu.int/osg/spu/cybersecurity/docs/Background_Paper_Comparative_Analysis_of_Spam_Laws.pdf.

³⁵ The report was presented to the Working Party on Information Security and Privacy (WPISP) at its 19th meeting in May 2005 and was declassified by the Committee for Information, Computer and Communications Policy (ICCP) at its 49th session in October 2005.

³⁶ <http://www.oecd.org/dataoecd/1/CO/35809749.pdf>.

³⁷ For more information, see http://www.oecd.org/document/24/0,2340,en_2649_34223_36375896_1_1_1_1,00.html.

Internet, promote its sustained growth and adoption, and identify opportunities for increased international cooperation on pressing issues.

UNCTAD

29. The ninth session of the Commission on Enterprise, Business Facilitation and Development (Geneva, 22-25 February 2005) of the Trade and Development Board approved recommendations on electronic commerce strategies for development. It recommended that UNCTAD should carry out research and policy oriented analytical work on the implications for trade and development of the different aspects of information and communications technologies (ICT) and e-business that fall within its mandate, with particular focus on those sectors of main interest to developing countries. It also recommended that UNCTAD continue to work, inter alia, in the field of ICT measurement, including the development of statistical capacity, to enable developing countries to measure the access, use and impact of ICT and monitor progress in this field. It further recommended that UNCTAD contribute to capacity-building in the area of ICT for development, particularly in trade sectors of special interest to developing countries or those that can be profoundly enhanced through the use of ICT, such as tourism, small and medium-sized enterprise (SMEs) development and poverty alleviation.

30. UNCTAD publishes annually its Information Economy Report, which has replaced the E-Commerce and Development Report that it published annually since 2000. The Report focuses on trends in ICT, such as e-commerce and e-business, and on national and international policy and strategy options for improving the development impact of these technologies in developing countries. The Report is available at www.unctad.org/ecommerce.

UNECE

31. At a UNECE-sponsored forum on paperless trade in international supply chains held on 20 and 21 June 2005,³⁸ UN/CEFACT presented its draft revision of its Recommendation 6 on the Invoice for International Trade.³⁹ The revised Recommendation seeks to resolve the obstacles to e-invoicing, and to provide a solution that can easily be implemented by both SMEs and large companies.

32. More recently, a workshop on International Standards to Stimulate Paperless Trade was conducted on 20 and 21 February 2006.⁴⁰ The goal of the two-day workshop was to present important international standards for document and information harmonization and exchange in international trade, to discuss the national and regional adaptation and implementation of those standards and to exchange know how and best practice on pilot projects and initiatives in the region. The workshop aimed to develop recommendations on the development, adaptation and implementation of global standards in the Asia Pacific Region. This was followed by a three-day technical workshop on UNeDocs Data Modelling and document design from 22 to 24 February 2006, in which seminar participants developed an international trade document which integrates the specific requirements of the region.

³⁸ Further information concerning the forum is available at <http://www.unece.org/forums/forum05/welcome.htm>.

³⁹ See further, http://www.unece.org/cefact/forum_grps/tbg/projects.htm.

⁴⁰ http://www.unece.org/trade/workshop/malaysia_feb06/welcome.htm.

UNESCAP

33. UNESCAP convened a forum, “Public-Private Partnerships for Development in Asia and the Pacific” in Jakarta, Indonesia on 7 and 8 April 2006, which discussed, *inter alia*, issues on the development of information and communication technology.⁴¹

WCO

34. In April 2006, a WCO IT Conference & Exhibition will be held in Bangalore, India, to address, *inter alia*, issues involved in outsourcing, (such as, whether outsourcing or off-shoring of IT functions to a specialized service provider can help customs maintain a sustainable ICT infrastructure that responds to the demands from all its stakeholders, in particular the private sector) and also, the lessons to be learned from past experiences.⁴²

D. Commercial arbitration and conciliation

CTO

35. The CTO Council adopted the Protocol setting up the CTO Alternate Dispute Resolution Centre⁴³ (“ADR Centre”) at its 45th meeting on 7 September 2005 in Yaoundé, Cameroon, in response to the growing number of disputes between commercial operators and between regulators and operators, or between governments and operators in CTO member countries. The ADR Centre assists in the settlement and resolution of disputes in the field of ICTs in accordance with its Adjudication Rules⁴⁴ (which provides for both online adjudication as well as full adjudication), Early Neutral Evaluation process⁴⁵ and its Arbitration Rules.⁴⁶ The CTO consulted with UNCITRAL in the drafting of these rules.

ICC

36. Following on from the adoption of a guide to the ICC Rules for Expertise in 2004, an outline for explanatory notes entitled “Practice of Expertise in ICC Expertise Dispute Resolution”⁴⁷ was presented to the ICC Commission on Arbitration⁴⁸ at its Meeting on 26 May 2005. The notes will cover topics such as the use of (i) experts in ICC Arbitration; (ii) experts under the ICC Rules for Expertise as fact finders; and (iii) neutral experts as facilitators under the ICC ADR and Dispute Board Rules.

37. At its last meeting in Paris held on 22 May 2006, the Commission on Arbitration heard a proposal by the Steering Committee of the ICC Commission on Arbitration to create two new task forces being: (1) a task force to prepare suggestions on the reduction of time and costs in complex arbitrations; and (2) a task force on “amiable compositeurs”.

⁴¹ <http://www.unescap.org/LDCCU/PLUS.asp>.

⁴² For more information, see <http://events.wcoomd.org/aboutconfit2006india.htm>.

⁴³ More information concerning the CTO ADR Centre and its related documents may be found at: <http://www.cto.int/adr/index.php?page=about>.

⁴⁴ http://www.cto.int/adr/adr_Adjudication_Service.doc.

⁴⁵ http://www.cto.int/adr/adr_ENE_Service.doc.

⁴⁶ http://www.cto.int/adr/adr_arbitration.pdf.

⁴⁷ <http://www.iccwbo.org/policy/arbitration/id1785/index.html>.

⁴⁸ Consists of more than 400 international legal specialists named by ICC national committees in some 82 countries. For more information, see http://www.iccwbo.org/home/international_arbitration/commission.asp.

38. As part of its regular publications, the ICC has recently published a new publication entitled “Parallel State and Arbitral Procedures”.⁴⁹

WIPO

39. In 2002, WIPO published a report, “Intellectual Property on the Internet: A Survey of Issues” that describes the impact of digital technologies on intellectual property and, in particular, on copyright and the international intellectual property system.⁵⁰ As part of this survey, WIPO undertook an analysis of the advantages and disadvantages of online dispute resolution.⁵¹

E. International payments

Hague Conference

40. In the context of the development of a convention on the international recovery of child support and other forms of family maintenance, the Hague Conference on Private International Law, with the assistance of UNCITRAL, is preparing proposals for medium-neutral provisions to ensure that central authorities can employ the most rapid means of communication under the future instrument to transfer funds payable as maintenance, including financial mechanisms of protection against foreign exchange fluctuations. The new Hague Convention could take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology.

ICC

41. The ICC Commission on Banking Technique and Practice⁵² is in the process of revising UCP 500, its universally used rules on letters of credit. It is also exploring the possibility of developing common practices in forfeiting. Issues being discussed include whether to allow discounting of a deferred payment credit, whether to retain the concept of a “reasonable time” for the acceptance or refusal of documents, and whether to remove the term “on its face” from the rules. Based on these discussions, the UCP Drafting Group will issue a further revised draft, which will then be sent to ICC national committees for comment. This draft, with any further revisions, will be discussed at the next meeting of the Banking Commission in May 2006 in Vienna. It is hoped that the final revision of the rules will be available to banks and practitioners in 2006. More information about the new rules can be found in ICC’s authoritative quarterly newsletter, DCInsight, available at www.iccbooks.com.

⁴⁹ <http://www.iccwbo.org/id3925/index.html>.

⁵⁰ Available at http://www.wipo.int/copyright/ecommerce/en/ip_survey/ip_survey.html.

⁵¹ WIPO, “Intellectual Property Rights on the Internet: A survey of the issues”. WIPO/INT/02, December 2002, <http://www.wipo.int/copyright/ecommerce/en/html/index.html>.

⁵² For more information, see <http://www.iccwbo.org/home/banking/commission.asp>.

F. Competition law

UNCTAD

42. In line with its mandate, provided by successive UNCTAD Conferences (the latest being the Sao Paulo Consensus, containing the outcome of UNCTAD XI in 2004) and the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” (the Set), adopted by the General Assembly in 2005, UNCTAD has continued to assist developing countries including least developed countries, as well as economies in transition in the formulation, adoption, implementation and revision of competition and consumer protection laws and policies.

43. In November 2005, the Fifth United Nations Conference to Review All Aspects of the Set unanimously adopted a resolution, which, *inter alia*, recognized “the role that competition policy plays in promoting competitiveness, building entrepreneurship, facilitating market access and entry, enhancing the equity of the international trading system and ensuring that trade liberalization brings about development gains”. The Conference further reaffirmed the validity of the Set and called upon all member States to make every effort to implement fully its provisions. States were invited to increase cooperation between their competition authorities and Governments, especially when anti-competitive practices occur at the international level, such cooperation being particularly important for developing countries and economies in transition. The Conference also recommended that the General Assembly convene a Sixth Review Conference under the auspices of UNCTAD in 2010. The Conference also agreed that the forthcoming November 2006 session of the Intergovernmental Group of Experts on Competition Law and Policy would consider four specific competition policy issues for better implementation of the Set, as they relate to: (i) sectoral regulators; (ii) hard-core cartels; (iii) cooperation and dispute settlement mechanisms; and (iv) subsidies.

G. Trade facilitation

UNCTAD

44. UNCTAD contributes to policy and research, technical assistance and capacity-building, seeking, *inter alia*, to promote the implementation of common standards in transport, trade and customs matters, particularly among developing countries. The provision of technical assistance and support to capacity-building is geared towards the revision and upgrading of administrative and legal frameworks along the lines of the provisions of various international conventions and other instruments relating to trade facilitation.

45. UNCTAD has assisted developing countries and least developed countries to build their capacity to effectively participate in the multilateral trade negotiations process on trade facilitation and logistics services. UNCTAD organized workshops, seminars and brainstorming sessions and produced technical notes on specific trade facilitation tools and measures; resource persons actively contributed to the WTO programme of workshops on trade facilitation. A number of Geneva-based delegates from developing countries and least developed countries participated in the above-mentioned workshops with a view to strengthening the working relationship between WTO delegates in Geneva and capital-based Government officials involved in trade facilitation.

46. UNCTAD also contributes actively to the work of the United Nations Centre for Trade Facilitation and Electronic Business, International Trade Procedures Working

Group, International Trade and Business Processes Group 15 related to a revision of Recommendation 12 “Measures to Facilitate Maritime Transport Documents Procedures”.

H. Insolvency

ADB

47. In April 2005, ADB presented its final report entitled “Regional Technical Assistance (RETA) 5975: Promoting Regional Cooperation in Insolvency Law Reforms”, covering cross-border insolvency, informal workout practices and the intersection between secured transactions and insolvency law regimes.

48. This work by ADB led to consultation meetings with Asian Bankers Association (ABA) member banks in 2005 to discuss a draft model agreement for company restructuring developed by the RETA consultants. In October 2005, the ABA formally adopted a set of guidelines for informal workouts and endorsed a Model Agreement for Company Restructuring for use by financial institutions throughout the region. The ABA also released a position paper, “Providing the Legal and Policy Environment to Support Effective Informal Workout Regimes in the Asia-Pacific Region” which recommends (a) adoption of a fast-track formal workout regime; (b) enactment of legislation providing for Creditors’ Voluntary Liquidation or Voluntary Administration; (c) promotion of a regional centre or centres for the resolution by arbitration of cross-border disputes; (d) strengthening of cross-border cooperation and assistance in insolvency cases; and (e) the undertaking of measures to enhance institutional capacity.

INSOL

49. INSOL is currently developing several publications to be launched within the next two years:

(a) Financing in Insolvency Proceedings. This publication, due to be launched in May 2006 will have 12 country chapters covering Australia, Brazil, Canada, Germany, the Hong Kong Special Administrative Region of China, India, Japan, Netherlands, Poland, South Africa, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Each country chapter will cover the different insolvency procedures that are available, and to what extent lenders get involved in providing finance to insolvent companies and related issues such as getting security, priority given to new lenders, and the role of the judicial process; and

(b) INSOL Lenders’ Group project on Credit Derivatives. INSOL has initiated a project to produce guidance for insolvency practitioners and others on matters relating to the impact of credit derivatives in restructuring procedures. The objective of the publication will be to raise awareness and promote understanding of relevant issues, and provide a point of reference for those involved in restructuring. The first working draft has been completed, and INSOL hopes to have this publication ready for distribution in September 2006.

50. Several other projects are being discussed internally at present. These include a publication on secured transactions, insolvency issues in the Asian region, and on distressed debt trading.

World Bank

51. In late 2005, the World Bank staff finalized the Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, which have been used since 2001 in assessing countries' insolvency and creditor rights systems, in the form of Reports on the Observance of Standards and Codes (ROSCs) and made them available for comment on the World Bank Global Insolvency Law Database (GILD) website.

52. Consultations between the World Bank, the UNCITRAL secretariat and the International Monetary Fund have achieved (a) consistency between the World Bank Principles and Guidelines, on the one hand, and the UNCITRAL Legislative Guide on Insolvency Law and the draft UNCITRAL Legislative Guide on Secured Transactions, on the other hand, (b) the development of a unified international standard in the area of insolvency law, and (c) the development of a ROSC Assessment Methodology. The complementary perspectives of the Principles and the Legislative Guide serve as important reference points for countries to evaluate and strengthen their insolvency and creditor rights systems in line with generally recognized standards of good practice. Given the international consensus on best practices reflected in the Bank's Principles and in the Recommendations that form part of the UNCITRAL Legislative Guide, the staffs of the Bank and the Fund will recommend that their respective Executive Boards recognize these Principles and Recommendations as constituting the unified standard for insolvency and creditor rights systems for the purpose of the Bank/Fund initiative on standards and codes. Insolvency and Creditor Rights ROSC assessments will be conducted on the basis of this unified standard on insolvency and creditor rights systems.

53. In the area of institutional frameworks related to insolvency, the World Bank has convened Global Judges Forums in 2003 and 2004 to encourage a dialogue among judges that oversee commercial enforcement and insolvency cases and to assist the World Bank to develop an Insolvency Court Practices Guide. A further forum is planned for 2006.

IBA

54. In May 2005, both the Section on Insolvency, Restructuring and Creditors Rights ("SIRC") and the Council of the IBA endorsed the UNCITRAL Legislative Guide on Insolvency Law.

55. The SIRC of IBA has established three new subcommittees: Insolvency Legislation and Legislative Reform and Harmonisation; Enforcement of Creditor's Rights; and Reorganization and Workouts. As international insolvency practice continues to evolve over the coming years, other Subcommittees may be created.

56. In addition to monitoring and reporting on developments in national insolvency legislation around the globe, the Insolvency Legislation and Legislative Reform and Harmonisation Subcommittee will coordinate: (i) provision of expert staffing at working sessions of such world bodies; (ii) provision of expert presentations at programs and colloquiums organised by such world bodies; (iii) consultation; and (iv) drafting of submissions concerning legislative reform projects. All UNCITRAL related work will be coordinated directly with, and supervised by, SIRC's UNCITRAL Liaison.

57. The Subcommittee on Enforcement of Creditors Rights will focus on issues of interest to secured and unsecured vendors and lenders in liquidation and reorganization, including, inter alia, remedies, lien enforcement, extension of credit to insolvent or distressed debtors, inter-creditor priorities and protection of the value of collateral. The Reorganisation and Workouts Subcommittee will focus on both formal and informal restructuring, including, inter alia, issues relating to the negotiation, proposal, solicitation

and litigation of plans of reorganization, schemes of arrangement, pre-packaged plans, compositions, expedited reorganization and out of court workouts.

III

58. In addition to its existing Committees, the III is establishing a committee on the use of arbitration in insolvency. It is also launching a joint project with The American Law Institute (ALI) to promote international approval and acceptance of the ALI's Principles for Cooperation in Transnational Cases.

OECD

59. The fifth meeting of the Forum on Asian Insolvency Reform (FAIR), organized by OECD in cooperation with APEC, the Australian Agency for International Development (AusAID), the Asian Development Bank, the World Bank and the Government of Japan, will take place in Beijing, PRC from 27 to 28 April 2006.

I. Corporate governance

EBRD

60. In 2005, EBRD completed an evaluation of the effectiveness (i.e. how the law works in practice) of legislation on corporate governance in all 27 countries of operation. The purpose of the initiative was to discover how corporate governance legislation is implemented and determine the effectiveness of mechanisms for a minority shareholder to obtain disclosure of corporate information and to obtain redress in case of breach of its rights. The results have been published in the Transition Report 2005 and will be detailed in the Spring 2006 edition of Law in Transition. The results of previous Legal Indicator Surveys (dealing with insolvency and enforcement of charges) are available on the EBRD website.⁵³

OECD

61. The OECD Steering Group on Corporate Governance coordinates and guides the Organisation's work on corporate governance and related corporate affairs issues. Much of the teams' non-member country work on corporate governance is carried out through Regional Roundtables. Meetings of the Regional Roundtables, including Eurasia, South Eastern Europe and Latin America held during 2005 and 2006 discussed, inter alia, corporate governance reform and enforcement. The agenda for the seventh Asian Roundtable on Corporate Governance in September 2005 included (i) corporate governance of banks, (ii) a stock take of progress in policy reforms since the publication of the Asian White Paper in 2003, (iii) the role of the board in implementing the OECD Principles of Corporate Governance, and (iv) corporate governance of state-owned enterprises.

62. In April 2005, OECD endorsed Guidelines on Corporate Governance of State-owned Enterprises. These new Guidelines provide the first international benchmark to help governments assess the way they exercise their ownership responsibilities vis-à-vis state-owned enterprises (SOEs). They are non-binding and complementary to the OECD Principles of Corporate Governance.

⁵³ <http://www.ebrd.org>.

63. In 2005, OECD also published case studies on good corporate governance in Latin America, examining how eight companies from Brazil, Colombia and Peru improved their corporate governance practices. Based on their experiences, this report gives practical advice and solutions for other companies in Latin America that are considering reforming their governance structure.

(A/CN.9/598/Add.1)

**Note by the Secretariat on the legislative work of international organizations
relating to public procurement****Contents**

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I. Introduction

1. This note sets out a summary of legislative work of international organizations relating to public procurement undertaken or planned to be undertaken in the past year or planned to be undertaken in the near future.¹ The note is not intended to be exhaustive but rather focuses on the work of the organizations that may have implications on the work of UNCITRAL Working Group I (Procurement) (the “UNCITRAL Working Group” or the “Working Group”).

2. On the basis of the information provided in the present note, the Commission and/or the Working Group may wish to consider where the current work of the Working Group on the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) may complement the work done by other organizations, and to identify appropriate cooperation and coordination strategies. The Commission may also wish to guide the Working Group as to the issues that it should consider in addition to those on its agenda in connection with the current project, or separately in due course.

3. The legislative work of the following organizations is described in this paper on the basis of publicly available materials and information received by the UNCITRAL secretariat from these organizations in response to its inquiries:

ADB	Asian Development Bank
AfDB	African Development Bank
APEC	Asia Pacific Economic Cooperation
COMESA	Common Market for Eastern and Southern Africa
EBRD	European Bank for Reconstruction and Development
EC	European Commission
IADB	Inter-American Development Bank
IAPSO	Inter-Agency Procurement Services Office
ITC	International Trade Centre
OAS	Organization of American States

¹ The “legislative work” summarized in the present note covers, in addition to rule-formulating activities, preparation of any non-binding documents, such as guidelines and explanatory notes, in the areas of public procurement within the scope of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. Consequently, legislative work of some organizations reviewed in the areas explicitly excluded from or not intended to be covered by application of the Model Law, such as defence procurement (see art. 1 (2) of the Model Law), public work concessions, public-private partnerships and privately-financed infrastructure projects, were not included in the summary of the present note. (For the legislative activities in these areas, see, in particular, in the EC procurement-related website, http://europa.eu.int/comm/internal_market/publicprocurement/dpp_en.htm and http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm). Also excluded from the scope of the present note are recently concluded or being negotiated bilateral and regional free trade agreements, which, although touch upon procurement-related issues covered by the Model Law, are concluded by individual countries or bloc of countries and thus fall outside the framework of legislative activities of any particular international organization.

OECD	Organization for Economic Cooperation and Development
UNCTAD	United Nations Conference on Trade and Development
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNODC	United Nations on Drugs and Crime
WAEMU	West African Economic and Monetary Union
the World Bank	
WTO	World Trade Organization

4. The note complements a note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law, contained in A/CN.9/598.

II. Summary of legislative work of international organizations relating to public procurement

A. Procurement in general and electronic procurement

1. World Trade Organization

5. The WTO activities in public procurement are currently in two main areas:² (i) the WTO working party on GATS rules continues negotiations on government procurement in services under GATS article XIII; and (ii) within the WTO Committee on Government Procurement that administer a plurilateral Government Procurement Agreement (the “GPA”), negotiations are underway with a view to improving the GPA, achieving the greatest possible extension of its coverage among all WTO parties and eliminating any remaining discriminatory measures and practices, as called for under article XXIV: 7 (b) and (c) of the GPA.

6. The most recent negotiations on government procurement in services under GATS article XIII in 2005 evolved around a proposal on the structure of an annex to the GATS on procedural rules for government procurement of services. Issues raised during the negotiations included the relationship to the GPA, the possibility of distinguishing between goods and services, thresholds and elements of procedural rules.³

7. As regards the second area, in a note by the Secretariat entitled “Current activities of international organizations related to the harmonization and unification of international trade law” (A/CN.9/584, para. 55) that was before the Commission at its thirty-eighth session, in 2005 (the “2005 Secretariat Note”), the Commission’s attention was drawn to

² As regards a third area, transparency in government procurement, the working group of all WTO members addressing transparency in government procurement has discontinued its work. See the General Council’s decision on the Doha Agenda work programme (the “July package”, at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm), of 1 August 2004, stating inter alia that there be no negotiation on the Singapore issue of transparency in government procurement.

³ See “Annual report of the Working Party on GATS rules to the Council for Trade in Services”, 2005, para. 5, at http://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm.

the current renegotiation of the GPA. While little information about the stage and extent of renegotiation is publicly available as the negotiations are held in informal meetings, it has been made known that the negotiations focus on the simplification and improvement of non-market-access-related provisions of the GPA, and during 2005, the Committee made substantial progress on the revision of these provisions. In addition, informal discussions have also been held on the so-called “horizontal” coverage matters as well as on various drafting proposals relating to market-access-related provisions.⁴ The target date for the overall conclusion of the negotiations pursuant to article XXIV:7 was set for the end of 2006.⁵

8. At the sessions of the Working Group, several UNCITRAL member States emphasized the importance of coordinating the approaches to drafting of any revised or new provisions in the Model Law and the Guide with the approaches on the same subjects taken in WTO. To this end, the Secretariat invited WTO representatives to the sessions of the Working Group and representatives have attended a majority of the sessions to date. In addition, informal consultations have been held between the Secretariat and WTO representatives. However, the confidentiality of the GPA renegotiation may limit the effectiveness of such measures.

9. The Commission may wish to appeal to WTO directly and/or through UNCITRAL member States that participate in the relevant WTO negotiation processes to improve coordination of the work in the relevant WTO bodies with the related work of the Working Group so that to ensure that revisions to the UNCITRAL Model Law and the Guide take into account relevant developments in the WTO.

2. Multilateral development banks (MDBs)

10. In the 2005 Secretariat Note, the Commission’s attention was also drawn to the activities of a joint working group on Harmonization of Electronic Government Procurement (e-GP) (the “joint Working Group”), set up at the beginning of 2003 by the ADB, the IADB, and the World Bank, and subsequently joined by the AfDB, EBRD and Nordic Development Fund. (See A/CN.9/584, para. 50).

11. Since its establishment, the joint Working Group has issued two sets of requirements that have to be met in borrowing countries where e-GP systems are used for procurement under MDB financed projects: the E-Tendering Requirements (October 2005) and the E-reverse Auction Guidelines (December 2005) (analysed in paras. 14 to 20 below).⁶ These requirements supplement and do not replace the existing requirements that apply to traditional procurement processes for MDB funded activities. The preparation of another set of requirements, for electronic purchasing, is pending.⁷

12. The joint Working Group also sponsored the preparation of the Guide for Legislators and Managers on Authentication and Digital Signatures in E-Law and Security (December 2004) and the Guide on Buyer-Supplier Activation (October 2005) as well as a number of papers on more general issues of e-GP intended to guide countries of MDBs’

⁴ The Secretariat understands that the proposed revisions may address, among other matters, framework agreements and electronic procurement techniques, such as electronic reverse auctions.

⁵ See “Report of the Committee on Government Procurement (December 2004-October 2005)”, paras. 19-23, at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁶ Available at the joint e-GP portal <http://www.mdb-egp.org/>.

⁷ According to the introductory part of the E-Tendering Requirements.

operation in assessing their readiness for e-GP and in the implementation of different e-GP stages.⁸ A common disclaimer accompanies the Guides and the papers stating that the views expressed therein do not represent the official position of the MDBs and the MDBs do not guarantee the accuracy of the included information and do not accept any responsibility for any use thereof.

13. The documents were prepared in response to an increasing trend in borrowing countries to use electronic procurement systems and means for processing and managing MDB funded activities. The general position under these papers is that e-GP domestic rules in borrowing countries should be developed in a technologically neutral manner, to accommodate the pace of changes in technology. The documents are also formulated on the basis of a phased approach to the implementation of e-GP, i.e., electronic means can be used for selected steps in the procurement process, adding more steps to the system as resources, legislation or developments permit.

E-Tendering Requirements for MDB Financed Procurement

14. As stated in the introductory remarks to this document, the requirements do not intend to establish a standard path in the development and implementation of e-GP, rather the MDBs encourage individual governments to find their own path. Nevertheless, as stated further in the introductory remarks, to ensure that the basic principles of good governance, such as transparency, non-discrimination, equality of access, open competition, accountability and security of process, are observed, the requirements provide for standards and qualities that have to be met if e-GP systems are to be used for procurement of goods, works, services or consulting services under MDB financed projects. Domestic e-GP systems' features, standards and operations in borrowing countries are thus to be evaluated for their compliance with the E-Tendering Requirements.

15. The E-Tendering Requirements, as stated therein, were formulated with the consideration in particular of costs and ease of participation in e-GP and importance of preserving good audit trails. They are grouped into the following 12 sections (providing inter alia for):

Section 1—System access (open, equal and unrestricted access with technical standards for interoperability, reliability and security);

Section 2—Advertising (publication in various media with no material difference between them; measuring the bidding period from the date of publication whichever is later; and online publication on a publicly-accessible website that is well-known nationally, well maintained, functional and affords free and unrestricted access);

Section 3—Correspondence, amendments, substitutions and clarifications (a possibility of making them electronically so long as print correspondence is used for bidders who request it);

Section 4—Bidding documents (non-advisability of splitting documents into combination of electronic and paper portions);

Section 5—Submission of bids/proposals (both paper and electronic form);

⁸ These papers, issued under the series of "Strategic Electronic Government Procurement", include "Introduction for Executives," "Standards framework" and "Roadmap" (all dated March 2004), "Strategic Planning Guide" (June 2004) and "Readiness Self-Assessment" (as reviewed in November 2004). These and other documents can be accessed through the e-GP Tool Kit at <http://www.mdb-egp.org/data/default.asp>.

Section 6—Bid securities (general discouragement of their use in e-GP);

Section 7—Public bid opening (physical presence of bidders and simultaneous posting information that was read out onto a web site);

Section 8—Bid evaluation and contract award (the use of pre-approved automated evaluation systems subject to compliance with evaluation criteria, principles of economy, efficiency, equal opportunity and transparency and other requirements, and which result in contract award to the lowest-evaluated, responsive bidder);

Section 9—Information security management (its conformation with international standards and taking into account recognized best practices);

Section 10—Authentication (legal recognition and acceptance of digital certification/signatures issued in a bidder's country and other measures to ease participation by non-domestic suppliers);

Section 11—Charges for the participation in e-GP systems (participation generally free of charge); and

Section 12—Other conditions (application of the E-Tendering Requirements to third-party service providers who with their subsidiaries or parent companies, for avoidance of a possible organizational conflict of interest, are not eligible for award of contracts procured through the e-GP systems operated by them).

16. All issues addressed in sections 1 through 9 and 11 of the E-Tendering Requirements are being considered by the UNCITRAL Working Group. As regards authentication (section 10), the UNCITRAL Working Group agreed not to deal with the issues of authentication in the Model Law but rather to discuss it in the Guide to Enactment with appropriate references to the applicable UNCITRAL instruments and regulatory framework that has to exist in the State enacting the revised Model Law.⁹ As regards the issue of third-party service providers and possible organizational conflict of interests, addressed in section 12 of the E-Tendering Requirements, the issue has been raised in the Working Group¹⁰ but has not been included as a separate topic on the Working Group's agenda. Nevertheless, the Working Group is expected to take it up in connection with its consideration of procurement methods and techniques where the risk of conflict of interests is particularly high, such as in the context of electronic reverse auctions and framework agreements.

⁹ See the Report of Working Group I (Procurement) on the work of its seventh session (A/CN.9/575), para. 34.

¹⁰ Ibid., para. 54.

E-Reverse Auction Guidelines for MDB Financed Procurement

17. The E-Reverse Auction Guidelines draw significantly on the E-Tendering Requirements. The guidelines are grouped into the following 11 sections: (i) system preparation; (ii) bidding specifications; (iii) advertising; (iv) operation; (v) correspondence, amendments and clarifications; (vi) access; (vii) bid securities; (viii) bid evaluation and contract award; (ix) information security management; (x) authentication; and (xi) other conditions. The requirements in sections (iii), (v), (vi) (except for the provisions establishing specific pre-qualification procedures in the electronic reverse auction (ERA) context), (vii), and (ix) through (xi) mostly repeat those contained in the E-Tendering Requirements, with some amendments to adapt them to ERAs. The ERA-specific requirements are found mainly in the following sections (establishing *inter alia*):

Section 1—System preparation (see para. 19 below);

Section 2—Bidding specifications (details about ERAs that have to be published with the bidding specifications);

Section 4—Operation (conditions that have to be met in the course of the running of auctions, including anonymity, confidentiality, automatic re-ranking of bidders, and content and extent of communication of information to bidders, and for closure of the auction);

Section 6—Access, in the provisions establishing special procedures to be followed if ERAs are preceded by pre-qualification (that ERAs must not be used if pre-qualification has reduced the number of bidders to a level that materially affects competition and under no circumstances when there will be less than three independent bidders); and

Section 8—Bid evaluation and contract award (that an ERA award must be based solely on prices where the contract is awarded at the lowest price to the corresponding qualified bidder; that contract awards should immediately be published online, together with the winner and the awarded price; and that there should not be any negotiation during or after the ERA process is closed).

18. Unlike the E-Tendering Requirements, the E-Reverse Auction Guidelines do not apply to the procurement of consulting services. The Guidelines' introductory remarks regarding general conditions for the use of ERAs state that "[n]ot all procurement is suitable for e-reverse auction. Such methods should deal only with contracts for which the specifications can be determined with precision, where price is the only determinant and where there exist significant numbers of potential bidders. It must also be possible to transparently establish the respective ranking of the bidders at any stage of the electronic auction. Those aspects of the bids which imply an assessment of non-quantifiable elements should not be the object of electronic auctions. Care must also be taken not to apply such methods in markets where they may be especially vulnerable to market manipulation or anti-competitive behaviour such as collusion. Markets with only a limited number of independent qualified bidders, or markets dominated by one or two major players will be especially vulnerable to this danger."

19. This general statement is transposed to the concrete conditions for the use of ERAs contained in the "system preparation" section, which in particular require:

(a) Precise specifications of the procurement and suitability of the purchase matter and requirements for simple bidding processes where evaluation is solely in terms of price;

(b) Clear establishment and advertisement of the auction scope and the evaluation criteria for selection and award of a contract, sufficiently high purchase value to make it commercially viable for a competitive supplier base, but not so high as to materially reduce competition;

(c) Verification that all operational conditions for starting the auction have been met;

(d) Good intelligence on past transactions in the market place and market structure to monitor and prevent possible market manipulation, predatory pricing or collusion; and

(e) That ERAs be used only for purchases below the relevant international competitive bidding threshold, only for procurement processes where price is the sole determining factor (which is generally for goods only) and not be used where such use conflicts with the principle of open competition by locking out significant numbers of otherwise eligible bidders who do not have access to the required technology.

20. Consequently, the Guidelines prefer to treat ERAs as a special case of e-purchasing, rather than e-bidding, explaining this preference by the fact that ERAs are suitable for simple well-defined purchases where the determining factor is price or quantity and where a considered evaluation process, common in e-bidding, is not required. The Guidelines also, with the reference to the discussions in the UNCITRAL Working Group, adopted the approach of treating ERAs as a procurement method in itself, rather than an optional phase in other procurement methods.

21. The ERA-specific issues addressed in the Guidelines are being considered by the Working Group, including conditions for the use of ERAs and award criteria, which would in turn identify types of procurement (goods, works and types of services) suitable for ERAs and determine whether ERAs will be treated as a procurement method in itself or an optional phase in other procurement methods. The Commission, at its thirty-ninth session, will have the reports of the Working Group on its eighth and ninth sessions (A/CN.9/590 and A/CN.9/595, respectively) that contain a summary of the Working Group's consideration of these issues.

22. For other related joint activities of the MDBs, see sections B and C below.

3. Africa

African Development Bank

23. The AfDB is currently revising its Rules of Procedure for Procurement of Goods and Works and for the Use of Consultants, to harmonize them with those of other MDBs. It is also involved, in particular through country procurement assessment reports and by providing support to subregional organizations, such as COMESA and WAEMU (see paras. 24 to 28 below), in various legislative initiatives on harmonization and modernization of public procurement systems at national, sub-regional and regional levels.

Common Market for Eastern and Southern Africa

24. In the 2005 Secretariat Note, the Commission's attention was also drawn to the work by the COMESA secretariat on the implementation, with support from the AfDB, of the COMESA Public Procurement Reform Project (PPRP) (A/CN.9/584, para. 51). The PPRP programmed activities for the period until December 2004 were completed, in particular

with the launch of the Internet-based Procurement Information System (CPIS)¹¹ and the development of the guidelines for the implementation of the 2003 COMESA public procurement Directive.^{12, 13}

25. A successor project, the Enhancing Procurement Reforms and Capacity Project (EPRCP)¹⁴ intends to fill gaps between the expected and achieved objectives under the PPRP.¹⁵ It, among others, envisages in the long run the development and signing of a regional procurement agreement that would provide national treatment for suppliers coming from COMESA member States and establish thresholds for each procurement category, above which contracts would have to be procured through regional procurement mechanisms. More focused attention is proposed to be given to the development of e-procurement: the EPRCP envisages upgrading the CPIS, as a platform for regional modern public procurement system, which is expected to deliver a range of more advanced procurement services, beyond the mere publicising of procurement information, such as enabling on-line submission of tenders.

26. The Working Group has established close relations with COMESA, which is regularly represented at the Working Group's sessions.¹⁶ In addition, the UNCITRAL secretariat cooperates with the COMESA secretariat on various issues related to legislative and technical assistance work.

West African Economic and Monetary Union

27. In the 2005 Secretariat Note, the Commission's attention was also drawn to the WAEMU programme of modernization and reform in public procurement, comprising two phases: (i) establishing the tools necessary for the reforms, and (ii) implementing them (A/CN.9/584, para. 51).

28. The first phase was finalised, with the adoption, by the WAEMU Council of Ministers, in December 2005, of the WAEMU Public Procurement Directives, including Local Government Regulations. The second phase covers capacity building at the level of the WAEMU Commission (to enable it to fully play its role in dissemination and control of the implementation of the Directives), and assistance to WAEMU member States in the effective application of the Directives at the national level.

¹¹ A centralized regional website <http://simba.comesa.int:90/cpis/>, for collecting and disseminating procurement information in the COMESA member States.

¹² The Directive was adopted by the COMESA Authority of Heads of States and Governments at its eighth summit at Khartoum in March 2003. It inter alia recommends the UNCITRAL Model Law as the model for local procurement law reforms in the COMESA member States.

¹³ The guidelines, available at the UNCITRAL secretariat, contain essential components of national legal framework and institutional and organizational arrangements necessary to implement the Directive.

¹⁴ Developed by the COMESA secretariat pursuant to the decision taken at the seventeenth meeting of the COMESA Council of Ministers (Kampala, 4-5 June 2004).

¹⁵ The EPRCP entails deepening the harmonization of public procurement laws, regulations, procedures and practices in COMESA with a view to achieve total compliance of COMESA member States' procurement laws and regulations with the COMESA public procurement Directive; improving local procurement systems; strengthening the local capacities of COMESA member States in public procurement; and encouraging full utilization of the CPIS.

¹⁶ The Working Group's sessions have been chaired by the COMESA Legal Director since 2004.

4. Asia

Asia Pacific Economic Cooperation

29. The APEC Government Procurement Expert Group (GPEG)¹⁷ is revising the APEC non-binding Principles on Government Procurement,¹⁸ in particular to incorporate the APEC Transparency Standards on Government Procurement¹⁹ and to minimize duplication among various non-binding Principles. The GPEG is also considering expanding the wording of the non-binding Principles on non-discrimination to reinforce their application as regards non-discrimination on the basis of gender. The revised draft of the non-binding Principles was due for consideration at the session of the APEC Committee on Trade and Investment in late May 2006. The GPEG also agreed to develop the initiative on assistance to small and medium enterprises (SMEs) through government procurement.

30. The content of the APEC non-binding Principles is being brought to the attention of the Working Group as and when they are relevant to the work of the Working Group. The Secretariat intends to continue doing so taking into account any revisions to the non-binding Principles that may be adopted within the APEC in the near future. For the subject of SMEs' participation in the public procurement, see further paragraphs 40 and 41 below.

Asian Development Bank

31. On 6 February 2006, ADB's Board of Directors approved the new Procurement Guidelines and Guidelines on the Use of Consultants. Both became effective on 1 April 2006.²⁰

5. European Commission

32. During the period under review, the EC issued a number of documents amending, supplementing and implementing the new European Union (EU) procurement Directives 2004/17/EC and 2004/18/EC (the "Directives"). The amendments to the Directives contained in directive 2005/51/EC of 7 September 2005 concern provisions on the format of publication of procurement-related notices, contained in the annexes to the Directives.²¹ In the light of new standard forms for publication of notices to be established in implementing measures, the references in the annexes to the old format established by directive 2001/78/EC were deleted.

33. The new standard forms were established by Commission Regulation (EC) No. 1564/2005 of 7 September 2005, which became binding for the use in all EU member

¹⁷ The Group was established in 1995 as a sub-forum of the APEC Committee on Trade and Investment.

¹⁸ Available at http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

¹⁹ See section I of the "APEC Leaders' Statement to Implement APEC Transparency Standards", 16th APEC Ministerial Meeting (Santiago, Chile, 17-18 November 2004), document 2004/AMM/028, available at http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

²⁰ Available at <http://www.adb.org/Documents/Guidelines/Procurement/guidelines-April-2006.pdf> and <http://www.adb.org/Documents/Guidelines/Consulting/consultant-guidelines-April-2006.pdf>, respectively.

²¹ Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC.

States from 1 February 2006.²² As was noted in the press release,²³ the adoption of the new standard forms is seen as a part of a wider EU strategy on computerising public procurement procedures in the EU.²⁴ The new forms follow the same structure as the ones in directive 2001/78/EC but were streamlined and simplified, taking into account elements introduced by the Directives, such as framework agreements, electronic reverse auctions and dynamic purchasing systems. The greatest advantage of the new form comes with online use: publication time in such case is shortened from 12 to 5 days and the time limits for the receipt of tenders or requests to participate can consequently be shortened by 7 days.²⁵

34. The conditions and rules for the use of the new standard forms are explained in the EC interpretative document, the Commission Staff Working Document on Requirements for Conducting Public Procurement Using Electronic Means under the Directives,²⁶ issued in July 2005 to facilitate the task of EU member States of transposing the Directives to their national systems. The document analyses the rules applicable to online communications and covers all stages of the contract award procedures that can be computerized. It also explains rules applicable to the new elements and purchase techniques of the Directives, such as framework agreements, electronic reverse auctions and dynamic purchasing systems.

35. The EC has also recently issued the following documents: (i) the detailed rules for the application of the procedure provided for in article 30 of Directive 2004/17/EC (Commission decision 2005/15/EC of 7 January 2005); (ii) the note explaining the regime laid down by Directive 2004/18/EC for competitive dialogue; (iii) the note explaining the regime laid down by Directive 2004/18/EC for framework agreements;²⁷ (iv) the note explaining the scope of “exclusive or special rights” within the meaning of Directive 2004/17/EC; and (v) the note explaining “contracts involving more than one activity” under Directive 2004/17/EC.²⁸

36. Its upcoming legislative initiatives include: (i) elaborating proposals to amend the directives defining specific requirements for remedies systems in the area of public procurement (directives 89/665/EC and 92/13/EC) in order to clarify and improve the efficiency of existing provisions; (ii) possible adoption by the end of 2006 of a communication on contracts outside the scope of the Directives, to explain and clarify how the principles of EU law should be applied to such types of contracts; (iii) adoption in the coming months of a directive modifying annexes to the Directives, to update the list of

²² The new forms are available online in a structured XML format at the SIMAP website: <http://simap.eu.int/>.

²³ IP/05/1248 of 11 October 2005.

²⁴ See “Action Plan for the implementation of the legal framework for electronic public procurement”, of 13 December 2004, available at http://europa.eu.int/comm/internal_market/publicprocurement/docs/eprocurement/actionplan/actionplan_en.pdf.

²⁵ See articles 36 (3) and 38 (5) of Directive 2004/18/EC and articles 44(3) and 45(3) of Directive 2004/17/EC.

²⁶ Available at http://europa.eu.int/comm/internal_market/publicprocurement/e-procurement_en.htm.

²⁷ Analysed in detail in document A/CN.9/WG.I/WP.44 and Add.1, submitted to Working Group I (Procurement) at its ninth session (New York, 24-28 April 2006).

²⁸ All documents are available at http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm.

contracting entities/authorities following the last enlargement process; and (iv) the preparation of an updated version of the “Common Procurement Vocabulary” (CPV).²⁹

37. The Working Group has established close relations with the EC, which is regularly represented at the Working Group’s sessions. In addition, the UNCITRAL secretariat is regularly in touch with the EC procurement experts regarding the EC treatment of various issues being considered by the Working Group. The results of consultation are subsequently reflected in notes by the Secretariat or oral reports to the Working Group. The EU legislative developments in the procurement field are also regularly brought to the attention of the Working Group by the EU member States participating at the Working Group’s sessions.

6. Latin America

38. The responses to the Secretariat’s enquiries indicate that there are currently no procurement-related legislative activities being undertaken by any of the Latin American regional or subregional organizations, and there is little work towards harmonizing procurement-related legislation on sub-regional and regional levels. Reforms or updates of procurement legislation and to some degree its harmonization in the region take place on a country-by-country basis mainly through the country procurement assessment reports (CPARs) within the auspices of the World Bank and IADB. The CPARs’ recommendations for improvement and action plans usually include proposals for legislative reform.

39. The Secretariat has been informed that the CPARs’ proposals for legislative reforms in the region rarely mention the Model Law as a standard to be considered. The Model Law is not much known and used when the national procurement-related legal reforms are being implemented. To improve the current situation with the limited awareness and use of the Model Law in Latin America and the Caribbean, the Commission may wish to appeal to its member States concerned and observers, in particular the MDBs active in the region, to seek active dissemination in the region of knowledge about the Model Law in its current form and the Working Group’s work on its revision so that they can be taken into account in legal reforms. The Commission may also wish to invite suggestions from its member States and observers for other cost-effective outreach actions that should be taken to this end in the region.

40. Limited legislative initiatives by some regional organizations have mainly evolved around e-GP and promotion of participation in public procurement by SMEs in response to the high interest in the countries of the region in these areas. In particular, the OAS Inter-American Agency for Cooperation and Development (IACD), as part of OAS efforts to increase transparency in public procurement and more effectively combat corruption, signed a series of agreements with governmental agencies from OAS member States that intended to promote e-GP and transfer the relevant appropriate technology. The first in the series of such agreements was signed between OAS/IACD and the government of Mexico. Subsequently, the agreements were concluded with Peru, Ecuador and Costa Rica and with other countries. However, the projects did not bring the expected results and were

²⁹ The CPV is the EU-wide single classification system for public procurement contracts, established by Regulation (EC) No. 2151/2003 to standardise the references used by contracting authorities and entities to describe the subject matter of their contracts. For the current CPV and its proposed draft version under consultation for updating, see <http://europa.eu.int/yourvoice/ipm/forms/dispatch?form=cpv&lang=en>.

abandoned. The IACD was abolished and replaced by a new department whose latest initiatives involve, apart from the e-GP, assistance to national authorities with implementing legislative measures for the protection and development of SMEs through inter alia promoting their participation in public procurement by setting margins of preferences and set aside programs.

41. The subject of SMEs' participation in public procurement has not been envisaged for consideration as a separate topic by the Working Group. SMEs' interests have been considered by the Working Group in the context of e-GP in general and ERAs in particular and are expected to be further considered in connection with these and other topics, such as framework agreements, suppliers' lists and the use of procurement to promote industrial, environmental and other socio-economic policies.

B. Transparency and anti-corruption in procurement

42. Multilateral instruments and initiatives have been developed in recent years to enhance international cooperation in the fight against corruption and fraud, most of them with the references to the area of public procurement. The subsections below do not intend to provide exhaustive information on them but rather illustrate some most recent examples (see also para. 40 above).

1. International instruments: United Nations Convention against Corruption³⁰

43. The United Nations Convention against Corruption, adopted by the General Assembly in October 2003, entered into force on 14 December 2005. A number of provisions of the Convention touch upon public procurement. Article 9 (1) of the Convention addresses public procurement specifically. Under the article, each State Party to the Convention is required to take the necessary steps to establish appropriate systems of procurement based on transparency, competition and objective criteria in decision making that are effective, inter alia, in preventing corruption. The article further provides that such systems must address: (a) the public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) the establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) the use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established are not followed; and (e) where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

44. The Convention envisages mechanisms for its implementation through the Conference of States Parties to the Convention. The Conference is to be assisted by the secretariat, which has in particular to ensure necessary coordination with the secretariats of relevant regional and international organizations on the implementation of the Convention.

³⁰ General Assembly resolution 58/4, annex.

45. The UNCITRAL secretariat has been in contact with representatives of the Conference secretariat (UNODC has been designated as such),³¹ regarding possible joint work to enhance the implementation of procurement-related provisions of the Convention, through legislative measures and technical assistance activities. As a first step, the UNCITRAL secretariat communicated to UNODC its analysis of the provisions of the Convention against the Model Law, pointing out that, although the only express corruption-related provision in the Model Law was in article 15, the Model Law by and large reflects the procurement-related provisions of the Convention. The analysis also pointed to some discrepancies, in particular that the requirements in article 9 (1)(e) of the Convention addressing conflicts of interest, screening procedures and training have no equivalent in the Model Law. The Secretariat intends to bring to the attention of the Working Group all the discrepancies between the Convention and the Model Law for its consideration in due course as part of its overall review of the Model Law.

2. Other initiatives

46. A number of international organizations, both governmental and non-governmental, touch upon various aspects of public procurement in their activities aimed at preventing corruption, fraud and other improprieties in the public sector. To name just a few, most multilateral donors have adopted specific anti-corruption policies to guide their development work, which in particular deal with procurement issues. Some donors are currently reviewing their development work policies to make them more effective in the fight against corruption, including in procurement.³² Poverty reduction strategies formulated with participation of donors increasingly envisage measures to increase transparency and prevent corruption in procurement. International non-governmental organizations, active in the area of anti-corruption, have also developed guidance documents and information resources aimed at preventing corruption in public procurement.³³

47. A number of international organizations have launched internal management reforms, which inter alia include the revision of procurement regulations and rules to strengthen their provisions on transparency and make them more effective in the prevention of corruption, fraud and other improprieties.

48. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group specifically considered the issue of the avoidance of fraud and corruption in public procurement and noted that, in its ongoing work, that issue would be one aspect to be taken into account when revising the Model Law and the Guide to Enactment.³⁴

³¹ See *ibid.*, para. 8.

³² See, for example, para. 29 above on the revision of the APEC NBPs. ADB as well has been revising its policies to improve the effectiveness of their development activities in countries of their operation, especially as regards the promotion of transparency, accountability and anti-corruption measures.

³³ For example, see the activities of the Transparency International in public procurement <http://www.transparency.org.uk/pcoat.htm>. In the focus of their procurement-related work are areas prone to corruption, such as defence procurement, construction projects and aid delivery. Within its auspices, a series of documents and guidelines related to procurement have been prepared, for example "Preventing corruption on construction projects: Risk assessment and proposed actions for banks, export credit agencies, guarantors and insurers" of March 2005. It also works on the topics of debarment, local government procurement and the right to access to information.

³⁴ See the Report of Working Group I (Procurement) on the work of its sixth session

Transparency in public procurement has subsequently been addressed in detail in the Working Group.

C. Procurement in the context of aid effectiveness

49. Connected to the activities described in the preceding section are the activities of international organizations aimed to increase aid effectiveness in recipient countries, in particular through the implementation of procurement reforms. The subsections below do not intend to provide exhaustive information on them but rather demonstrate major developments.

1. Developing diagnostics

50. The Paris Declaration on Aid Effectiveness of 2 March 2005³⁵ calls for the gradual alignment of donors' procurement rules, guidelines and practices with those existing in the recipient countries, provided that the latter comply with the internationally accepted standards.³⁶ To assess the compliance of the recipient countries' procurement systems with such standards and to monitor progress over time in improving country procurement systems, a number of donors and recipient countries, pursuant to their commitment under the Paris Declaration, are involved in the development of harmonised diagnostics and performance assessment frameworks.³⁷

51. Within the auspices of the Working Party on Aid Effectiveness of OECD Development Assistance Committee (DAC), a Joint Venture on Procurement has been set up to oversee the implementation of the Paris Declaration as it relates to procurement and instigate activities to ensure progress towards the procurement-related targets. To this end, the Joint Venture builds its activities on the work undertaken by the World Bank-OECD/DAC Roundtable on Strengthening Procurement Capacities in Developing Countries (2003-2004), which inter alia resulted in development, endorsement of and commitment to implement an integrated set of Good Practice Papers on benchmarking, monitoring and evaluation, capacity development and mainstreaming procurement.³⁸

52. The first meeting of the Joint Venture, attended by States, MDBs, UNDP/IAPSO, UNDG and other international and regional organizations and some national institutions, was held from 8 to 10 February 2006. The meeting accepted the Joint Venture's work plan for 2006-2008,³⁹ which envisages, among other things, development of a benchmarking tool and methodology for establishing baselines and measuring progress against the Paris

(A/CN.9/568), para. 11.

³⁵ See <http://www.aidharmonization.org/>.

³⁶ See the procurement related indicators of the Paris Declaration: 2b – the establishment of reliable country procurement systems, and 5b—the use by donors of these country systems.

³⁷ Recipient countries and donors have jointly committed to use mutually agreed standards and processes to carry out diagnostics of the state of country procurement systems in recipient countries and identification of measures for effective performance of public procurement systems, develop sustainable reforms and monitor implementation.

³⁸ See DAC Guidelines and Reference Series—Harmonizing Donor Practices for Effective Aid delivery, Volume 3, “Strengthening Procurement Capacities in Developing Countries,” OECD/DAC Roundtable on Procurement. Available at <http://www.oecd.org/dataoecd/12/14/34336126.pdf>.

³⁹ The revised version of the work plan as of 26 January 2006 is available at <http://www.oecd.org/dataoecd/15/6/36233324.pdf>.

indicators/targets related to procurement. The meeting also considered a draft guide for assessment of procurement systems intended to be used as such a tool, to improve the consistency of assessments of national procurement systems and to facilitate measurements of compliance with benchmarks. The draft guide is based on the baseline indicators and sub-indicators proposed by the World Bank-OECD/DAC Roundtable (the “BLIs”) (see the preceding paragraph). In the draft guide, further guidance is provided on BLIs and some BLIs are being refined to minimize risk of duplication and ambiguity and to fill in existing gaps.⁴⁰

53. The next meeting of the Joint Venture, expected to be held in December 2006, should look at the revised version of the tool. The outstanding issues include formulation of clear definitions of “international standards”, “recognized standards”, and “internationally accepted good practices”, and further refinement of the BLIs. Also, the establishment of associated performance indicators is proposed, as the BLIs per se are not indicative of the quality of any procurement system.

54. It has been recognized in the Joint Venture that a wider consultation with procurement stakeholders and countries are needed to ensure that the tool is accepted. In this regard, the Commission may wish to note the relevance of the work being done in the Joint Venture to the work of the Working Group, especially as regards international standards and good practices in the area of public procurement. The Commission may wish to express hope that in the course of the Joint Venture’s work, including in any efforts to formulate definitions of “international standards”, “recognized standards”, and “internationally accepted good practices” in the area of public procurement, due account would be taken of the UNCITRAL Mode Law and the current work in the Working Group. In addition, the Commission may wish to note the relevance of the work being done in the Joint Venture also to the work of the technical assistance and coordination unit of the UNCITRAL secretariat that is involved in providing technical assistance to national bodies with the formulation and implementation of legal reforms in the field of international trade law, including in the area of public procurement. The Commission may therefore wish to call for closer coordination and cooperation between the Joint Venture and the UNCITRAL secretariat, and to that end suggest that the involvement of the UNCITRAL secretariat in the work of the Joint Venture would be highly desirable.

⁴⁰ In the draft guide, the BLIs are grouped into the following pillars: legal and regulatory framework, institutional framework and management capacity, procurement operations and market practices, and integrity and transparency of the public procurement system. As regards each sub-indicator, the key aspect or a standard to be met is highlighted and a set of four scenarios describing four degrees of compliance with the standard is set. Associated with each scenario is a score from 3 to 0. By using an appropriate scoring system to aggregate scores for sub-indicators a score for the indicator is achieved. Under S1 scoring system, applied to interdependent sub-indicators, a failure to meet one sub-indicator results in failure of the entire indicator and score for the entire indicator is the lowest of the sub-indicators. Under S2 scoring system, applied when sub-indicators are independent from each other, scores are averaged and rounded to the next whole number. The two annexes to the draft guide provide for good practice provisions for national competitive bidding (Annex 1) and suggested minimum content of the bidding documents (Annex 2).

2. Other harmonization efforts

55. Pursuant to the 2003 Rome Declaration on Harmonization⁴¹ and the Paris Declaration, a number of multilateral donors have also been engaged in the efforts to harmonize their policies, procedures and guidance tools used in the context of aid delivery.⁴² Such efforts have been undertaken, for instance, in UNCTAD, in particular through its joint centre with WTO (ITC) and UNDG,⁴³ as well as by MDBs.⁴⁴

56. Apart from what has been described elsewhere in this note (see in particular section A.2), the MDBs' joint procurement policies harmonization efforts include regular meetings of the Heads of Procurement for the MDBs.⁴⁵ The harmonization of tender documents, guidelines and what is mutually considered to be best practice is one of the key activities undertaken by this group. The most recently prepared set of standard procurement documents and user's guide, dated May 2005, contain standard bidding documents and user's guide for procurement of works.⁴⁶

3. Relevance to the work of the Working Group

57. The international procurement benchmarks and standards proposed by the World Bank-OECD/DAC Roundtable have been brought to the attention of the Working Group when and as they are relevant to its work, and the UNCITRAL secretariat intends to continue doing so taking into account modifications proposed to these benchmarks and standards within the framework of the Joint Venture (see paras. 50 to 54 above).

58. In addition, at its sessions, the Working Group is regularly informed by representatives of development institutions of local procurement practices and issues arising on the ground in the application of procurement rules and procedures, including the Model Law, in the context of aid delivery. Mainly through the initiative of such development institutions, the subject of participation of local communities in public procurement has been included on the agenda of the Working Group. During its consideration of e-GP issues, the Working Group has also benefited from the contributions made by development institutions on the issues of access to procurement by SMEs and on cross-border procurement issues, which allowed the Working Group to address these issues in proposed revisions to the Model Law and the Guide.

⁴¹ Available at <http://www1.worldbank.org/harmonization/romehlf/Documents/RomeDeclaration.pdf>.

⁴² Under the Paris Declaration, donors have committed to progressively rely on partner country systems for procurement when the country has implemented mutually agreed standards and processes, and to adopt harmonised approaches when national systems do not meet mutually agreed levels of performance or donors do not use them.

⁴³ See, for example, the joint manual of IMF, ITC, UNCTAD, UNDP, the World Bank and the WTO, entitled "Integrated framework (IF) for trade-related technical assistance for least developed countries," document UNCTAD/LDC/2005/2, of 1 July 2005.

⁴⁴ See, for example, para. 23 above on the revision of the AfDB procurement rules.

⁴⁵ The most recent annual meeting was held from 13 to 16 February 2006 in Manila, the Philippines.

⁴⁶ The earlier sets, dated May 2004, contained standard: requests for proposals (selection of consultants) (including forms and sample contracts); prequalification documents and user's guide for procurement of civil works; bidding documents for procurement of goods (as revised in May 2005); and bidding documents for procurement of works (smaller contracts). All available at the World Bank website.

59. The Commission may wish to express its appreciation to all institutions that have supported the work of the Working Group and emphasise the importance of continued and enhanced support for the work of the Working Group by a wide range of international, regional and sub-regional development institutions with expertise in the implementation of procurement reforms on the ground. The Commission may wish to invite all international organizations concerned to actively use the Working Group's forum for addressing difficulties encountered on the ground with the implementation of existing procurement standards and to bring to the attention of the Working Group emerging issues in the procurement field. Apart from the benefits of the shared practical knowledge and expertise, this will also contribute to harmonization of legal norms in the procurement field by disseminating information on the Model Law and the current work of the Working Group on its revision to a broader audience.

(A/CN.9/598/Add.2)

**Current activities of international organizations related to the
harmonization and unification of law relating to Security Interests**

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I. Introduction

1. At its thirty-third session in 2000, its thirty-seventh session in 2004 and thirty-eighth session in 2005, the Commission considered coordination of international organizations in the area of security interests on the basis of notes prepared by the Secretariat (A/CN.9/475, A/CN.9/565 and A/CN.9/584 respectively). This note updates the information included in these notes. It focuses on activities of international organizations primarily undertaken since 2000 to develop harmonized and unified international trade law instruments in the area of secured credit law and is based upon publicly available material and, to the extent possible, consultations undertaken with the listed organizations.

2. The work of the following organizations is described in this report:

(a) United Nations bodies and specialized agencies:

WIPO	World Intellectual Property Organization
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(b) Other intergovernmental organizations:

EBRD	European Bank for Reconstruction and Development
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European Commission	Commission of the European Union
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Hague Conference	Hague Conference on Private International Law
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OAS	Organization of American States
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Unidroit	International Institute for the Unification of Private Law
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World Bank	International Bank for Reconstruction and Development
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II. Harmonization and unification of law relating to security interests

A. UNCITRAL¹

3. Recognizing the importance of access to affordable credit to economic growth and international trade, the Commission at its thirty-fourth session in 2001 established a Working Group on security interests to develop a flexible and effective legal framework for secured credit.² At its thirty-fifth session in 2002, the Commission confirmed the mandate given to Working Group VI (Security Interests) and affirmed that the mandate should be interpreted widely to ensure an appropriately flexible work product, in the form of a legislative guide.³ The Working Group, in the context of the mandate given by the Commission, decided to extend the scope of the draft legislative guide (“the draft Guide”)

¹ <http://www.uncitral.org>.

² Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 459.

³ Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 204.

to receivables, proceeds of letters of credit, bank accounts, negotiable documents, negotiable instruments and intellectual property rights.⁴

4. So far, the Working Group has held nine sessions and developed chapters on key objectives, scope, approaches to security, creation, third-party effectiveness, priority, enforcement, insolvency, acquisition financing, conflict of laws and transition.⁵ In addition, the Working Group has held two joint sessions with the UNCITRAL Working Group on Insolvency (which was developing and has now completed the Legislative Guide on Insolvency Law) to discuss the insolvency chapter of the draft Guide.⁶

5. The Working Group has also worked closely with the Hague Conference in the formulation of the chapter on conflict of laws of the draft Guide. In addition, the Working Group has coordinated with Unidroit, which is preparing a text on intermediated securities (see paras. 6-16), and with the World Bank, which has finalized a set of principles for effective insolvency and creditor rights systems.

B. Unidroit⁷

1. Draft convention on substantive rules regarding intermediated securities

6. Unidroit is currently preparing a draft convention on substantive rules regarding intermediated securities ("the draft Convention"). The first and second meetings of the committee of governmental experts were held in Rome from 9 to 20 May 2005 and from 6 to 14 March 2006, respectively. A third meeting is scheduled for November 2006.

7. At the second meeting of governmental experts, it was agreed that the two secretariats will cooperate and report to their respective bodies on issues of common interest and in particular on the treatment of proceeds of intermediated securities that take the form of assets within the scope of the draft Guide or of proceeds of assets within the scope of the draft Guide that take the form of intermediated securities.

8. The Commission may wish to note that securities (in general, not only intermediated securities that are the subject of the draft Convention) are excluded from the scope of the draft Guide as original encumbered assets.⁸ However, securities may be affected by the recommendations of the draft Guide in two instances.

9. First, if a security right in securities secures a receivable, negotiable instrument or other obligation and the receivable is assigned or a security right is created in the negotiable instrument or other obligation, a security right is automatically created in the securities and becomes automatically effective against third parties. This rule does not affect any third-party rights, priority or enforcement requirements existing under securities law.⁹ For example, under the draft Convention a security right in intermediated securities

⁴ Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 222.

⁵ See <http://www.uncitral.org> for reports of the Working Groups (A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543, A/CN.9/549, A/CN.9/570, A/CN.9/574, A/CN.9/588 and A/CN.9/593).

⁶ Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 217. See http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html for reports A/CN.9/535 and A/CN.9/550 on joint sessions of the Working Groups on security interests and insolvency law.

⁷ <http://www.unidroit.org>.

⁸ See A/CN.9/WG.VI/WP.26/Add.7, rec. 4 (a) and (b).

⁹ See A/CN.9/WG.VI/WP.26, rec. 16.

that was made effective against third parties by a book entry or control under securities law will have priority over a competing right that was made effective under other law.¹⁰

10. In addition, securities may be affected by the recommendations of the draft Guide if they constitute proceeds of an asset covered in the draft Guide (e.g. inventory or funds in a bank account). The security right in the original encumbered assets continues in the proceeds.¹¹ A separate act is not necessary for the security right in the proceeds to be effective against third parties.¹²

11. In order to better reflect the fact that securities and other assets outside the scope of the draft Guide may be affected by the draft Guide, the Secretariat suggested that the Working Group may wish to consider whether a qualified exclusion leaving securities outside the scope of the draft Guide only to the extent there is special legislation would be more appropriate than an outright exclusion which would leave securities out of the scope of the draft Guide even if there is no such special legislation, thus leaving a gap in the law.¹³

12. If the Working Group were to adopt this approach, methods of achieving third-party effectiveness (e.g. a book entry or a control agreement) other than registration would need to be preserved and a new recommendation may need to be added to preserve the priority of rights made effective against third parties through one of these special methods.

13. Such an approach would be consistent with the approach followed in the draft Guide with respect to attachments to immovable property or movable property subject to a specialized registration or title certificate system. Under this approach, a security right in attachments to immovable property is subordinate to a security right in the relevant immovable property or in the relevant movable property subject to a specialized registration or title certificate system, unless it is registered first in the immovable registry or in the specialized registry or is noted on the relevant title certificate, as applicable.¹⁴

14. In addition, this approach would be consistent with the draft Convention, under article 6 (1) of which a security right in securities (as original encumbered assets or as proceeds) that was made effective against third parties under the draft Convention has priority over a security right that was made effective against third parties under law outside the draft Convention (e.g. a law based on the recommendations of the draft Guide). The rationale underlying this approach is that the book entry or control related system established by the draft Convention could not be relied upon if a security right in intermediated securities created and perfected under other law had priority over a security right made effective against third parties under the draft Convention.

15. Moreover, this approach would avoid excluding from the scope of the draft Guide directly held securities to the extent they are not subject to any special legislation (even the Unidroit draft Convention does not apply to directly-held securities). Thus, no gap would be left with respect to, for example, security rights in shares of a subsidiary all held by the parent company, since such security rights are involved in many commercial loan transactions.

¹⁰ This is the result under art. 5 (3) and 10 (1) of the draft Convention. See Study LXXVIII-Doc. 42, March 2006.

¹¹ See A/CN.9/WG.VI/WP.26/Add.4, recs. 29 and 30.

¹² See A/CN.9/WG.VI/WP.26/Add.4, recs. 41 and 41 bis.

¹³ See A/CN.9/WG.VI/WP.26/Add.7, note to rec. 3 (g).

¹⁴ See A/CN.9/WG.VI/WP.26/Add.4, recs. 46, 46 bis, 82, 83, 84 and 84 bis.

16. A different issue is what law applies to proceeds of securities that are within the scope of the draft Guide (e.g. securities are sold and the proceeds are deposited in a bank account). It seems that, if proceeds of bank accounts in the form of securities should be subject to the law governing securities, proceeds of securities in the form of funds in a bank account should be subject to the law governing security rights in funds credited to bank accounts, at least with respect to third-party effectiveness, priority and enforcement of a security right. This approach seems to be consistent with the approach followed in the draft Convention, since, if a secured creditor has obtained a control agreement, the account holder cannot dispose of or encumber the securities without the consent of the secured creditor. If the secured creditor does not obtain a control agreement or has authorized further dispositions or encumbrances by the account holder, the secured creditor cannot claim priority over another secured creditor with a security right in proceeds from the disposition of the securities credited to a bank account. As this is the result of consultations with experts familiar with the draft Convention, it may need to be further examined and confirmed.

17. The Commission may wish to note this matter and request the Working Group to submit its proposals with the rest of the draft Guide, which is expected to be adopted by the Commission at its fortieth session in 2007.

2. Principles and rules on trading in securities in emerging markets

18. Unidroit is preparing an instrument on principles and rules capable of enhancing trading in securities on emerging markets. Work is envisaged to start in decentralized, regional working groups in 2006.

3. Draft model law on leasing

19. Unidroit is undertaking the drafting of a model law on leasing (“the draft Model Law”) in cooperation with the International Finance Corporation, aimed in particular at assisting developing countries and economies in transition. A special advisory board has already held three sessions in Rome (its first from 17 to 18 October 2006, its second from 6 to 7 February 2006 and its third from 3 to 5 April 2006). At its third session, the advisory board considered the second preliminary draft of the Model Law,¹⁵ as well as comments and suggestions by the UNCITRAL secretariat to avoid overlap and conflicts between the draft Model Law and the draft Guide.¹⁶

20. The overlap and conflicts between the draft Model Law and the draft Guide are the result of the fact that both texts cover leases that serve security purposes (i.e. financial leases) treating them differently.¹⁷ For example, as a result of articles 1 and 3 of the draft Model Law, in effect registration is referred to the law of the State where the encumbered/leased asset is located, the law of the State where the grantor/lessee has the centre of its main interests, or the law of the State whose law governs the security/lease agreement. Such a result would be inconsistent with recommendation 136 of the draft Guide,¹⁸ according to which the law applicable to the creation, third-party effectiveness (including registration) and priority of a security right (including the right of a financial lessor) in movable property would be the law of the State where the encumbered/leased

¹⁵ See Unidroit 2006, Study LIXA-Doc. 6, March 2006.

¹⁶ See Unidroit 2006, Study LIXA-Doc.7, March 2006.

¹⁷ See Unidroit 2006, Study LIXA-Doc.8, art.1, as well as A/CN.9/WG.VI/WP.26/Add.7, rec. 3 (c) and (e), as well as definition of “acquisition security right” in A/CN.9/WG.VI/WP.24/Add.5.

¹⁸ See A/CN.9/WG.VI/WP.24.

asset is located (exceptions apply to leases in mobile equipment and to leases in movable property that is subject to title registration¹⁹).

21. At the third session of the advisory board in April 2006, it was indicated that implementation notes might be the way to address the conflict of the draft Model Law with current secured transactions laws that treat financial leases as secured transactions, as well as with the law of countries that will adopt the recommendations of the draft Guide in the future.²⁰ It is doubtful that this would be sufficient. More importantly, this approach would not address the concern that a special law that covers financial leases, i.e. a transaction that performs security functions, could detract from the approach recommended in the draft Guide that countries should adopt a law that systematically and comprehensively covers all transactions that perform security functions.

22. The draft Model Law is expected to be submitted to the Governing Council at its meeting to be held in Rome from 8 to 11 May 2006 for consideration of the most appropriate follow-up action. The Secretariat of Unidroit is expected to recommend that the draft Model Law be submitted to Governments for finalization at a special conference in October 2006 and then at an extraordinary session of the Unidroit General Assembly to be held in Rome from 27 to 29 November 2006.²¹

23. The Commission may wish to consider this matter and recommend that the draft Model Law exclude financial leases, or, if financial leases were to be included, the Model Law (i) be limited to contractual issues or (ii) defer to secured transactions law or (iii) be coordinated with the recommendations of the draft Guide.

4. Protocols to the Cape Town Convention

24. Unidroit, jointly with the Intergovernmental Organization for International Carriage by Rail (OTIF),²² is finalizing the second Protocol to the Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001),²³ that deals with matters specific to railway rolling stock (the draft Rail Protocol). The Rail Registry Task Force established to prepare an international registry system and related aspects submitted the draft Rail Protocol to the Unidroit Governing Council in April 2005. The Protocol is to be submitted for adoption by a diplomatic conference in the near future.

25. A third protocol to the Cape Town Convention dealing with matters specific to space assets (a preliminary draft Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters specific to Space Assets) is being drafted. The third session of the committee of governmental experts is scheduled to be held in Rome in September/October 2006. Additional protocols that may cover agricultural and construction equipment are also under consideration.

¹⁹ See A/CN.9/WG.VI/WP.24. For more examples of conflicts between the two texts, see Unidroit 2006, Study LIXA-Doc.7, March 2006, Comments by the UNCITRAL secretariat.

²⁰ See, for example, Unidroit 2006, Study LIXA-Doc.9, comment 3 on article 2, comment C on article 3, comment B on article 7.

²¹ See Unidroit 2006, Study LIXA-Doc.9, future work.

²² <http://www.otif.org>.

²³ The Convention entered into force on 1 April 2004. UNIDROIT performs depositary functions under the Cape Town Convention and its Protocol on Matters Specific to Aircraft Equipment Instruments (Cape Town, 16 November 2001) (the "Aircraft Protocol"). In such capacity, it oversees the development of an International Registry for aircraft objects as provided by the Aircraft Protocol.

C. Hague Conference²⁴

26. A commercial edition of the Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Hague Securities Convention) was published in 2005. The Report provides the most authoritative and comprehensive explanations of the Convention and is available on the website of the Hague Conference.²⁵ The Hague Conference continues to work closely with UNCITRAL on the conflict-of-laws chapter of the draft Guide.

D. EBRD²⁶

27. In 2004, in the context of its work on the modernization of secured transactions legislation, the EBRD published the EBRD Guiding Principles for the Development of a Charges Registry.²⁷

E. European Commission²⁸

1. The financial collateral, the late payment and the settlement finality directives

28. The European Commission issued a Financial Collateral Arrangements Directive on 6 June 2002 to improve the legal certainty of financial collateral arrangements,²⁹ a Directive on Combating Late Payment in Commercial Transactions on 29 June 2000,³⁰ and a Settlement Finality Directive in May 1998.³¹ The Secretariat received informal comments and suggestions from the European Central Bank on the relationship between the draft Guide's recommendations on bank accounts and these directives. The conclusion seems to be that there is no conflict between the recommendations in the draft Guide and these directives.³²

2. The proposal for a regulation on the law applicable to contractual obligations (Rome I)

29. At its thirty-seventh session in 2004, the Commission noted efforts in the European Commission towards development of a new community instrument in which the issue of the law applicable to third party effects of assignments, which had been settled in article 22 of the United Nations Convention on the Assignment of Receivables in International Trade (the "United Nations Assignment Convention") by reference to the law of the State in which the assignor was located, would be addressed.

²⁴ See <http://www.hcch.net>.

²⁵ <http://www.hcch.net>.

²⁶ <http://www.ebrd.com>.

²⁷ <http://www.ebrd.com/country/sector/law/st/new/develop/index.htm>.

²⁸ <http://europa.eu.int>.

²⁹ <http://europa.eu.int/scadplus/leg/en/lvb/l24401.htm>.

³⁰ http://europa.eu.int/comm/enterprise/regulation/late_payments/index.htm.

³¹ http://europa.eu.int/comm/internal_market/financial-markets/settlement/index_en.htm. The Settlement Finality Directive was adopted in May 1998.

³² http://europa.eu.int/comm/internal_market/financial-markets/settlement/index_en.htm. The Settlement Finality Directive was adopted in May 1998.

30. At that session, it was widely felt that the rule in article 22 of the United Nations Assignment Convention provided certainty for third parties and thus would most likely increase the availability and reduce the cost of credit and that adoption of a different rule by the European Union would not only have a negative impact on the availability and the cost of credit but would also produce disharmony in trade relationships involving European Union parties and non-European Union parties, where a priority dispute was brought before a court in a non-European Union country.

31. At the same session, a number of States, including Member States of the European Union, indicated that they were considering ratifying or acceding to the United Nations Assignment Convention and that, as a result, had a great interest in seeing the European Union adopt an approach to the issue of the law applicable to third party effects of assignments that would be consistent with the approach followed in article 22 of the United Nations Assignment Convention. In the discussion, strong support was expressed for holding a coordination meeting that would involve representatives of the European Commission, UNCITRAL and relevant industry to resolve the matter as soon as possible so as to remove any obstacle to wide adoption of the United Nations Assignment Convention.

32. After discussion, the Commission recommended that every effort be made to avoid that a future European Union instrument taking a different approach than article 22 of the United Nations Assignment Convention and requested the Secretariat to organize a meeting with representatives of the European Commission, Member States and industry with a view to resolving that matter as soon as possible.³³

33. The Secretariat held informal consultations with the Justice and Home Affairs Directorate of the European Commission responsible for Rome I with a view to: (i) ensuring that the new European Union instrument will be consistent with the United Nations Assignment Convention; and (ii) facilitating adoption of the United Nations Assignment Convention by European Union Member States. The Secretariat also informed the European Commission about UNCITRAL's request to hold a coordination meeting. However the meeting has not taken place so far.

34. On 15 December 2005, the European Commission published its proposal (COM (2005) 650 final, 2005/0261) for a regulation of the EU Parliament and the Council on the law applicable to contractual obligations (Rome I). Article 13 (3) adopts the law of the assignor's habitual residence for third-party effects of assignment. According to the comment to article 13 (3), the approach adopted is the approach of the United Nations Assignment Convention. Article 18, however, defines habitual residence by reference to the principal place of business (the term "establishment" is used) and, if there is a branch office, the location of the branch office. There is no comment to article 18 pointing out the difference with the location rule in the United Nations Assignment Convention (referring to the place of the assignor's central administration), as a result of which the law applicable under the proposed regulation article 13 (3) may be different from the law applicable under article 22 of the United Nations Assignment Convention.

35. The Commission may wish to consider the matter and recommend that increased efforts be made through informal or formal consultations and meetings to ensure consistency between the proposed regulation and the Assignment Convention and, in any case, to facilitate adoption of the United Nations Assignment Convention by European Union Member States.

³³ See Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17), paras. 104-107.

F. OAS³⁴

36. The OAS, through its sixth Inter-American Specialized Conference on Private International Law (CIDIP VI), held in 2002, adopted the Model Inter-American Law on Secured Transactions. The thirty-fifth regular session of the OAS General Assembly held in June 2005 approved the agenda items for CIDIP VII, which includes further work on the development of uniform Inter-American registration forms as well as regulatory guidelines for secured transactions registries, and the electronic operation thereof, for implementation in conjunction with the Model Law.³⁵

37. This work will be conducted by governmental experts on an internet-based forum. The group of experts has the mandate to negotiate and draft three Inter-American instruments on electronic registries: (i) Uniform Registration Forms; (ii) Guide for Personal Property Collateral Registries; and (iii) Guide for Electronic Registries. Preparatory work will commence in June 2006 with a discussion of five Uniform Registration Forms. Although most features of the forum are public, the ability to add comments and remit documents is reserved to designated experts, including designated members of the UNCITRAL secretariat.³⁶

38. The Commission may wish to take note of this work and request the secretariat to follow this OAS project and report to the Commission in due course.

G. WIPO³⁷

39. WIPO is providing a forum for ad hoc discussions by intellectual property experts on the issue of intellectual property financing secured transactions and intellectual property rights. These discussions include an examination of the effect of the recommendations in the draft Guide on intellectual property rights.

40. The draft Guide recognizes the importance of intellectual property rights as a source of credit, either as original collateral or as incidental collateral (i.e. where the collateral is equipment including intellectual property rights). In the latter case, the collateral would be useless if the security right did not include a licence to use or sell the equipment (which would be the case if the collateral were, for example, computers incorporating software subject to copyright).

41. Accordingly, the draft Guide provides that its recommendations apply to security rights in intellectual property rights to the extent that the recommendations are not inconsistent with existing laws or international obligations of the enacting State relating to these assets. The draft Guide also calls the attention of enacting States to the need for them to consider whether it might be appropriate to adjust certain of the recommendations as they apply to security rights in intellectual property. The Working Group considered that the draft Guide could not specifically address those adjustments since to do so would require substantial work that would go beyond the time available to the Working Group for the completion of its work (early in 2007 for submission to the 2007 Commission session).

42. For that reason, the WIPO and UNCITRAL secretariats have conducted consultations with a view to undertaking further collaborative work in the area of

³⁴ <http://www.oas.org>.

³⁵ <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/dil/>.

³⁶ http://www.oas.org/dil/esp/derecho_internacional_privado_foro_garantias_mobiliarias.asp.

³⁷ <http://www.wipo.int>.

intellectual property in the context of the draft Guide. A joint meeting of experts in secured transactions and intellectual property is scheduled for September 2006. The purpose of this meeting is to formulate proposals to the Commission for an additional chapter or appendix to the draft Guide that would deal with security rights in intellectual property rights.

43. The Commission may wish to take note of this preparatory work and request the secretariat to submit a note on the matter for consideration at the fortieth session of the Commission in 2007.

H. World Bank³⁸

44. The Investment Climate Department of the World Bank informed the secretariat of its plan to prepare, with the assistance of outside consultants, a manual for reforming collateral systems in the area of secured finance, which is aimed at assisting task managers who are working with countries to support the reform of the legal and institutional frameworks for secured lending.

45. The Commission may wish to request the secretariat to monitor developments in this regard with a view to avoiding overlap and conflict between this text and the draft Guide.

³⁸ <http://www.worldbank.org>.

Part Three

ANNEXES

I. REVISED ARTICLES OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

[Issued as a United Nations publication, Sales No. E.08.V.4]

II. RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,¹ has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,² as subsequently revised, particularly

¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

² *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

with respect to article 7,³ the UNCITRAL Model Law on Electronic Commerce,⁴ the UNCITRAL Model Law on Electronic Signatures⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts,⁶

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

³ Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

⁴ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

⁵ Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

⁶ General Assembly resolution 60/21, annex.

III. EXPLANATORY NOTES ON THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

[Issued as a United Nations publication, Sales No. E.07.V.2]

**IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO
THE WORK OF UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW:^{*}
NOTE BY THE SECRETARIAT
(A/CN.9/602) [Original: English]**

I.	General
II.	International sale of good
III.	International commercial arbitration and conciliation
IV.	International transport
V.	International payments.
VI.	Electronic commerce
VII.	Independent guarantees and stand-by letters of credit
VIII.	Procurement
IX.	Insolvency
X.	Receivables financing
XI.	International construction contracts
XII.	International countertrade
XIII.	Privately financed infrastructure projects
XIV.	Security interests
Annex.	UNCITRAL legal texts

^{*} Case-law on United Nations Commission on International Trade Law (UNCITRAL) texts (CLOUT) and bibliographical references thereto are contained in the document series A/CN.9/SER.C/-.

I. General

- Barres Benlloch, P. Nota informativa sobre la 37ª sesión del plenario de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional. *Revista de derecho bancario y bursátil* (Valladolid) 24:97:214-224, 2005.
- Béguin, J. and M. Menjucq, eds. *Droit du commerce international*. Paris, Lexis Nexis—Litec, 2005. xxii, 1119 p.
- Спецвыпуск международная научно-практическая конференция на тему: “право международной торговли”. *Вестник высшего хозяйственного суда Республики Беларусь* (Минск) 24:2005. Available online at: <http://www.court.by/about/conference/2005-10-13/>
- Espugues Mota, C. and D. Hargain, eds. *Derecho del comercio internacional. MERCOSUR—Unión Europea. Montevideo—Buenos Aires—Madrid*, Editorial B de F—Editorial REUS, 2005. xxiv, 774 p.
- Folsom, R. H., M. W. Gordon, and J. Spanogle. *International business transactions*. 7 ed. St. Paul (Minnesota), Thomson West, 2004. xvii, 346 p.
- Goode, R. Rule, practice and pragmatism in transnational commercial law. *International and comparative law quarterly* (London) 54:3:539-562, 2005.
- Lannan, K. UNCITRAL: colloquium on international commercial fraud and ongoing work. / Colloque de la CNUDCI sur la fraude commerciale internationale et travaux en cours. *Uniform law review / Revue de droit uniforme* (Rome) 10:4:838-857, 2005. In English and French.
- La necesaria uniformidad interpretativa y <<http://www.uc3m.es/cisg>>. *Derecho de los negocios* (Madrid) 16:182:1-5, 2005.
- Masahatu, O. UNCITRAL-SIAC kyōsai kokusai shōji chūsai ni kansuru moderuhō 20 shunen oyobi kokusai dōsanbutsuhin baibai ni kansuru kokurenjōyaku 25 shunen kinen kokusai kaigi. *JCA Journal* (Tokyo) 52:12:48-51, December 2005. In Japanese.
Title in English: Joint UNCITRAL-SIAC international conference celebrating 20 years of the Model Law on International Commercial Arbitration and 25 years of the Convention on Contracts for the International Sales of Goods.
- Sarkar, R. *Transnational business law*. The Hague, Kluwer law international, 2003. xlviii, 419 p.
- Smit, H. The universalization of private law. In *De tous horizons. Mélanges Xavier Blanc-Jouvan*. Paris, Société de législation comparée, 2005. p. 335-353.

II. International sale of goods

- Aschauer, C. La prescription des sentences arbitrales. *ASA bulletin* (The Hague) 23:4:593-609, 2005.
- Azeredo da Silveira, M. Anticipatory breach under the United Nations Convention on Contracts for the International Sale of Goods. *Nordic journal of commercial law* (Turku) 2:2005. Available online at: http://www.njcl.fi/2_2005/article1.pdf

- Baasch Andersen, C. The uniform international sales law and the global jurisconsultorium. *The journal of law and commerce* (Pittsburgh, Pennsylvania) 24:2:159-179, 2005.
- Бахин, С. Принцип добросовестности в международных контрактных отношениях. In *Russland im Kontext der internationalen Entwicklung: internationales Privatrecht, Kulturgüterschutz, geistiges Eigentum, Rechtsvereinheitlichung / Russia in the international context: private international law, cultural heritage, intellectual property, harmonization of laws / Россия в контексте международного развития: международное частное право, защита культурных ценностей, интеллектуальная собственность, унификация права*. Festschrift für Mark Moiseevic Boguslavskij. A. Trunk, R. Knieper, A.G. Svetlanov, eds., Berlin, Berliner Wissenschafts-Verlag, 2004. p. 725-737. With summary in English.
- Bevilacqua, T. L'article 3 de la Convention de Vienne et les contrats complexes dans le domaine de l'informatique: une lecture de la jurisprudence pertinente. *McGill law journal* (Montreal, Quebec) 50:553-593, 2005.
- Campanale, S. Diritto del commercio internazionale e normativa comunitaria. Milano, Giuffrè editore, 2005. 127 p.
In Italian. Title in English: International trade law and European Community rules.
See, in particular, chapter 5 on the CISG.
- CISG Advisory Council. CISG Advisory Council opinion no. 3, Parol evidence rule, plain meaning rule, contractual merger clause and the CISG, 23 October 2004. *Internationales Handelsrecht* (Munich) 5:2:81-86, 2005.
- CISG Advisory Council. CISG Advisory Council opinion no. 4, Contracts for the sale of goods to be manufactured or produced and mixed contracts (article 3 CISG) 24 October 2004. *Internationales Handelsrecht* (Munich) 5:3:124-132, 2005.
- CISG Advisory Council. CISG Advisory Council opinion no. 5, The buyer's right to avoid the contract in case of nonconforming goods or documents. *Internationales Handelsrecht* (Munich) 6:1:35-48, 2006.
With case overview in annex.
Also appeared in *Nordic journal of commercial law* (Turku) 2:2005. Available online at: http://www.njcl.fi/2_2005/commentary2.pdf
- Cohen, K. S. Achieving a uniform law governing international sales: conforming the damage provisions of the United Nations Convention on Contracts for the International Sale of Goods and the uniform commercial code. *University of Pennsylvania journal of international economic law* (Philadelphia, Pennsylvania) 26:3:601-622, 2005.
- Comité consultatif de la CVIM. Avis n° 1 et n° 2 du Comité consultatif de la Convention de Vienne sur les contrats de vente internationale de marchandises. *Journal du droit international* (Paris) 133:1:428-439, 2006.
For bibliographic reference to English version please see: A/CN.9/581.
- Eiselen, S. Unresolved damages issues of the CISG: a comparative analysis. *Comparative and international law journal of Southern Africa* (Pretoria) 38:1:32-46, 2005.
- Ferrari, F. The CISG's uniform interpretation by courts—an update. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:233-252, 2005.
- _____. La Convention de Vienne sur la vente internationale et le droit international privé. *Journal du droit international* (Paris) 133:1:27-61, 2006.

- _____. Fundamental breach of contract under the UN sales convention—25 years article 25 CISG. *Revue de droit des affaires internationales / International business law journal* (Paris) 3:389-400, 2005.
- _____. The formal validity of contracts for international sale of goods governed by the CISG—an overview of the case law. *Revue de droit des affaires internationales / International business law journal* (Paris) 1:85-90, 2004.
- _____, ed. Quo vadis CISG? Celebrating the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Bruxelles—Munich—Paris, Bruylant—Sellier European law publishers—FEC, 2005. 323 p.
- _____. What sources of law for contracts for the international sale of goods? *Internationales Handelsrecht* (Munich) 6:1:1-20, 2006.
- Fountoulakis, C. Zurückbehaltungsrecht bei nicht ausgestellter Quittung im UN-Kaufrecht. *Internationales Handelsrecht* (Munich) 5:6:244-249, 2005.
In German.
Title in English: The right to retain the goods in case of non-issuance of receipt under the CISG.
- Freiburg, N. Die Rügeobliegenheit des Käufers bei grenzüberschreitendem Warenverkehr. *Internationales Handelsrecht* (Munich) 5:2:56-64, 2005.
In German.
Title in English: On the requirements of the notice of non-conformity in international sales transactions.
- Gabriel, H. D. Contracts for the sale of goods: a comparison of domestic and international law. Dobbs Ferry (New York), Oceana publications, 2004. v, 375 p.
- _____. The CISG: raising the fear of nothing. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:219-221, 2005.
- Grosshans, A. Reflections on the scope of the 1980 U.N. Convention on Contracts for the International Sale of Goods. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:223-231, 2005.
- Henschel, R. F. The conformity of goods in international sales. Copenhagen, Forlaget Thomson, 2005. 328 p.
- Huber, A. and L. Nicolas-Vullierme. L'accord des volontés dans le contrat de vente international : CVIM, codes civils français et allemand et code de commerce des Etats-Unis. *Revue de droit des affaires internationales / International business law journal* (Paris) 6:816-825, 2005.
- Huber, P. The availability of termination as a remedy for defective delivery. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:303-311, 2005.
- Hulmák, M. Kontraktační proces podle Vídeňské úmluvy o mezinárodní koupi zboží ve srovnáním s úpravou České republiky. *Právník* (Prague) 144:11:1219-1236, 2005.
In Czech, with a summary in English.
Title in English: Contract formation under civil and commercial codes of the Czech Republic and the Vienna Convention on International Sale of Goods.

- Jacobs, M. S. and Y. Huang. An arbitrator's powers and duties under art. 114 of Chinese Contract Law in awarding damages in China in respect of a dispute under a contract governed by CISG. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:5:39-43, 2005.
- _____. and _____. A rebuttal of Dr. Bruno Zeller's commentary "The CISG and the opting out clause pursuant to article 6—a corrective reply". *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:10:28-30, 2005.
- Janssen, A. Nach welchem Recht richtet sich die Einbeziehung von Allgemeinen Geschäftsbedingungen in den Niederlanden? *Internationales Handelsrecht* (Munich) 5:4:155-158, 2005.
- In German.
- Title in English: Which law determines the valid incorporation of general business terms in the Netherlands?
- Koch, R. Whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG. *Internationales Handelsrecht* (Munich) 5:2:65-70, 2005.
- Korpinen, A. On legal uncertainty regarding timely notification of avoidance of the sales contract. *Nordic journal of commercial law* (Turku) 1: 2005. Available online at: http://www.njcl.fi/1_2005/article1.pdf
- Kröll, S. Die internationale Zuständigkeit deutscher Gerichte für einstweiligen Rechtsschutz bei ausländischem Schiedsort. *Internationales Handelsrecht* (Munich) 5:4:142-147, 2005.
- In German.
- Title in English: The international jurisdiction of the German courts for interlocutory proceedings in case of foreign arbitration clauses.
- Kunda, I. and J. Mutabžija. Odgovornost prodavatelja za pravo ili potraživanje trećih osoba s osnove intelektualnog vlasništva prema Bečkoj konvenciji o međunarodnoj prodaji robe.
- Zbornik pravnog fakulteta sveučilišta u Rijeci* (Rijeka, Croatia) 26:2:733-794, 2005.
- In Croatian, with abstracts in English, German and Italian.
- Title in English: Seller's liability for third party's right or claim based on intellectual property pursuant to the Vienna Convention on International Sale of Goods.
- Leyens, P. C. The interpretative challenge of mistake and the validity loophole. In *Review of the Convention on Contracts for the International Sale of Goods (CISG), 2003-2004*. Munich, Sellier European law publishers, 2005. p. 3-51.
- Liu, C. Effects of avoidance: perspectives from the CISG, UNIDROIT principles and PECL and case law. *Nordic journal of commercial law* (Turku) 1:2005. Available online at: http://www.njcl.fi/1_2005/article2.pdf
- Lookofsky, J. CISG case commentary on pre-emption in Geneva Pharmaceuticals and Stawski. In *Review of the Convention on Contracts for the International Sale of Goods (CISG), 2003-2004*. Munich, Sellier European law publishers, 2005. p. 115-122.
- López Rodríguez, A. M. The duty to pay interest on advance payments under art. 84 (1) CISG. *Nordic journal of commercial law* (Turku) 2:2005. Available online at: http://www.njcl.fi/2_2005/commentary1.pdf

- _____. The effects of avoidance on obligations: the modes of restitution under the 1980 U.N. Convention on the International Sale of Goods. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:291-302, 2005.
- Lurger, B. Überblick über die Judikaturentwicklung zu ausgewählten Fragen des CISG. *Internationales Handelsrecht* (Munich) 5:5:177-188, 2005 (Part I); 5:6:221-232, 2005 (Part II).
In German.
Title in English: Overview of judicial decisions on selected issues relating to the CISG.
- Martínez Cañellas, A. La interpretación y la integración de la Convención de Viena sobre la compraventa internacional de mercaderías, de 11 de abril de 1980. Granada, Editorial Comares, 2004. xxii, 419 p.
- Mazzotta, F. G. CISG Article 78: the endless disagreement among the commentators, much less among the courts. *In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*. Munich, Sellier European law publishers, 2005. p. 123-161.
- McMahon, J. P. Address: Pace University School of Law conference on the United Nations Convention on Contracts for the International Sale of Goods (CISG): primary differences between the UCC and the CISG. *In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*. Munich, Sellier European law publishers, 2005. p. 91-103.
- Meyer, F. Die Anwendung des UN-Kaufrechts in der US-amerikanischen Gerichtspraxis. *IPRax: Praxis des internationalen Privat- und Verfahrensrechts* (Bielefeld) 25:5:462-467, 2005.
In German.
Title in English: The application of the United Nations Sales Convention in the US judicial practice.
- Meyer, J. UN-Kaufrecht in der deutschen Anwaltspraxis. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen) 69:3:457-486, 2005.
In German.
Title in English: The CISG in the practice of German lawyers.
- Mittmann, A. Einheitliches UN-Kaufrecht und europäische Verbrauchsgüterkauf-Richtlinie. Frankfurt am Main, Peter Lang, 2004. xvi, 195 p.
In German.
Title in English: Uniform United Nations sales law and the European directive on sales of goods to consumers.
- Mohs, F. The restitution of goods on avoidance of the contract for lack of conformity within the scope of art. 82(2)(c) CISG: on the different treatment of defects in quality, third-party intellectual property rights, and defects in title as elements of the remedies for the buyer. *In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*. Munich, Sellier European law publishers, 2005. p. 53-73.

- Müller, T. M. and F. Togo. Die Berücksichtigung der Überzeugungskraft ausländischer Präzedenzfälle bei der Auslegung des CISG—Die neuere italienische Rechtsprechung als Vorreiter und Vorbild. *Internationales Handelsrecht* (Munich) 5:3:102-107, 2005.
In German.
Title in English: The consideration of foreign persuasive authorities in the interpretation of the CISG. The new Italian case law as precursor and example.
- Muranov, A. I. History of the official publication of the UN Convention on Contracts for the International Sale of Goods (Vienna, 1980) in the Russian Federation in the context of application of international treaties in Russia. *Digest of the Moscow journal of international law* (Moscow) 166-203, 2000-2001.
Available online at: <http://www.mjil.ru/files/journal.pdf> and at: <http://www.muranov.ru/research/pdf-picture/History.pdf>
- Niibori, S. INCOTERMS 2000 to sono shuhen. *JCA journal* (Tokyo) 52:3:54-58, March 2005 (part I); 52:4:29-35, April 2005 (part II); 52:5:40-44, May 2005 (part III); 52:6:41-45, June 2005 (part IV); 52:7:28-32, July 2005 (part V); 52:8:42-47, August 2005 (part VI); 52:9:38-41, September 2005 (part VII).
In Japanese.
Title in English: INCOTERMS 2000 and related topics.
- Perović, J. S. Bitna povreda ugovora: međunarodna prodaja robe. Belgrade, Javno preduzeće službeni list SCG, 2004. 402 p.
In Serbian.
Title in English: Fundamental breach of contract: international sale of goods.
- Ramberg, J. Address: Pace University School of Law conference on the United Nations Convention on Contracts for the International Sale of Goods (CISG): CISG-Advisory Council opinion no.1—electronic communications under the CISG. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*. Munich, Sellier European law publishers, 2005. p. 105-112.
- Remy-Corlay, P. Force majeure, imprévision et faute : la répartition des risques dans la Convention de Vienne. *Revue trimestrielle de droit civil* (Paris) 2:354-357, 2005.
- Robin, G. Le principe de la bonne foi dans les contrats internationaux. *Revue de droit des affaires internationales / International business law journal* (Paris) 6:695-727, 2005.
In English and French.
- Romero Jiménez, M. La compraventa internacional de mercaderías. *Revista mexicana de derecho internacional privado y comparado* (México D.F) 17:25-46, 2005.
- Розенберг, М. Некоторые вопросы применения Венской конвенции о договорах международной купли-продажи товаров в практике Международного коммерческого арбитражного суда при ТПП РФ. In *Russland im Kontext der internationalen Entwicklung: internationales Privatrecht, Kulturgüterschutz, geistiges Eigentum, Rechtsvereinheitlichung / Russia in the international context: private international law, cultural heritage, intellectual property, harmonization of laws / Россия в контексте международного развития: международное частное право, защита культурных ценностей, интеллектуальная собственность, унификация права*. Festschrift für Mark Moiseevic Boguslavskij. A. Trunk, R. Knieper, A.G. Svetlanov, eds., Berlin, Berliner Wissenschafts-Verlag, 2004. p. 739-748. With summary in English.

- Saenger, I. and E. Sauthoff. Die Aufrechnung im Anwendungsbereich des CISG. *Internationales Handelsrecht* (Munich) 5:5:189-195, 2005.
In German.
Title in English: Offset in the scope of application of the CISG.
- Sauthoff, E. Auslegung der Art. 75, 76 CISG nach Treu und Glauben? *Internationales Handelsrecht* (Munich) 5:4:151-154, 2005.
In German.
Title in English: Interpretation of arts. 75, 76 CISG according to the principles of utmost good faith?
- Schlechtriem, P. Keynote address: Pace University School of Law conference on the United Nations Convention on Contracts for the International Sale of Goods (CISG): Of words and issues—finding a common language for common issues. *In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*. Munich, Sellier European law publishers, 2005. p. 79-90.
- _____. and P. Perales Viscasillas. Interpretación en clave nacional de la Convención de Viena de 1980 sobre compraventa internacional de mercancías: STPI de Tudela (España) de 29 marzo 2005. *Derecho de los negocios* (Madrid) 16:180:23-33, 2005.
- Schroeter, U. G. UN-Kaufrecht (CISG) und Verbrauchsgüterkauf-Richtlinie—zugleich. GPR—*Zeitschrift für Gemeinschaftsprivatrecht* (Frankfurt a.M.—München) 2:4:173-176, 2005.
In German.
Title in English: CISG and EU directive on consumer protection together.
- Schumacher, F. Kaufoptionsvertrag und Verwendungsrisiko im UN-Kaufrecht. *Internationales Handelsrecht* (Munich) 5:4:147-151, 2005.
In German.
Title in English: Optional sales contract and utility risk under the CISG.
- Sein, K. and I. Kull. Die Bedeutung des UN-Kaufrechts im estnischen Recht. *Internationales Handelsrecht* (Munich) 5:4:138-142, 2005.
In German.
Title in English: On the relevance of the CISG in Estonian law.
- Seliazniova, T. Prospective non-performance or anticipatory breach of contract (comparison of the Belarusian approach to CISG application and foreign legal experience). *The journal of law and commerce* (Pittsburgh, Pennsylvania) 24:1:111-140, 2004.
- Sokolovski, I. Závaznost oferty—vhodný(é) model(y). *Právník* (Prague) 144:9:1040-1060, 2005.
In Czech.
Title in English: Binding force of the offer—appropriate model(s).
- Torsello, M. Remedies for breach of contract under the 1980 U.N. Convention on Contracts for the International Sale of Goods. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:253-290, 2005.
- Treitel, G. Frustration and force majeure. London, Thomson—Sweet and Maxwell, 2005. lxxxii, 673 p.
See, in particular, paras. 6-048 and 15-043, 15-044.

- Walker, G. C. Trade usages and the CISG: defending the appropriateness of incorporating custom into international commercial contracts. *The journal of law and commerce* (Pittsburgh, Pennsylvania) 24:2:263-280, 2005.
- Weiszberg, G. Les premières années de jurisprudence sur la « contravention non essentielle » dans la Convention de Vienne du 11 avril 1980 sur la vente internationale de marchandises. *Revue de droit des affaires internationales / International business law journal* (Paris) 1:106-116, 2006.
- Witz, C. Droit uniforme de la vente internationale de marchandises : panorama 2004. *Recueil Dalloz* (Paris) 181:33:2281-2292, 2005.
- . Les vingt-cinq ans de la Convention des Nations Unies sur les contrats de vente internationale de marchandises. Bilans et perspectives. *Journal du droit international* (Paris) 133:1:5-25, 2006.
- Wu, D. CIETAC's practice on the CISG. *Nordic journal of commercial law* (Turku) 2:2005. Available online at: http://www.njcl.fi/2_2005/article2.pdf
- Wurmnest, W. UN-Kaufrecht und Gerichtsstand des Erfüllungsorts bei Nichterfüllung einer Alleinvertriebsvereinbarung durch den Lieferanten—zugleich eine Anmerkung zu Corte di Cassazione, Beschl. v. 1.7.2004. *Internationales Handelsrecht* (Munich) 5:3:107-114, 2005.
- In German.
- Title in English: CISG and jurisdiction of the place of performance in cases of breach of an exclusive distribution agreement by the supplier—together with a comment on Corte di Cassazione, 1 July 2004.
- Yovel, J. The seller's right to cure a failure to perform: an analytic comparison of the respective provisions of the CISG and the PECL *Nordic journal of commercial law* (Turku) 1: 2005.
- Available online at: http://www.njcl.fi/1_2005/commentary1.pdf
- Zeller, B. Damages under the Convention on Contracts for the International Sale of Goods. Dobbs Ferry (New York), Oceana publications, 2005. xiii, 247 p.
- . The CISG and the opting out clause pursuant to article 6—a corrective reply. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:8:51-56, 2005.
- Zhang, M. Choice of law in contracts: a Chinese approach. *Northwestern journal of international law & business* (Chicago, IL) 26:289-333, 2006.
- Zimmermann, R. Comparative foundations of a European law of set-off and prescription. Cambridge, Cambridge university press, 2002. xi, 182 p.
- . Restitutio in integrum: the unwinding of failed contracts under the Principles of European Contract Law, the UNIDROIT Principles and the Avant-projet d'un Code Européen des Contrats. *Uniform law review / Revue de droit uniforme* (Rome) 10:4:719-735, 2005.

III. International commercial arbitration and conciliation

- Abramson, H. I. Mining mediation rules for representation opportunities and obstacles. *American review of international arbitration* (New York, New York) 15:1:103-109, 2004.

- Andenas, M. and G. Sanders, *gen. eds.* Enforcing contracts in transition economies. London, British institute of international and comparative law, 2005. xvi, 205 p.
- Arfazadeh, H. *Ordre public et arbitrage international à l'épreuve de la mondialisation.* Bruxelles, Bruylant, 2005. xx, 352 p.
- Aschauer, C. La prescription des sentences arbitrales. *ASA bulletin* (The Hague) 23:4:593-609, 2005.
- Baykitch, A. and J. Truong. Innovations in international commercial arbitration—interim measures a way forward or back to the future. *The arbitrator & mediator* (Melbourne) 24:2:95-103, 2005.
- Beraudo, J. P. Case law on articles 5, 8 and 16 of the UNCITRAL Model Arbitration Law. *Journal of international arbitration* (London) 23:1:101-114, 2006.
- . Recognition and enforcement of interim measures of protection ordered by arbitral tribunals. A comparison with the Republic of Congo pre-arbitral referee case. *Journal of international arbitration* (London) 22:3:245-254, 2005.
- Bergsten, E. E. Some musings about the adoption of the UNCITRAL Arbitration Rules. *Vindobona journal of international commercial law and arbitration* (Vienna) 9:2:213-217, 2005.
- Binder, P. International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. 2 ed. London, Sweet & Maxwell, 2005. xlvi, 550 p.
- Castellani, L. UNCITRAL developments on arbitration agreements in electronic form. *The arbitrator & mediator* (Melbourne) 24:1:19-24, 2005.
- Cato, D. M. The English Arbitration Act 1996: a comparison of UNCITRAL model law and the rules of law of the UAE. *DIAC journal* (Dubai) 1:4:17-37, 2005.
- In Arabic and English.
- Chovancová, K. Rozhodcovské pravidlá medzinárodnej obchodnej komory v bankovej praxis. *Právnik* (Prague) 144:8:893-924, 2005.
- In Czech.
- Title in English: The ICC arbitration rules in banking practice.
- Cohen, J. Practical issues to consider in relation to enforcing and resisting enforcement of international arbitration awards. *Asian dispute review* (Hong Kong) 22-27, January 2006.
- Conejero Roos, C. The new Chilean arbitration law and the influence of the model law. *Journal of international arbitration* (The Hague) 22:2:149-162, 2005.
- Cordero Moss, G. Can an arbitral tribunal disregard the choice of law made by the parties? *Stockholm international arbitration review* (Stockholm) 1:1-21, 2005.
- Danielius, H. The New York Convention: the practice of Swedish courts. *Stockholm arbitration report* (Huntington, New York) 2:35-46, 2004.
- Dražoal, C. The making of the award: comments on case law developments under the UNCITRAL Model Law. *International arbitration law review* (London) 8:5:183-190, 2005.
- Eksi, N. General evaluation of the Turkish international arbitration act. *International arbitration law review* (London) 8:3:87-94, 2005.

- El Motei, A. Local court intervention in international arbitration. *DIAC journal* (Dubai) 1:4, 64-72, 2005.
In Arabic and English.
- Engert, A. Der international-privatrechtliche und sachrechtliche Anwendungsbereich des Rechts der Europäischen Aktiengesellschaft. *Zeitschrift für vergleichende Rechtswissenschaft* (Heidelberg) 104:444-460, 2005.
In German.
Title in English: Scope of application of the law of the Societas Europaea in international private and property law.
- Entwurf eines neuen Schiedsverfahrensrechts. Mit Erläuterungen von Paul Oberhammer. Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen Band XXVII. Wien, Manz, 2002. VIII, 160 p.
- Ezrahi, A.M. Arbitration in the Arab Middle-East: a snapshot. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:11:33-42, 2005.
- Fremuth-Wolf, A. Die Schiedsvereinbarung im Zessionsfall. Wien, Verlag Österreich, 2004. 324 p.
In German.
Title in English: The arbitration agreement in the assignment.
- Ganguli, A. K. International commercial arbitration and enforcement of foreign awards in India. In *India and international law*. Patel B.N., ed. Leiden, Martinus Nijhoff publishers, 2005. p. 319-343.
- Giambastiani, C. A. Lex loci arbitri and annulment of foreign arbitral awards in U.S. courts. *American university international law review* (Washington, DC) 20:1101-1112, 2005.
- González de Cossío, F. Chauvinism rejected: Mexican Supreme Court upholds the constitutionality of the Mexican arbitration statute. *Journal of international arbitration* (The Hague) 22:2:163-166, 2005.
- Грешников, И. Международный и внутренний арбитраж понятие и компетенция. *Журнал ЮРИСТ* (Алматы) 4:46, 2005. Available on line at: http://www.zakon.kz/magazine/archive/2005_04_10.asp
- Grigera Naón, H. A. Arbitration and Latin America: progress and setbacks. 2004 Freshfields lecture. *Arbitration international* (The Hague) 21:2:127-176, 2005.
See, in particular, pp. 168-172, on the relation between the New York Convention, 1958, and regional treaties on arbitration.
- Gu, W. Security of costs in international commercial arbitration. *Journal of international arbitration* (London) 22:3:167-205, 2005.
- Hamilton, C. A. and E. M. Vázquez. Interim measures and the new Spanish arbitration act. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:6:22-28, 2005.
- Horey, M. Translation of the recent Japanese law on arbitration. *World arbitration and mediation report* (Huntington, New York) 16:11:340-353, 2005.
Contains footnoted cross-reference to the UNCITRAL Model Law on International Commercial Arbitration, 1985.
- Horn, N. The arbitration agreement in light of case law of the UNCITRAL model law (arts. 7 and 8). *International arbitration law review* (London) 8:5:146-152, 2005.

- Howell, D. Interim measures of protection in international arbitration proceedings: towards a new paradigm? *Asian dispute review* (Hong Kong) 18-21, January 2006.
- Japanese arbitration law. *Model law materials* (Culoz, France) 5:1:11-13, 2005.
Contains in annex the text of the Japanese arbitration law, 2003, in English and in Japanese, and a table of concordance of the provisions of UNCITRAL Model Arbitration Law and the Japanese arbitration law, 2003.
- Jiménez Figueres, D. and A. Armer Rios. Notes on the new Chilean law on international arbitration. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 20:7:21-33, 2005.
- Jørgensen, J. C. and D. Terkildsen. The new Danish arbitration act. *International arbitration law review* (London) 8:6:203-210, 2005.
- Kachwaha, A. The arbitration law of India: a critical analysis. *Asian international arbitration journal* (Singapore) 1:2:107-126, 2005.
- Kadjo, P. The African Union and international commercial arbitration. *World arbitration and mediation report* (Huntington, New York) 16:6:185-196, 2005.
- Kakolecki, A. and P. Nowaczyk. Poland's new arbitration legislation. *ICC international court of arbitration bulletin* (Paris) 16:2:41-46, 2005..
- Katz, L. V. Arbitration as a bridge to global markets in transitional economies: the Republic of Cuba. *Willamette journal of international law & dispute resolution* (Salem, Oregon) 13:109-148, 2005.
- Kee, C. Set-off in international arbitration—what can the Asian region learn? *Asian international arbitration journal* (Singapore) 1:2:141-160, 2005.
- Khvalei, V. and J. Benedictsson. Recognition and enforcement of foreign arbitral awards in the Russian Federation. *Stockholm international arbitration review* (Stockholm) 1:23-48, 2005.
- Kleinheisterkamp, J. International commercial arbitration in Latin America. Dobbs Ferry (New York), Oceana publications inc., 2005. xxx, 691 p.
- Knieper, R. The not-so-silky road to commercial arbitration in post-Soviet countries. Global reflections on international law, commerce and dispute resolution. In Aksen G., Böckstiegel K.-H., Mustill M. J., Patocchi P. M., Whitesell A. M. eds. *Liber amicorum in honour of Robert Briner*. Paris, ICC Publishing, 2005. p. 463-475
- Комаров, А. Применение материально-правовых норм при разрешении споров международным коммерческим арбитражем. In *Russland im Kontext der internationalen Entwicklung: internationales Privatrecht, Kulturgüterschutz, geistiges Eigentum, Rechtsvereinheitlichung / Russia in the international context: private international law, cultural heritage, intellectual property, harmonization of laws / Россия в контексте международного развития: международное частное право, защита культурных ценностей, интеллектуальная собственность, унификация права*. Festschrift für Mark Moiseevic Boguslavskij. A. Trunk, R. Knieper, A.G. Svetlanov, eds., Berlin, Berliner Wissenschafts-Verlag, 2004. p. 313-324. With summary in English.

- Корабельников, Б. и А. Маковский. Арбитрабельность споров: российский подход. *In Russland im Kontext der internationalen Entwicklung: internationales Privatrecht, Kulturgüterschutz, geistiges Eigentum, Rechtsvereinheitlichung / Russia in the international context: private international law, cultural heritage, intellectual property, harmonization of laws / Россия в контексте международного развития: международное частное право, защита культурных ценностей, интеллектуальная собственность, унификация права. Festschrift für Mark Moisevic Boguslavskij. A. Trunk, R. Knieper, A.G. Svetlanov, eds., Berlin, Berliner Wissenschafts-Verlag, 2004. p. 271-301. With summary in English.*
- Kotiranta, K. and T. Ylikantola. Kansainvälisen välimiesmenettelyn salassapitovelvollisuudesta. *Defensor legis* (Helsinki) 86:2:303-330, 2004.
In Finnish.
Title in English: On the duty of confidentiality in international arbitration.
- Koussoulis, S. Greek arbitration law—introduction. *Model law materials* (Culoz, France) 5:1:85-86, 2005.
Contains in annex the text of the Greek arbitration law, 1999, in English and in Greek.
- Kröll, S. Setting aside proceedings in model law jurisdictions—selected procedural and substantive questions from the case law. *International arbitration law review* (London) 8:5:170-178, 2005.
- Kurkela, M. S. Due process in international commercial arbitration. Dobbs Ferry (New York), Oceana publications inc., 2005. xx, 485 p.
See, in particular, pp. 7-34, on due process in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
- Liebscher, C. Interpretation of the written form requirement art. 7(2) UNCITRAL Model Law. *International arbitration law review* (London) 8:5:164-169, 2005.
- Lynch, K. The forces of economic globalization. Challenges to the regime of international commercial arbitration. The Hague, Kluwer law international, 2003. xii, 466 p.
- Malaysia adopts new arbitration law based on UNCITRAL *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 21:1:19, 2006.
- Maniruzzaman, A.F.M. The Bangladesh Arbitration Act 2001—some reflections. *Asian dispute review* (Hong Kong) 73-75, October 2005.
- Merkin, R. Arbitration law. London—Singapore, LLP, 2004. cxii, 1080.
See, in particular, paras. 1.8-1.22, on the UNCITRAL Model Law on International Commercial Arbitration and English law.
- Meurs-Gerken, P. R. Distinctive features of the new Danish arbitration act. *ICC international court of arbitration bulletin* (Paris) 16:2:47-49, 2005.
- Mistelis, L. A. Confidentiality and third party participation. *Arbitration international* (The Hague) 21:2:211-231, 2005.
- Müller, C. International arbitration. A guide to the complete Swiss case law (unreported and reported). Zürich—Basel—Genève, Schulthess juristische medien AG, 2004. xxx, 332 p.
See, in particular, pp. 221-276, on the application of the New York Convention, 1958.

- Najjar, N. L'arbitrage dans les pays arabes face aux exigences du commerce international. Paris, L.G.D.J., 2004. xviii, 618 p.
- Nakamura, T. Appointment of arbitrators according to the UNCITRAL Model Law on International Commercial Arbitration. *International arbitration law review* (London) 8:5:179-182, 2005.
- _____. Case-studies for arbitration law: arbitration agreements in writing. *JCA Journal* (Tokyo) I in 52:3:31-33, March 2004; II in 52:4:13-15, April 2004; III in 52:5:28-31, May 2004.
In Japanese.
- Neuhaus, J. E. Current issues in the enforcement of international arbitration awards. *The university of Miami Inter-American law review* (Miami, Florida) 36:1:23-39, 2004.
- Oghigian, H. Japan's new arbitration law. *Asian dispute review* (Hong Kong) 56-57, July 2005.
- _____. Japan's new arbitration law. *Arbitration* (London) 71:4:344-346, 2005.
- Onyema, E. Selection of arbitrators in international commercial arbitration. *International arbitration law review* (London) 8:2:45-54, 2005.
- Oyarzabal, M.J.A. Jurisdiction over international electronic contracts: a view on inter-American, MERCOSUR, and Argentine rules. *Temple international and comparative law journal* (Philadelphia, Pennsylvania) 19:87-104, 2005.
- Perales Viscasillas, P. Case law on the recognition and enforcement of arbitral awards under the UNCITRAL Model Law on International Commercial Arbitration. *International arbitration law review* (London) 8:5:191-201, 2005.
- Pozzi, V. Arbitrato e tutela cautelare: profili comparatistici. *Rivista dell'arbitrato* (Milano) 1:17-44, 2005.
In Italian.
Title in English: Arbitration and interim measures of protection: comparative outline.
- Rau, A. S. The culture of American arbitration and the lessons of ADR. *Texas international law journal* (Austin, Texas) 40:449-536, 2005.
- Reed, L. Mixed private and public international law solutions to international crises. In *Recueil des cours; Académie de droit international de La Haye*. Leiden, Martinus Nijhoff, 2005. p. 177-410. (v. 306).
See, in particular, pp. 266-285, on the use of the UNCITRAL Arbitration Rules by the Iran-United States Claims Tribunal.
- Roughton, D. A brief review of the Japanese arbitration law. *Asian international arbitration journal* (Singapore) 1:2:127-140, 2005.
- Rico, R. M. Searching for standards: suspension of enforcement proceedings under article VI of the New York Convention. *Asian international arbitration journal* (Singapore) 1:1:69-82, 2005.
- Rubins, N. The enforcement and annulment of international arbitration awards in Indonesia. *American university international law review* (Washington, DC) 20:359-402, 2005.
- Saleh, S. Commercial arbitration in the Arab Middle East. 2 ed. Oxford—Portland (Oregon), Hart Publishing, 2006. xxx, 478 p.

- Sanders, P. UNCITRAL's Model Law on International Commercial Arbitration: present situation and future. *Arbitration international* (The Hague) 21:4:443-482, 2005.
- Sharaf El Din, A. Arbitration period and courts power to order suspension of arbitration procedures (comment on procedural order issued by president of Cairo appeal court). *DIAC journal* (Dubai) 1:4, 49-63, 2005.
In Arabic and English.
- Shepherd, C. and A. Chiu. A challenge to the appointment of an arbitrator under the UNCITRAL Rules. *Asian dispute review* (Hong Kong) 78-80, October 2005.
- _____. and E. Gooding. Hong Kong case report: applying article 8(1) of the UNCITRAL Model Law—New Sound Industries Ltd. v. Meliga Ltd. *Asian international arbitration journal* (Singapore) 1:1:95-101, 2005.
- Simović, A. Prikaz arbitražnih pravila stalne arbitraže pri privrednoj komori slovenije. *Strani pravni život* (Beograd) 34:1:153-169, 2005.
In Serbian.
Title in English: Review of the rules of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia.
- Sorieul, R. UNCITRAL's current work in the field of international commercial arbitration. *Journal of international arbitration* (London) 22:6:543-568, 2005.
- Spiegelberger, W. R. Russian court practice enforcing foreign arbitral awards: an overview. *Journal of international arbitration* (London) 22:4:351-356, 2005.
- Stacher, M. You don't want to go there—antisuit injunctions in international commercial arbitration. *ASA bulletin* (The Hague) 23:4:640-654, 2005.
- Сулейменов, М. Новое законодательство об арбитраже (научно-практический комментарий). *Журнал ЮРИСТ* (Алматы) 1:43, 2005. Available on line at: http://www.zakon.kz/magazine/archive/2005_01_2.asp
- Tepeš, N. The more favorable right provision of art. VII of the New York Convention and its application to the form of arbitration agreements. *Croatian arbitration yearbook* (Zagreb) 12:125-153, 2005.
- Thomas, J. C. Interim measures in international arbitration: finding the best answer. *Croatian arbitration yearbook* (Zagreb) 12:213-222, 2005.
- To, A. Incorporating an arbitration agreement. *Asian dispute review* (Hong Kong) 38-42, July 2005.
- UNCITRAL achieves consensus on interim measures in arbitration. *World arbitration and mediation report* (Huntington, New York) 16:3:83, 2005.
- Uzelac, A. Jurisdiction of the arbitral tribunal: current jurisprudence and problem areas under the UNCITRAL Model Law. *International arbitration law review* (London) 8:5:153-163, 2005.
- _____. Written form of the arbitration agreement: towards a revision of the UNCITRAL Model Law. *Croatian arbitration yearbook* (Zagreb) 12:111-123, 2005.
- Van de Hout, T. T. Le règlement d'arbitrage de la CNUDCI. In Les conférences du CEDROMA. Vol. I. Les traités d'entraide judiciaire, d'extradition et d'arbitrage entre le Liban et les pays arabes. Bruxelles, Bruylant, 2004. p. 233-239.

- Von Hase, A. M. Arbitration and E-commerce related disputes: legal barriers and challenges. *In* Internet international law. International and European studies and comments. G. Chatillon, *ed.*, Bruxelles, Bruylant, 2005. p. 579-599.
- Wang, S. C. and S. E. Hilmer. China arbitration law v. UNCITRAL Model Law. *International arbitration law review* (London) 9:1:1-7, 2006.
- Winstanley, A. UNCITRAL heralds the age of ex parte measures. *Model law materials* (Culoz, France) 5:1:5-7, 2005.
- Wong, J. The issuance of interim measures in international disputes: a proposal requiring a reasonable possibility of success on the underlying merits. *Georgia journal of international and comparative law* (Athens, Georgia) 33:605-621, 2005.
- Zhao, Y. Dispute resolution in electronic commerce. Leiden, Martinus Nijhoff publishers, 2005. xiii, 292 p.
- Зыкин, И. Альтернативное разрешение споров и коммерческий арбитраж. *In* Russland im Kontext der internationalen Entwicklung: internationales Privatrecht, Kulturgüterschutz, geistiges Eigentum, Rechtsvereinheitlichung / Russia in the international context: private international law, cultural heritage, intellectual property, harmonization of laws / Россия в контексте международного развития: международное частное право, защита культурных ценностей, интеллектуальная собственность, унификация права. Festschrift für Mark Moiseevic Boguslavskij. A. Trunk, R. Knieper, A. G. Svetlanov, *eds.*, Berlin, Berliner Wissenschafts-Verlag, 2004. p. 303-311.

IV. International transport

- Alcántara, J. M. Propuesta de anteproyecto de Ley General de la navegación marítima. Algunas reflexiones desde la plaza y una valoración. *Derecho de los negocios* (Madrid) 16:178-179:5-15, 2005.
- Asariotis, R. Some recent developments at UNCITRAL and UNCTAD. *Journal of international maritime law* (Witney, U.K.) 11:1:69-71, 2005.
- Crowley, M. E. The limited scope of the cargo liability regime covering carriage of goods by sea: the multimodal problem. *Tulane law review* (New Orleans, Louisiana) 79:5-6:1461-1504, 2005.
- Derrington, S. The Hague Rules—a lost opportunity. *The law quarterly review* (London) 121:209-213, 2005.
- Girvin, S. Bills of lading and straight bills of lading: principles and practice. *Journal of business law* (London) 86-116, January 2006.
- González Lapeyre, E. Transport maritime et régime portuaire. *In* Recueil des cours; Académie de droit international de La Haye. (V. 308.) Leiden, Martinus Nijhoff, 2005. p. 253-378.
V. en particulier le chapitre II, sur la responsabilité dans le contrat de transport maritime.
- Haak, K. F. The harmonization of intermodal liability arrangements. *European transport law / Droit européen des transports* (Antwerp) 40:1:11-51, 2005.

- Haak, K. and M. Hoeks. Intermodal transport under unimodal arrangements. Conflicting conventions: the UNCITRAL/CMI draft instrument and the CMR on the subject of intermodal contracts. *Transportrecht* (Neuwied, Germany) 28:3:89-102, 2005.
- Honka, H. UNCITRALs konventionsutkast om transport av gods. Tillämpningsregler. *Tidskrift utgiven av juridiska föreningen i Finland* (Helsingfors) 4-5:530-540, 2005.
In Swedish.
Title in English: UNCITRAL draft convention on the transport of goods.
Scope of application.
- Marrella, F. Unity and diversity in international arbitration: the case of maritime arbitration. *American university international law review* (Washington, DC) 20:1055-1100, 2005.
- Murungi, J.E.N. and L. J. Kotzé. Environmental liability under the Terminal Operators Convention: a South African perspective. *Comparative and international law journal of Southern Africa* (Pretoria) 38:1:47-74, 2005.
- Nikaki, T. The UNCITRAL draft instrument on the carriage of goods [wholly or partly] [by sea]: multimodal at last or still at sea? *Journal of business law* (London) 647-658, September 2005.
- Pejovic, C. The straight bill of lading: do we really need it? *European transport law / Droit européen des transports* (Antwerp) 40:3:303-319, 2005.
- Sturley, M. F. Overruling Sky Reefer in the international arena: a preliminary assessment of forum selection and arbitration clauses in the new UNCITRAL transport law convention. *Journal of maritime law and commerce* (Baltimore, Maryland) 37:1:1-21, 2006.
- _____. Solving the scope-of-application puzzle: contracts, trades, and documents in the UNCITRAL transport law project. *Journal of international maritime law* (Witney, U.K.) 11:1:22-41, 2005.
- Sweeney, J. C. Exculpatory clauses in global transport: crossing the Himalayas. *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 125 S.Ct. 385, 2004 AMC 2705 (2004). *Journal of maritime law and commerce* (Baltimore, Maryland) 36:2:155-199, 2005.

V. International payments

- Rodner, J. O. El dinero: obligaciones de dinero y de valor, la inflación y la deuda en moneda extranjera. 2 ed. Caracas: Academia de ciencias políticas y sociales, Centro de investigaciones jurídicas, 2005, 1172 p.

VI. Electronic commerce

- Бахин, С. В. и А. В. Зажигалкин. Электронная коммерция: правовые проблемы конвенционного регулирования. *Журнал международного частного права* (Санкт-Петербург) 38:4:1-19, 2002.

- Bakhin, S. V. and A. V. Zazhigalkin. Electronic commerce: legal problems of conventional regulation. *Journal of private international law* (Saint Petersburg) 38:4:19-33, 2002.
English translation of Russian original.
- Benabou, V. L. Should there be a minimum harmonization of the law? *In* Internet international law. International and European studies and comments. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 167-178.
- Blythe, S. E. Hong Kong electronic signature law and certification authority regulations: promoting E-commerce in the world's "most wired" city. *North Carolina journal of law & technology* (Chapel Hill, North Carolina) 7:1:1-65, 2005.
- Brin, J. P. The protective roles of the law as regards technology. *In* Internet international law. International and European studies and comments. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 467-481.
- Caprioli, E. A. International aspects of electronic commerce. *In* Internet international law. International and European studies and comments. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 179-189.
- Castellani, L. UNCITRAL developments on arbitration agreements in electronic form. *The arbitrator & mediator* (Melbourne) 24:1:19-24, 2005.
- D'Avila Dutra, R. and H. Dias Carneiro. Electronic contracts and signatures in Brazil. *In* Comparative law yearbook of international business; volume 27, 2005. The Hague, Kluwer Law International, 2005. p. 3-21.
- Draetta, U. Internet e commercio elettronico nel diritto internazionale dei privati. 2 ed. Milano, Giuffrè editore, 2005. 251 p.
In Italian.
Title in English: Internet and electronic trade in international private trade.
See, in particular, pp. 90-98 on the UNCITRAL Model Law on Electronic Commerce and pp. 116-117 on the UNCITRAL Model Law on Electronic Signatures.
- _____. Internet et commerce électronique en droit international des affaires. *In* Recueil des cours; Académie de droit international de La Haye. Leiden, Martinus Nijhoff, 2005. p. 9-232. (v. 314)
- Eko, L. and N. Tolstikova. To sign or not to sign on the electronic dotted line: the United States, the Russian Federation, and international electronic signature policy. *International journal of communications law and policy* (Münster, Germany—New Haven, Connecticut, USA) 10:5,2005. Available online at: http://www.ijclp.org/10_2005/pdf/ijclp_05_10_2005.pdf
- Estrella Faria, J. A. Convention des Nations Unies sur l'utilisation de communications électroniques dans les contrats internationaux. *Journal du droit international* (Paris) 133:1:393-403, 2006.
- Gregory, J. D. Canadian and American legislation on electronic signatures with reflections on the European Union directive. *In* Internet international law. International and European studies and comments. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 399-413.
- Intven, H., R. Pfohl, C. Slusarchuk and B. Sookman. Legal and regulatory aspects of E-commerce and the Internet. *The World Bank legal review: law and justice for development* (Washington, DC) 1:3-159, 2003.

- New draft convention for electronically created agreements. *World arbitration and mediation report* (Huntington, New York) 16:11:335, 2005.
- Mas, F. La conclusion des contrats du commerce électronique. Paris, LGDJ, 2005. xii, 442 p.
- Martin, C. H. The UNCITRAL electronic contracts convention: will it be used or avoided? *Pace international law review* (White Plains, New York) 17:261-300, 2005.
- Natsui, T. Electronic contracts and signatures in Japan. In *Comparative law yearbook of international business*; volume 27, 2005. The Hague, Kluwer Law International, 2005. p. 23-66.
- Niibori, S. Gurōbaru shōtorihiki-hō kakuron kokusai keiyaku ni okeru denshi tsūshin no shiyō ni kan suru kokuren jōyaka. *JCA journal* (Tokyo) 53:3:46-51, March 2006 (part I).
In Japanese.
Title in English: Essays on global commercial contracts: the United Nations Convention on the Use of Electronic Communications in International Contracts.
- Oyarzabal, M.J.A. Jurisdiction over international electronic contracts: a view on inter-American, MERCOSUR, and Argentine rules. *Temple international and comparative law journal* (Philadelphia, Pennsylvania) 19:87-104, 2005.
- Paterson J., A. Robertson and P. Heffey. Contract cases and materials. 10 ed. Sydney, Lawbook co., 2005. lix, 1214 p.
See, in particular, para. 3.240, on the UNCITRAL Model Law on Electronic Commerce.
- Perales Viscasillas, M. Convención de UNCITRAL sobre la utilización de las comunicaciones electrónicas en los contratos internacionales (proyecto de 2005) e ICC eTerms 2004. *elDial.com. Suplemento de derecho internacional privado y de la integración*. 25 noviembre 2005. Online journal.
- Proyecto de convención sobre la utilización de las comunicaciones electrónicas en los contratos internacionales. *Derecho de los negocios* (Madrid) 16:177:33-38, 2005.
- Railas, L. Sähköiset sopimukset kansainvälisessä kaupassa—UNCITRALin uusi yleissopimus. *Defensor legis* (Helsinki) 86:6:1268-1291, 2005.
In Finnish.
Title in English: E-contracts in international trade.
- Sorieul, R. The UNCITRAL's Model Law on Electronic Signatures. In *Internet international law. International and European studies and comments*. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 389-397.
- Von Hase, A. M. Arbitration and E-commerce related disputes: legal barriers and challenges. In *Internet international law. International and European studies and comments*. G. Chatillon, ed., Bruxelles, Bruylant, 2005. p. 579-599.
- Зажигалкин, А. В. Международно-правовое регулирование электронной коммерции. Санкт-Петербург, ТЕХМАШ, 2005. 28 с. Автореферат.
- Zhao, Y. Dispute resolution in electronic commerce. Leiden, Martinus Nijhoff publishers, 2005. xiii, 292 p.

VII. Independent guarantees and stand-by letters of credit

Barnes, J. G. Paper on scope of draft UNCITRAL legislative guide on secured transactions with respect to letters of credit. *In* The 2005 annual survey of letter of credit law & practice. Byrne J.E. and C.S. Byrnes, eds. Montgomery Village (MD) Institute of international banking law & practice, 2005. p. 186-189.

Bertrams, R. F. Bank guarantees in international trade. 3 rev. ed. The Hague, Kluwer law international, 2004. xxviii, 562 p.

VIII. Procurement

Mosoti, V. Reforming the laws on public procurement in the developing world: the example of Kenya. *International and comparative law quarterly* (London) 54:3:621-649, 2005.

Nwogwugwu, E. Towards the harmonization of international procurement policies and practices. *Public procurement law review* (London) 14:3:131-152, 2005.

Trepte, P. Regulating procurement: understanding the ends and means of public procurement regulation. New York (New York) Oxford university press, 2004. xiv, 411 p.

Yukins, C. R. and D. Wallace, Jr. UNCITRAL considers electronic reverse auctions, as comparative public procurement comes of age in the United States. *Public procurement law review* (London) 14:4:183-202, 2005.

IX. Insolvency

Abeyratne, S. Third UNCITRAL/INSOL international insolvency colloquium. *INSOL world; the quarterly journal of INSOL International* (London) first quarter 2006, p. 34.

Baillo Morales-Arce, J. Impulso a los trabajos de la CNUDMI sobre el régimen de la insolvencia. *Revista de derecho bancario y bursátil* (Valladolid) 24:99:272, 2005.

Biery, E. H., L. B. Jason and J. D. Cornwell. A look at transnational insolvencies and chapter 15 of the bankruptcy abuse prevention and consumer protection act of 2005. *Boston college law review* (Boston, Massachusetts) 47:23-57, 2005.

El-Boraei, R. Forum of competent jurisdiction: lessons from the European Union insolvency regulation. *The international lawyer* (Chicago, Illinois) 39:4:781-816, 2005.

Garašić, J. Anerkennung ausländischer Insolvenzverfahren. Frankfurt a.M.: Peter Lang, 2005, 2 vols., 499 p., 633 p.
In German.
Title in English: The recognition of foreign insolvency proceedings.

Greene, J. Bankruptcy beyond borders: recognizing foreign proceedings in cross-border insolvencies. *Brooklyn journal of international law* (New York, New York) 685-727, 2005.

- Heath, P. Sixth joint UNCITRAL/INSOL colloquium. *INSOL world; the quarterly journal of INSOL International* (London) third quarter 2005. p. 7.
- The implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain. *Freshfields Bruckhaus Deringer News release*, 4 April 2006.
- Kurth, M. The UNCITRAL Model Law on Cross-Border Insolvency gains momentum with its incorporation in the United States Bankruptcy Code. *INSOL world; the quarterly journal of INSOL International* (London) third quarter 2005. p. 25-26.
- Leonard, B. Reforming Chapter 11: an international perspective. *Eurofenix* (Wallingford, UK) Autumn 2005, 14-15.
- Lyons, H. and J. Tillman. Cross-border insolvency: a patchwork quilt. *Eurofenix* (Wallingford, UK) Autumn 2005, 7.
- Riddler, G. and E. Widdowson. A model law on cross-border insolvency? *INSOL world; the quarterly journal of INSOL International* (London) first quarter 2006, p. 29.
- Rüfner, T. Neues internationales Insolvenzrecht in den USA. *ZIP—Zeitschrift für Wirtschaftsrecht* (Köln) 26:42:1859-1865, 2005.
In German.
Title in English: New international insolvency law in the USA.
- Smith, C. Who takes charge after cross-border failure? *Financial times* (London) 23 February 2006, 11.
- Westbrook, J. L. Chapter 15 at last. *The American bankruptcy law journal* (Lexington, South Carolina) 79:713-729, 2005.

X. Receivables financing

- Bazinas, S. V. and L. Meinhard (Hrsg.) Das UN-Abtretungsübereinkommen. Wien, Springer—Bank Verlag, 2005. 135 p.
- Horn, R. Die UN-Konvention über Forderungsabtretungen als Einheitrecht. *In Norm und Wirkung. Festschrift für Wolfgang Wiegand zum 65. Geburtstag*. E. Bucher, C.-W. Canaris, H. Honsell, T. Koller, eds., Bern—München, Stämpfli Verlag AG—Verlag C.H. Beck, 2005. p. 373-386.
In German.
Title in English: The United Nations Convention on the Assignment of Receivables as uniform law.
- Kieninger, E. M. Nationale, europäische und weltweite Reformen des Mobiliarsicherungsrecht (Teil II). *Zeitschrift für Wirtschafts- und Bankrecht* (Frankfurt) 59:50-52:2353-2359, 2005.
In German.
Title in English: National, European and global reforms of the law of securities on movables (Part II).
- _____. and E. Schütze. Die Forderungsabtretung im Internationalen Privatrecht. *IPRax* (Bielefeld) 25:3:200-208, 2005.
- Wiegand, W. and C. Zellweger-Gutknecht. Assignment. *in UNIDROIT principles: new developments and applications*. Paris, ICC International Court of Arbitration bulletin special supplement, [no. 662] 2005. p. 27-41

XI. International construction contracts

[No publications recorded under this heading.]

XII. International countertrade

[No publications recorded under this heading.]

XIII. Privately financed infrastructure projects

De Cazalet, B. and J. Crothers. Présentation des Dispositions législatives type sur les projets d'infrastructures a financement privé. Additif du Guide législatif de la CNUDCI. / Presentation of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. Addendum to UNCITRAL Legislative Guide. *Revue de droit des affaires internationales / International business law journal* (Paris) 1:33-41, 2004.

Wallace, D., Jr. Creating law in changing societies: the case of law for privately financed infrastructure projects. In Liber amicorum Ibrahim F.I. Shihata. S. Schlemmer-Schulte and Ko-Yung Tung, eds. The Hague, Kluwer law international, 2001. p. 827-838.

_____. Private and capital infrastructure: tragic? Useful and pleasant? Inevitable? In Privatising development: transnational law, infrastructure and human rights. M.B. Likosky, ed. Leiden, Martinus Nijhoff Publishers, 2005. p. 131-145.

XIV. Security interests

Bazinas, S.V. The UNCITRAL draft legislative guide on secured transactions. *Uniform law review / Revue de droit uniforme* (Rome) 10:1-2:141-154, 2005.

Bourbon-Seclet, C. Cross-border security interest in movable property: an attempt at rationalizing the international patchwork. Part 2. *Journal of international banking law and regulation* (London) 20:10:501-513, 2005.

Machoka, P. The need for efficient and effective secured transactions regimes in sub-Saharan Africa: the case for Kenya. *Journal of international banking law and regulation* (London) 20:8:395-401, 2005.

Annex

UNCITRAL legal texts

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ^a
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), ^b and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) ^c
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ^d
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) ^e
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) ^f
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) ^g
UNCITRAL Construction Contracts Guide (1987)	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) ^h
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) ⁱ
UNCITRAL Electronic Funds Guide (1986)	UNCITRAL Legal Guide on Electronic Funds Transfers (1986) ^j
UNCITRAL Infrastructure Projects Guide (2001)	UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) ^k
UNCITRAL Insolvency Law Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) ^l

^a United Nations publication, Sales No. E.95.V.14.

^b Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I.

^c Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3), part I.

^d Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), part II.

^e United Nations publication, Sales No. E.93.V.6.

^f United Nations publication, Sales No. E.95.V.16.

^g United Nations publication, Sales No. E.81.V.6.

^h United Nations publication, Sales No. E.87.V.10.

ⁱ United Nations publication, Sales No. E.99.V.11.

^j United Nations publication, Sales No. E.87.V.9.

^k United Nations publication, Sales No. E.01.V.4.

^l Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17), Chap.III.

<i>Short title</i>	<i>Full title</i>
UNCITRAL International Countertrade Guide (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992) ^m
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) ⁿ
UNCITRAL Model Conciliation Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) ^o
UNCITRAL Model Insolvency Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) ^p
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) ^q
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) ^r
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement Of Goods, Construction and Services (1994) ^s
UNCITRAL Model Provisions on Infrastructure Projects (2003)	UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) ^t
United Nations Assignment Convention (2001)	United Nations Convention on the Assignment of Receivables in International Trade (2001) ^u
United Nations Convention on Electronic Contracting (2005)	United Nations Convention on the Use of Electronic Communications in International Contracts (2005) ^v
United Nations Guarantee and Stand-by Convention (1995)	United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) ^w
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) ^x
United Nations Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) ^y

^m United Nations publication, Sales No. E.93.V.7.

ⁿ United Nations publication, Sales No. E.95.V.18.

^o United Nations publication, Sales No. E.05.V.4.

^p United Nations publication, Sales No. E.99.V.3.

^q United Nations publication, Sales No. E.99.V.4.

^r United Nations publication, Sales No. E.02.V.8.

^s United Nations publication, Sales No. E.98.V.13.

^t United Nations publication, Sales No. E.04.V.11.

^u United Nations Publication, Sales No. E.04.V.14.

^v A/Res/60/21 (9 December 2005).

^w United Nations publication, Sales No. E.97.V.12.

^x United Nations publication, Sales No. E.95.V.12.

^y Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991 (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

V. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

A. List of documents before the Commission at its thirty-eighth session

1. General series

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/587	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-ninth session	
A/CN.9/588	Report of Working Group VI (Security Interests) on the work of its eighth session (Vienna, 5-9 September 2005)	Part Two, chap. I, A
A/CN.9/589	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-third session (Vienna, 3-7 October 2005)	Part Two, chap. II, A
A/CN.9/590	Report of Working Group I (Procurement) on the work of its eighth session (Vienna, 7-11 November 2005)	Part Two, chap. III, A
A/CN.9/591 and Corr.1	Report of Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November-9 December 2005)	Part Two, chap. IV, A
A/CN.9/592	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-fourth session (New York, 23-27 January 2006)	Part Two, chap. II, E
A/CN.9/593	Report of Working Group VI (Security Interests) on the work of its ninth session (New York, 30 January-3 February 2006)	Part Two, chap. I, D
A/CN.9/594	Report of Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006)	Part Two, chap. IV, M
A/CN.9/595	Report of Working Group I (Procurement) on the work of its ninth session (New York, 24-28 April 2006)	Part Two, chap. III, E
A/CN.9/596	Note by the Secretariat on insolvency law: possible future work	Part Two, chap. V, B
A/CN.9/597	Note by the Secretariat on developments in insolvency law: adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and developments in interpretation of “centre of main interests” in the European Union	Part Two, chap. V, C
A/CN.9/598	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law	Part Two, chap. IX
A/CN.9/598/Add.1	Note by the Secretariat on legislative work of international organizations relating to public procurement	Part Two, chap. IX
A/CN.9/598/Add.2	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of law relating to security interests	Part Two, chap. IX
A/CN.9/599	Note by the Secretariat on technical assistance	Part Two, chap. VII
A/CN.9/600	Note by the Secretariat on commercial fraud: ongoing and possible future work	Part Two, chap. V, D
A/CN.9/601	Note by the Secretariat on the status of conventions and model laws	Part Two, chap. VIII
A/CN.9/602	Bibliography of recent writings related to the work of UNCITRAL	
A/CN.9/603	Report of Working Group VI (Security Interests) on the work of its tenth session (New York, 1-5 May 2006)	Part Two, chap. I, F
A/CN.9/604	Note by the Secretariat on possible future work in the area of electronic commerce	Part Two, chap. V, A

A/CN.9/605	Note by the Secretariat on settlement of commercial disputes: interim measures	Part Two, chap. II, H
A/CN.9/606	Note by the Secretariat on settlement of commercial disputes: form of arbitration agreement	Part Two, chap. II, I
A/CN.9/607	Note by the Secretariat on settlement of commercial disputes: draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention	Part Two, chap. II, J
A/CN.9/608 and Add.1-4	Note by the Secretariat on legal aspects of electronic commerce: explanatory note on the Convention on the Use of Electronic Communications in International Contracts	
A/CN.9/609 and Add.1-6	Note by the Secretariat on draft legislative provisions on interim measures and the form of arbitration agreement: draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—comments received from Member States and international organizations	Part Two, chap. II, K
A/CN.9/610 and Corr.1	Note by the Secretariat on possible future work in the field of settlement of commercial disputes	Part Two, chap. II, L
A/CN.9/610/Add.1	Note by the Secretariat on possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules	Part Two, chap. II, L
A/CN.9/611	Note by the Secretariat on the draft legislative guide on secured transactions: security rights in receivables	Part Two, chap. I, I
A/CN.9/611/Add.1	Note by the Secretariat on the draft legislative guide on secured transactions: security rights in rights to payment of funds credited to a bank account, proceeds under an independent undertaking, negotiable instruments and negotiable documents	Part Two, chap. I, I
A/CN.9/611/Add.2	Note by the Secretariat on recommendations of the draft legislative guide on secured transactions	Part Two, chap. I, I
A/CN.9/611/Add.3	Note by the Secretariat on the draft legislative guide on secured transactions	Part Two, chap. I, I
A/CN.9/612	Note by the Secretariat on transport law: preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]—joint proposal by Australia and France on freedom of contract under volume contracts	Part Two, chap. IV, X

2. *Restricted series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/XXXIX/CRP.1 and Add.1-24	Draft report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session	Not reproduced
A/CN.9/XXXIX/CRP.2	Draft report Programme outline for an UNCITRAL congress on modern law for global commerce	Not reproduced

3. *Information series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/XXXIX/INF.1 and Rev.1	List of participants	Not reproduced
A/CN.9/XXXIX/INF.2	Programme for the Special Event on the United Nations Convention on the Use of Electronic Communications in International Contracts	

B. List of documents before the Working Group on Security Interests at its eighth session

1. Working papers

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.VI/WP.20	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.21 and Add.1-5	Note by the Secretariat on security interests: recommendations of the draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its eighth session	Part two, chap. I, B
A/CN.9/WG.VI/WP.22 and Add.1	Note by the Secretariat on the draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its eighth session	Part two, chap. I, C

2. Restricted series

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.VI/VIII/CRP.1 and Add.1-4	Draft report of the Working Group on Security Interests at its eighth session	Not reproduced

3. Information series

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C. List of documents before the Working Group on Security Interests at its ninth session

1. Working papers

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A/CN.9/WG.VI/WP.23	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.24 and Add.1-5	Note by the Secretariat on security interests: recommendations of the draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its ninth session	Part two, chap. I, E

2. Restricted series

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A/CN.9/WG.VI/IX/CRP.1 and Add.1-4	Draft report of the Working Group on Security Interests at its ninth session	Not reproduced
A/CN.9/WG.VI/IX/CRP.2	Recommendations of the draft Legislative Guide on Secured Transactions	Not reproduced
A/CN.9/WG.VI/IX/CRP.3	Proposal by Commercial Finance Association concerning recommendation 133 of A/CN.9/WG.VI/WP.24/Add.5	Not reproduced

3. Information series

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D. List of documents before the Working Group on Security Interests at its tenth session

1. Working papers

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A/CN.9/WG.VI/WP.25	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.26 and Add.1-8	Note by the Secretariat on security interests: draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its tenth session	Part two, chap. I, G
A/CN.9/WG.VI/WP.27 and Add.1-2	Note by the Secretariat on security interests: draft Legislative Guide on Secured Transactions, submitted to the Working Group on Security Interests at its tenth session	Part two, chap. I, H

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A/CN.9/WG.VI/X/CRP.1 and Add.1-4	Draft report of the Working Group on Security Interests at its tenth session	Not reproduced
A/CN.9/WG.VI/X/CRP.2	Proposal by the Commercial Finance Association and the United States of America concerning recommendation 16 and related issues (A/CN.9/WG.VI/WP.26)	Not reproduced
A/CN.9/WG.VI/X/CRP.3	Proposal by France, Spain and the International Chamber of Commerce concerning recommendation 139 (A/CN.9/WG.VI/WP.26/Add.1)	Not reproduced

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E. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its forty-third session

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A/CN.9/WG.II/WP.135	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.136	Note by the Secretariat on settlement of commercial disputes: preparation of a model legislative provision on written form for the arbitration agreement, submitted to the Working Group on Arbitration at its forty-third session	Part two, chap. II, B
A/CN.9/WG.II/WP.137 and Add.1	Settlement of commercial disputes: preparation of uniform provisions on written form for arbitration agreements, proposal by the Mexican delegation, submitted to the Working Group on Arbitration at its forty-third session	Part two, chap. II, C
A/CN.9/WG.II/WP.138	Note by the Secretariat on settlement of commercial disputes: interim measures of protection, submitted to the Working Group on Arbitration at its forty-third session	Part two, chap. II, D

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A/CN.9/WG.II/XLIII/CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration and Conciliation on work of its forty-third session	Not reproduced
A/CN.9/WG.II/XLIII/CRP.2 and Add.1	Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures	Not reproduced

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F. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its forty-fourth session

1. Working papers

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A/CN.9/WG.II/WP.139	Note by the Secretariat on settlement of commercial disputes: preparation of uniform provisions on written form for arbitration agreements, submitted to the Working Group on Arbitration at its forty-fourth session	Part two, chap. II, F
A/CN.9/WG.II/WP.140	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.141	Note by the Secretariat on settlement of commercial disputes: interim measures of protection, submitted to the Working Group on Arbitration at its forty-fourth session	Part two, chap. II, G

2. Restricted series

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A/CN.9/WG.II/XLIV/CRP.1 and Add.1-5	Draft report of the Working Group on Arbitration and Conciliation on work of its forty-fourth session	Not reproduced

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G. List of documents before the Working Group on Procurement at its eighth session

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A/CN.9/WG.I/WP.37 and Corr.1	Provisional agenda	Not reproduced
A/CN.9/WG.I/WP.38 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its eighth session	Part two, chap. III, B
A/CN.9/WG.I/WP.39 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its eighth session	Part two, chap. III, C
A/CN.9/WG.I/WP.40 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its eighth session	Part two, chap. III, D

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A/CN.9/WG.I/VIII/CRP.1 and Add.1-5	Draft report of the Working Group on Procurement on work of its eighth session	Not reproduced

3. Information series

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H. List of documents before the Working Group on Procurement at its ninth session

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A/CN.9/WG.I/WP.41	Provisional agenda	Not reproduced
A/CN.9/WG.I/WP.42 and Add.1	Note by the Secretariat on possible revisions to UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its ninth session	Part two, chap. III, F
A/CN.9/WG.I/WP.43 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its ninth session	Part two, chap. III, G
A/CN.9/WG.I/WP.44 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its ninth session	Part two, chap. III, H
A/CN.9/WG.I/WP.45 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, submitted to the Working Group on Procurement at its ninth session	Part two, chap. III, I

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A/CN.9/WG.I/IX/CRP.1 and Add.1-4	Draft report of the Working Group on Procurement on work of its ninth session	Not reproduced

3. *Information series*

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A/CN.9/WG.I/IX/INF.1/Rev.1	List of participants	Not reproduced

I. List of documents before the Working Group on Transport Law at its sixteenth session

1. *Working papers*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/WP.48	Provisional agenda	Not reproduced
A/CN.9/WG.III/WP.49	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: jurisdiction and arbitration: information presented by the Danish delegation at the fifteenth session, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, B
A/CN.9/WG.III/WP.50/Rev.1	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: right of control: information presented by the Norwegian delegation, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, C
A/CN.9/WG.III/WP.51	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: scope of application of and freedom of contract: information presented by the Finnish delegation at the fifteenth session, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, D
A/CN.9/WG.III/WP.52	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: transfer of rights: information presented by the Swiss delegation, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, E
A/CN.9/WG.III/WP.53	Note by the Secretariat on the preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: comparative table on limitation levels of carrier liability, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, F
A/CN.9/WG.III/WP.54	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: proposal by the Netherlands on arbitration, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, G
A/CN.9/WG.III/WP.55	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: shipper's obligations: information presented by the Swedish delegation, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, H
A/CN.9/WG.III/WP.56	Note by the Secretariat on transport law: draft convention on the carriage of goods [wholly or partly] [by sea], submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, I
A/CN.9/WG.III/WP.57	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: delivery: information presented by the delegation of the Netherlands, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, J
A/CN.9/WG.III/WP.58	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: proposal by the United States of America, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, K
A/CN.9/WG.III/WP.59	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: comments by the United Kingdom of Great Britain and Northern Ireland, submitted to the Working Group on Transport Law at its sixteenth session	Part two, chap. IV, L

2. *Restricted series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/XVI/CRP.1 and Add.1-16	Draft report of the Working Group on Transport Law on work of its sixteenth session	Not reproduced
A/CN.9/WG.III/XVI/CRP.2	Joint Proposal of the European Community and the United States of America on Chapter 16 on Jurisdiction	Not reproduced
A/CN.9/WG.III/XVI/CRP.3	Joint Proposed text by the European Community, Japan, Norway, and the United States of America	Not reproduced
A/CN.9/WG.III/XVI/CRP.4	Joint Proposed text of Chapter 17 on arbitration by Denmark, Japan, the Netherlands, and the United States of America	Not reproduced

3. *Information series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/XVI/INF.1/Rev.2	List of participants	Not reproduced

J. List of documents before the Working Group on Transport Law at its seventeenth session

1. *Working papers*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/WP.60 and Corr.1	Provisional agenda	Not reproduced
A/CN.9/WG.III/WP.61	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: proposal by Finland, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, N
A/CN.9/WG.III/WP.62	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: transport documents and electronic transport records: document presented for information by the United States of America, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, O
A/CN.9/WG.III/WP.63	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: delivery to the consignee proposal by Switzerland, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, P
A/CN.9/WG.III/WP.64	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: comments of the European Shippers' Council, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, Q
A/CN.9/WG.III/WP.65	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: proposal by Japan, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, R
A/CN.9/WG.III/WP.66	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: volume contracts: document presented by the Comité Maritime International, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, S
A/CN.9/WG.III/WP.67	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: shipper's obligation: drafting proposal by the Swedish delegation, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, T
A/CN.9/WG.III/WP.68	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: proposal by the Netherlands, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, U

A/CN.9/WG.III/WP.69	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: shipper's obligation: proposal by the United States of America, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, V
A/CN.9/WG.III/WP.70	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: proposals by the Italian delegation, submitted to the Working Group on Transport Law at its seventeenth session	Part two, chap. IV, W

2. *Restricted series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/XVII/CRP.1 and Add.1-22	Draft report of the Working Group on Transport Law on the work of its seventeenth session	Not reproduced

3. *Information series*

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.III/XVII/INF.1/Corr.1	List of participants	Not reproduced

VI. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK*

The present list indicates the particular volume, year, part, chapter and page where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the Yearbook; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
 - (a) Working Group I:
Time-Limits and Limitation (Prescription), (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004)
 - (b) Working Group II:
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); International Commercial Arbitration and Conciliation (as of 2000)
 - (c) Working Group III:
International Legislation on Shipping (1970 to 1975); Transport Law (as of 2002)**
 - (d) Working Group IV:
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
 - (e) Working Group V:
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)*
 - (f) Working Group VI:
Security Interests (as of 2002)**
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

** At its 35th session, the Commission adopted one-week sessions, creating six working groups.

1. Reports on the annual sessions of the Commission

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A/8417 (fourth session)	Volume II: 1971	Part one, II, A	9
A/8717 (fifth session)	Volume III: 1972	Part one, II, A	9
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A/9617 (seventh session)	Volume V: 1974	Part one, II, A	13
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A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A	9
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A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A	7
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A	3
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A	3
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A	3
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A	3
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A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A	3
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A	3
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A	3
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A	3
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A	3
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A	3
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A	3
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A	3
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A	3
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A	3
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A	3
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A	3
A/54/17 (thirty-second session)	Volume XXX: 1999	Part one, A	3
A/55/17 (thirty-third session)	Volume XXXI: 2000	Part one, A	3
A/56/17 (thirty-fourth session)	Volume XXXII: 2001	Part one, A	3
A/57/17 (thirty-fifth session)	Volume XXXIII: 2002	Part one, A	3
A/58/17 (thirty-sixth session)	Volume XXXIV: 2003	Part one, A	3
A/59/17 (thirty-seventh session)	Volume XXXV: 2004	Part one, A	3
A/60/17 (thirty-eighth session)	Volume XXXVI: 2005	Part one, A	3

2. Resolutions of the General Assembly

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2102 (XX)	Volume I: 1968-1970	Part one, II, A	18
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2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3	92
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3	127
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31/100	Volume XIII: 1977	Part one, I, C	7
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32/438	Volume IX: 1978	Part one, I, C	8
33/92	Volume X: 1979	Part one, I, B	8
33/93	Volume X: 1979	Part one, I, C	8
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35/166	Volume XI: 1980	Part three, III	166
35/51	Volume XI: 1980	Part one, II, D	31
35/52	Volume XI: 1980	Part one, II, D	31
36/32	Volume XII: 1981	Part one, D	20
36/107	Volume XII: 1981	Part three, I	269
36/111	Volume XII: 1981	Part three, II	270
37/103	Volume XIII: 1982	Part three, III	425
37/106	Volume XIII: 1982	Part one, D	21
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42/153	Volume XVIII: 1987	Part one, E	43
43/165 and annex	Volume XIX: 1988	Part one, D	19
43/166	Volume XIX: 1988	Part one, E	20
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45/42	Volume XXI: 1990	Part one, D	18
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47/34	Volume XXIII: 1992	Part one, D	25
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51/161	Volume XXVII: 1996	Part one, D	40
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52/158	Volume XXVIII: 1997	Part one, D	40
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54/103	Volume XXX: 1999	Part one, D	51
55/151	Volume XXXI: 2000	Part one, D	67
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58/75	Volume XXXIV: 2003	Part one, D	42
58/76	Volume XXXIV: 2003	Part one, D	42
59/39	Volume XXXV: 2004	Part one, D	
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3. Reports of the Sixth Committee

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A/6396	Volume I: 1968-1970	Part one, II, B	18
A/6594	Volume I: 1968-1970	Part one, II, D	58
A/7408	Volume I: 1968-1970	Part two, I, B, 2	88
A/7747	Volume I: 1968-1970	Part two, II, B, 2	121
A/8146	Volume II: 1971	Part one, I, B	3
A/8506	Volume III: 1972	Part one, I, B	3
A/8896	Volume IV: 1973	Part one, I, B	3
A/9408	Volume V: 1974	Part one, I, B	3
A/9920	Volume VI: 1975	Part one, I, B	3
A/9711	Volume VI: 1975	Part three, I, A	297
A/10420	Volume VII: 1976	Part one, I, B	3
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A/33/349	Volume X: 1979	Part one, I, B	3
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A/36/669	Volume XII: 1981	Part one, C	20
A/37/620	Volume XIII: 1982	Part one, C	20
A/38/667	Volume XIV: 1983	Part one, C	20
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A/40/935	Volume XVI: 1985	Part one, C	46
A/41/861	Volume XVII: 1986	Part one, C	37
A/42/836	Volume XVIII: 1987	Part one, C	40
A/43/820	Volume XIX: 1988	Part one, C	18
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A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B	188
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A/45/736	Volume XXI: 1990	Part one, C	18
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A/47/586	Volume XXIII: 1992	Part one, C	25
A/48/613	Volume XXIV: 1993	Part one, C	38
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4. Extracts from the reports of the Trade and Development Board of the United Nations Conference on Trade and Development

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A/9015/Rev.1	Volume V: 1974	Part one, I, A	3
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TD/B/617	Volume VIII: 1977	Part one, I, A	3
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A/33/15/Vol.II	Volume X: 1979	Part one, I, A	3
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A	3
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B	30
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TD/B/973	Volume XIV: 1983	Part one, B	20
TD/B/1026	Volume XV: 1984	Part one, B	22
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5. Documents submitted to the Commission, including reports of meetings of working groups

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A/CN.9/31	Volume I: 1968-1970	Part three, I, A, 1	159
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A/CN.9/35	Volume I: 1968-1970	Part three, I, A, 2	176
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A/CN.9/82	Volume IV: 1973	Part two, V	217
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A/CN.9/87, annex I-IV	Volume V: 1974	Part two, I, 2-5	51
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A/CN.9/91	Volume V: 1974	Part two, IV	191
A/CN.9/94 and Add.1 and 2	Volume V: 1974	Part two, V	195
A/CN.9/96 and Add.1	Volume VI: 1975	Part two, IV, 1 and 2	187
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United Nations Publication
Published on CD-Rom

Sales No.E.11.V.1
V.10-56796-February 2011
ISSN 0251-4265

USD 80
ISBN 978-92-1-133701-3

